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Summer 2015

### Vol. 32, Nos. 3 & 4

Robert Bruno

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*Illinois Fraternal Order of Police Labor Council*

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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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A VIEW FROM ORGANIZATION LABOR**

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## RECENT DEVELOPMENTS

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, the equal employment opportunity laws and the pension provision of the Illinois Constitution.

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## **THE CHANGING LANDSCAPE AND FUTURE OF LABOR RELATIONS: A VIEW FROM ORGANIZED LABOR**

**By Robert Bruno**

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Professor Bruno has been a frequent commentator on labor relations for both regional and national media, and has served as a commentator for numerous newspapers. Professor Bruno has taught many different labor relations courses, specializing in collective bargaining, labor history and American politics, as well as given numerous public presentations on labor relations.

### **I. INTRODUCTION**

Practitioners and students of labor relations were very attentive to the March 29, 2016, Supreme Court decision in *Friedrichs v. California Teachers Association*.<sup>[1]</sup> The plaintiffs in the case argued that there were no distinctions between the collective bargaining activities of a government employees union and its political advocacy. However, in a one sentence unsigned opinion, the Court split 4-4 over the question of whether First Amendment rights of nonunion members are violated when they are compelled to pay “fair-share” fees.<sup>[2]</sup> In deadlocking, the Court affirmed the lower court rulings that union security clauses for government employees were not unconstitutional prohibitions of First Amendment protections. The death of conservative justice Antonin Scalia likely denied the petitioners a majority ruling that would have imposed a national right-to-work regime on the public sector.

The challenge to “fair share” payments could have imposed a national right-to-work (RTW) scheme in the public sector. As unsettling as this possibility was for organized labor, to a large degree it is not qualitatively different from what unions have been experiencing in the last ten years. A review of proposed and passed state bills from 2001-2015 limiting worker standards and associational rights reveals a very anti-labor legislative landscape.

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At least four states lifted restrictions on child labor, while sixteen cut the value of weekly unemployment insurance benefits or the number of weeks they are available.[3] A number of states, like Ohio and Missouri, moved to completely eliminate their state department of labor's enforcement staff.[4] Another nineteen reduced pension benefits and ten proposed or passed laws outlawing or restricting the use of project labor agreements.[5] Prevailing wage standards were eliminated or scaled back in seven states,[6] while another four prohibited local governments from enacting prevailing wage ordinances.[7] Also, in 2016, West Virginia repealed its prevailing wage law.[8] Fifteen states passed laws restricting public employees' collective bargaining rights or ability to collect "fair share" dues through payroll deductions.[9] States like Idaho, Wisconsin and Michigan turned particularly antagonistic against teacher unions. In Idaho for example, separate bills were passed that limited the subjects of collective bargaining to compensation only, teacher contracts were capped at one year, tenure was eliminated for new teachers and tenure was prohibited from being considered as a factor in layoffs, and performance-based pay was instituted.[10] In nineteen states RTW bills were introduced and passed in Michigan, Indiana and Wisconsin.[11] West Virginia became the nation's 26th state to prohibit "fair share" when in 2016 the Republican majority legislature overrode Democrat Governor Earl Tomblin's veto of a RTW bill.[12]

A separate review of state public employee labor-relations bills during the 2015 legislative session reveals that 67 percent of all proposed legislation was anti-labor in nature. The types of measures were diverse and far-reaching.[13] They included prohibitions on agency fee or union security clauses (e.g. New Hampshire)[14] and payroll dues deductions (e.g., North Carolina).[15] Bills also required annual union re-authorization (e.g., Maine),[16] steps to de-certify a union (e.g., Missouri),[17] and restrictions on the right to organize (e.g., Rhode Island).[18] Narrowing the scope of bargaining (e.g., Kansas)[19] and placing caps on negotiated wage increases (e.g., New Jersey)[20] were also popular. Additionally, limits on the ability of unions to act electorally (e.g., Michigan)[21] were prevalent, as was requiring increased reporting of union activities (e.g., Pennsylvania).[22] A particular threatening type of measure was allowing counties and municipalities to be exempt from the state public employment relations acts (e.g., Illinois).[23]

The volume of bills designed or passed into law to weaken public employee unions and restrict collective bargaining rights had a decidedly partisan makeup. Out of 119 bills proposed by Republican legislators, 98 percent were "negative" or anti-labor. But of fifty-seven Democratic bills, roughly 95 percent were "positive" or pro-labor.[24]

Recent election outcomes best explain the overwhelmingly hostile legislative environment for labor. Since Barack Obama was first elected, Democrats have been losing office at all levels of government at an alarming rate. Since 2008, Democrats have dropped sixty-nine House seats, thirteen Senate seats, 910 State Legislative seats and eleven Governorships.[25] In addition, Republicans now control 30 state legislative chambers and there are 23 States with Republican governors and majorities in both legislative houses.[26]

The record is disturbing. No matter your perspective – labor, management or neutral – how society addresses what early 20th Century commentators called the “labor question” is the policy area most essential to the nation’s collective well being. The question of how labor is treated has always been paramount to the country’s economic prosperity because someone has to do the work and create the wealth. But the terms upon which the society’s goods and services get produced and how the benefits of wealth creation are distributed have always been fiercely contested. From the end of chattel slavery, producers and proletarians in America have fought in courtrooms, legislative chambers and in the streets over how the “labor question” would be solved. Confronting labor today are conservative Republican legislators and governors fueled by corporate right-wing groups like the American Legislative Council, which are committed to the degradation or elimination of collective bargaining rights.

While state laws and judicial interpretations of the National Labor Relations Act have badly diminished collective bargaining’s efficacy, organized labor has been more than a damaged victim.[27] To be sure, the legal-institutional context of the post-Taft-Hartley period has restricted labor’s capacity to seriously challenge management’s interests. The loss particularly of unionization and power in the private sector has been profound. But as conservative corporate forces now turn their attention to the public sector, the labor movement has embarked on an effort to fashion a future for labor relations that advances the interests of working people.

Surveying a hostile environment, segments of the labor movement lead by the American Federation of State, County and Municipal Employees (AFSCME), American Federation of Teachers (AFT), National Education Association (NEA) and the Service Employees International Union (SEIU) but including others, like the United Steel Workers (USW) and the building trades have engaged in a process of introspection, experimentation and transformation. The motivations for change are obvious. Public and private sector unions are under an incredibly well financed, multipronged, relentless campaign to marginalize or eliminate their ability to represent the economic and political interests of the working class.

As recent high-profile battles over collective bargaining rights in states like Wisconsin and Illinois have highlighted, public sector workers occupy an increasingly combative space in contemporary political discourse. It is not surprising that public employees hold such a central place in today's policy debates given that the last four decades have been defined by the ascendancy of political coalitions devoted to the privatization and deregulation of public goods and services. Public sector unions have become the principal targets of a concerted neoliberal offensive because they represent the country's best protection against a radical decomposition of public institutions.

The prominence of public sector labor struggles can also be traced to public employees' increasingly large role in the American labor movement. Currently nearly half of the nation's union members are public employees, and union density in the public sector (35.3%) is more than five times what it is in the private sector (6.7%).<sup>[28]</sup> Today, state employees, teachers and firefighters figure significantly in a new form of class warfare because they represent, as autoworkers and steelworkers did in 1959, the core of organized labor.

*Friedrichs* was a sharp instrument aimed at the resource capacity of public sector labor to confront corporate and conservative political enemies operating within a *Citizens United* influenced environment, characterized by the greatest levels of wealth and income inequality in the democratic industrialized world. But *Friedrichs* was not the end game, nor was it even the tip of the anti-union spear. Labor escaped a severe wound this time, but other legal challenges to public sector bargaining simmer in lower courts<sup>[29]</sup> and as the recent governor's election in Kentucky and the forthcoming 2016 governor's contest in Missouri illustrate, state level efforts to delegitimize forms of union activity continue unabated. And as a startling November 2015 story in the *New York Times* reported, less than a dozen individuals and families are funding a drive in Illinois to, one can only assume, reduce unionism in the state to zero.<sup>[30]</sup>

So what is labor doing in anticipation of and in preparation for a more-RTW shaped American labor-relations landscape? In an attempt to assess how unions are strategizing and changing to more effectively operate in a more confined legal space, I conducted interviews and consulted with national, state and local labor officials, union organizers, labor lawyers, and labor studies professors in both right-to-work and collective bargaining states. Additionally, I reviewed court briefs, law review articles, court opinions, and congressional records on right-to-work policy in the private and public sector. In brief, the results of my study reveal that organized labor intends to be an active agent in its own destiny.

While there are different narrative ways to explain labor's response, I have summarized their efforts according to five categories: Internal Organizing and Membership Engagement, Structural Adjustments, Reimagining the Statutory, Legal and Institutional Boundaries, Bargaining for the Common Good, and Signaling Shame or Pride. The sections below describe an assessment of each union response based on the study I conducted and is followed by a concluding analysis of what the contemporary roll back of labor rights represents and why it is so potentially harmful to working-class Americans.

## **II. LABOR'S FORWARD MOVEMENT**

### ***A. Internal Organizing and Membership Engagement***

Each of the public sector unions that were directly in the line of *Fredrichs'* fire acknowledged that two essential objectives were driving what by all measures was an unprecedented level of union data sharing and strategic cooperation well beyond the writing of court briefs. First, there was a need to educate members of the dangers of anti-union statutes, policies, and politicians; and second, a parallel dedication to converting dues payers into, as Walter Reuther once said, real organized union members. Or as AFSCME Council 31 calls it, "100% Union."

As if for the first time, unions are starting a genuine internal conversation on what union membership demands. Crisis has invited an opportunity to rethink what it means to be union. This mission involves a commitment to constantly reach out to the rank-and-file and cease relying on the union security clause to maintain a level of stability. First and foremost in this process is to invest much more in labor education. Unions conduct a large amount of education and training but they acknowledge that too few rank-and-file union members have attended educational programs. Not enough of them have been exposed to the origins of a workers movement. In Chicago SEIU's "All in it Together for Power" education program addresses movement theory by focusing on economic and racial justice through the lens of income inequality and voter suppression. Union officials admit that many more of their members need a common sense understanding of economics. And perhaps most problematically, it is the uncommon union member who can articulate what a class-based political movement would entail. Union activists from longstanding RTW and collective bargaining states emphatically argued that union literacy needed to be significantly raised.

