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Probable Interpretations of Selected Sections of the Illinois Educational Labor Educational Labor Relations Act

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PROBABLE INTERPRETATIONS OF SELECTED SECTIONS OF THE ILLINOIS
EDUCATIONAL LABOR RELATIONS ACT

by

G. Robb Cooper

A Dissertation Submitted to the Faculty of the Graduate School
of Loyola University of Chicago in Partial Fulfillment
of the Requirements for the Degree of
Doctor of Philosophy

March

1987

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Finally and most importantly, my daughters Katherine and Elissa and my wife Lynn, put up with far too many evenings with daddy and husband away from home. To them I owe an immeasurable debt and dedicate this work.

VITA

The author, G. Robb Cooper, is the son of Daniel Roy Cooper, Sr. and Authula (Powell) Cooper. He was born August 2, 1951, at Ft. Lewis, Washington.

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CHAPTER I

INTRODUCTION

Collective bargaining in the public education sector has increasingly become an issue that commands a great deal of attention from school administrators, teachers, parents, students and the general public. With increasing frequency, state legislatures have responded to this attention by passing legislation that addresses the issue of collective bargaining and public school employees.

Illinois joined the ranks of those states with legislation in this area by passing the Illinois Educational Labor Relations Act (IELRA) in 1983.

Statement of the Problem

The central problem addressed by this study is the probable interpretation of the Illinois Educational Labor Relations Act in the areas of scope of bargaining, unfair labor practices and unit organization. These areas generated the most controversy during the legislative debates and the interpretation of the statute in these areas is of primary concern to teachers and administrators.

Purpose and Significance of the Study

The IELRA establishes a list of mandatorily bargainable topics. However, it also provides that subjects which directly impact on the mandatory subjects of bargaining are mandatorily

bargainable unless they are inherently managerial rights. The determination of the scope of mandatory bargaining is important for several reasons that are closely intertwined.

First, the determination that a topic is mandatorily bargainable means that management may not make unilateral decisions in that area. Second, if a topic is determined to be mandatorily bargainable, management's ability to alter policy in that area is restricted. Third, most topics of bargaining involve monetary expenditures either directly or indirectly. This budget involvement means that the determination of a topic as a mandatory subject of bargaining will have an impact on the budgetary process.

The determination of what constitutes an unfair labor practice will have a significant impact on how schools are governed. Administrative personnel will have to be sensitive to what constitutes an unfair labor practice and amend their practices accordingly.

The determination of what constitutes unfair labor practices will also affect the collective bargaining process. Under the IELRA both management and employee groups may commit unfair labor practices during the life of the contract and during the bargaining process. Practices which may have been allowable before the statute are now proscribed and this will affect how both parties approach the bargaining table.

Unit determination will establish which employees must be dealt with as a group. This is significant because of the

difficulty of bargaining with either a single group representing diverse interests, or conversely, with many groups simultaneously.

This study will provide a basis for understanding how the Illinois Educational Labor Relations Board (IELRB) will approach resolution of these questions. It will also suggest probable interpretations of the pertinent portions of the IELRA.

Nature of the Study

The nature of the study was a documentary research project. All of the published reports of the IELRB from January 1, 1984 to August 1, 1986 were read. This includes IELRB Opinions and Orders, Orders, and Recommended Decisions and Orders. All of the legislative history was read as well. This includes floor debates in the Illinois House of Representatives and Senate on Senate Bill 536 and House Bill 1530, the Governor's Amendatory Veto Message on House Bill 1530, and listening to the tapes of the Committee Hearings on House Bill 1530.

Organization of the Study

This study is organized into six chapters as follows:

Chapter 1 contains an introduction, statement of the problem, purpose and significance of the study, nature of the study, and organization of the study.

Chapter 2 contains a discussion of the background of the IELRA and provides an overview of the content of the statute.

Chapter 3 contains a discussion of the scope of bargaining under the National Labor Relations Act, a review of the four tests for determining whether a topic is a mandatory or permissive subject of bargaining, an overview of the scope of bargaining under the IELRA, and specific analyses of the bargainability of teacher evaluation, class size, teaching assignments and curriculum, and conclusions regarding the scope of mandatory bargaining under the IELRA.

Chapter 4 contains a general consideration of unfair labor practices under the NLRA, a discussion of unfair labor practices under the IELRA with specific examples drawn from reported decisions, responses to six specific questions posed regarding unfair labor practices under the IELRA, and conclusions regarding unfair labor practices under the IELRA.

Chapter 5 contains a discussion of unit determination under the NLRA, an analysis of the statutory framework for unit determination under the IELRA, a discussion and analysis of IELRB decisions dealing with unit determination, a discussion of supervisory, managerial and confidential exclusions, a discussion and analysis of decisions dealing with this area, and conclusions to be drawn regarding this topic.

Chapter 6 contains a summary of the conclusions drawn in each chapter, a discussion of the implications of those conclusions and recommendations for further study.

CHAPTER 2

THE BACKGROUND AND CONTENT OF THE ILLINOIS EDUCATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) was formed and refined in three separate Congressional actions - the Wagner Act of 1935, the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. The Wagner Act was clearly an attempt by Congress to facilitate interstate commerce and to foster industrial peace by removing barriers to the formation of unions. The Taft-Hartley Act and the Landrum-Griffin Act both served to refine the process of bargaining and the adjudication of disputes under the NLRA as well as to clarify some provisions of the NLRA. The NLRA is found at USC Section 151, et seq. An in depth historical examination of the NLRA is to be found in Gorman (1976) and Meltzer (1977).

The important aspect of the NLRA for this discussion is that it covers only employees of private industry engaged in interstate commerce, NLRA Section 1(b). This limited coverage is in accord with Congress' stated purpose in passing the NLRA:

...."to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce.... NLRA Section 1(b).

However, this coverage excluded what has grown to become a

very sizeable segment of the work force, the public sector employees.

Without the protection of the NLRA, public employees did not have the right for their labor unions to be recognized and they did not have the right to bargain collectively on any issue. Specifically, they did not have the right to bargain over issues dealing with terms and conditions of employment or the right to engage in concerted activity in furtherance of those issues. As a result of this lack of protection it was unclear whether unions of public employees had any status at all. In fact, an early Connecticut decision, Norwalk Teachers Ass'n. v. Board of Education, 83 A.2d 482 (1951), held that in the absence of statute or regulation there was no reason why public employees could not organize a union. However, that court refused to order the employer to recognize the union and stated that there was no constitutional right to recognition.

It is against this background that the Illinois Education Labor Relations Act (IELRA) was enacted by the General Assembly of Illinois in the summer of 1983. Governor James Thompson signed the bill into law on September 23, 1983 and used his amendatory veto power to alter its form. Under the terms of the statute, the full force and effect of the statute came into being on January 1, 1984.

The history leading to the passage of the IELRA is interesting in itself. Illinois, Chicago in particular, has long had a reputation for being staunchly pro-union. However, Illinois was the last northern industrial state to enact public labor law

legislation. On the surface, this appears somewhat incongruous, especially since a carefully crafted labor-management relations bill for public employees was regularly introduced in the General Assembly throughout the late nineteen-sixties. (Scariano, 1984) However, the bill never received much consideration from the General Assembly. This puzzled the co-sponsors of the bill, Anthony Scariano and Abner Mikva, because the bill was fair to both workers and employers.

Finally, Scariano went to see the Democratic leaders in the House. They told him that the "administration" was against the bill. He went to see then Governor Kerner about the matter. Kerner told Scariano that he knew nothing about the bill and had no position on it. It occurred to Scariano that when Cook County Democratic leaders spoke about the administration that they were referring to the Mayor Daley. He visited Mayor Daley and was referred to the deputy Mayor. The deputy Mayor confirmed that the Mayor was against the bill.

When Scariano pressed for an explanation, he was told, "We don't want our employees sitting across the table from us demanding things—they've got to ask and they must give things in return. We can't get anything from them if they have the right to it." (Scariano, p.3.) When Scariano inquired as to what was expected from the workers he was told, "Campaign contributions, workers in election campaigns, endorsements, etc. - we just don't want them sitting across the table from us as equals." (Scariano, p.3.)

The exchange reported by Scariano explains why Illinois was so long in obtaining a public employees labor relations law. Giving

the right to public employees to organize and bargain would eliminate the control over one of the largest political assets of the controlling political party.

When the IELRA did come into existence it was the result of a sustained effort by the Illinois Federation of Teachers (IFT) and the Illinois Education Association (IEA). Representative Greiman's comments during the debates of May 18, 1983 make it clear how much input the IEA had in the drafting of the bill. In that debate, while discussing Amendment Seven of the bill, (a significant restructuring of the bill), Greiman made the following remarks:

GREIMAN: "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. I did think that I should make one thing clear. Amendment #7 is the product of a great deal of effort. It is supported by both of the major teacher organizations in this state, whom had significant input into the crafting of it. And in accordance with the desire of so many people to have labor peace, it was our effort and it remains our effort to bring management into the picture on a meaningful negotiating basis. Accordingly, I convened, and chaired...more or less chaired a meeting with management people last week. I have been getting back some material from them. Today, we are proceeding, the managers....the four managers of this Bill, chose to proceed on the Bill, and that do now and this Bill arriving on the Governor's desk, that it will...that it is written in stone or that it will not be changed. And I wanted to make clear to those organizations who have contacted me, some of whom have provided me, just yesterday with proposals for changes of language, certainly that is possible between now and the moment when this Bill reaches the Governor's desk. And I didn't want them to believe that there was any act of bad faith or any act to which would foreclose consideration of other issues. I believe that House Bill 1530 is a significant matter, to be considered a step forward in employee public...employee relations, and ask that it be adopted." (House Debates, May 18, 1983, pages 112, 113.)

Representative Stuffle's remarks during the May 26 debates also make it clear that the IEA and the IFT were consulted at every step during the development of the bill:

STUFFLE: "Yes, Madam Speaker and Members of the House, this is, of course, the comprehensive collective bargaining Bill that covers educational employees in the public sector in Illinois. And if you might bear with me for a few moments, I would indicate that the Bill includes specific election and recognition procedures, mediation and impasse procedures, as well as injunctive relief procedures that are available to employees. I would point out to you that this comprehensive Bill was put together through many weeks of effort by the Speaker, who initiated the Bill. The Speaker of the House, Mike Madigan, asked those of us who have sponsored Bills for public sector educational employee bargaining over the years to try to sit down, through his efforts, to try to negotiate and end the stalemates between the teacher groups. Representative McPike, and Representative Greiman spent many weeks with the IFT and the IEA negotiating their differences. To their credit, the IFT and the IEA agreed to put aside long-standing differences, some small, some large, to put this Bill together under the leadership, as I said, of Speaker Madigan. Representative Greiman, thereafter, initiated meetings with management groups in the Bill comes today not as a perfect Bill, but I think it's the closest thing I've seen to it in the over twelve years that I've worked on this particular Bill and in the seven I've sponsored. (House Debates, May 26, 1983. 254,5.)

The official statements of the IFT and of the IEA also claimed that the organizations had a good deal of input into the drafting of the bill. All of these uncontested statements created some obvious concerns on the part of management interests that the IELRA as enacted would heavily favor the interests of labor. Certainly, labor was afforded statutory rights that it did not have in the absence of the statute.

The intent of the legislature in passing this statute is clearly expressed in Section 1 of the IELRA:

POLICY. It is the public policy of this State and the purpose of this Act to promote orderly and constructive relationships between all educational employees and their employers. Unresolved disputes between the educational employees and their employers are injurious to the public, and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution. It is the purpose of this Act to regulate labor relations between educational employers and educational employees, including the designation of educational employee representatives, negotiation of wages, hours, and other conditions of employment and resolution of disputes arising under collective bargaining agreements. The General Assembly recognizes that substantial differences exist between educational employees and other public employees as a result of the uniqueness of the educational work calendar and educational work duties and the traditional and historical patterns of collective bargaining between educational employers and educational employees and that such differences demand statutory regulation of collective bargaining between educational employers and educational employees in a manner that recognizes these differences. Recognizing that harmonious relationships are required between educational employees and their employers, the General Assembly had determined that the overall policy may best be accomplished by (a) granting to educational employees the right to organize and choose freely their representatives; (b) requiring educational employers to negotiate and bargain with employee organizations representing educational employees and to enter into written agreements evidencing the result of such bargaining; and (c) establishing procedures to provide for the protection of the rights of the educational employee, the educational employer and the public.

Thus, the legislature took notice of the public policy of promoting peace between educational employers. It also took notice of the unique nature and needs of public education employees and employers.

The legislative history reveals some other interesting motivations for the passage of the bill. In Governor Thompson's prefatory remarks of the veto message he referred to collective bargaining as a "fundamental right." (Thompson, 1983, p.2) Within a legal context a fundamental right is the most basic of all rights and cannot be violated by the state. This is very strong language for a right that is to be conferred by statute and demonstrates the high priority placed on the passage of the bill by the Governor.