In addition to educational endeavors, unions are setting a myriad of performance goals designed to increase membership activism. For example, they are developing stronger new member orientations and establishing mentoring programs. Unions are also engaged in plans to get 70% of their members to attend a minimum

number of annual union meetings and 80% of them engaged in some union capacity building exercise. High on the priority list is to double the number of “activists” into the 100,000s by holding regional and state wide strategic planning sessions and building as the AFT is doing as part of its “All-In” effort, a *State Network of Membership Engagement Coordinators*. Unions are also requiring that local officers hold and track one-on-one conversations with every union and nonunion member, like the outreach done with 1,000 Cook County College, Illinois members or 50% of the teachers in Perth Amboy, New Jersey.

And importantly, unions seek to increase membership. AFSCME Council 31, for example, has begun to convert agency fee payers into members. Ironically, its membership rate has increased since the governor’s executive order suspending “fair share” payments. In Texas, the AFT has embarked on a ten year organizing plan whose goal is to organize 160,000 teachers and win enabling legislation for collective bargaining in the state legislature by 2023 that would be followed by contract negotiation and aggressive membership recruitment.

When RTW passed in Indiana, United Food and Commercial Workers’ representatives traveled to southern states on a listening tour to hear from their colleagues about being union in an anti-union context. The message they heard was deafening; you need to embark on a non-stop organizing program. In response, the union has held focus groups with over 100 non-union retail workers in four major cities to gauge workers’ understanding and openness to joining a union. Not surprisingly, none of the participants knew what RTW meant and provocatively, the majority believed that unions were creations of the employer. In a series of word associations terms like “strike, fees, fines, and dues” were negatively linked with unions. However, revealingly, much stronger positive associations were found for “security, stability, family, and struggle.” Struggle and family resonated because these workers recognized that with a union they are not alone – not in difficulty nor in the ability to serve others.

The strategy of public, as well as private sector unions, is to build capacity around local issue campaigns and elections. The plan includes inoculating members against the siren song of getting something for nothing. In Washington State, for example, Freedom Works, a Koch Brothers funded operation that has committed since 2013 to weakening unions as a way to reduce government spending on social welfare programs, encouraged public employees to refuse to pay union dues through a message that said “Opt Out, Save Money, Lose Nothing.[31]”

Michigan is another example, where the Mackinaw Center solicited United Auto Workers (UAW) members to quit the union.[32] Closer to home, leafleting done

outside of SEIU Healthcare's union office in Chicago by the Illinois Policy Institute urged employees to surrender their union membership.[33] In response to such inflammatory measures, unions have assertively connected the dots between collective power and individual interest.

Their message is blunt: Workers will lose – they will lose a lot if the larger conservative political agenda prevails. Women and people of color particularly will be harmed. Therefore, teacher unions like the Illinois Education Association (IEA) and Illinois Federation of Teachers (IFT) have pointed out to their members that absent a collective bargaining agreement their school board will not offer each school employee an opportunity to engage in individual negotiations, but will do what every employer, private or public, has always done and will do again, unilaterally institute whatever terms and conditions of employment it chooses.

But the strategy also demands doing something more profound and long lasting. As articulated by public and private sector unions, the goal is to build sustainable workplace labor organizations that are not creatures of political machinations, judicial interpretations that undermine labor protections, or partisan legal maneuvers decided by 5-4 court majorities or shaped by legislative vote counting. This is old-school, pre-Wagner Act labor organizing. Union representatives stressed that it was imperative to re-tool the union and not merely react to the next ALEC-inspired bill.

A reengineered union movement would examine critically the dynamics of a strong local union. It begins with the work at the local level and the relationships workers have with each other. Do they know each other? Do they work together in a common place? Are the occupations homogenous? Are they compelled to depend on each other? Do they recognize the benefits of collective bargaining (CB)? Is there a sense of shared effort required and a common good produced?

Two current studies that I have done may provide answers to the last question. Findings from one study with unionized Illinois public employees reveals a strong, positive causal relationship between worker perceptions of their union's commitment to public service and the employees' own desire to perform meaningful work for their government employer. A second study found that union members care not only about individual forms of workplace justice, but they also care deeply about the justice done on behalf of external constituents, like students, the disabled, and single mothers. Putting the findings together suggests that unions help to raise a worker's commitment to job quality, service, social justice and doing a job that is valued for more than dollars and cents.

But membership engagement will not spontaneously happen; the objective conditions are needed but not sufficient for union consciousness and a sense of solidarity to develop. Local leaders must engage the membership and drive a cultural change. Here is where the kind of leadership modeled by the Chicago Teachers Union (CTU) matters. Prior to the 2012 bargaining round CTU embarked on an unprecedented level of rank-and-file education. As modeled by CTU and expressed by the people I interviewed, the leadership effort had to be intentional and responsive to the needs of the local workers.

These activities are predicated on a provocative question: Does RTW cause a weak labor relations regime? Or does a weak labor relation's regime attract RTW? Here the emphasis inverts the intended objective of RTW advocates and instead recognizes that RTW encroaches upon the space where unions are weak. Repeatedly, I was told that strong unions in collective bargaining states are also strong unions in RTW states.

Now to be clear, the research that has been done on RTW unequivocally reveals that restrictions on collective bargaining harms workers, lowers union rates, and unlike what is falsely claimed by advocates, does not independently produce any definitive employment boost.[34] Additionally, the law's historical backers from Southern segregationists, proto-fascist organizations like the American Liberty League, and corporate opponents of the New Deal, to contemporary supporters including anti-government Tea Party conservatives, the National Right to Work Committee, large employer associations and a relative handful of uber-rich families are decidedly antagonistic towards the existence of workers collectively organized.

Make no mistake, any further expansion of RTW – public or private – or limitations on union collective bargaining power, like Act 10 in Wisconsin, represents a real danger to labor and working people. But by shifting the focus to building their own organization that represents the values and needs of workers, the coalition of public employee union programs, raises the question of the causal agency of union decline and renewal. The answer it suggests draws on the worker movement that emerged before the Wagner Act and prior to the passage of state public employee laws. In this retelling of labor's story, unions are not the product of statute or Supreme Court edicts, but the evolution of a powerful notion. Joe Hill put it this way:

If the workers take a notion, They can stop all speeding trains; Every ship upon the ocean,  
They can tie with mighty chains. Every wheel in the creation, Every mine and every mill,  
Fleets and armies of the nation, Will at their command stand still.[35]

## ***B. Structural Adjustments***

Union representatives also stressed that structural change inside the labor movement was needed to build effective worker organizations. People working for unions and elected to office had to cease treating the organization as if it were a business. The days of top-down, business unionists narrowly focused on contract negotiations and grievance processing had to end. Roles would have to be redefined and staff either retrained, reassigned or dismissed.

Along with new job descriptions, performance benchmarks are being established for local organizations and their staffs to meet. Consequently, union representatives are undergoing retraining to become internal and external organizers. Their top priority is no longer grievance processing, handling arbitrations and contract negotiations, but instead membership engagement and mobilization, building community allies, developing communication strategies, and recruiting and training new activists. It turns out Mother Jones had the right idea when she declared that, “I am an organizer, an agitator and an aggravator.” So everyone is an organizer, and everything the union does should answer the question that CTU activists and other union representatives claimed was now a precondition for action: How does this action build power for working people?

Answering that question requires organizational creativity. Unions effective in both RTW and collective bargaining states, like the Hotel Employees and Restaurant Employees, have designed and staffed new departments dedicated to diverse forms of union activity from consumer boycotts to external communications. Unions like the AFT have adopted multi-point strategic plans focused on issue advocacy, membership recruitment and needs assessment, internal and external communications, leadership development, budgeting and data management, political action, and community alliances that compel the institution to re-do its organizational chart.

As described by union representatives in RTW states the objective was to do everything, all the time. Making this structural adjustment requires understanding that organizations are built to either succeed or fail. Therefore, many questions are being raised. Such as, is it possible to avoid the statutory inhibitions of a labor organization by forming “employee associations” that would co-exist alongside of unions? Could associate membership plans be developed and clusters of “associate members” be eventually organized? Recall that it was an associate membership group affiliated with the USW that demanded the right to bargain with their employer, Dicks Sporting Goods.[36]

What about having the union form a legal defense fund that for a fee would represent nonunion bus drivers, teachers, or correction officers? Are there important services, like liability insurance and career development through training and credentialing that the union could provide that would be a valuable draw to union affiliation? What, for instance, is an alternative to employer payroll deductions? Would bank drafts work? Leadership and talent are critical components but the shape of the institution is itself a determinate variable. Crisis has been in the making for decades and what organizational structure is best suited for success isn't intuitively obvious. It's the equivalent of designing a plane while trying to fly it.

### ***C. Reimagining the Statutory, Legal and Institutional Boundaries***

Unions are investigating and pursuing statutory and legal options in response to RTW's expansion and other *Friedrichs*-like legal challenges. In 2013 the USW initiated a National Labor Relations Board (NLRB) case, *Buckeye Florida*, to allow it to charge grievance fees for nonunion members. The administrative law judge ruled against the union finding that it had violated Section 8(b)(1)(A) by maintaining and implementing in RTW Florida a "fair share policy" requiring nonmember bargaining-unit employees to pay a grievance-processing fee.[37] Despite ruling against the union, in April 2015 the Board invited briefs addressing the question of whether unions can charge nonmembers for the cost of representation in grievance-arbitration proceedings absent a valid union security clause, but then backed off.[38]

In Indiana, Operating Engineers Local 150 filed a lawsuit contending that the state's RTW law violated the state's constitution, which prohibited compelling any person or entity to provide a service without being compensated and that it was preempted by federal labor law. The state's supreme court subsequently ruled against the union,[39] as did the Court of Appeals for the Seventh Circuit in a parallel federal case.[40] But Chief Judge Diane Wood's dissent encouraged the union to request a full circuit court rehearing of the case. The vote to rehear was rejected by a tantalizingly obscure 5-5 split with the five judges voting to rehear, including two Republican appointees, adopting Judge Wood's dissent in the panel decision.[41]

Judge Wood's dissent agreed with the union that the Indiana Right-to-Work law was preempted by the NLRB's exclusive primary jurisdiction to the extent it prohibited unions from collecting "fair share" representation fees. [42] She added that if it was not preempted, the Right-to-work law amounted to an unconstitutional "taking" from the union of its services without compensation.[43]

The union is now pursuing a similar case in Idaho arguing that Taft-Hartley's Section 14(b) never meant to allow states to prohibit a labor organization from collecting payment for certain services rendered.[44]

Legislatively, a lot is happening at the local level. For example, in Seattle a labor-backed municipal ordinance passed unanimously granting Uber and Lyft drivers who are independent contractors the right to bargain collectively under the jurisdiction of the city.[45] There is also a forensic-like reading of the state labor laws to determine what creative tactics could be used to help workers and strengthen unions. For example, a bill amending Michigan's RTW law has been proposed that would allow workers on an employer-by-employer basis to vote on whether they wish to require that every one pays union dues.[46] In Nebraska, public sector labor organizations may charge fees for providing any grievance or legal representation for nonmembers.[47] And Florida's public sector labor law does not require that employee organizations process grievances for employees who are not members of the organization.[48]

Building trade unions are also investigating the potential of using referendum petitions to put initiatives on the ballot in RTW states that would effectively overturn prohibitions on union security clauses, limitations on collective bargaining and laws that restricted worker rights. For example, the Operating Engineers North-Central States Conference successfully initiated a drive to collect signatures to place a citizen referendum on the fall 2016 ballot in South Dakota. The petition language reads: "Notwithstanding any other provisions or law, an organization, corporate or nonprofit, has the right to charge a fee for any service provided by the organization." [49] Twenty-four states allow citizens to initiate legislation through the petition process and fourteen are RTW states. In 2014, referendum petitions were used successfully to raise the state minimum wage in each of the three RTW states that had ballot initiatives, including South Dakota.

The idea of using citizen-made law to blunt anti-union attacks is not a quixotic exercise. In 2012 a coalition lead by the Idaho Education Association used a popular referendum petition to veto two anti-teacher union bills previously passed in the state. The "Idaho Teacher' Collective Bargaining Veto Referendums," repealed the laws by collecting nearly 60 percent of the popular vote.[50] The outcome stunned the laws' supporters. Idaho has a relatively small union membership and the teachers union operates in a very hostile environment. The state also gave over 70 percent of its presidential votes in 2012 to Mitt Romney who campaigned against the teacher unions. Despite the *Idaho State Journal* calling the education laws "easily Idaho's top 2012 poll issue," voters rejected the additional restraints on collective bargaining.[51]

In pursuing the use of citizen ballots and public issue campaigns, the successful fight against Right-to-Work in Ohio and Missouri is informative. In both states, labor organizations established 501(c)(4) committees to raise money and coordinate efforts. Sophisticated polling, focus groups, and PR consultants were used to determine, among other leverage points: Which local and/or state government officials were supportive? What did the voters think about unions, right-to-work, raising wages and collective bargaining? And what messages might work to appeal to voters both short and long-term?

Ballot initiatives can also be used to embed collective bargaining rights in state constitutions. In 2012, fearing that Michigan's majority Republican general assembly was going to pass a RTW bill and that despite his demurral on signing the measure, ex-CEO and Republican Governor Rick Snyder was ready to sign it, the UAW lead a coalition of unions to put Proposal 12-2 on the ballot. Titled "Protect Our Jobs," the act stated that "The people shall have the rights to organize together to form, join or assist labor organizations, and to bargain collectively with a public or private employer through an exclusive representative of the employees' choosing, to the fullest extent not preempted by the laws of the United States." It further iterated that "No existing or future law of the state or its political subdivisions shall impair, restrict or limit the negotiation and enforcement of any collectively bargained agreement with a public or private employer respecting *financial support by employees of their collective bargaining representative according to the terms of that agreement.*"[52]

In a public opinion poll taken two months before the vote, a plurality of 48 percent of state residents supported constitutionally guaranteeing collective bargaining rights.[53] But on November 6, the "Protect Our Jobs" proposal was defeated by a convincing 57 percent to 42 percent vote. [54] While unsuccessful in Michigan, labor is engaging constitutional experts and grassroots organizations to probe the possibilities of directly moving voters to protect collective bargaining rights in both RTW and free-collective bargaining states.

Labor is also contemplating sponsoring local pro-collective bargaining measures that push back against local anti-union threats. Labor leaders who have grown disenchanted with a defensive posture are recommending a non-intuitive strategy. As theorized by these individuals, an anti-union/working class political wave crested in 2010, much as it did in 1946.[55] Unions today, as they did a half-century ago, function as the primary storm surge breakers and have been battling continuously to hold back any further erosion of worker rights. But fighting off loss usually sacrifices advancement. Instead, labor activists argue that defeating restrictions on collective bargaining requires a more concerted challenge within

the very states that have acted against unionization, for instance, in Kentucky where RTW advocates have passed RTW ordinances at the local level and in Illinois jurisdictions where the Governor's "turn around agenda" was being considered.[56]

Alerted by labor counsel, unions have even contemplated the existence of a contrarian legal opportunity embedded in what could have been the deeper implications of a *Friedrichs* ruling overturning government sector "fair share" agreements. If the Court had declared that compelling non-members to pay agency fees to public employee unions violates the First Amendment then as some labor lawyers contend, a union's "First Amendment rights are also infringed by the exclusive bargaining obligation and corresponding duty of fair representation." [57] Based on the January 11 oral arguments, expectations were that the court would wipe out the distinction, established in 1977 by *Abood vs. Detroit Board of Education*, [58] between a union's non-political and political speech. [59] But once collective bargaining activities are redefined as political expressions then, the argument goes, "requiring unions to engage in that speech on behalf of non-members. . . should also be considered compelled political speech and compelled expressive association." [60] The principal would equally apply to the requirement that unions provide service to non-members.

Additionally, some labor counsel have also begun to speculate about what a ruling based on political speech infringement would mean for the continued validity of secondary boycott restrictions and other limitations on the right to strike. After all if, as Justice Scalia claimed, "everything that is collectively bargained with the government is within the political sphere, almost by definition," [61] and no political speech can be compelled then what would justify suppressing the union members' right to exercise their First Amendment rights to petition for grievances and assemble?

Even without statutory or constitutional changes, there are numerous examples of labor reconfiguring its forms. In Chicago, AFSCME is representing taxi drivers, the National Domestic Workers Alliance has formed and pushed a domestic workers bill of rights in many state legislatures, including one currently in Illinois. Worker centers, like ARISE Chicago, have proliferated and the Fight-for-\$15 is a national movement to represent workers in the fast food and retail industry. What is euphemistically referred to, as "alt-labor" is ubiquitous.

Unions have also revisited an old but effective strategy. In North Carolina and Texas non-instructional school employees and auto, aerospace and machine workers have established member only unions. [62] And perhaps in the most

conventional-representational-bending example, the UAW has established a near-majority, “sort of union” at Volkswagen in Chattanooga, Tennessee.[63] The union also subsequently organized a group of skilled-trades workers at the company becoming the first collective bargaining unit formed at a foreign-owned automaker in the South.[64] What forms these minority unions flower into remains uncertain. They are in uncharted territory, but that’s exactly the point.

*Friedrichs* was scary and could have pinned public sector labor’s ears back, but as in the laws of motion, so in labor relations – for each action there is an opposite reaction. Labor’s opponents have orchestrated legal challenges to its existence and in doing so they have invited new forms of worker activism and representation. What these efforts signal is that workers have reconsidered allowing the political and legal structure to determine their collective will; instead many workers are simply choosing to act like they are already organized.

#### ***D. Bargaining for the Common Good***

The legislative and legal challenges to public employee unionism have, not coincidentally, coincided with an equally draconian diminishment of public services. Over the past four decades, privatization, tax policies that favor corporations and the rich, and an attack on public sector unions have created a toxic and unsustainable environment for the most vulnerable communities and the workers who serve them. As a result, tax revenue has been drained from public budgets, leading to devastating government cuts to services, surging inequality, and the scapegoating of public sector workers.

While many unions and community groups have resisted these trends, their collaborations have been uneven, episodic, defensive, and transactional in nature. They have not been the product of a shared analysis or long-term plan. But with a lineage of court decisions leading to *Friedrichs* and others queuing up behind, some public employee unions now see the present as an opportunity to reinvent collective bargaining.

For these unions, the very substance of the bargaining itself is re-conceptualized. Instead of a union bargaining as merely an economic agent for the financial good of its members, it now reorients contract negotiations around the public interest, with the union bargaining on behalf of the community, fighting for the services it needs, trying to win back the revenue that has been drained from the treasury, and standing for the common good. We saw this materialize in 2012 with the CTU strike and again in negotiations for a successor agreement in 2016. Frustrated by city austerity policies and a state government budget stalemate that denies resources to Chicago schools and social service agencies, CTU announced a one-

day strike for April 1. The plan for a “Historic Day of Action” was supported by a growing coalition of university professors, city bus drivers, college students, fast food workers, and community groups.[65]

Other examples include bus drivers in Massachusetts and Pittsburg joining in an alliance with community groups to re-install routes in low-income neighborhoods,[66] or state employees in Oregon demanding sufficient funding for disability, child and home health care services. [67] Today, teachers all over the country are chafing under high stakes testing but so are their students. So in Seattle, teachers waged a successful strike with parental support over standardized testing policies,[68] and in New York, the teachers union embraced the largest “opt-out” movement in the country. [69] When schools lack counselors and libraries it is hard on teachers, but it is catastrophic for their students. So why not, as Chicago teachers have insisted, bargain over wrap-around services? [70]

The point is that hundreds of anti-union state bills and manufactured budgetary crises have harmed public employees as well as the citizens they serve. In reply, unions like AFSCME Council 31 are going public and staging a series of rallies around the state inviting union and nonunion members alike to stand up for the people that they serve.[71]

Here then is an opportunity to seek common ground, to build permanent alliances, to make what happens to the workers represented by AFSCME or SEIU matter to the recipients of public services. *Friedrichs* may shrink the resources available to effectuate public sector collective bargaining and laws like Act 10 in Wisconsin and SB 7 in Illinois place “no fly zones” around what can be bargained, but they cannot prevent citizens and workers from finding a common voice. Contrarily, they are a powerful inducement to give fresh meaning to a clichéd belief that “An injury to one is an injury to all.” Or if you prefer a more contemporary but no less radical expression of solidarity, as Illinois Federation of Teachers President Dan Montgomery has noted, “Community is the new UNION density.”