It is of particular interest that part of the stated legislative purpose was added by the amendatory veto of Governor Thompson. The portion of this section that was added are the two sentences beginning with the words "It is the purpose of this Act...." and ending with "in a manner that recognizes these differences." (Thompson, 1983, p.2) It is this addition that took legislative notice of the unique nature of educational employees and employers. The fact that this notice was added by amendatory veto and not in the text of bill might imply that the teacher organizations were not particularly anxious for this notice to be taken.

Another statement made by Representative Stuffle during the May 26 debates expressed a reason for the introduction and passage of the bill.

"We live in the 20th Century, and we need to face 20th Century realities. The Bill is not capitulating to labor, but it's an effort to provide a true and systematic method of resolving impasses, of limiting strikes, not promoting them, of eliminating decades of strife in this state....It's time we settle our

differences across the bargaining table. It's time we settle them there, not in the streets, that we realize educational people ought to be and are people, are taxpayers, and ought to be first class citizens." (Stuffle, 1983, p.255.)

The implications from this passage are that bargaining in the education sector was archaic, that educational personnel were treated as though they were not people and that educational personnel had been treated as second class citizens. If those were the beliefs of Representative Stuffle then the motivation in introducing the bill was not simply to "promote orderly and constructive relationships between all educational employees and their employers."

Any statute requires the careful reading by the individual wishing to understand the statute. However, general provisions of the statute must be discussed to provide a framework for the ensuing study.

Section 2 of the IELRA provides definitions for specialized terms within the IELRA. Many of those terms will be discussed within other chapters but some of them must be discussed here to provide a general understanding.

Subsection (a) provides the definition of "Educational employer":

(a)"Educational employer" or "employer" means the governing body of a public school district, combination of public school districts, including the governing body of joint agreements of any type formed by 2 or more school districts public community college district or State college or university, and any State agency whose major function is providing education services. (IELRA, Section 2(a))

This is a broad definition and was provided expressly to include joint agreements.

Subsection (b) defines an educational employee as any individual employed full or part time by an educational employer. This provides broad coverage but that coverage is narrowed by the exclusion of "supervisors, managerial, confidential, short term employees, student and part-time academic employees of community colleges...." (IELRA, Section 2(b)).

Section 3 establishes employee rights and Section 4 provides for employer rights. These sections will be discussed in the chapter dealing with scope of bargaining.

Section 5 establishes the Illinois Educational Labor Relations Board (IELRB). It is composed of three members, no more than two from the same political party, appointed by the Governor with the advice and consent of the Senate. The section provides that members must have at least five years of experience directly related to labor and employment relations in representing educational employers or educational employees in collective bargaining matters.

The section gives broad powers to the IELRB in order to carry out the objectives of the IELRA. The IELRB may "....subpoena witnesses, subpoena the production of books, papers, records and documents which may be needed as evidence on any matter under inquiry and may administer oaths and affirmations." (IELRA, Section 5(g))

Section 5(h) gives the IELRB the power to make rules and regulations pursuant to the Illinois Administrative Procedure Act.

The IELRB has created those rules and regulations. They are found at 80 Ill. Adm. Code Sections 1100-1130. Specific rules and regulations will be discussed in appropriate chapters.

Section 6 provides for the establishment of the Illinois Education Labor Mediation Roster. This is necessary because mediation is one of the prerequisites before a teacher organization can file a notice of intent to strike.

Section 7 establishes the process and guidelines the IELRB is to follow when considering concerning unit determination. This section will be discussed more fully in the chapter on unit determination.

Section 8 provides for the election and certification process of the exclusive bargaining representative.

Section 9 requires the IELRB to establish rules and regulations governing "...the appropriateness of bargaining units, representation elections, employee petition for recognition and procedures for voluntary recognition of employee organizations by employers." (IELRA, Section 9) This is a particularly important provision because it requires the IELRB to enunciate the standards to be used in determining appropriateness. The regulations that have been promulgated in this area will be discussed in the chapter on unit determination.

Section 10 establishes the duty to bargain in good faith within parameters established by the section. This section will be explored more fully in the chapter on the scope of bargaining.

Section 11 allows non-member fair share payments to be included in a negotiated contract. The fair share cannot include any fees for contributions related to the election or support of any candidate for political office. The section also allows an employee objecting to fair share on a religious basis to pay his fair share to a non-religious charitable organization agreed upon by the employee and the exclusive representative.

Section 12 establishes the impasse procedures to be followed. Basically, if the parties have not reached an agreement by 90 days before the scheduled start of the coming school year, the parties must notify the IELRB of the status of the negotiations. If a reasonable period of negotiations has passed, and it is within 45 days of the scheduled beginning of the school year, either party may petition the IELRB to begin mediation. The IELRB also has the power to initiate mediation on its own motion. If settlement has not been reached within 15 days of the scheduled start of the school year the IELRB is required to invoke mediation.

Section 13 establishes five conditions that must be satisfied before educational employees may engage in a strike. The conditions are:

Educational employees shall not engage in a strike except under the following conditions:

(a) they are represented by an exclusive bargaining representative;

(b) mediation has been used without success;

(c) at least 5 days have elapsed after a notice of intent to strike has been given by the exclusive bargaining representative to the educational employer, the regional superintendent and the Illinois Educational Labor Relations Board;

(d) the collective bargaining agreement between the educational employer and educational employees, if any, has expired; and,
(e) the employer and the exclusive bargaining representative have not mutually submitted the unresolved issues to arbitration. (IELRA, Section 13(a)-13(3))

All five of the conditions must be met before employees may legally engage in a strike. The section also allows the employer to seek an injunction if the strike presents a clear and present danger to the health or safety of the public. An unfair labor practice or other evidence of unclean hands by the employer is a defense to such an action.

Section 14 lists the action by educational employers and employees that will be considered unfair labor practices. This section will be considered in the chapter on unfair labor practices.

Section 15 establishes the procedures to be followed when an employee or employer believes an unfair labor practice has been committed. This section provides that after a charge has been filed the IELRA will investigate the charge to determine if the charge states an issue of law or fact. If the IELRA finds that the charge meets that requirement the IELRB is to issue and serve a complaint upon the party charged and hold a hearing on the charges. Both parties are entitled to have an attorney present at the hearing and the IELRB may seek a court order to compel the attendance of the parties.

If the IELRB finds that the charged party has committed an unfair labor practice the IELRB may issue an order requiring the

practice to cease. The IELRB may take additional affirmative action including requiring periodic reports to demonstrate compliance with the order. The detailed mechanics of processing an unfair labor practice charge are contained within the Rules and Regulations. Those details will be discussed in the chapter on unfair labor practices.

Section 16 provides that a charging party or any person aggrieved by a final decision of the IELRB has the right to seek judicial review in the Appellate Court of the judicial district in which the IELRB maintains its principal office. Currently, that is the First District.

This section also gives the IELRB the right to seek judicial relief if any person has violated a final order of the IELRB. If the Court grants the relief and a party violates the Court order the Court is empowered by this section to treat the violation as civil contempt.

Section 17 establishes that the IELRA will prevail and control if there is a conflict between it and any other law, executive order or administrative regulation.

Section 18 establishes that the provisions of the Open Meetings Act will not be applicable to collective bargaining negotiations and grievance arbitrations conducted pursuant to the IELRA.

A careful reading of the IELRA reveals that the areas most likely to yield disputes between employers and employees are scope of

bargaining issues, unit determination issues, and unfair labor practices. A chapter will be devoted to each of these areas.

CHAPTER 3

SCOPE OF BARGAINING

INTRODUCTION

The phrase, scope of bargaining, refers to the range of issues which will be bargained between employer and employees. The scope of bargaining provided by the National Labor Relations Act, (NLRA) is found in Section 8(d) of the NLRA. It requires the employer and representative of the employees to meet "at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment...." This language is precisely the same as that found in Section 10 of the IELRA.

Although the IELRB is not bound by the National Labor Relation Board's (NLRB) interpretation of the identical provision in the NLRA, it is clear that the IELRB will look to the decisions of the NLRB for guidance. See, e.g. Lake Zurich School District No. 95, Case No. 84-CA-0003, Decision of IELRB, 1 PERI 1031 (1984). Therefore, the approach of the NLRB to scope of bargaining will be discussed. Following that discussion, there will be a general treatment of different states' approach to scope of bargaining issues, the IELRA's application to scope questions in general and then specific treatment of four issues involving the scope of bargaining.

Scope of bargaining under the NLRA

In the landmark case of NLRB v Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958), the Supreme Court established the division of bargaining topics into three categories - mandatory, permissive, and illegal. Mandatory topics lawfully regulate wages, hours and other terms and conditions of employment and must be bargained in good faith. However, either party may insist on its position until impasse and may use economic force to support its position. Permissive topics deal with subjects other than wages, hours and terms and conditions of employment and may be included in the contract on a voluntary basis. Illegal contractual provisions are those which are prohibited by statute or public policy. Those provisions so prohibited may not be included within a labor contract even if both parties voluntarily agree to them. The Borg-Warner approach has been widely accepted by states with similar statutory language and will probably be followed by the IELRB.

The NLRB has broadly construed the meaning of wages under the NLRA. Provisions classified as wages, and thus mandatory subjects of bargaining, have included merit or incentive pay (NLRB v. Katz, 1962), pay for sick leave (NLRB v. Katz, 1962), pay differentials for workers of different shifts (NLRB v. Laney & Duke Storage Warehouse Co., 1966), paid holidays and vacations (Singer Mfg. Co. v. NLRB, 1942), group health insurance (W.W. Cross and Co. v. NLRB, 1949), overtime pay (NLRB v. Tom Johnson, 1965), bonuses if they are

remuneration for work done (NLRB v. Niles-Bement-Pond Co., 1952), food prices and services where the employer provides an on site cafeteria for employees (Ford Motor Co. v. NLRB, 1979), remuneration of bargaining unit members for time spent actually negotiating (Axelson, Inc. v. NLRB, 1979), and pension plans (Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 1971). This long list gives some indication of how broadly the NLRB has construed the term 'wages'.

The NLRB has also provided a broad construction of what constitutes 'hours' within the meaning of the NLRA. The number of hours to be worked in each day, the particular hours to be worked in each day and the particular days to be worked in each week have been deemed to be 'hours' for the purposes of the NLRA (Local 189, Meat Cutters v. Jewel Tea Co., 1965).

The NLRB has also expanded the number of items which are included within the phrase "other conditions of employment." The list of items includes company rules and hiring practices (S.S. Kresge Co. v. NLRB), the rental rate of company housing, (American Smelting & Refining Co. v. NLRB), safety rules (NLRB v. Miller Brewing Co.), employee work loads (Gallenkamp Stores Co. v. NLRB), effects of plant relocation (NLRB v. Die Supply Corp.), contracting out of work (Fibreboard Paper Products Corporation v. NLRB), and grievance procedures (Hughes Tool Co. v. NLRB). However, even with that broad construction, the Supreme Court has recognized that some parameters have to be established for the scope of bargaining under

the phrase "conditions of employment."

Justice Stewart, in his concurrence in Fibreboard, attempted to articulate those limits:

in common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment....In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain and this alone may be sufficient reason to conclude that such decisions are not 'with respect toconditions of employment.'Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. (Fibreboard at 223)

Justice Stewart noted that there are some managerial rights, not listed in the statute, that should not be labeled as subjects of mandatory bargaining.

Currently, the test used by the NLRB to determine whether a management decision is subject to bargaining under the NLRA is based on the Supreme Court's decision in NLRB v. First National Maintenance Corp., 452 U.S. 666 (1981). That test is whether the subject proposed for discussion is amenable to resolution through the bargaining process.

This brief overview of the scope of bargaining under the NLRA yields a perspective as to how broadly the NLRB has construed that scope. It must be cautioned, however, that the decisions of the NLRB, decisions of federal courts on review, and decisions of other state agencies are not binding on the IELRB although the IELRB may take into consideration those decisions it finds relevant and

persuasive to the case it is considering. (Lake Zurich School District No. 95.) It must be noted that the NLRA is dealing with private sector labor disputes, does not have the equivalent of the strong management rights provision in Section 4 of the IELRA and is not drafted to accomodate the unique considerations of public education employees.

Four Tests for Determining Whether a Subject is Mandatory or Permissive

Ritter's article, "The Duty to Bargain Under Education Labor Relations Acts," delineates four tests used by state public labor relations boards and courts for determining whether a particular issue is a mandatory or permissive subject of bargaining. The four tests are the minimal relations test, the significant relations test, the primary relations test and the balancing test.

The minimal relations test is the easiest test to satisfy. Essentially, it classifies a subject as mandatory if it in any way impinges on wages, hours or terms and conditions of employment. Under this standard, nearly any management decision would become a subject of mandatory bargaining. This test is articulated and applied in State College Educ. Ass'n. v. Pennsylvania Lab. Rel. Bd., 337 A.2d 262 (1975).

The significant relations test is also relatively easy to satisfy. It requires a significant relation between the subject and wages, hours or terms and conditions of employment. It does not

require the balancing of the employer's interests or rights. This test is articulated and applied in Clark County School Dist. v. Local Gov't. Employee Management Relations Bd., 530 P.2d 114 (1974).