#### ***E. Signaling Shame or Pride***

Being union or choosing not to be comes with a certain level of sacrifice. Either way, the decision wasn’t free. I repeatedly heard without failure from every union official I spoke with that if unions were to prosper after what was expected to be a bad *Friedrichs* ruling they had to do so in the ways that they did before *Friedrichs*. They had to offer real value to a worker for joining, and just as importantly, raise the cost of choosing not to join. Using ostracism, labeling, peer-pressure, or applying a Scarlet Letter to anyone who received the benefits of a union but felt unencumbered by ethics or guilt to pay for them, like others working on

construction sites, in auto plants, firehouses or in schools, was one side of a psychological appeal to collective identity.

The union incentive was always a mix of carrot and stick. Take for a moment the building trades. For a contribution of \$3,500 in annual dues a worker can earn 15 to 30 times that amount in income and “cradle to grave” family health benefits without having to pay for medication. In addition, he or she gets thousands of dollars in skills training for free, use of a hiring hall, a middle class career, pension benefits, and a safe work environment.

The benefits clearly offset the dues. It all adds up to a powerful sense of unionism. The key, according to union officials, was that the members could see the union acting on their behalf; the union was always visually present. Meetings, newsletters, social events, trainings all contributed to building a culture of unionism. For example, the Operating Engineers require union members to wear a button on the job that signals that their dues are paid. But what happens if a worker shows up to work without a button?

Imagine a situation where a dues-paying worker is doing a physically demanding job aside someone who has chosen to “free-ride.” To the button wearers it screams, “Screw the union,” and it sometimes happens. Union members are encouraged to engage the person and ask why he or she has opted not to join. Now this kind of subtle or not so subtle signaling can be very effective when the vast majority of workers are union. In a situation where 90 percent or better of the employees are union members, a “union denier” is more readily exposed.

This “calling-out” or not being able to hide nonparticipation has some credibility as an anti-defection device. Research has shown that one of the most compelling reasons why people act ethically is that they don’t like being thought of as unethical by others. In the trades, workers are seen in the hiring hall, at union meetings, and on the job. Each of these spaces, but particularly the jobsite, becomes a place to promote the union.

One staffer at the International Brotherhood of Electrical Workers (IBEW) offered a more intellectually penetrating rebuke to “free riders.” On the occasion of Indiana’s passage of a RTW law, the IBEW representative sent a letter to all of the locals he services. Under the reference line, “Membership Resignation,” the letter acknowledged that many union members distained the idea of voluntary dependency brought on by government welfare programs. He pointed out that, “those who are swayed by the rhetoric of the right wing and choose not to support their local union financially also decry welfare benefits, where those who are

otherwise able to work choose to collect benefits on the backs of the taxpayer.” [72] Once having reminded members of their own professed value system, the letter confronted the readers with an ethical choice. “Ironically, those same individuals who choose not to support their union financially do exactly the same thing by collecting the wages and benefits guaranteed by the agreement, which is negotiated by the union and paid for by its members, while contributing nothing to support the agency.”[73] Shaming is a sharp weapon here. By forcing workers to consider their professed ideological opposition to “freeloading,” the IBEW staffer creates a moral quandary for any worker considering resigning from the union. The letter demands that workers examine their own sense of self and no matter the lure of something for nothing, hold fast to Shakespeare’s advice: “This above all: to thine own self be true.”

But shaming is unlikely to matter in a worksite where less than half the workers are paying dues, and not all workplaces or jobs are the same. Most public employees, including teachers, don’t have the same job entry and workspace hegemony as their construction union brothers and sisters. The trades have three to six years of apprenticeship to inculcate a moral obligation to becoming a union member. It isn’t offered or bestowed after the first ninety days of employment. There is a very real element of having to earn the privilege of wearing that button.

Appreciating the long-term value of slow cooking union membership, the AFT has adopted an ambitious program to move away from simply counting heads and chartering locals and instead requiring them to move through a series of phases that serve as a proving ground for union membership. The notion here is that unionized workplaces with a concentration of employees who can develop a mutually reinforcing relationship are more likely to prevent “free riders.” In Iowa, for instance, K-12 teachers are highly unionized with the Iowa Education Association. And there are manufacturing plants in the state, which has been RTW since 1947, and that have always maintained upwards of 85-90 percent membership.

Some union organizers believe that the number of “true free-riders” – those liking the benefits but if they don’t have to pay they won’t – may actually be small. Typically a nonmember objects to the cost of membership, not the idea. But it’s rare that the price of admission exceeds the value of membership or the affordability. Therefore, unions from private and public industries agreed that creative outreach plans that combined benefits with obligations can reduce vulnerability and increase membership.

In the end, unions need to do a better job of making sure that the members know the value of their membership and be able to articulate the union impact.

### III. CONCLUSION

Union resistance notwithstanding, there seems to be an Orwellian future aspect to the immediate past and current legislative and legal landscape. In George Orwell's dystopian classic *1984*, the author's primary antagonist the enigmatic O'Brien compels the story's protagonist Winston Smith to state and restate two claims about how reality and truth are known. The first part of the creed is "Who controls the past controls the future." But the second accompanying form of doublespeak is more dangerous and relevant to making predictions about the future of labor relations: "Who controls the present controls the past."

Now consider the hyperbolic framing language used by the petitioners in their *Friedrichs*' Supreme Court brief to re-define organizations that negotiate wages, hours and working conditions for millions of working people, as the "largest regime of compelled political speech in the Nation." To be certain that the ominous characterization sticks, in the very next paragraph the petitioners' brief modifies the label this way: "*This multi-hundred-million-dollar* regime of compelled political speech..."[74] Here we see evidence of Orwell's recognition of the power of a peoples' collective but malleable memory to cast a chilling shadow over the current political and legal assaults on both private and public sector unionism.

What I fear is that there is a systematic effort to wipe clean our national memory of the benefits of unionisms and collective bargaining. With each limitation on the scope of bargaining, withdrawal of payroll deductions, prohibitions of fair share agreements, demands for annual recertification, blanket restrictions on union political activity, local exemptions from statewide labor relations laws, and denials of the right to strike, we not only alter the future, but we erase the past.

And what takes the place of history will not be determined by a distinguished panel of historians or a plebiscite of the people, but rather through partisan restrictions on voting rights, billions of dollars donated by a privileged few to political campaigns, legal challenges to worker rights to organize, underfunding workplace regulatory agencies, red-baiting labor boards, mischaracterizing the arbitration process, ignoring policy analysis, and spreading un-truths about unions and economic growth. Every time an act of legislative or judicial fiat predicated on a false claim of austerity walks back the economic and political gains that workers have achieved through bargaining it is a dramatic act of erasure.

When the facts about labor and its undeniable, profound role in building the middle class become fiction and vice versa, when ignorance about collective bargaining is confused for strength, when the language we use about unions corrupts what we think about the value of work, when ultimately we make it harder for workers to unionize in the present we make it harder to remember a past when prosperity was built on the foundations of collective action.

This erasure of how union growth and collective bargaining raised incomes, reduced inequality, created a highly productive labor force, stabilized capitalism, brought democracy to workplaces, gave voice to the policy interests of working people, expanded political citizenship and made real the promise of America constrains the ability of working people in 2015 to imagine a future that is not shaped by the wealthy few.

Yes, “Who controls the present controls the past.” The question then for everyone who recognizes the transformational value of collective bargaining is to what ends is our past being re-remembered and to whose benefit?

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[1] No SACV 13-676-JLW (CWx), 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013), *aff'd*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted* 135 S. Ct. 2933 (2015), *aff'd by equally divided Court*, No. 14-95, 2016 WL 1191684 (Mar. 29, 2016).

[2] See Lyle Dennison, “*Opinion Analysis: Result but No Guidance on Public Unions’ Fees*,” SCOTUSBLOG available at <http://www.scotusblog.com/2016/03/opinion-analysis-result-but-no-guidance-on-public-unions-fees/>.

[3] See GORDON LAFER, THE LEGISLATIVE ATTACK ON AMERICAN WAGES AND LABOR STANDARDS, 2011–2012, ECONOMIC POLICY INSTITUTE, (Oct. 31, 2013), available at <http://www.epi.org/publication/attack-on-american-labor-standards>.

[4] *Id.*

[5] Author’s analysis of the Collective Bargaining and Labor Union Legislation Database,” *National Conference of State Legislatures* at <http://www.ncsl.org/research/labor-and-employment/collective-bargaining-legislation-data7base.aspx>; see also LAFER, *supra* note 2.

[6] See LAFER, *supra* note 3; see also, Indiana Department of Labor, *Repeal: Effective July 1, 2015*” State of Indiana, 2015; Dep’t of Workforce

Development, *The 2015-17 Budget Bill Made Significant Changes to Wisconsin's Prevailing Wage Laws*, State of Wisconsin, 2015.

[7] LAFFER, *supra* note 3.

[8] Jeff Jenkins, *Tomblin's Vetoes Short-Lived; Right to Work, Repeal of Prevailing Wage Now Law*, METRONews, Feb. 12, 2016, at <http://wvmetronews.com/2016/02/12/tomblins-vetoes-last-only-a-few-hours-right-to-work-repeal-of-prevailing-wage-now-law/>.

[9] LAFER, *supra* note 3.

[10] S. 1108, S. 1109, S. 1110, 61st Leg. (Idaho 2011). The statutes were repealed by citizen referendum in 2012. Idaho Sec'y of State, Election Div., *Nov. 6, 2012 General Election Results*, Props. 1, 2, 3, [http://www.sos.idaho.gov/elect/RESULTS/2012/General/tot\\_stwd.htm](http://www.sos.idaho.gov/elect/RESULTS/2012/General/tot_stwd.htm).

[11] LAFER, *supra* note 3.

[12] Dave Jamieson, *West Virginia Republicans Just Delivered A Huge Blow To Unions*, HUFFINGTON POST, Feb. 12, 2106, at <http://www.huffingtonpost.com/entry/west-virginia-right-to-work>.

[13] Author's analysis of 246 bills in the Collective Bargaining and Labor Union Legislation Database, *National Conference of State Legislatures* at <http://www.ncsl.org/research/labor-and-employment/collective-bargaining-legislation-database.aspx>.

[14] L.S.R. 819 (N.H. 2015).

[15] S.B. 3 (N.C. 2015).

[16] H.B. 921 (Me. 2015).

[17] H.B. 26 (Mo. 2015).

[18] H.B. 5180 (R.I. 2015).

[19] S.B. 136 (Kans. 2015).

[20] S.B. 813 (N.J. 2015).

[21] H.B. 4311 (Mich. 2015).

[22] S.B. 645 (Pa. 2015).

[23] H. B. 4224, 99th Leg. (Ill. 2015).

[24] Author's analysis of 246 bills in Collective Bargaining and Labor Union Legislation Database, *National Conference of State Legislatures* at <http://www.ncsl.org/research/labor-and-employment/collective-bargaining-legislation-database.aspx>.

[25] Joseph P. William, *A Dim Future*, U.S. NEWS & WORLD REP., Sep. 11, 2015, available at <http://www.usnews.com/news/the-report/articles/2015/09/11/a-dim-future-for-the-democratic-party>.

[26] Author's analysis from *National Conference of State Legislatures* at <http://www.ncsl.org/research/elections-and-campaigns.aspx>.

[27] University of Richmond Law Professor, Ann Hodges has referred to these interpretations as "amendments" which have undermined the Act's purpose. See Ann Hodges, Op-Ed, *Judicial Amendments and the Attack on Worker Rights*, TRUTHOUT, April 4, 2013 at <http://www.truth-out.org/opinion/item/15400-judicial-amendments-and-the-attack-on-worker-rights>.

[28] U.S. Dept. of Labor, Bureau of Labor Statistics, Economic News Release, Union Member Summary, Jan. 28, 2016, <http://www.bls.gov/news.release/union2.nro.htm>.

[29] See Moshez Z. Marvit, *When Scalia Died, So Did Friedrichs – And an Even Grander Scheme to Destroy Unions*, IN THESE TIMES, Feb. 18, 2016, available at [http://inthesetimes.com/working/entry/18869/when\\_scalia\\_died\\_so\\_did\\_friedrichs\\_and\\_an\\_anti-union\\_grand\\_scheme](http://inthesetimes.com/working/entry/18869/when_scalia_died_so_did_friedrichs_and_an_anti-union_grand_scheme).

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[38] *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 1192*, 199 L.R.R.M. 1074, 2014 WL 1276240 (N.L.R.B. April 15, 2014) [www.nlrb.gov/case/12-CB-109654](http://www.nlrb.gov/case/12-CB-109654).

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[40] *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014).

[41] Jennifer Nelson, *Full 7th Circuit Declines to Rehear Right-to-Work Appeal*, THE INDIANA LAWYER, (Jan. 15, 2015), available at <http://www.theindianalawyer.com/full-7th-circuit-declines-to-rehear-right-to-work-appeal/PARAMS/article/36138>.

[42] *Sweeney, v. Pence*, 767 F.3d at 678-82 (Wood, C.J. dissenting).

[43] *Id.* at 683-85.

[44] Complaint at 1-14, *International Union of Operating Engineers Local 370 v. Wasden*, No. 4:15-cv-00500, (Idaho filed Oct. 22, 2015) <<https://advance.lexis.com/r/documentprovider/-9wfk/attachment/data?attachmentid=urn:contentItem:5H6K-Y4Y1-DXDT-G3F4-00000-00&attachmenttype=PDF&attachment>

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[45] See Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES, Dec. 14, 2015, available at <http://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html?r=0>.

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[47] NEB. REV. STAT. § 48-838 (2015).

[48] FLA. STAT. § 447.401 (2015).

[49] An Act to Provide for Businesses or Nonprofit Organizations to Collect Certain Fees, Initiated Measure 23 (Certified Jan. 19, 2016), <https://sdsos.gov/elections-voting/upcoming-elections/general-information/2016-ballot-questions.aspx>.

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[52] *Full Text of Proposed Constitutional Amendment Petition Sponsor: Protect Our Jobs Proposal 12-2* at [http://www.michigan.gov/documents/sos/Full\\_Text\\_-\\_Protect\\_Our\\_Jobs\\_399440\\_7.pdf](http://www.michigan.gov/documents/sos/Full_Text_-_Protect_Our_Jobs_399440_7.pdf) (emphasis added).

[53] See Tom Gray, *Unions on Offense in Michigan*, BUSINESS INVESTORS DAILY, Sept. 20, 2012, at <http://finance.yahoo.com/news/unions-offense-michigan-203400915.html>.

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[58] 431 U.S. 209 (1977).

[59] Transcript of Oral Argument, *Rebecca Friedrichs et al v. California Teachers Association*, (No. 14-915). at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-915\\_e2p3.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-915_e2p3.pdf). Justice Scalia's death likely changed the predicted outcome.

[60] Whitney, *supra* note 57, at 7.

[61] Transcript, *supra* note 59.

[62] See Moshe Marvit & Leigh Anne Schriever, *With Traditional Unions on the Decline, Can Members-Only Unions Breathe Life Back Into Labor?*, IN THESE TIMES, Oct. 21, 2015, <http://inthesetimes.com/working/entry/18530/members-only-unions-minority-labor-decline>.

[63] Josh Eidelson, *Volkswagen's Sort-of Union in Tennessee*, Feb. 19, 2015, <http://www.bloomberg.com/news/articles/2015-02-19/volkswagen-s-sort-of-union>.

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[67] Eileen Boris & Jennifer Klein, *Organizing Home Care: Low-Waged Workers in the Welfare State*, 34 POLITICS & SOCIETY 81, 83 (2006), [https://www.ssa.uchicago.edu/sites/default/files/uploads/Politics\\_and\\_Society\\_published.pdf](https://www.ssa.uchicago.edu/sites/default/files/uploads/Politics_and_Society_published.pdf).

[68] See Valerie Strauss, *Seattle Teachers Boycotting Test Score a Victory*, WASH. POST, May 16, 2013, available at <https://www.washingtonpost.com/blogs/answer-sheet/wp/2013/05/16/seattle-teachers-boycotting-test-score-a-victory>.

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[72] Letter from Bruce L. Getts, International Brotherhood of Electrical Workers 6th District Representative to Indiana union membership (undated) (on file with author).

[73] *Id.*

[74] Brief of Petitioner at 1, *Friedrichs v. California Teachers Ass'n*, No. 14-915 (emphasis added).

## **CONDUCTING INDEPENDENT RESEARCH: SHOULD AN ARBITRATOR LOOK BEYOND THE RECORD OR THE LAW?**

**By, Thomas Sonneborn**

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### **I. INTRODUCTION**

This article considers the extent to which an arbitrator may look beyond the record presented by the parties for the facts or the law. Is the neutral bound to make a decision based solely on the record presented, even when that record is lacking facts the arbitrator regards as necessary to make a reasoned award? If the applicable law presented by the parties is incomplete, or perhaps even considered wrong, may the arbitrator conduct independent legal research? The answer to the first question is relatively well settled; the answer to the second question is changing with the evolution of arbitration in our modern world of dispute resolution.

### **II. INVESTIGATING THE FACTS**

Labor-management arbitrations rarely involve a presentation of all the facts that led to a grievance, but rather normally there is a presentation of only those facts the parties want the arbitrator to know, cast in the light most favorable to the presenters. Much like a stage play being simultaneously produced by two competing directors, each scene is offered from two different vantage points requiring the neutral to choose those which most nearly capture what likely happened.

What may an arbitrator do to “get the facts right?” Questions to clarify are commonplace, but should the neutral question witnesses beyond merely inquiring for clarification? At what point do clarifying questions become or appear to become advocacy? Is it appropriate to ask for the presentation of more evidence or testimony? May an arbitrator conduct independent factual research outside the record presented by the parties? This tension between what the parties want the arbitrator to know and what the arbitrator wants to know is a common occurrence in labor arbitration. Rare is the instance when a neutral is satisfied that he or she knows “all the facts” of a case. More often than not the arbitrator leaves the hearing wanting to know more to render a decision. The neutral knows there likely are

facts that were not disclosed, ones the parties chose for strategic and tactical reasons to shield from the neutral's view.

It comes as no surprise that advocates resent arbitrators who try the case for them by asking questions that go to the heart of the dispute – questions the parties may have chosen not to ask for their own reasons. The advocates presumably have carefully sifted through the evidence and have a plan for what is to be presented and how it is to be presented. That is the mission of an advocate. Yet, what if the neutral believes he or she has insufficient evidence upon which to base a reasoned award?

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators (NAA), the American Arbitration Association (AAA), and the Federal Mediation and Conciliation Service (FMCS) addresses the question in Section 5(A)(1)(b) which empowers the arbitrator “to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.”[1] This type of inquiry is conducted in the open, in the presence of both parties, and each party has an opportunity to comment and respond. Except in the most egregious instances evidencing clear bias, there is little or no basis for vacating an award because an arbitrator asked questions to further clarify the facts, even if the facts elicited favor one party or the other.

The factual inquiry more likely to lead to vacating an award is one that is conducted away from the parties and outside the record established at the hearing – i.e. independent research. In *Quesada v. City of Tampa*,[2] the Second District Court of Appeal of Florida vacated an arbitration award upholding the termination of a firefighter accused of taking illegal anabolic steroids because the arbitrator conducted independent factual research. During the hearing the City's expert had testified he was unaware of a positive test result such as the firefighter's having occurred except in the instance of using illegal steroids.[3] The fire union's expert testified there a false positive test could result from the use of legal supplements.[4] In her award, the arbitrator acknowledged she had conducted independent research on the legal supplement the firefighter claimed to have taken, examining the manufacturer's website and contacting a dietician, both of which indicated that a false positive result was not likely. The arbitrator used this information gathered *ex parte* to uphold the termination. The Florida Second District Court of Appeal concluded the arbitrator's research was misconduct that prejudiced the rights of the firefighter. What she had gathered from her “independent research yielded information not only different from any of the evidence in the record but also damaging to Quesada's case.”[5]

It was clear that the arbitrator's decision in *Quesada* turned on the results of her independent factual research. But what if it had not? In *International Medical Centers, Inc. v. Sabates*,<sup>[6]</sup> the Third District Court of Appeal of Florida held that prejudice was the decisive factor in deciding whether to vacate an award. Sabates, the head of the eye care center at the International Medical Centers (IMC), was terminated for failing to provide IMC with proof of his insurance coverage.<sup>[7]</sup> Witnesses testified at the arbitration that the IMC could have easily obtained confirmation of his insurance coverage by contacting directly the Florida Patient's Compensation Fund, a public agency required to make such disclosures upon demand.<sup>[8]</sup>

During the arbitration panel's deliberations, one of the arbitrators confirmed to his fellow panelists that the information could have been obtained by IMC with a mere phone call. To prove his point, he asked his secretary to call the Fund and confirm Sabates' insurance coverage which she did.<sup>[9]</sup> The panel found for Sabates' and ruled IMC had breached its contract with him.<sup>[10]</sup> IMC sought to have the award vacated on the grounds the panel was guilty of misconduct in that it had conducted independent factual research. The court declined to vacate the award.