The primary relations test is more difficult to satisfy and gives more deference to the concept of managerial rights. It will be satisfied only if the subject primarily relates to or affects wages, hours or terms of conditions of employment. A topic can have a significant relation but not have a primary relation so the primary relations standard is higher. This test is articulated and applied in City of Beloit v. Wisconsin Employment Relations Comm'n, 242 N.W.2d 231 (1976).

The balancing test is different than the other three because it explicitly recognizes that each side may have interests and attempts to balance those interests. By definition, the balancing test must be applied on a case by case basis. The advantage of this test is that it does not begin with a conclusive priority which biases the outcome. This test is articulated and applied in East County Bargaining Council v. Centennial School District, 685 P.2d 452 (1983).

Scope of bargaining under the IELRA

Section 10 of the IELRA imposes the affirmative duty to bargain on the public employer and the exclusive representative. Section 10(a) requires them to:

meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, and to execute a written contract incorporating any agreement reached by such obligation provided that such obligation does not compel either party to agree to a proposal or require the making of a concession. (IELRA, 1984)

The portion of this section dealing with the scope of bargaining is the phrase "... wages, hours, and other terms and conditions of employment." 'Wages' is fairly straightforward. 'Wages' include salary, fringe benefits and cash bonuses. 'Hours' is also fairly straightforward. 'Hours' is the duration of time that the employee must spend toiling for the employer before the employee can receive the wages and benefits. 'Terms and conditions of employment' however, is difficult to interpret because virtually anything within the education work world could be construed as a term or condition of employment. However, The Act does limit the scope somewhat in Section 10(b) and requires some specific items in Sections 10(c) and (d).

Section 10(b) limits the scope of bargaining by labeling some subjects of bargaining as illegal. It states that the parties "... shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by The General Assembly of Illinois" (IELRA, 1984). The section does allow contractual provisions which supplement Illinois state statutes pertaining to wages, hours and other terms and conditions of employment. However, if the provisions

have the effect of "... negating, abrogating, replacing, reducing, diminishing or limiting in any way..." employee rights under such statutes, those provisions will be void and unenforceable. However, permissible provisions of the collective bargaining agreement will still be valid and enforceable. (IELRA, 1984) In short, even if the parties agree, they may not, in any way, replace or limit employee rights and benefits under statutes dealing with wages, hours and employment conditions.

Sections 10(c) and (d) have specific items which must be included in the contract. First, the contract must include a grievance resolution procedure that applies to all the employees within the bargaining unit. The grievance procedure must provide for binding arbitration of disputes concerning the administration or interpretation of the agreement.

Second, the agreement must contain appropriate language prohibiting strikes for the life of the agreement. This provision was included so the stated purpose of the IELRA "... to promote orderly and constructive relationships between all educational employees and their employers..." could be effected (Section 1, IELRA, 1984).

The final affirmative requirement is that the agreement must be reduced to writing and signed by both parties.

The expansive language of the scope of bargaining under Section 10(a) is somewhat limited by the language of Section 4 under the heading of Employer Rights. The limitation imposed is:

Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees. (Section 4 of IELRA, 1984)

There is nothing within the wording of the statute to indicate that the listing of the managerial policies is exhaustive. The policies listed are definitely managerial rights, other managerial policies may be determined as inherent rights through the interpretations of the IELRB.

However, even as employers are granted relief from bargaining over matters of inherent managerial policy, they are required to bargain over the impact of policy decisions. Section 4 states that employers:

Shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives. (Section 4 of IELRA, 1984)

First, it should be noted that impact bargaining is only required if the employee representative requests it. Because an oral request may well be forgotten or ignored, it is likely that the requests for impact bargaining will be put in written form.

Second, there is no guidance within the statute as to the meaning of the requirement imposed. It is clear that increasing the length of the school day, while arguably an inherent managerial right, has a direct effect on the hours worked by the employee and is a mandatory subject of bargaining. It is not nearly as clear whether

the elimination of interscholastic sports is a change in working conditions.

When read together, Sections 10 and 4 create an uneasy tension. Section 10 clearly requires that the employer bargain over wages, hours, and other terms and conditions of employment.

On the other hand, Section 4 relieves the employer from the obligation to bargain over matters of inherent managerial policy. However, that relief does not extend to inherent managerial policies directly affecting wages, hours and terms and conditions of employment or from the impact of policy decisions on wages, hours and terms and conditions of employment.

Arguably, any managerial decision will have an impact on those areas. Was that the intent of the legislature? Or did the legislature intend that a line be drawn at some point? To answer these questions, it is instructive to look at the legislative record.

The Employer Rights provision did not appear in the draft form of House Bill 1530 (later to become known as IELRA). In fact, it was not inserted into the bill until Governor Thompson's amendatory veto on September 23, 1983. The language of the provision is nearly identical to the Management Rights provision of the Illinois Public Labor Relations Act, known in bill terms as Senate Bill 536. The only differences in language are the titles and the inclusion of the phrase "examination techniques" in the first sentence of the Senate Bill 536, Section 4. Therefore, a consideration of the legislative record must begin with an analysis

of the debates concerning the scope of bargaining under Senate Bill 536.

Before the addition of the "Management Rights" language to Senate Bill 536, an important exchange took place on May 27, 1983 between Senator Collins, one of the Senate sponsors, and Senator Keats regarding the scope of bargaining:

SENATOR KEATS:

Would the ... would the labor board under this legislation consider the same factors as those considered by the NLRB in its ... determinations; such as, determinations of whether a subject of bargaining is mandatory or ... permissive in nature?

Senator Collins.

SENATOR COLLINS:

Yes.

(Senate Debate on S.B. 536, May 27, 1983)

At that point, then, the sponsors of the bill believed that the scope of bargaining would be patterned after the guidelines established by the NLRB, as discussed earlier in this chapter. The bill was sent to the House, the Management Rights provision was added. The bill was referred back to the Senate. On June 30, 1983 there was more interaction between Senators Collins and Karpel to clarify the meaning of the Management Rights provision:

SENATOR COLLINS:

Yes, thank you, Mr. President and members of the Senate. Senate Bill 536, I'm sure as you know, creates the Illinois Public Labor Relations Act. This bill has gone to the House and has been amended, and I feel that the final product of this bill is designed to protect the rights of both public employers and employees and it provides for orderly procedures for implementation and the administration of the Act. This bill is the product of about six months of concentrated effort of various segments of labor, public employees, public employers, mayors, attorneys, Chicago, industry ... commerce and

industry and many lawyers across this State. And I personally feel that it is a workable product and that we should concur. The House amended this bill ... It added back the management right sections that we had previously had in the drafting of the bill...

SENATOR KEATS:

So, if you don't mind, I'm just going to ask three questions and the sponsor has been kind enough to ... give some thought to these answers. Does the management rights clause not included in Section 4 of Senate Bill 536 set forth those matters not subject to bargaining under this Act with the intention of preserving as management rights all areas of discretion or policy affecting the functions of the employer?

Senator Collins.

SENATOR COLLINS:

Yes. Amendatory binding Statute /sic/ is not extended to any of the areas of employment subject to management discretion or policy making... (Senate Debate on S.B. 536, June 30, 1983)

This exchange clearly indicates that at least one sponsor saw the Management Rights provision as one that would protect management discretion, not subject it to mandatory bargaining.

The final exchange on the Management Rights provision of Senate Bill 536 took place on November 2, 1983. In this exchange, Senator Greiman, another sponsor of the bill responded to questions by Senator Karpziel:

KARPIEL:

"Representative, could you answer ... Is there a Section in this Bill on management rights?"

GREIMAN:

"Absolutely. Absolutely."

KARPIEL:

"Could you tell me what they include?"

GREIMAN:

"Sure. Section ... I think it's Section IV, but we'll look precisely at it. Okay. Section IV is two paragraphs and it precisely sets out the rights of the management."

KARPIEL:

"I don't have the Bill in front of me, Representative."

Could you tell me what some of those are?"

GREIMAN:

"... I will give you a synopsis of it. 'Employers shall not be required to bargain over matters of inherent managerial policy'. And then it suggests a number of items which are discretionary as to that policy and deal with the function of the employers and the standards of service. It is quite clear."

GREIMAN:

"The management rights are quite clear. They are explicit. They are based on a history of the National Labor Relations Act. They are based on a history of labor relations in this state, and they are some 25 lines in this Bill. And they are quite clear as to what the rights of management, and they are quite awesome." (Senate Debate on S.B. 536, November 2, 1983)

This interaction clearly reflects that management should retain powerful rights in the bargaining process. It certainly indicates that the scope of bargaining is to be no broader than the scope under the NLRB, perhaps it is to be narrower since practitioners do not consider management rights to be 'awesome' under the NLRB.

There is only one specific discussion in the legislative history of the Employer Rights provision of IELRA. It came after the Governor's amendatory veto and is contained in an exchange between Senators Buzbee and Bruce on November 2, 1983. Senator Buzbee asked a general question about the scope of bargaining under the IELRA and Bruce responded:

SENATOR BRUCE:

Senator Buzbee, we do have a long history in the State of Illinois, and historically, the scope of bargaining has been very broad and this bill will not change that. In fact, within Section 4 of the Act, it states that "employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained

for and agreed to in a collective bargaining agreement prior to the effective date of this Act." In addition to that, the preceding paragraph puts that language in that they shall, in fact, if they have not already bargained, bargain over wages, hours, terms, and conditions of employment as well as the impact thereon upon request by employee representatives. So, in fact, it will give the bargaining rights over wages, hours, terms and conditions, other things mentioned in the bill which would include, already, class size, textbook ... selection, evaluation procedures and like... like things presently in collective bargaining agreements and presently being bargained."

This response is significant because he does not refer to the phrase "... policy matters directly affecting..." contained within the second sentence nor attempt to broaden the traditional scope of bargaining. This traditional scope of bargaining, it should be remembered, is shaped by decisions of the NLRB.

As discussed earlier, the Employer Rights provision of the IELRA was inserted by Governor Thompson's Amendatory Veto. The message that accompanied that action on September 23, 1983 recognized the unique needs of schools in the area of management rights and reflected a desire to strengthen the law in order to protect those rights.

... I believe that several changes need to be made in the legislation to create a workable and fair system that balances the rights of educational employees with unique managerial problems that beset educational employers and the taxpayers who ultimately pay the bill. (Veto Message, page 1).

The history of the IELRA makes it clear that the statute is a result of long and concerted effort. It is also clear that the

statute, as enacted, is designed to meet the unique needs of the educational employer and employee. Having completed the discussion of the legislative history, decisions of the Illinois Education Labor Relations Board (IELRB) and its Hearing Officers will now be considered.

There are four cases which provide some indication as to how the statute will be interpreted. The cases are Heyworth School District No. 3, Case No. 84-CA-0044-S, Hearing Officer's Recommended Decision and Order; Berkeley School District No. 87, Case No. 84-CA-0056-C, Opinion and Order; Carbondale Community High School District No. 165, Case No. 84-CA-0057-S Opinion and Order; and Community Unit School District No.4, Case No. 84-CA-0015-S, Hearing Officer's Recommended Decision and Order.

Heyworth was an early case under IELRA, the charge being made on September 5, 1984. It was the first to deal with the interpretation of "hours" under the statute and is instructive for that purpose. Briefly, the following facts lead to the charge that the school board was refusing to bargain over a mandatory topic.

Prior to June 6, 1984 there had never been an employee organization within the school district. The Heyworth Education Association was certified as the exclusive bargaining representative of the teachers on June 6, 1984. The bargaining representative requested that collective bargaining begin on June 19, 1984 and the first bargaining session was held on July 26, 1984. On July 25, 1984 the school district announced that the working day of the teachers



had been increased by 15 minutes each day. The School District's bargaining representative did not discuss the change at the July 26 bargaining session. On July 26, the school district informed the employees' bargaining representative that all employees in the bargaining unit would be required to attend faculty meetings one day each month from 3:50 until 4:30.

In the hearing, the employee's representative maintained that the unilateral change in the hours was an unlawful act because the particular hours of employment in a day was clearly within the realm of wages, hours and other terms and conditions of employment.

The school district, looking to Section 4 of the IELRA, argued that the change in the work day was a managerial prerogative because "... it concern[ed] a matter of educational policy fundamental to the existence, direction and control of a school system ..." (Heyworth, p.2)

The Hearing Officer rejected the reasoning of the School District.

The length of an employee's work day as well as his starting and quitting time are mandatory subjects of bargaining, unless the phrase "hours and other terms and conditions of employment" is devoid of meaning, it must necessarily refer to the length of an employee's work day and his starting and quitting time. (Heyworth, page 2).

This is an unequivocal statement about what must be bargained in terms of hours. The Hearing Officer went on to attempt an initial clarification of Section 4:

Matters "fundamental" to the operation of a school district are those matters historically recognized as

falling outside an employee's concern, such as an employer's budget, the nature of the service the employer provides and its basic structure. ...There can be few items of more fundamental concern to an employee than his hours of labor and his starting and quitting times. (Heyworth, p. 3).