The alleged misconduct in this case consisted of telephonic verification of matters already presented to the panel or previously within the personal knowledge of the two arbitrators who were attorneys. Although we agree that arbitration panels should not, in the course of their deliberations, go outside the evidence presented to them, the challenged conduct in this case was without prejudice to IMC. The information procured by the telephone call, that Sabates possessed proper coverage, was already in the record.<sup>[11]</sup>

A similar conclusion was reached in *Hawaii Teamsters and Allied Workers, Local 996 v. Airgas West, Inc.*,<sup>[12]</sup> in which the court found that an arbitrator conducting internet research and making inquiry of his daughter as to the meaning of certain disputed Hawaiian words did not invalidate his findings and award.<sup>[13]</sup> In the court's view, there was no prejudice as the information gleaned from that research did not alter the outcome of the case as explained in the award.<sup>[14]</sup>

While the arbitral awards were not vacated in two of these cases, it was clear the arbitrators' actions were frowned upon by the courts. These cases illustrate the pitfalls for arbitrators who venture into the realm of conducting independent factual research. There are ample approved means of securing additional information without resorting to independent inquiries outside the record. The Labor Arbitration Rules of the American Arbitration Association provide that the parties are to "produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."<sup>[15]</sup> The neutral's powers include the authority as provided by law to subpoena witnesses and documents

independently and the ability to reopen the record for the taking of more evidence on the arbitrator's initiative.[16]

The Code of Professional Responsibility for Arbitrators of the NAA, AAA and FMCS affords a means by which neutrals can seek additional evidence *from the parties* without resorting to investigatory efforts outside the record and the process. Section 5(A)(1)(b) permits the neutral to request submission of additional evidence, "either at the hearing or by subsequent filing." [17] The arbitrator who finds himself or herself missing facts essential to making an informed and reasoned decision has no need to conduct an independent inquiry. Should a party decline to provide the information sought by the neutral, adverse inferences may be drawn by the neutral.[18]

With the exception of taking into account matters that are generally known in the public record and the ordinary meaning of words, it is evident that arbitrators should not conduct their own factual research to supplement the evidence presented at the hearing. To do otherwise is to try the case for the parties and to convert the process from an application of the contract language to the facts presented at hearing to an arbitrator's personal quest for the truth. But, what about legal research? Is it appropriate for an arbitrator in a labor-management arbitration to conduct independent legal research?

### **III. RESEARCHING THE LAW**

There was a time when arbitration was a simpler process, when arbitrators were viewed solely as interpreters and appliers of the law of the contract. External law only became a part of the process when the parties incorporated it into their agreement. If the law of the contract and the external law were in conflict, most neutrals applied the law of the contract and left questions of external law to the courts. Neutrals no longer have that luxury. This transition was forecast in the remarks Federal Labor Relations Authority Chairman Jean McKee made to the National Academy of Arbitrators in 1992:

It seems to me that arbitrators should request information from the parties, if in doubt about the law. Unions and agencies in the Federal sector deal, on a daily basis, with those laws and regulations that regulate their working conditions. The parties are familiar with such external laws and are usually in a better position to provide assistance to the arbitrator. However, and I know this is controversial, nothing precludes the arbitrator from doing independent research. Someday we may have our computerized case decisions on-line for you to look at should you want to. We hope in a year or two.[19]

That instant access to the law and precedents Chairman McKee foresaw in 1992 obviously is part of our technology today. Statutes and case decisions are readily available to the parties and neutrals.

With the passage of numerous laws during the last half of the twentieth century applicable to the workplace,[20] arbitrators have found themselves grappling with whether and how to apply external laws to the parties' bargain when interpreting labor agreements. Parties to collective bargaining agreements frequently include all or some portion of these laws in their agreements, occasionally citing directly to the law and more often making generalized statements that appear to incorporate the spirit if not the text of the laws. Gone are the days when the company's labor relations staff squared off against the local union officials and agreed they would have to run their tentative agreements by their attorneys. Today, attorneys frequently take center stage for both parties.

The increased applicability of federal and state laws to the workplace and the increased involvement of attorneys in the contract formation process have led to the increased involvement of attorneys in the dispute resolution process. With these developments, alternative dispute resolution has begun to look more like its civil litigation kin, with pre-hearing motions and post-hearing briefs flush with legal precedents in support of the parties' positions. The influx of attorneys into the realm of labor arbitration has changed dramatically the role of the labor arbitrator. [21] No longer can an arbitrator confine his or her inquiry to the law of the contract. The applicable external law must be considered.

The impact of this evolution has been most significant in public sector labor relations. The Federal Labor Relations Authority (FLRA) has the authority to overturn an arbitration award that it finds contrary to any law, rule or regulation, including the power to make a de novo review of the arbitrator's legal findings.[22] In the public sector, many courts have adopted a public policy exception to the enforceability of arbitral awards. For example, the Illinois Supreme Court has vacated awards it found were contrary to public policy, even where the decisions were consistent with the language of the parties' agreements.[23] "Courts have crafted a public policy exception to vacate arbitral awards which otherwise draw their essence from a collective-bargaining agreement." [24] The United States Supreme Court has noted that where an agreement has been made to waive civil remedies in favor of arbitrating a claim under a federal law, the requirements of the law take precedence over the terms of the parties' agreement.[25] Arbitrators can no longer simply ignore the external law in favor of the terms of a collective bargaining agreement.

With the National Labor Relations Board's (NLRB's) policy of deferral, arbitrators are called upon to decide disputes that would otherwise form the basis of unfair labor practice charges. Under the NLRB's decision in *Babcock & Wilcox Construction Co.*[26] the standards for deferral to the grievance procedure and arbitration require that the neutral have been explicitly authorized to decide the unfair labor practice issue, the arbitrator was presented and considered the statutory issue (or was prevented from doing so by the party opposing deferral), and Board law permits the decision. The arbitrator's decision must have included a reasonable application of the statutory principles that would have governed a Board decision had the matter proceeded to hearing at the NLRB. The need to know the law is evident. The NLRB's deferral policy does not speak to Board law as it may be presented by the parties, but rather requires an application of the statutory principles that would have governed a Board decision. Arbitrators cannot rely upon the advocates' presentation of their views of the law; they must know the law and apply it consistent with the statutory principles that would have been applied by the NLRB.

Given that the law is in play in arbitration, how does an arbitrator determine its existence, applicability and scope? The neutral should not depend on the parties to thoroughly outline the law's parameters in argument and post-hearing briefs. Lawyers are advocates and place emphasis on those portions of the law and those precedents they believe support their positions. That is the essence of advocacy. When they do so, however, the arbitrator is often left with the sense that further reading and research into the applicable law is required. How else can an arbitrator supplement what has been provided by the parties except by conducting independent legal research? In this writer's view, the neutral must look beyond the legal authority provided to determine whether it correctly reflects the applicable law.

This question is not settled within the arbitral community. Absent prior approval of the parties or the designation of applicable law in the contract or during the proceedings, some commentators regard doing so as risking allegations of misconduct on the arbitrator's part and challenges for partiality and exceeding one's authority.[27] In their view, the arbitrator is governed by the wishes of the parties and bound to consider only that which they present. Even taking the precautionary step of asking the parties to further brief a legal issue the arbitrator has discovered from his or her own independent research risks a court vacating the award. Perhaps the party failing to raise the legal issue did so (or did not do so) on purpose; perhaps not. If the failure to raise the legal issue was an unintended omission or oversight on the part of one party, the other party may view the

arbitrator's raising it after the fact as putting his or her finger on the scales and evidencing bias.

Those opposed to conducting independent research note that the parties are expected to brief neutrals on the applicable law – particularly non-attorney arbitrators – and failing to do so is to proceed at one's own peril. In a case reviewing an award for manifest disregard of the law, the U.S. Court of Appeals for the Second Circuit described an arbitrator as “a blank slate unless educated by the parties . . . . There is certainly no requirement under the FAA that arbitrators be members of the bar and we have recognized ‘that arbitrators are often chosen for reasons other than their knowledge of applicable law.’”[28] In that court's view, the courts “cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney.”[29]

Setting aside the Second Circuit's apparent lack of faith in the ability of arbitrators to read and understand the law, its comments went to what neutrals are expected to know and did not answer the question of whether an arbitrator may investigate the law beyond the record provided by the parties. The doctrine of manifest disregard applied in that case involved circumstances where the neutral knew a well-defined law and deliberately ignored it or refused to apply it.[30] The doctrine neither establishes a duty to independently research the law nor a prohibition against doing so. What if the arbitrator is unsure of the law and finds the parties' presentations (or lack of presentations) on the law lacking?

Section 1(G) of the Code of Professional Responsibility in Section 1(G) addresses the question:

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research

1. An arbitrator must assume full personal responsibility for the decision in each case decided.
  - a. The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, at the hearing.
  - b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with the acceptance of full personal responsibility for the award.[31]

Judges are bound by the law and expected to research it to verify the authority presented by the parties. Arbitrators, however, are said to be bound by the parties' contract and their stipulations at a hearing. Collective bargaining agreements

most often do not contain a clause that goes directly to the question of whether an arbitrator may conduct independent legal research. Equally rare is a stipulation at hearing on the question of the arbitrator's independent legal research. Much more common are boilerplate clauses calling for the law of a given state to govern the agreement or a reference to a statute to govern a given benefit, right or duty. Often those references are by name or on occasion by citation, but rarely if ever do parties actually incorporate the entire text of a law into their agreement. To do so would be cumbersome and restrictive – cumbersome in terms of the sheer volume of the collective bargaining agreement and restrictive in that each time the law was amended the contract itself would require negotiations over possible amendment. In those instances, it seems one reasonably may infer the parties' intent that the arbitrator knows and applies the referenced law to the facts presented at hearing.

To suggest in such instances that the neutral first must obtain the parties' permission to read the referenced law and the court decisions interpreting it makes little sense. Absent evidence to the contrary, the parties' bargain would appear to be that the particular law as enacted and amended would apply to their relationship, not one party's or the other's interpretation of that law. Interpreting and applying the cited law would fall within the purview of the arbitrator. Arbitrators are frequently chosen to resolve disputes because of their reputation for familiarity with an issue that presents itself in the case at hand. If the neutral had thoroughly read and was familiar with the law and the attendant decision interpreting it *prior* to coming to the hearing, his or her decision obviously would be based on that prior reading and familiarity. Why would such prior knowledge be contemplated by the parties' bargain, but a decision based on reviewing the law and precedents after the hearing be outside the scope of the arbitrator's charge?

The more difficult situation arises when the contract is silent on whether a particular law applies, yet it is evident to the neutral that the law may apply to the facts of the case at issue. How best can an arbitrator exercise the discretion granted by the Code of Professional Responsibility to decide whether to research the law?

Grievance procedures often contain a contractual provision that limits the arbitrator's authority to interpreting and applying the express terms of the parties' agreement, barring the neutral from adding to or ignoring any such term. Does that grant of limited authority preclude the arbitrator from conducting independent legal research to supplement that which was provided by the parties? The Code of Professional Responsibility grants an arbitrator discretion on the question absent an agreement of the parties in the contract or at the hearing.

Many arbitrators assert not only may they conduct independent legal research they must do so. In their view, “[a]rbitrators are expected to follow the law in the absence of a valid and legal agreement not to do so.”[32] The risk of course is that the neutral may be seen as advocating for one party or the other by conducting further research after the hearing and briefs. That risk may be minimized by the neutral informing the parties at the outset of the hearing that he or she intends to review the law as presented by the advocates during the hearing and in post-hearing briefs, as well as independently research the law to determine its applicability.

Doing so places the parties on notice prior to the presentation of any evidence that the law will be researched and considered, both from the parties’ and the neutral’s point of view. If a party believes doing so is inappropriate or beyond the arbitrator’s jurisdiction as outlined in the collective bargaining agreement, the objection can be addressed prior to the time the arbitrator has heard any evidence and prior to the time an argument can be made that doing so evidences bias for one side or the other. Perhaps there is express contract language that prohibits such independent research, and the arbitrator who finds himself or herself limited to the law as advocated by the parties is free to explain the award’s inconsistency with the actual law in the confines of the opinion. However, such an occurrence is very unlikely. What party would announce at an arbitration that it does not want the neutral to follow the law as it exists, but rather limit himself or herself to one party or the other’s interpretation of the applicable law; or worse yet, to ignore the applicable law? Making that argument lays a party open to vigorous argument from the opposing party, not to mention doing significant damage to a party’s credibility in the labor-management relationship. According to Arbitrator Theodore St. Antoine there is a general assumption that arbitrators will interpret contracts in light of the law:

Arbitrators must make a reasonable effort to address applicable public law when it is at issue. I personally would let the parties narrow the issues and insist that I stick to interpreting and applying the contract; the parties could then have a court address legal issues if that is necessary. But increasingly, perhaps especially in public sector cases and certainly in federal cases, it is generally assumed that the parties intended the arbitrator to interpret the contract in light of public law.[33]

A likely by-product of placing the parties on notice that the arbitrator may perform independent legal research is that the parties will conduct their legal advocacy in a more thorough and straightforward manner. The purpose of the arbitrator’s independent research is to determine what the state of the law is. Doing so does not preclude the parties from advocating how that law should be applied to the facts of the case at hand. Establishing the law, both statutory and precedent,

places the parties and the neutral on equal footing as the evidence and the arguments progress.

Consider the circumstance where the arbitrator happens to be familiar with the statutory provisions and the most current precedents applying that law. If during the hearing, an advocate advances an interpretation that differs from those precedents, would not the arbitrator make inquiry into the basis for that alternate interpretation? To do so would not evidence bias, but rather would constitute an exercise of the arbitrator's authority under the Code of Professional Responsibility and institutional rules to "obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing." For an arbitrator to do so during the hearing would be an effort to seek clarification and an understanding of a party's position.

Doing so after the record is closed presents different considerations. In some instances the arbitrator may be thoroughly versed in the applicable law; in others, he or she may not be. If the arbitrator conducts independent research after the record is closed and discovers the law is consistent with what was presented by at least one of the parties, no further action on his or her part should be required. Adopting one party or the other's interpretation of the applicable law is the essence of arbitration – choosing one party's position or the other. However, if the arbitrator's post-record closing research discovers a statute or precedent neither party raised that the arbitrator views as applicable, the best practice would be to notify both parties and afford them the opportunity for comment. Doing so will not inoculate the arbitrator from a party claiming bias, but if the neutral has cautioned the parties at the outset that the law will be researched and has afforded the parties the opportunity to comment on the applicability of the "new" law discovered in his or her independent research, such a claim is unlikely to be successful. The only bias the arbitrator will have exhibited is a preference for knowing what the law is and how it has been applied by the courts.

While it is clear that the question of an arbitrator's conducting independent research is not fully settled among the members of the arbitral community, in this writer's view today's neutrals have no choice but to learn the law and how it has been applied. The law has invaded the realm of collective bargaining and dispute resolution, both from the actions of state and federal legislative bodies and from the actions of the parties at the bargaining table. Considering the level of sophistication of today's bargaining, it is reasonable to believe the parties were aware of the law and its applications when they engaged in that bargaining – and that the law formed the underpinnings of their bargain. To subsequently ignore the law in dispute resolution is to ignore one of the bases of the parties' bargain.

#### IV. CONCLUSION

The Code of Professional Responsibility and institutional rules afford arbitrators ample means for securing more facts from the parties both during and after the hearing. Any venture into independent factual research is likely to result in an award being vacated. Independent legal research is another matter. The Code grants arbitrators the discretion to rely on precedent and to conduct independent research when the desires of the parties are not known or when the parties express differing opinions or policies. Most often the desires of the parties will not be known or at most will differ.

By confronting the question at the outset of the hearing and informing the parties of the neutral's intent to conduct independent research into the law, any claim of bias will be muted. Most courts and agencies expect arbitrators to know the law and to issue awards consistent with the law. Reliance upon advocates to present the law in a detached and unflavored manner is to deny the essence of advocacy. Not understanding that the existence of applicable law was likely one of the bases of the parties' bargain as expressed in the contract is equally problematic. To do so imperils the rights of individuals as provided by the law, individuals whose only forum for relief often will be arbitration. To suggest that contract language was negotiated in a vacuum without an awareness of the existing law is to ignore the realities of the modern bargaining table. Arbitrators are expected to know the law and apply it as appropriate for the circumstances of a given case. Independent legal research is one of the tools available to neutrals for discovering what that law is and how it is to be applied.

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[1] CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MGMT. DISPUTES OF THE NAT'L ACAD. OF ARBITRATORS AM. ARBITRATION ASS'N FED. MEDIATION AND CONCILIATION SERV. § 5(A)(1)(b) (amended Sept. 2007), *available at* <http://www.naarb.org/code.html> [hereafter Code of Prof'l Responsibility].

[2] *Quesada v. City of Tampa*, 96 So. 3d 924 (Fla. Dist. Ct. App. 2012).

[3] *Id.* at 925.

[4] *Id.*

[5] *Id.* at 926.

[6] *Inte'l Med. Ctrs., Inc. v. Sabates*, 498 So. 2d 1292 (Fla. Dist. Ct. App. 1986).

[7] *Id.* at 1293.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Hawaii Teamsters and Allied Workers, Local 996 v. Airgas West, Inc.*, No. 12-00517, 2013 WL 1856264 (D. Hawaii, Apr. 30, 2013).

[13] *Id.* at \*5.

[14] *Id.* at \*15.

[15] AMERICAN ARBITRATION ASSOCIATION, LABOR ARBITRATION RULES (INCLUDING EXPEDITED LABOR ARBITRATION RULES), R. 27 (effective July 1, 2013), *available at* [www.adr.org/labor](http://www.adr.org/labor).

[16] *Id.*

[17] CODE OF PROF'L RESPONSIBILITY, *supra* note 1, at § 5(A)(1)(b).

[18] ELKOURI & ELKOURI, HOW ARBITRATION Works 8-50 (Kenneth May ed., 7th ed. 2012).

[19] Jean McKee, *Remarks Before the National Academy of Arbitrators*, 10 HOFSTRA LAB. L.J. 341, 344 (1992).

[20] For example, on the federal level examples include the Equal Pay Act, 29 U.S.C. § 206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78; the Employee Retiree Income Security Act of 1974, 29 U.S.C. §§ 1001-1191; the Family Medical Leave Act, 29 U.S.C. §§ 2611-19; and the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (codified in scattered sections of 42 U.S.C.). Examples of state acts impacting employee rights and benefits include the Illinois Public Employee Disability Act, 5 ILCS 345/1; the Fire Department Promotion Act, 50 ILCS 742/1 to 742/65; the Uniform Peace Officers Disciplinary Act, 50 ILCS 725/1 to 725/8; the 2005 amendments to the Illinois Hospital Licensing Act, 210 ILCS 85/10.9; and the Illinois Public Safety Employee Benefits Act, 820 ILCS 320/1 to 320/20.

[21] For an in-depth consideration of the change that has come to arbitration and its roots, see Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199 (2005).

[22] 5 U.S.C. § 7122(a)(1).

[23] See, e.g., *AFSCME v. Dept. of Central Mgmt. Servs.*, 173 Ill.2d 299, 671 N.E.2d 668 (1996).

[24] *Id.* at 306-07, 671 N.E.2d at 673.

[25] *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79 (1998).

[26] 361 N.L.R.B. No. 132 (Dec. 15, 2014).

[27] See Paul Bennett Marrow, *Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?*, N.Y.S. BAR ASS'N J., May 2013, at 24. This article also includes reviews of institutional rules and the standards in international arbitration, as well as the ethical standards of the American Bar Association.

[28] *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004).

[29] *Id.*

[30] For a review of the doctrine of manifest disregard, see Michael LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137 (2011).