The Hearing Officer found that the school district had engaged in an unfair labor practice by refusing to bargain over a mandatory topic of bargaining. As the remedy, he ordered the school district to return to status quo, to cease and desist the practice, and to provide back pay for those employee's who performed extra work associated with the school district's unilateral change.

Heyworth stands for two important propositions. First, any change in the length of the work day, the starting time or the quitting time is a mandatory topic of bargaining. Second, the IELRB, or at least this Hearing Officer, is going to be very hesitant about using the provisions of Section 4 to narrow the traditional scope of bargaining.

Berkeley is an Opinion and Order by the full IELRB. As such, it serves as precedent for future decisions by Hearing Officers unless modified by judicial action. The Opinion and Order, issued on May 30, 1986 is one of great significance as declared by the IELRB, "the issue is one of first impression for this Board and presents, as one of the parties noted, the basic and fundamental issue as to the proper interpretation of Section 4 of the Act." (Berkeley, p.10).

The facts of the case, briefly are as follows. The school district began to consider the possibility of changing from an

interscholastic athletic program to an intramural program in the school year 1981-82. Among the reasons for considered change were the school district's desire that more students participate in the athletic program and for reduced costs for transportation and referees.

During the 1983-84 school year the school district began to consider the change even more seriously and developed proposals for the school board to consider. The school board voted to implement the change effective school year 1984-85 on June 25, 1984.

The school board, in accordance with its collective bargaining agreement, sent a copy of its minutes to the president of the teachers' association with the following statement about the change:

That the Board approved the change from an interscholastic athletic program to an intramural athletic program in the Middle schools, effective with the start of the 1984-85 school year and as previously discussed at an Education and Finance Committee meeting. (Berkeley, page 3).

The School Board implemented the change on September 19, 1984 while negotiations for a collective bargaining agreement for the 1984-85 school year were still underway.

The athletic program change was first raised as an issue at the bargaining table on September 18, 1984. Although there had been informal discussions between the bargaining representatives, no formal demand to bargain was made before that date. The school district listened to the demand, caucused and returned to notify the

teacher's agent that it would not bargain about the decision to adopt an intramural athletic program. The school district invoked the protection of Section 4 and claimed that the decision was managerial in nature and not subject to the duty to bargain.

The issue was raised again at the September 24 bargaining session. The school district held firm in its position but stated that it was ready to negotiate the impact of the change. On October 5, the teachers' representative proposed that the coaches be paid at the rate of \$10.50 an hour. The school district presented a counter proposal on October 9 that offered compensation of \$64 a week for a program that lasted from 3:15 until 5:00, four days a week. The bargaining representative filed the unfair labor charge on October 10.

There were several points at issue in the case, including jurisdictional issue and a question of mootness. The issue of importance for the discussion at hand, however, is whether the school district committed an unfair labor practice by refusing to bargain over its decision.

The IELRB began its analysis with a consideration of the wording of Section 10. However, the phrasing of the question before it gives the careful reader some idea of how the analysis might go. On page 9 of the opinion, the IELRB phrased the issue before it as "... whether the District was obligated to bargain in good faith over its decision to change the focus and nature of its athletic program." The key words in that phrase are "focus and nature". The earlier

discussion in this paper that dealt with the traditional scope of bargaining under the NLRA pointed out that a change in the focus and nature of a business were not subject to the duty to bargain.

At any rate, the Board's analysis began with the wording of Section 10 and it quickly determined that decision was not subject to the duty to bargain under that Section:

It seems clear on its face, and is apparently at least impliedly acknowledged by both parties here, that the decision about the kind of athletic program the District considered most appropriate for its students would not be considered "wages, hours and other terms and conditions of employment:", and thus would not be a mandatory subject of collective bargaining, under accepted public and private sector precedent interpreting the "traditional" scope language of Section 10. (Berkeley, p.3)

However, the basic argument of the teacher's representative was not that Section 10 required that the decision be bargained but that Section 4 requires bargaining because the decision was "... a policy matter directly affecting wages, hours, and terms and conditions of employment..." of the junior high coaches.

The IELRB acknowledged that the meaning of Section 4 was unclear on its face. (Berkeley, page 11). It characterized the teachers' representative's position as maintaining that inherent policy matters are subject to collective bargaining if they "directly" affect wages, hours and terms and conditions of employment. The IELRB characterized the school district as disagreeing with the teacher's position because to adhere to that interpretation would...."contradict(s) the plain meaning of the first

sentence of the section and would render Section 4 meaningless because almost every managerial decision directly affects wages, hours and terms and conditions of employment."

After acknowledging that the statute contained nothing that would help clarify the situation, the IELRB went through the legislative history in the same fashion as presented in pages 28-32 of this work. At the end of that process, the IELRB concluded that:

We find no intention expressed in any of this legislative or veto history on either 536 or 1530 that the Section 4 language in either Act was meant to significantly broaden the scope of mandatory subjects of bargaining and thus radically shift the thrust of these Acts away from the intention to follow traditional, accepted and known public and private sector practice with respect to mandatory bargaining, as expressed in the legislature on May 27, 1983 (536) and June 27, 1983 (1530). Indeed, quite the contrary seems to be the case. Yet, the ultimate effect of accepting the Association's position on Section 4 would be that the "Employer Rights" provision of our statute would crucially restrict and diminish rather than protect so-called "inherent management rights." There is no evidence that this is what was intended by the legislature. (Berkeley, page 17).

In short, the IELRB rejected the position of the bargaining representative because 1) to allow it would broaden the traditional scope of mandatory subjects of bargaining and 2) restrict management rights. Neither of those possibilities were supported by the legislative record.

The IELRB was still faced with the question of how Section 4 was to be construed if the teachers' interpretation was to be rejected. It followed judicially recognized rules of statutory construction and construed the meaning of the section from the

context of the section and the statute as a whole. Therefore, it looked to the language and to the object and purpose of Section 4 as expressed by Governor Thompson in his amendatory veto message. The expressed purpose of that message was to balance the right to bargain collectively with the unique managerial problems facing educational employers as well as protect the rights of the taxpayers. (Amendatory veto message, page 1) The IELRB then came to this conclusion:

In our judgment, the interpretation of Section 4 most consistent with a reasoned attempt to relate each of the sentences and phrases of Section 4 to the underlying purpose of the entire Section and to the legislative history is that "policy matters directly affecting wages, hours and terms and conditions of employment" are those policies that have wages, hours and terms and conditions of employment as their primary subject; clearly, decisions concerning such policies are mandatory subjects of bargaining. However, the inherent managerial policy decision involved here -- a change in the nature of the District's athletic program -- does not have wages, hours and terms and conditions of employment as its primary subject and only indirectly affects those matters; thus it is not a mandatory subject of bargaining. (Berkeley, p. 18).

By coming to this conclusion, the IELRB essentially embraced the primary relations test discussed earlier in this chapter. The IELRB also took this opportunity to carefully distinguish the IELRA from the Pennsylvania statute mentioned earlier. It noted that:

In Pennsylvania, employers are enjoined only to "meet and discuss," not to engage in good faith bargaining, "...over policy matters affecting wages, hours..." Under our Section 4, formal, good faith bargaining, not "meet(ing) and discuss(ing)" is mandated, but only with respect to "...policy matters that directly affect wages, hours..." (emphasis added). These differences -- "meet and discuss" versus "bargain" and the crucial addition of the word "directly" as a

qualifier of "policies affecting" are, in our estimation significant enough to render Pennsylvania precedent not particularly useful as a guide to our deliberations in this case under our statute. (Berkeley, p.19).

Thus, although the language of Section 4 of the IELRA was clearly based on the Pennsylvania statute the IELRB has made it clear that it will not be bound by Pennsylvania precedent.

The IELRB also found that the school district did have a duty to bargain the impact of the decision. It further found that the school district met that duty by offering to bargain, and indeed bargaining, as soon as the bargaining representative of the teacher made a demand to bargain.

This case, then, stands for three very important propositions. First, the IELRB will rely upon the words and context of the statute as well as the legislative history to interpret the meaning of the statute. This is significant because it gives the IELRB much greater latitude in coming to decisions.

Second, the IELRB intends to give import to the concept of employer rights. This should help to allay the fears held in some quarters that the IELRB is an employee oriented body. More importantly, it established that educational employers are unique and the management rights possessed by them are important to the public good.

Third, the IELRB will use the primary relations test in determining if a policy decision directly affects the mandatory topics of bargaining. It is not, of course, clear what decisions

will be construed as directly affecting the topic of mandatory bargaining. However, at least there is now an articulated test for coming to that determination.

Finally, although the case cannot be considered as standing for a proposition in this area, the IELRB left open the possibility that it might even consider narrowing the scope of bargaining given the unique managerial needs of educational employers.

The same day that the IELRB decided Berkeley, it also decided Carbondale. In Carbondale, the school district determined that it might be more economically efficient for its custodial and maintenance work to be sub-contracted than for it to continue to be done by members of a recognized bargaining unit. The school district notified the employee's group of its interest in sub-contracting and invited the employee's group to work with the school district in exploring ways that costs might be contained. When the school district decided that the possibility merited serious consideration, it invited the employee group to bargain over the decision. The school district did finally sub-contract the work and an unfair labor charge was filed.

Carbondale is of primary importance for its analysis of what kind of bargaining must occur if an employer wishes to avoid unfair labor charges. However, it also clearly stands for the proposition that the sub-contracting of work is a mandatory subject of bargaining. (Carbondale, p 9, 11)

Community Unit School District No. 4 is a Hearing Officer's

Recommended Decision and Order that was issued on June 20, 1986. Exceptions have been filed by the teacher's union so the decision is not final. However, the decision was based on Berkeley so there is a substantive basis for the decision. Briefly, the facts of the case are as follows.

Prior to 1984, the school district employed both counselors and deans at its two high schools. Counselors worked primarily with the students' personal, emotional and academic needs while the deans dealt primarily with attendance and disciplinary problems. However, the duties of the two groups were inter-related and overlapped. The counselors were in the bargaining unit but the deans were not.

In April of 1984, the principal of one of the high schools told the counselors and the deans that the school district was considering the creation of a new administrative position by combining the separate positions of dean and counselor. The deans and counselors of the other high school did not learn of the possibility of the change until the afternoon of May 24, 1984 when they were told that the change would be proposed at the Board of Education meeting scheduled for that evening.

At the Board of Education meeting on the evening of May 24, the school district announced that there would be a reorganization of the services beginning with the school year 1984-85. At that meeting, the president of the teachers' union requested that the school district bargain over both the reorganization and over the impact of the decision.

The school district refused to bargain over the decision to reorganize and implemented the plan on August 1, 1984. There were no terminations as a result of the decision. The school district also refused to bargain over the impact of the decision.

The Hearing Officer determined, based upon the record, that the decision was not motivated by a desire to reduce labor costs or that the decision was by anti-union animus. The Hearing Officer began his analysis by noting that the IELRB had not yet considered whether a decision to reorganize student service programs was a subject of mandatory bargaining under Section 10 (Community Unit School District No. 4, p. 10). He noted that decisions of the NLRB, federal courts and other state agencies were not binding. However, under Lake Zurich School District No. 95, he was empowered to take into consideration those cases he considered to be persuasive and relevant to the case at hand. With that empowerment, he began his analysis with a U.S. Supreme Court decision, NLRB v. First National Maintenance Corp., 452 U.S. 666(1981).

In First National Maintenance, the Supreme Court held that the employer's decision to terminate part of its operation was not a mandatory subject of bargaining. The court stated the premise underlying mandatory bargaining "...that collective bargaining backed by the parties economic weapons will result in a decision better for both management and labor and for society as a whole..." and went on to point out that this premise is only valid if the subject proposed as a mandatory subject of bargaining is amenable to resolution

through the bargaining process.

The Hearing Officer also cited Otis Elevator, 269 NLRB 891 (1984) where it was held that an employer's decision to consolidate its operations to eliminate overlapping functions was not a mandatory subject of bargaining. The Hearing Officer noted that under the NLRB analysis discussed earlier in this chapter, an employer's decision is not a mandatory subject of bargaining where the decision does not turn upon labor costs.

The findings of fact had already established that it was not a desire to save labor costs that motivated the decision but rather a desire to eliminate inefficiency. That finding of fact, coupled with the analysis of the NLRB led to the conclusion that the decision was not a mandatory subject of bargaining under Section 10.

The Hearing Officer also found that the decision was a matter of inherent managerial policy under Section 4. He based that decision on the "primary subject" analysis established in Berkeley and found that:

The primary subject of this policy decision is not wages, hours or terms and conditions of employment, but rather a change in the methods of providing student services. The impact of that decision on wages, hours and terms and conditions of employment thus only indirect. (Community Unit School District No.4, p. 14)

The Hearing Officer did find that the school district was guilty of an unfair labor charge for failing to bargain the impact of the decision after a demand to bargain was made by the teacher's union.