[31] CODE OF PROF'L RESPONSIBILITY, *supra* note 1, at §1(G).

[32] M. Ross Shulmister, *Attorney Arbitrators Should Research Law: Permission of the Parties to Do So is Not Required*, in AMERICAN ARBITRATION ASSOCIATION, HANDBOOK ON ARBITRATION PRACTICE, 265, 267 (2d ed. 2016) (quoting *Montes v. Shearson Lehman Brothers*, 128 F.3d 1456, 1461 (11th Cir. 1997)).

[33] Theodore J. St. Antoine, *Guidelines of Professional Responsibility for Arbitrators of Employment Disputes*, [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2015/february/adr/6.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2015/february/adr/6.authcheckdam.pdf).

## RECENT DEVELOPMENTS

By, Student Editorial Board:

**Marko Cvijanovic, Zachary Jordan, Jenna Kim and, Mary M. Pietrzak**

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, the equal employment opportunity laws and the pension provision of the Illinois Constitution.

### I. IELRA DEVELOPMENTS

#### A. Arbitration

In *Board of Education of City of Chicago v. IELRB*, 2015 IL 118043, the Illinois Supreme Court held that the employer was not obligated to arbitrate grievances concerning the employer's placement of do not hire notices in the files of terminated probationary teachers. In so doing, the court affirmed the Appellate Court's reversal of a contrary decision by the IELRB.

In 2010, the employer instituted a new policy of designating as ineligible for rehire nonrenewed probationary teachers who had been nonrenewed twice or who had been given an unsatisfactory performance rating. The union filed grievances on behalf of three teachers who had received the designations, and on behalf of all probationary teachers claiming that the action violated the collective bargaining agreement. When the employer refused to arbitrate the grievances, the union filed an unfair labor practice charge with the IELRB. The IELRB found that the employer was required to arbitrate but the Appellate Court reversed.

The Illinois Supreme Court held that the grievances did not relate to terms and conditions of employment, but related to hiring decisions, a matter that was not arbitrable under the collective bargaining agreement. Second, the court held that arbitrating these matters would violate Sections 4 and 10(b) of the IELRA. Section 4 declares that employers are not required to bargain over the selection of new employees. Third, the court held that this activity would violate various sections of the School Code, including 105 ILCS 5/10-22.4 and 34-84. The court read these provisions as placing the non-delegable authority to hire teachers with the school board. In sum, because the placing of do not hire memos in the files of dismissed

probationary teachers were considered hiring decisions, these actions were within the school board's authority and it was not required to arbitrate the grievances.

In *Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO and Chicago Board of Education*, 31 PERI ¶ 200 (IELRB 2015), the IELRB held that the Chicago Board of Education did not violate Section 14(a)(1) and (5) of the IELRA when it refused to arbitrate grievances over the dismissals of a substitute teacher and two probationary appointed teachers.

The IELRB observed that the collective bargaining agreement expressly provided that arbitrators only had jurisdiction to hear disciplinary matters explicitly set forth in the agreement. The agreement afforded substitute and probationary appointed teachers pre-dismissal hearings before the Board of Education's Talent Office of Employee Engagement, but did not provide a right to arbitration. The IELRB noted that during negotiations, the union proposed language that would have made all disciplinary action arbitrable, but the union abandoned this proposal and the language was not part of the final agreement. Because the contract language clearly excluded these types of disputes from arbitration, the IELRB dismissed the charge.

Board Member Sered dissented. She observed that the contract provision precluded arbitrators from hearing disciplinary matters "except as specifically set forth in this Agreement." She maintained that the exception required interpretation of the contract, a matter that the IELRB should have left to the arbitrator rather than take on itself.

### ***B. Duty to Bargain***

In *Evanston Township High School District 202 and Student Welfare Officers and Student Management Personnel Association, IEA-NEA*, 32 PERI ¶ 4 (IELRB 2015), the IELRB held that Student Management Personnel Association, IEA-NEA did not violate Section 14(b)(1) and (3) of the IELRA when one of its representatives sent an email to the District's Board of Education regarding the current contract negotiations.

In the email, the union representative informed the Board of Education that the district's human resources director was behaving unprofessionally during bargaining and that the behavior was causing strife during negotiations. The union also stated that the continued behavior could lead to "damaging press coverage and public exposure," and asked the Board of Education to intervene to aid the negotiations. The IELRB held that the union's statement could not be interpreted as a threat of reprisal or force, but was simply an opinion. Therefore, the statement

was protected under the IELRA. Lastly, the IELRB held that the email was not evidence of direct dealing. This was because the union was only stating its opinion about the negotiations and nothing in the email suggested that the union was trying to negotiate with the Board of Education directly. Accordingly, the IELRB dismissed the charge.

## **II. IPLRA DEVELOPMENTS**

### ***A. Bargaining Unit Clarification***

In *International Union of Operating Engineers Local 965 v. ILRB*, 2015 IL App (4th) 140352, the Illinois Appellate Court for the Fourth District affirmed the ILRB State Panel's grant of a unit clarification petition filed by the Illinois Office of Comptroller which excluded public service administrators (PSAa) from two bargaining units as of the April 5, 2013 effective date of an amendment to the IPLRA. The court rejected the union's argument that the exclusion could not apply until the existing collective bargaining agreements expired.

On April 4, 2013, the union and the office of comptroller entered into collective bargaining agreements whose coverage included PSAs. On April 5, 2013 the general assembly amended section 3(n) of the IPLRA to exclude from the definition of "public employee" any person who is a state employee under the jurisdiction of the office of the comptroller and who holds a PSA position. The office of the comptroller interpreted the language of the amendment to be self-effectuating; meaning that the PSAs employed by the comptroller no longer enjoyed collective bargaining rights. The union interpreted the amendment as not applying until the expiration of the existing contracts.

The court considered whether the amendment to section 3(n) was self-effectuating. The court noted that the General Assembly did not clearly prescribe the temporal reach of the amendment and because of that the court had to determine whether the amendment was substantive or procedural. If the amendment was substantive it could not be given retroactive effect. The court held that the amendment was a substantive amendment. However, the court reasoned that applying the amendment from the date it was enacted (April 5, 2013) was not applying it retroactively. The court reasoned that a statute which creates new requirements to be imposed in the present or the future and not in the past does not have a retroactive impact on the parties. Consequently, the court affirmed the State Panel's decision excluding the PSAs from the bargaining unit effective with the enactment of the amendment.

### III. EEO DEVELOPMENTS

#### A. *Religious Discrimination*

In *EEOC v. Abercrombie & Fitch Stores Inc.*, 125 S. Ct. 2028 (2015), the U.S. Supreme Court held that a plaintiff need only show that a defendant's belief that a job applicant would seek a religious accommodation was a motivating factor in the defendant's rejection of the applicant to prove disparate treatment on the basis of religion. The Court held that the plaintiff need not prove that the defendant knew that the applicant would seek an accommodation.

The EEOC brought suit on behalf of a Muslim woman who wore a black hijab when she interviewed for a sales position with Abercrombie and Fitch. Although the applicant received good reviews in her interview she was not hired because her hijab did not conform with the store's look policy which forbade sales employees from wearing black clothing or caps. During her interview the applicant did not mention her religion or request a religious accommodation, but the interviewing manager assumed she wore her hijab because she was Muslim and would seek an accommodation exempting her from the look policy. The EEOC alleged that Abercrombie should have made an exception to its look policy to accommodate the plaintiff's religious practice. The district court granted the EEOC's motion for summary judgment on liability, holding that the store was on notice that the plaintiff wore the hijab for religious reasons and that it failed to demonstrate that granting an accommodation would pose an undue hardship. The Tenth Circuit Court of Appeals reversed, reasoning that no one at Abercrombie had actual knowledge that the applicant wore her hijab for religious reasons. The Supreme Court held that actual knowledge of a need for a religious accommodation is not necessary for employer to violate Title VII's reasonable accommodation requirement.

The Court began its analysis by noting that Title VII does not expressly include a knowledge requirement. It noted that an employer may violate Title VII even when its employment decision is based on "an unsubstantiated suspicion" that a potential employee might need a religious accommodation. Thus, the Court noted that a showing of the employer's certainty that an accommodation is needed is not required. The Court further rejected Abercrombie's argument that it was not liable for disparate treatment because of its enforcement of its neutral look policy. The Court reasoned that even though the look policy applied to all employees, regardless of religion, Title VII requires neutral policies to give way to the need for an accommodation of religious practices. The Court did not address whether Abercrombie's look policy violated Title VII or whether accommodating the

applicant would have imposed an undue hardship; the opinion was limited to whether the Tenth Circuit's standard for granting summary judgment was correct. The Supreme Court concluded that it was not.

### ***B. Pension Developments***

In *In re Pension Reform Litigation*, 2015 IL 118585, 32 N.E. 3d 1, the Illinois Supreme Court held that Public Act 98-599's reductions of retirement annuity benefits to members of the General Assembly Retirement System, State Employees Retirement System, State University Retirement System and Teachers Retirement System violated Article XIII, Section 5 of the Illinois Constitution. This provision, commonly referred to as the pension protection clause states, "Membership in any pension or retirement system of the State, any unit of local government or school district, or agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Public Act 98-599 delayed by up to five years the time that certain participants could begin receiving retirement benefits, it capped the maximum salary that could be considered in calculating a participant's retirement annuity, it eliminated annual 3 percent increases in pension payments, replacing them with a formula that limits the amount of annual adjustment and it completely eliminated up to five years of annual adjustments depending on the participant's age as of the effective date of the act.

Citing a lengthy list of prior decisions, the court considered it well-established that the pension protection clause applies to retirement system participants "once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires." The court reasoned that Public Act 98-599 violated the "clear requirements" of the pension protection clause.

The court rejected the State's contention that the act was justified by the State's reserved police powers. The court opined that fiscal challenges cannot override clear constitutional mandates. It held as a matter of law the State could not establish that the fiscal challenges were unforeseen and unintended when the Legislature established the pension systems. The court observed that economic fluctuations were continuous and that the Legislature did not resort to alternative measures such as reamortizing the pension deficit or increasing taxes, but rather allowed the income tax surcharge to expire. The court went further and declared, "[A]ccepting the State's position that reducing retirement benefits is justified by economic circumstances would require that we allow the legislature to do the very thing the pension protection clause was designed to prevent it from doing."