This decision is significant for two reasons. First, the NLRB analysis used by the Hearing Officer gives school districts potential defenses against unfair labor charges of failure to bargain such issues as teacher evaluation, class size and curriculum. For instance, a school district might argue that the decision is not amenable to the collective bargaining process or that it was motivated by a desire to save on labor costs.

Second, it is the first case to use the analysis enunciated by the IELRB in the Berkeley decision. This acknowledgment of precedent is of particular importance. The composition of the IELRB is subject to change, and with change, may vary interpretation of the issues before it. However, well established precedent imposes constraints upon those possible variations.

The preceding discussion provides the analytical framework for considering how the IELRB is likely to determine whether the following topics are subjects of mandatory bargaining: teacher evaluation, class size, teaching assignments and curriculum. Each of the topics is presented separately. Consideration will be given to the decisions of other states, Illinois legislative history, and any Illinois decisions that have bearing on that particular issue.

Teacher Evaluations

The question of whether teacher evaluation is a mandatory subject of bargaining is currently of great concern to both employee groups and school districts. A major reason for this heightened

concern is the amendment to the Illinois School Code which states "...a school district shall develop, in co-operation with its teachers, or where applicable the exclusive bargaining representative of its teachers, an evaluation plan for all teachers in contractual continued service" (Section 24A-4)

The language of Section 24A-4 makes it clear that school districts must at least "meet and confer" with teachers regarding the evaluation plan. However, the statutory provision does not directly address the bargainability of the issues. In addition, the issue of teacher evaluation is not addressed in either Section 4 or Section 10 of the IELRA.

Employee groups would like to see the evaluation process and the evaluation standards treated as mandatory subjects of bargaining. In order to support this view, the assertion would be that by virtue of Sections 10 and 4 of the IELRA, anything that is, or affects, a term or condition of employment, is a mandatory subject of bargaining. Teacher evaluations would be construed as a term or condition of employment, or at least directly affecting terms and conditions of employment, and thus a subject of mandatory bargaining under Sections 10 or 4. Several states have determined that teacher evaluations are a subject of mandatory bargaining. Cases from Michigan and Indiana are cited to support this position.

Michigan

The first case is Central Michigan University Faculty Association v. Central Michigan University, 273 N.W. 2d 21 (1978),

decided by the Michigan Supreme Court.

In that case, the Faculty Senate passed a resolution adopting a teaching effectiveness program. As part of that program, students and department faculty would evaluate faculty members. The results were to be utilized in departmental recommendations for re-appointment, tenure and promotion. The Faculty Association filed an unfair labor charge against the University. The charge was based on the claim that the adoption of the program was a unilateral change in the terms and conditions of employment and thus a violation of the duty imposed by Section 423.15 of the Michigan Compiled Laws.

The court determined that in this case, the evaluation procedures were a subject of mandatory bargaining (Central Michigan, 1978, p.25). In reaching this conclusion, the court used a two step process.

First, the court looked to the interpretation of the NLRA. It noted that the U.S. Supreme Court has found that a liberal approach to what constitutes a mandatory subject of bargaining is the best way to attain the objective of labor peace. This approach shaped Michigan's view and the court asserted that "...Michigan has adopted a broad view of other terms and conditions of employment." (Central Michigan, p. 25.)

The second step was to borrow the analysis from another public employee sector case, Detroit Police Officers Association v. Detroit, 214 N.W. 2d 803 (1974). In that case, the court had looked at private sector rulings for guidance and found that "such subjects

as ...seniority and promotion are... mandatory subjects of bargaining." (Detroit Police Officers, p.809).

Because the results of the evaluations were going to be considered in decisions to promote, retain and grant tenure, the court determined that the evaluation process was a mandatory subject of bargaining. (Cent. Michigan, p.25)

There are two important points to be remembered when applying this result to situations in Illinois. First, there is no management rights clause in the Michigan statute. This allows a potentially wider scope of mandatory subjects of bargaining in Michigan.

Second, it was because the evaluations were used in retention, re-appointment and promotion decisions that the court deemed them mandatory subjects of bargaining. The record does not indicate that the University ever argued that the decision was an educational policy decision and thus excluded from the bargaining process because it was an "inherent managerial policy."

Indiana

The second case is Evansville-Vanderburgh School Corporation v. Roberts, 405 NE 2d 895, decided by the Indiana Supreme Court. In that case, the school corporation (district) implemented a teacher evaluation plan without any discussion with the exclusive bargaining representative for the teachers. The purpose of the plan was to maintain high teacher competence by means of self-evaluation forms, classroom observations by evaluators and evaluation conferences. The record indicates that, "the entire process may result in a

recommendation for a change of assignment or a teacher dismissal..." (Evansville-Vanderburgh, p. 898). The school corporation had met with a group of teachers, not members of the bargaining unit, before the implementation of the plan.

An unfair labor charge was filed by a member of the bargaining unit, alleging that the school corporation had violated Indiana Code 20-7.5-1-5 by failing to discuss the plan with the exclusive bargaining representative before implementing the change. The applicable portion of that Section provides:

A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters: working conditions, other than those provided in Section 4; curriculum development and revision, textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations...(20-7.5-1-5-(a))

Because of the stated philosophy of the plan, and the fact that the results could result in a change of assignment or dismissal, the court determined that this particular teacher evaluation plan was a "working condition." (Evansville-Vanderburgh, p. 898)

There are three important points to remember when applying this decision to Illinois situations. First, a careful reading of 20-7.5-1-5 reveals that the charge was based on a failure to meet and confer, not on a failure to bargain over a mandatory subject. The section clearly says that the school corporation may bargain

collectively over the enumerated matters but shall not be required to bargain over those matters. The court's decision did not establish that the evaluation plan was a mandatory subject of bargaining. It simply established that the plan was a mandatory subject of discussion. The court went to some length to make that clear by citing Indiana Code 20-7.5-1-2 (0):

'discuss' means the performance of the mutual obligation of the school corporation through its superintendent and the exclusive representative to meet at reasonable times to discuss, to provide meaningful input, to exchange points of view, with respect to items enumerated in Section 5 of this chapter. This obligation shall not, however, require either party to enter into a contract, to agree to a proposal, or to require the making of a concession. A failure to reach an agreement on any matter of discussion shall not require the use of any part of the impasse procedure...

This definition of 'discuss' makes it abundantly clear that the court did not perceive the plan to be a mandatory subject of bargaining.

Second, there is no provision similar to Illinois' Section 4 that protects inherent managerial policies from the scope of mandatory bargaining. Because of that lack, there was no argument made that the primary purpose of the plan was related to educational policy. Teacher evaluation was clearly a working condition under the meet and confer requirements of 20-7.5-1-5.

Under the evaluation plan, the evaluation process might result in a recommendation for an assignment change or a dismissal. This would clearly fall within the meet and confer requirements regarding selection, assignment or promotion of personnel as contained in Section 20-7.5-1-5.

It is the clarity of that statutory language that led the court to its decision. The court did not consider whether the primary purpose of the plan was related to educational policy. In fact, the court did not at all consider the policy underlying the decision.

Third, the Illinois statute does not have a provision comparable to Section 20-7.5-1-5 of the Indiana Code. There is no listing of subjects in the Illinois Statute that the employer is required to discuss although not required to reach agreement on.

As discussed earlier, the approach of the IELRA is similar to that of the NLRA when dealing with the scope of bargaining. There are mandatory, permissive and illegal subjects of bargaining. There is no fourth category of mandatorily "discussable" topics. Because of the unique category contained in Indiana law, it is misleading to look to Indiana law in this area.

Proponents of the view that teacher evaluations are not a subject of mandatory bargaining will find support in a series of court decisions from the states of Kansas, Minnesota, Wisconsin, and Oregon. The courts of these states have determined, with different variations, that teacher evaluation is not a subject of mandatory bargaining.

Kansas

The seminal case in the state of Kansas is National Education Association of Shawnee Mission v. Board of Education of Shawnee Mission Unified School District No. 512, 512 p. 2d 426 (1973). At

that time, school districts negotiated under the authority of the Kansas Professional Negotiations Act. That Act required teacher organizations and school districts to bargain over "terms and conditions of professional service."

Shawnee Mission was the first case to interpret the scope of bargaining under this Act. In that case, the school board had submitted two items for negotiation and the teachers' organization had submitted a master contract of 123 pages containing 22 sections and 122 subsections.

The major issue before the court was how to determine what were subjects of mandatory bargaining so that the impasse could be resolved and the parties could get back to the table. The court chose to use the following approach in interpreting the Act.

The "terms and conditions of professional service" which are negotiable under the act are something more than the minimal economic terms of wages and hours, but something less than the basic educational policies of the board of education. The key to determining whether an issue is negotiable or not is an assessment of how direct an impact it has on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole. Such assessment must be made on a case-by-case basis. (Shawnee-Mission, p.427.

Using this analysis, the court determined that "terms and conditions of professional service" included salaries, hours and amounts of work, vacation allowance, holidays, sick leave, personal leave, insurance benefits, wearing apparel, jury duty, and grievance procedures. The court also agreed with the position of the teachers' organization that mandatory subjects of bargaining included

probationary period, transfers, teacher appraisal procedure, disciplinary procedure, and resignations and terminations of contracts. Therefore, under Shawnee Mission, teacher evaluation was a mandatory subject of bargaining.

The Kansas legislature took note of the decision in Shawnee Mission and amended K.S.A. 72-5413 in 1977. The amendment defined "terms and conditions of professional service" as follows:

"(1)'Terms and conditions of professional service' means salaries and wages, hours and amounts of work, vacation allowance, holiday, sick and other leave, number of holidays, retirement, insurance benefits, wearing apparel, pay for overtime, jury duty, grievance procedure, disciplinary procedure, resignations, termination of contracts, matters which have a greater direct impact on the well-being of the individual professional employee than on the operation of the school system in the school district or of the community junior college and such other matters as the parties mutually agree upon as properly related to professional service. Nothing in this act, or the act of which this section is amendatory, shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state."

This was how the law read when the National Education-Topeka and Unified School District No. 501 began negotiations for the 1978-79 school year. The law was interpreted in the court case that ensued when the two parties could not reach agreement. That case is N.E.A.-Topeka v USD 501. 502 P.2d 93 (1979). The court was concerned with interpreting the scope of mandatory subjects of bargaining under the revised statute. In doing so, it noted that the statute had incorporated the impact test enunciated in Shawnee Mission. That is, mandatory subjects of bargaining included those matters "which have a

greater impact on the well being of the individual employee than on the operation of the school system."

The court also noted that the legislature, in providing a definition of terms and conditions of professional service, specifically excluded probationary period, transfers and teacher appraisal procedures (teacher evaluations) from the list of mandatory subjects of bargaining, (N.E.A.-Topeka, p.97).

The court then refused to include teacher evaluations as being subjects of mandatory bargaining because it did not satisfy the impact test.

There are three important aspects of this case for those seeking to use it in interpreting Illinois law. First, there is no management rights clause in the Kansas statute that is comparable to the one found in the Illinois statute. Therefore, the Kansas statute cannot be used to help interpret Section 4 of the IELRA.

Second, the court looked at legislative intent for assistance in interpreting the statute. The legislature had opted to exclude teacher evaluation in a defined list of mandatory subjects of bargaining. However, it had provided the opportunity for judicial interpretation by allowing subjects that satisfied the impact test to be determined as mandatory topics of bargaining.

The third important aspect is that the court considered the impact test, as provided in the statute and enunciated in Shawnee Mission, and declined to say that teacher evaluation satisfied that test.

Minnesota

The Minnesota Public Employment Labor Relations Act imposes a duty upon public employers to bargain in good faith concerning terms and conditions of employment. This obligation is imposed by Section 179.61 of the Minnesota Statutes.

The Minnesota Act also includes a managerial rights section in Section 179.66. In part, that section reads:

Subdivision 1. A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

This section is quite similar to the Illinois Act. Both Acts identify matters of inherent managerial policy as functions of the employer, the overall budget, the organizational structure and the selection and direction of employees. The Minnesota Act specifically includes programs, utilization of technology and number of employees while the Illinois statute does not specifically mention those items. The Illinois statute specifically includes standard of services, while the Minnesota Act does not use those terms.

The similarity of the Illinois and Minnesota statutes makes it particularly appropriate to look to Minnesota cases to determine if teacher evaluations are a mandatory subject of bargaining or an employer right.

At this time, there is only one Minnesota case that addresses this question. That case is University Education Association v.

Regents of the University of Minnesota, 353 N.W.2d 534 (Minn. 1984).

In that case, the University Education Association (UEA) alleged that the Board of Regents had committed an unfair labor practice by refusing to bargain the subjective criteria used to determine promotion and tenure, review of faculty evaluations and the academic calendar. The Minnesota Supreme Court found that all three of these issues were matters of inherent managerial policy.

The basis of the NEA's argument was that the three matters all had a significant impact on faculty job security, advancement, compensation and work assignment so were terms and conditions of employment. (University Education Association, p. 537.)

The court began its analysis by noting that:

This court has repeatedly emphasized that the purpose of PELRA requires the scope of the mandatory bargaining area to be broadly construed so that the purpose of resolving labor disputes through negotiation could best be served. (University Education Association, p. 578).

However, it also noted that a string of Minnesota decisions recognized "...that many inherent managerial policies concomitantly and directly affect the terms and conditions of employment." (Id at 539).

Because areas of 'inherent managerial policy' and 'terms and conditions of employment' often overlap, the court had to establish a test for determining how an issue would be categorized.

The court had established such a test in St. Paul Firefighters, Local 21 v. City of St. Paul, 336 N.W.2d 301 (Minn. 1983). The court established the basic approach as follows:

A decision in respect of a matter of inherent managerial policy--a discretionary decision which a public employer is not required to negotiate--may well impinge upon negotiable terms and conditions of employment. Minn.Stat. S 179.66 (1982). The impact upon the terms and conditions of employment of an inherent managerial policy decision does not, however, render the policy decision a subject of mandatory negotiation if the decision and its implementation are so inextricably interwoven that requiring the public employer to meet and negotiate the method of carrying out its decision would require the employer to negotiate the basic policy decision. See *Minneapolis Association of Administrators and Consultants v. Minneapolis Special School District No. 1*, 311 N.W. 2d 474, 476-77 (Minn. 1981). If, however, the inherent managerial policy decision is severable from its implementation, the effect of implementation on the terms and conditions of employment is negotiable to the extent that negotiation is not likely to hamper the employer's direction of its functions and objectives. *Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District No. 1*, 258 N.W. 2d 802, 805 (Minn. 1977); *International Union of Operating Engineers v. City of Minneapolis*, 305 Minn, 364, 233 N.W. 2d 748 (1975). (*St. Paul Fire Fighters*, 336 N.W. 2d at 302.)

Essentially, the approach established by St. Paul Fire Fighters is a two- part test. First, the impact of a policy decision upon terms and conditions of employment must be determined. If the policy impinges upon mandatory subjects of bargaining, the court must then determine if the policy and 'terms and conditions of employment' are so interwoven that negotiation of the issue would require negotiation of the policy. If they can be separated, bargaining is mandatory for the issues relating to the implementation of the policy.

After establishing that this was the proper approach, the court addressed each of the three issues. It dealt with the issue of

faculty evaluations in two brief paragraphs on page 542 of the opinion:

The MEA argues that the faculty has a direct interest in assuring that evaluations are fair, accurate and properly used. The faculty evaluation issue relates to all faculty and consequently is an issue separate from tenure and promotion.

The substantive criteria, weights and review of faculty evaluations are undoubtedly managerial matters while the application of the evaluations is an issue that may directly affect a faculty member's terms and conditions of employment. The fairness of the application of faculty evaluation standards is ensured by the negotiability of the tenure and promotion procedural process. It is obvious that the quality of work an employer, public or private, expects is a managerial decision. (University Education Association, p. 542)

It is important to note that the court saw a distinction between the substantive criteria, weights and review of faculty evaluations and the application of those evaluations. This kind of distinction is also recognized in Section 4 of the IELRA by the impact bargaining provision.

This case is significant for three reasons. The first is that it involves a statute with an employer's rights provision similar to that of the IELRA.

The second is that in creating an approach to the dilemma created by the employer's rights provision, the court realized that there would often be an overlapping between subjects of mandatory bargaining and matters of inherent managerial policy. The approach recognizes that and acknowledges that a balance must be struck that will fulfill the legislative purposes of the Act.

The third important aspect of the case is the distinction the

court made as discussed above. This distinction may be analogized to the provisions of Section 4 of the IELRA and will be referred to later in this discussion.

Wisconsin

Wisconsin's statute establishing the right of bargaining in the public sector is found in Section 111.70(1)(d) of the Wisconsin Statutes. The statute requires public employers and employee representatives to bargain with respect to wages, hours and conditions of employment. The statute does not have as an employer's rights provision as explicit as the Illinois Act. However, it does reserve some power to management within the statute:

The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees.

It is important to note that those management rights are limited if the exercise of them affects the wages, hours and conditions of employment of the employee.

The most significant case to date in interpreting the scope of bargaining in Wisconsin is City of Beloit, Etc. v. Wis. Employment, Etc., 242 N.W. 2nd 231 (Wis. 1976). In this case, the Beloit Education Association (BEA) and the Beloit City School Board could not agree whether a list of eleven topics were mandatory or permissive subjects of bargaining under the Wisconsin statute. The eleven subjects were:

- (1) the manner in which supervision and evaluation of teachers will be conducted,

- (2) the structure and maintenance and availability to teachers of school district files and records,
- (3) right of representation prior to reprimand, warning or discipline,
- (4) whether or not "just cause" shall be the standard applied in limitation of the Board's actions with respect to renewal of individual teachers contracts,
- (5) the procedure and order of preference to be utilized in event of teacher layoffs,
- (6) the treatment and disposition of problem students,
- (7) class size,
- (8) type and extent of in-service training to be conducted,
- (9) the type and extent of reading program to be utilized,
- (10) the establishment and structure of summer programs,
- (11) the school calendar.

Because they could not agree, they took advantage of a provision in the statute that allowed them to submit the list to the Wisconsin Employment Relations Commission for a declaratory ruling on whether they were mandatory. The Commission issued a declaratory ruling and the ruling was appealed.

The court first discussed the statute, the limitations on the scope of the bargaining and the nature of the parties. When it came to the discussion of the problem, the court stated that the problem with interpreting the statute was that many subject areas relating to wages, hours and conditions of employment also had "...a relatedness to matters of educational policy and school management and operation." (City of Beloit, 235).

After defining the problem, the court considered how to best construe the statute. The court concluded that "What is fundamentally or basically or essentially a matter involving wages,

hours and conditions of employment, is, under the statute, a matter that is required to be bargained." (Id, at 236). This kind of test, by necessity, must be applied on a case by case basis.

The court then applied this test to the question of teacher evaluations. The court acknowledged that the area of teacher evaluation related to management and direction as well as to wages, hours and conditions of employment using the primary relations test, the court held that BEA proposals regarding who was to evaluate teacher performance and assistance to teachers with poor evaluations were not mandatory subjects of bargaining. However, five proposals went "to the right of teachers to have notice and input into procedures that affect their job security," (Id., at 237.) Those five proposals were:

Teacher Supervision and Evaluation (1) Orientation of new teachers as to evaluative procedures and techniques, (2) Length of observation period and openness of observation, (3) Number and frequency of observations, (4) Copies of observation reports and conferences regarding same, and teachers' objections to evaluations, and (5) Notification of complaints made by parents, students and others. (Id., Footnote 16 at 237)

There are three important aspects to be remembered when applying this case to Illinois. First, the employer's rights clause in Wisconsin is not as strong as that in Illinois.

Second, the court did not address the negotiability of criteria. That is important because many school districts are willing to concede the negotiability of procedures but will maintain that criteria are strictly matters of educational policy and

therefore insulated by Section 4.

Third, the language of Section 4 only requires the negotiation of policy matters "directly" affecting wages, hours and terms and conditions of employment. Arguably, this is a different test than the primary relations test applied by the Wisconsin court.

Oregon

Oregon's Public Employment Collective Bargaining Act, found in the Oregon Revised Statutes, Section 243.650 et seq., requires public employer to bargain in good faith over "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." (Oregon Revised Statutes, Section 243.650 [7]). Oregon has elected to use a balancing approach to determine the scope of bargaining when dealing with school districts. That approach "weighs the comparative effect of a proposed bargaining subject on educational policy and on teacher employment conditions...." East County Bargaining Council v. Centennial School District No. 28JT, 685 P. 2d 453 at 454 (Or. App. 1984).

This approach was adopted by Oregon's Supreme Court in a 1980 decision, Springfield Education Assn. v. School Dist., 621 P.2d. 547 (Ore. 1980). That decision developed a three-part standard for applying the balancing approach to teacher evaluation proposals:

"ERB concluded that the bases for and use of evaluation related predominantly to educational policy, although they affect teachers' working conditions somewhat, because the bases represent the determination of programs and program standards and the use of evaluation is to determine whether these program standards are

being met. The determination and measurement of program standards are management functions.

ERB also concluded that the mechanics of evaluation also affect working conditions, but relate primarily to educational policy because the mechanics and bases of evaluation are 'inextricably intertwined.' The form, content, number and sequence of evaluations, and the resources allocated therefore, ERB reasoned, must be designed to correlate to the program standards and to serve as the basis for subsequent managerial action. Accordingly, both the bases for and uses of evaluation and the mechanics of evaluation were deemed not to be conditions of employment and, hence, subject to permissive rather than mandatory bargaining.

ERB next concluded that those parts of the proposals dealing with procedural fairness (e.g., notice and opportunity to be heard) had no effect on the formulation and achievement of program and little effect on the allocation of resources, but greatly affected teachers' employment. Hence, procedural fairness procedures were deemed to be subject to mandatory bargaining." 290 Or. at 235-37, 621 P. 2d 545.

Following that case, however, the Oregon legislature amended the Oregon Statute governing teacher evaluations. That statute, found at Oregon Revised Statutes Section 342.850 was amended to include a provision very similar to the Illinois statute dealing with teacher evaluations on that matter. The section added, reads in pertinent part as follows:

(2)(a)The district school board shall develop an evaluation process in consultation with school administrators and with teachers. If the district's teachers are represented by a local bargaining organization, the board shall consult with teachers belonging to and appointed by the local bargaining organization in the consultation required by this paragraph.

(b) The district school board shall implement the evaluation process that includes:

"(A) The establishment of job descriptions and performance standards which include but are not limited to items included in the job description;

"(B) A pre-evaluation interview which includes but

- is not limited to the establishment of performance goals for the teacher, based on the job description and performance standards;
- "(C) An evaluation based on written criteria which include the performance goals; and
 - "(D) A post-evaluation interview in which (i) the results of the evaluation are discussed with the teacher and (ii) a written program of assistance for improvement, if needed, is established.
- "(c) Nothing in this subsection is intended to prohibit a district from consulting with any other individuals."

A subsequent case determined whether the amendment of the evaluation law affected the application of the Springfield test for determining what evaluation related matters are mandatory subjects of bargaining. That case is East County Bargaining Council v. Centennial School District No. 28JT, 685 P.2d 452 (Or. App. 1984).

In that case, the teachers' bargaining council (council) argued that:

because the amendment made the statutory requirements for evaluations more specific, increased the evaluation-related rights of teachers and reduced the flexibility and discretion of school districts in connection with evaluations, the effect was to shift the balance from the educational policy to the employment conditions end of the spectrum and to make virtually all matters pertaining to teacher evaluations mandatory bargaining subjects. The council implicitly makes the related point that, because the district must comply with the statute, it has no educational policy interests which militate against bargaining about proposals that simply duplicate the statutory requirements. (Id., at 455, 456).

The court however, determined that any bargaining proposal was still subject to the balancing test. Indeed, the court stated that the amendment did not "explicitly enlarge the scope of

mandatorily bargainable subjects." (Id at 457.)

The most significant aspect of this case, within the Illinois context, is the court's holding that the amendment did not enlarge the scope of mandatory bargaining. This is particularly important when considered in conjunction with Section 17 of the IELRA.

Illinois

There are no Illinois decisions to date that deal with the issue of teacher evaluation as a mandatory subject of bargaining. However, a Complaint and Notice of Hearing has been issued by the Executive Director of the IELRB for a case involving this issue.

The case, Community Consolidated School District 59, Case No. 86-CA-0012, deals with a demand to bargain collectively about the development of evaluation criteria and procedures as well as the impact of them. The complaint was issued on July 24, 1986.

There is also very little legislative history on this issue. Teacher evaluation was not discussed at all in the House debates and was only mentioned once in the Senate debates. That discussion is cited on page 32 of this work and gives no direction on this issue.

However, based on the IELRB decisions discussed earlier in this chapter, the NLRB decisions and the decisions of other states, it is possible to make a reasonable prediction as to how the IELRB might approach this question.

First, the IELRB will likely reject the argument that teacher evaluations have been made a mandatory subject of bargaining by the amendment to the School Code which requires school districts to

develop "...in co-operation with its teachers, or where applicable the exclusive bargaining representative of its teachers, an evaluation plan for all its teachers in contractual continued service." (Section 24A-4). A careful reading of that amendment reveals that the school district is required to develop a plan in co-operation with the teachers or their bargaining representative. The language does not impose an affirmative duty to bargain the contents of that plan but rather, is similar to the meet and confer requirements of a state like Indiana.

Another reason the IELRB is likely to reject this argument is because of the provisions of Section 17 of the IELRA. That section reads:

Effect on other laws. In case of any conflict between the provisions of this Act and any other law, executive order or administrative regulation, the provisions of this Act shall prevail and control. Nothing in this Act shall be construed to replace or diminish the rights of employees established by Section 36d of "An Act to Create the the State Universities Civil Service System", approved May 11, 1905, as amended or modified.

This section makes it very clear that the IELRA is to be the controlling law if there is any conflict between the IELRA and any other state law. Further, the only exception to this rule that the legislature was willing to contemplate was incorporated in Section 17. Therefore, the only way the list of mandatory subjects of bargaining can be expanded by statute is by amending the IELRA to reflect that change. The new teacher evaluation law is incorporated in the School Code, not the IELRA. Therefore, it cannot be regarded

as a statutorily imposed subject of mandatory bargaining.

The IELRB will consider several factors when it addresses the issue of whether teacher evaluations are a subject of mandatory bargaining. One will be the strong language of Section 4 of the IELRA. In Berkeley the IELRB made it very clear that it viewed management rights as significant and that educational employers are unique. In that decision, the IELRB considered the claims by both sides and determined that the word 'directly' was very significant and that unless there was a direct effect on the subjects of mandatory bargaining, the decision was to be left to management.

Another factor that the IELRB will likely consider is whether teacher evaluations are a matter of educational policy. All the state courts that have considered this question have concluded that teacher evaluations at least include an element of educational policy, even those courts that have determined that teacher evaluations are a mandatory subject of bargaining. The IELRB will most likely concur with those courts and determine that teacher evaluations are a matter of educational policy.

Although all the courts cited have determined that teacher evaluations include a question of educational policy, they have applied different tests to determine whether it might still be a subject of mandatory bargaining. Under the minimal relations test and the significant relations test the courts have determined that teacher evaluations are mandatory subjects of bargaining.

However, under the primary relations test and the balancing

test the courts have determined that teacher evaluations are not a mandatory subject of bargaining. In Berkeley, the IELRB adopted the primary relations test. The application of that test in the context of teacher evaluations is best exemplified in Beloit discussed earlier.

If the IELRB applies the primary relations test as in Beloit, it will find that the number, frequency and duration of evaluations will be subjects of mandatory bargaining. It will also find that the time span between the observation and the evaluator/teacher conference will be a mandatory subject of bargaining. However, the identity of the evaluator will probably be found to be an inherent managerial right. The criteria for the evaluation are clearly matters of educational policy because they are pronouncements of what the district considers to be proper teaching behavior as the behavior relates to attaining the district's educational objectives. This will be the result if the IELRB follows the lead of the Wisconsin courts.

One caveat is in order, however. The Wisconsin statute dealing with managerial rights, cited on page 60, gives employees the right to bargain over managerial rights if the exercise of those rights affect the wages, hours and conditions of employment of the employees. That statute does not include the word 'directly' that the IELRB found so significant in Berkeley. Therefore, the primary relations test applied by the IELRB may narrow the scope of mandatory bargaining even beyond that established in Beloit.

In summary then, if the IELRB follows Beloit, it will find that the procedures of teacher evaluation are mandatory subjects of bargaining but that the identity of the evaluator and the criteria for evaluation will be permissive subjects of bargaining. If the IELRB continues to place great reliance on the presence of the word 'directly' in Section 4 it may even find that the procedures are not subjects of mandatory bargaining. At any rate, both the procedures and criteria will likely be found to be subjects for impact bargaining under Section 4.

CLASS SIZE

Class size is another topic that the teacher unions will likely consider as a mandatory subject of bargaining. Teachers have long believed that the number of pupils in a class has a direct impact on the quality of teaching and learning that goes on in the classroom. School administrators might agree with that sentiment, but argue that precisely because the number of students affect teaching and learning, a determination of class size based on that belief would be an educational policy decision. Employee groups would likely consider it a term or condition of employment.

Several states now have judicial determinations of whether class size is a mandatory subject of bargaining. Those states include Connecticut, Nevada, Florida and Wisconsin.

Connecticut

The Connecticut Teacher Negotiations Act is found at C.G.S.A.

sections 10-153(a) through 10-153(h). It requires school boards to negotiate over "salaries and conditions of employment." This statutory requirement was interpreted with respect to class size in the case of West Hartford Education Association v. DeCourcy, 162 Conn. 566 (1972).

West Hartford was an action for a declaratory judgment determining whether certain items were mandatory subjects of bargaining. In the court's analysis of the scope of bargaining, it began by noting that absent guidance from the statute, the court must look to the legislative history to determine the meaning of "conditions of employment. (Id.at 533.) All three of the labor acts covering public employees in Connecticut mirrored the language of the National Labor Relations Act and made it mandatory for the employer to bargain over wages, hours and conditions of employment. The court determined that the omission of hours from the Teacher Negotiations Act reflected a legislative judgment that "teachers' hours of employment' determine students' hours of education and that this is an important matter of education policy which should be reserved to the board of education." (Id. at 534.)

Because of that attributed legislative judgment, the court found that the length of the school day and the school calendar were not mandatory subjects of bargaining. It also used the perceived legislative judgment as the basis of the analysis regarding class size. The court asserted that the legislature intended that the scope of negotiations should be broad, stating that, "The use of the

phrase 'conditions of employment' reflects a judgment that the scope of negotiations should be relatively broad, but sufficiently flexible to accommodate the changing needs of the parties." (Id at 535.)

Having made that determination, the court looked to decisions under the National Labor Relations Act. The scope of bargaining under that Act, as discussed earlier, has been expanded under the penumbra of the phrase, "terms and conditions of employment." However, there are still some limits to that scope as defined in Fibreboard Paper Products , "nothing should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control." (379 U.S. 203 at 223.) The Connecticut court equated the controls in Fibreboard with matters of educational policy in the case at hand and defined educational policy as "those which are fundamental to the existence, direction and operation of the enterprise." (West Hartford at 536.)

The Connecticut court also looked to the history and custom of the industry in collective bargaining and to the policies underlying the Teacher Negotiation Act. The court took notice of the fact that of the ninety-six teacher contracts negotiated in Connecticut, sixty-one had class size provisions. The court also noted that the Act divested the boards of education of some of the discretion they would normally have in an effort to eliminate any "need for resort to illegal and disruptive tactics." (Id at 536.)

Using this three pronged analysis, the court stated that, "There can be no doubt that policy questions are involved....but that

cannot be decisive in the present case....Class size and teacher load chiefly define the amount of work expected of a teacher, a traditional indicator of whether an item is a condition of employment." (Id. at 537.)

There are two important aspects of this decision when applied to the Illinois situation. The first is that the Connecticut statute does not have the equivalent of the employer's rights section of the Illinois Act. The second is that the Connecticut court engaged in a kind of balancing test. This is quite different than the "primary relations" test enunciated by the IELRB in Berkeley and applied in Community Unit School Dist. No. 4.

Nevada

The Nevada statute requires every government employer to negotiate concerning "wages, hours and other terms and conditions of employment." NRS 288.150(1). However, this obligation is limited by subparagraph 2 of that section:

"2. Each local government employer is entitled, without negotiation or reference to any agreement resulting from negotiation:

- (a) To direct its employees;
- (b) To hire, promote, classify, transfer, assign, retain, suspend, demote, discharge or take disciplinary action against any employee;
- (c) To relieve any employee from duty because of lack of work or for any other legitimate reason;
- (d) To maintain the efficiency of its governmental operations;
- (e) To determine the methods, means and personnel by which its operations are to be conducted; and
- (f) To take whatever actions may be necessary to carry out its responsibilities in situations of emergency.

The interpretation of this statute as it concerns the

negotiability of class size is found in the case of Clark County School District v. Local Government Employee Management Relations Board, 90 Nev. 442, 520 P.2d 114 (1974). This case consolidated two separate actions where the court was called upon to determine the negotiability of several items including class size. In the decision, the court upheld the standard enunciated by the Employment Management Relations Board, "that the government employer be required to negotiate if a particular item is found to significantly relate to wages, hours and working conditions even though the item is also related to management prerogative." (Id. at 117.) Using that analysis, the court found that because class size had a significant impact on working conditions, it was a subject of mandatory bargaining.

There is one very important aspect of this case when applying it to the Illinois situation. The test applied in Nevada is the significant relationship test which is a much easier test for employee groups to satisfy than the primary relations test adopted by the IELRB.

Florida

The Florida statute requires school boards to negotiate over wages, hours and terms and conditions of employment. F.S.A. Section 447.309(1). However, this obligation is modified by F.S.A. Section 447.209 which allows public employers to unilaterally set "standards of service to be offered to the public."

The application of this statute to the negotiability of class

size is found in Hillsborough Classroom Teachers Association v. School Board of Hillsborough County, 423 So.2d 965 (1982). In that case, the court found that class size was not a mandatory subject of bargaining. However, the impact of a decision regarding class size will be a subject of mandatory bargaining after the employee group makes a showing of negotiable impact. The basis of that decision was the belief that class size was a matter of educational policy and thus was within the term "standards of service to be offered to the public" and to be unilaterally set by the public employer.

There are two important aspects of this case when applying it to the Illinois situation. The first is that the Florida court's conclusion that class size was an educational policy decision is in agreement with the other state courts that have considered this question. The second important aspect is that the limiting factor in Florida, standards of service to be offered to the public, is different than the limiting factor in Illinois which is the management rights found in Section 4.

Wisconsin

The Wisconsin statute, found at W.S.A. Section 111.70(1)(d) requires the parties to meet and confer with respect to wages, hours, and conditions of employment. The case applying this statute to the negotiability of class size is City of Beloit, discussed in the section of this chapter dealing with the negotiability of teacher evaluations.

The court began its discussion of the general scope of

negotiability by offering an evaluation based on class size:

The difficulty encountered in interpreting and applying Sec. 111.70(1)(d), is that many subject areas relate to "wages, hours and conditions of employment," but not only to such area of concern. Many such subjects also have a relatedness to matters of educational policy and school management and operation. What then is the result if a matter involving "wages, hours and conditions of employment" also relates to educational policy or school administration? An illustration is the matter of classroom size, subsequently discussed. The number of pupils in a classroom has an obvious relatedness to a "condition of employment" for the teacher in such classroom. But the question of optimum classroom size can also be a matter of educational policy. And if a demand for lowered classroom size were to require the construction of a new school building for the reduced-in-size classes, relatedness to management and direction of the school system is obvious. Would such required result of a new building not be a matter on which groups involved, beyond school board and teachers' association, are entitled to have their say and input? (City of Beloit at 235,6.)

Thus, the Wisconsin court acknowledged the difficulty of separating the issues when educational policies are related to the subjects of mandatory bargaining and explicitly used class size as the perfect kind of example of this conflict.

After establishing the primary relations test, discussed at page 24 of this work, the court addressed the issue of negotiability of class size at pages 240 & 241 of its opinion. The teacher's association proposal regarding class size read as follows:

Because the pupil-teacher ratio is an important aspect of an effective educational program, the Board agrees that class size should be lowered wherever possible to meet the optimum standards of one (1) to twenty-five (25). Exceptions may be allowed in traditional large group instruction or experimental classes, where the Association has agreed in writing to exceed this standard. (Footnote 35 at 240.)

The court conceded that class size had an impact on conditions of employment but adopted the language of the Wisconsin Employment Relations Commission's memorandum which stated:

size of a class is a matter of basic educational policy because there is a very strong evidence that the student-teacher ratio is a determinant of educational quality. Therefore, decisions on class size are permissive and not mandatory subjects of bargaining. (Footnote 36 at 241.)

Therefore, the application of the primary relations test resulted in a finding that although there was an impact of the decision on the working conditions, the decisions concerning class size were purely managerial and not mandatory subjects of bargaining.

However, the court did find that the impact of that decision was mandatorily bargainable because if the class was larger, there would be more papers to grade, more preparation would be required, there would be a greater likelihood of discipline problems, and there would be more work projects to be supervised. (Id. at 241.)

Illinois

Apart from the exchange between Senators Bruce and Buzbee on November 2, 1983, quoted on page 32, there is no mention in the legislative history of the negotiability of class size. Therefore, it is likely that the IELRB will look to other jurisdictions with similar statutes for guidance in applying the IELRA to this question.

The IELRB will not find the Connecticut decision persuasive for four reasons. The first reason is that when the Connecticut court looked to its legislative history, it found that the scope of

bargaining was to be relatively broad. This is in direct contrast to the Berkeley decision which found a narrow scope of bargaining reflected in the Illinois legislative history.

The second reason is that there is no management rights provision in the Connecticut statute. The very presence of such a provision in the Illinois statute sets it apart from Connecticut.

The third reason is that the Connecticut court looked to the history and custom of the industry when considering the question and found it persuasive that nearly two-thirds of the Connecticut school districts had class size provisions. There is nothing in the Illinois statute or in the IELRB decisions to indicate that the IELRB will look to custom and history of the industry if it can find guidance in the statute and in the legislative history.

The fourth reason is that the Connecticut court relied on a balancing test rather than the type of primary relations test adopted by the IELRB. Because the weight accorded each factor was different than it might be in Illinois (according such difference to the habit and custom of the industry) the result was very likely different than it would be in Illinois even if the balancing test was used. In addition, the primary relations test is very different than the balancing test.

The IELRB will not find the Nevada decision persuasive for two very important reasons. The first, as noted above, is that the Nevada court used the significant relations test. That standard is much easier to satisfy because all that must be demonstrated is that

there is a significant relationship between the topic and the conditions of employment. However, the test adopted by the IELRB requires that there must be a primary relationship between the topic and the conditions of employment.

The second reason for the IELRB's unwillingness to follow the Nevada court is to be found in the legislative history of the IELRA. As noted earlier, the management rights provision was added to the IELRA by the Governor's amendatory veto and is essentially the management rights provision found in the IPLRA. That management rights provision was added to the IPLRA through an amendment by Senator Greiman. However, before that amendment was adopted the House rejected a management rights provision by Representative Davis. That amendment read:

Public employers should not be required to bargain over matters of inherent managerial policy, which should include, but shall not be limited to, such areas of discretion or policy as the functions and programs of the employer, the standards of services, the overall budget, the utilization of technology, and the organizational structure, and selection, and direction of personnel. 83rd Gen. Assem. House Debates on S.B. 536, p279 (June 23, 1983).

This language is very similar to the management rights provisions in Nevada. The Nevada statute, found at NEV. REV. STAT. Sec. 288.150(2) reads:

Each local government employer is entitled without negotiation or reference to any agreement resulting from negotiation: (a) to direct its employees; (b) hire, promote, classify, transfer, assign, retain, suspend, demote, discharge, or take disciplinary action against any employee; (c) to relieve any employee from duty because of lack of work or for any other legitimate reason; (d) to maintain the efficiency of its

governmental operation; (e) to determine the methods, means and personnel by which the operations are to be conducted; and (f) to take whatever actions may be necessary to carry out its responsibilities in situations of emergency.

The Illinois legislature had opportunity, then, to consider a provision that would have allowed the IELRB and the courts to look to Nevada for precedent and chose to reject it. By doing this, it can be inferred that the legislature intended to provide stricter guidelines than that afforded the administrative agency and judiciary in Nevada. The legislature's decision to use the clause it did and to qualify the exceptions by the use of the word directly reflects a desire to construe the scope narrowly and to take some options out of the hands of the judiciary.

The IELRB may look to the Florida court for confirmation that class size is indeed a matter of educational policy, a conclusion that is shared by the other state courts that have considered this question. However, the management rights provision of the IELRA is even a stronger argument for determining class size to be a non-mandatory topic of bargaining than the standard of services relied upon by the Florida court as in the question concerning the negotiability of teacher evaluations, the IELRB is most likely to look to the Wisconsin court, if any, for guidance in the question at hand. Because class size is so clearly related to educational policy, the IELRB will find it as a matter of inherent managerial policy if the employer defends its position on that basis. The only way that class size might be viewed as a subject of mandatory

bargaining is if, as suggested in Community Unit School District No. 4, it is clearly evident that the district's decisions are prompted only by a desire to save labor costs. A school district wishing to retain the right to make class size decisions as a matter of inherent managerial policy must argue that it needs the flexibility to do so in order to adequately meet the educational needs of its students.

CURRICULUM

Curriculum is likely to be another subject that teacher organizations would prefer to see classified as a mandatory subject of bargaining while school boards would see it as a matter of inherent managerial policy. Teacher organizations might argue that curriculum is similar to the tools used by craftsman and thus a condition of employment. On the other hand, school districts might look to Section 4 of the IELRA and argue that curriculum falls under the rubric of "standards of service."

Curriculum certainly is an area of educational policy. The question is whether its impact on working conditions is great enough to meet any of the four tests discussed in the first section of this chapter. Using any of the four tests, only one state was found that established that curriculum was a mandatory subject of bargaining.

A state using the minimal relations test is Pennsylvania. In State College Ed. Ass'n. v. Pennsylvania Labor Relations Board, 306 A.2d 404 (1973), the court held that curriculum was a matter of inherent managerial policy within the ambit of Pennsylvania's

management rights clause. This is the easiest test to satisfy and curriculum was still believed to a matter of inherent managerial policy.

A state using the significant relations test is Nevada. In Clark County School District v. Local Government Employee Management Relations Board, the court held that there was a significant relationship between the amount, type, quality and availability of instructional supplies and the working conditions of teachers. Therefore, curriculum was held to be a mandatory subject of bargaining. However, the management rights clause of Nevada's statute is significantly different than that of Illinois. The Illinois legislature had considered and rejected a clause like that of the Nevada statute.

A state utilizing the primary relations test is Wisconsin. In City of Beloit v. Wisconsin Employment Relations Commission, the court held that a school reading program related primarily to basic educational policy and was not a mandatory subject of bargaining. In the court's words:

"It is clear that the Association's proposal on 'reading' relates primarily to basic educational policy, and therefore concerns a matter subject to permissive, but not mandatory bargaining. The need for such a program is essentially a determination of whether the District should direct itself toward certain educational goals." (City of Beloit at 242, Footnote 39.)

A state using the balancing test is Oregon. In Springfield Education Association v. Springfield School District No. 19, the court held that where matters to a large extent involve questions of

educational policy, those matters are not mandatory subjects of bargaining. Because curriculum was found to involve educational policy to a greater extent than it involved working conditions, the court held that curriculum was not a mandatory subject of bargaining. In support of this finding, the court looked at rulings of a number of other states:

Labor relations boards and courts in other jurisdictions have reached similar conclusions. Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17, 311 A.2d 737 (1973) (class size, curriculum, transfers, work assignments held not mandatory bargaining subjects); School Dist. of Seward, 188 Neb. 722, 199 N.W.2d 752 (1972) (class size, work schedules and transfers held not mandatory subjects); Burlington Cty. Col. Fac. Assoc. v. Bd. of Trustees, 64 N.J. 10, 311 A.2d 733 (1973) (the school calendar held not a mandatory subject); Aberdeen Ed. Ass'n v. Aberdeen Bd. of Ed., S.D., 215 N.W.2d 837 (1974) (class size and the availability of materials and supplies held not mandatory bargaining subjects). (Springfield Education Association at 650.)

There is a Michigan case that must be discussed as well because of the contrast it has with Nevada. Like Nevada, Michigan applies the significant relations test. However, in doing so, Michigan came up with the opposite result that Nevada reached.

The case that applied the test in dealing with the issue of curriculum is West Ottawa Education Association v. West Ottawa Public Schools Board of Education, 334 N.W. 2d 533 (Mich. App. 1983). In this case, the school board had decided to quit offering a Dutch dance class. The teacher's organization filed a complaint charging that the decision was a change in working conditions and therefore a mandatory subject of bargaining. The Michigan court articulated the

test to be applied in this fashion:

Various tests have been employed to determine whether a subject is a "term and condition of employment", and, therefore, a mandatory subject of bargaining. This Court has developed a standard which incorporates several of these tests. Any matter which has a material or significant impact upon wages, hours, or other conditions of employment or which settles an aspect of the relationship between employer and employee is a mandatory subject, except for management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security. (West Ottawa at 542.)

After enunciating that test, the court looked to the Supreme Court's decision in First National Maintenance. In that decision, The Supreme Court decided that absent an anti-union animus, a business was not required to negotiate a partial closing of a business for economic reasons. The Michigan court analogized the decision to drop a class offering to the partial closing of a business and found that:

We conclude that the board was not required to bargain over its initial decision to drop the Dutch dance program. The decision was made solely because of school budget cuts. The decision related to the board's right to determine curriculum. West Ottawa at 543.

Illinois and the negotiability of curriculum

The prevailing weight of states have held that curriculum is not a mandatory subject of bargaining. Although Illinois is not bound by any of those state decisions the IELRB will certainly be aware of them and may look to them for guidance.

The state that uses the test most similar to the one

articulated by the IELRB in Berkeley, Wisconsin, has held that issues of curriculum are not mandatory subject of bargaining. It should be expected that the IELRB will look first to Section 4 of the IELRA and determine that curriculum would fall under the category "standards of service." Applying the primary relations test, the IELRB will find, if it follows the weight of opinion, that issues of curriculum are not mandatory subjects of bargaining.

TEACHER TRANSFERS

Another concern of teacher organizations is the negotiability of teacher transfers. Teacher transfers means the transfer of teachers between buildings and/or a change of subject assignments. In light of building closings and termination of teaching positions, teacher organizations can be expected to argue that a transfer to another building or a change in teaching assignment is a change in working conditions and thus a mandatory subject of bargaining. School boards will look to Section 4 of the IELRA and argue that teacher transfers fall within the scope of "organizational structure" and "direction of employees." It should be assumed that the IELRB will use the primary relations test established in the Berkeley decision.

The weight of authority is that teacher transfers are not a mandatory subject of bargaining. Springfield Education Association, Dunellen Board of Education, School District of Seward. The only

case discovered that found teacher transfers to be a subject of mandatory bargaining was the Nevada case of Clark County School District discussed earlier in the chapter.

One case deserves special mention because of the wording of its statute and its clear analysis of the issue. That case, Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District No. 1, 258 N.W. 2d 802 (1977), deals with a situation where the teachers' organization sought a declaratory judgment on the question of whether the school district's teacher transfer procedures were subject to mandatory negotiations.

The wording of Minnesota's employer rights is very similar to the language contained in the Illinois statute. The Minnesota statute, found at Minn. St. 179.66 provides in pertinent part:

"Subdivision 1. A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

For purposes of the question at hand, the only difference between the two statutes is that Illinois' statute refers to the selection of new employees and direction of employees while Minnesota's statute refers to the "selection, direction and number of personnel."

Relying upon that phrase in the statute, the Minnesota court held that the decision to transfer a number of teachers was a managerial decision and not a subject for negotiation:

Minn. St. 179.66 outlines in very broad terms what managerial policy shall be. Thus, under the phrase "selection and direction and number of personnel," the question is what scope is to be given the word "direction." If the entire section is read, however, it seems clear the legislature intends the board shall have direction over the broad educational objectives of the entire district. There is no doubt the decision to transfer a number of teachers is a managerial decision. The criteria for determining which teachers are to be transferred, however, involves a decision which directly affects a teacher's welfare and enters into a field which we hold is in fact negotiable. (Id at 806)

Therefore, although the decision to transfer was not a mandatory subject of bargaining, the adoption of criteria by which individual teachers may be identified for transfer was found to be a mandatory subject of bargaining.

Illinois will probably adopt the prevailing view and find that teacher transfers are not a mandatory subject of bargaining. Nevada's decision is not likely to be persuasive because it applied a different test than that adopted in Illinois and because of the difference in the language of the statute discussed under the section dealing with class size.

In addition, the IELRB is compelled to look at the language of the statute before considering even legislative history. The language of Section 4 appears to be clearly applicable to this issue. School closings and resultant transfers appear to be included within the term "organizational structure" and the term "direction of employees" would apply to the transfer of teachers for any other reason and to changes of subject teaching assignments.

CONCLUSION

Determining the scope of bargaining under the IELRA will be a difficult task because of the potential conflict presented by the strongly worded employer rights section. The legislative history clearly indicates that the purpose of that section was to provide notice to the judiciary that the scope of bargaining was not to be extended beyond traditional norms. The legislative history also makes it clear that the unique nature of the educational employer was one of the reasons that the employer rights section was included. The two IELRB decisions dealing with this issue to date have recognized this legislative intent and have adopted the primary relations test as a means of determining whether particular issues are mandatory subjects of bargaining.

The IELRB will consider each issue on a case by case basis and will carefully consider the individual facts of each case before making its determination.

CHAPTER 4

UNFAIR LABOR PRACTICE

INTRODUCTION

This chapter deals with unfair labor practices under the Illinois Educational Labor Relations Act (IELRA). The chapter will first provide a general consideration of unfair labor practices under the National Labor Relations Act (NLRA) and then a general consideration of unfair labor practices under the IELRA. Both of those discussions will include consideration of six specific questions regarding unfair labor practices: 1. Is an illegal strike an unfair labor practice under the IELRA? 2. Can employees file charges of unfair labor practices? 3. Who is to prosecute an unfair labor practice charge under the IELRA? 4. Does a breach of the duty of fair representation constitute an unfair labor practice under the IELRA? 5. Is recognitional picketing an unfair labor practice under the IELRA? 6. What is the standard of the burden of proof under the IELRA?

National Labor Relations Act

The NLRA recognizes that both the employer and the employee have legitimate rights. (NLRA Section 1(b)) The rights of the employees are listed in Section 7:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

However, it is worth noting that although the NLRA clearly recognizes that there are legitimate employer rights it does not explicitly list them.

One of the stated purposes of the statute is to "provide orderly and peaceful procedures for preventing the interference by either (the employee or the employer) with the legitimate rights of the other. (NLRA Section 1(b)) Those means of prevention are listed in Sections 10 and 11.

Another of the stated purposes of the statutes is to "define and proscribe practices on the part of labor and management which affect commerce and are critical to the general welfare." (NLRA Section 1(b)) Those practices, known as unfair labor practices, are found in Section 8. This section does list specific unfair labor practices for both the employer and the employee organizations.

Section 8(a) lists the unfair labor practices for the employer:

It shall be an unfair labor practice for an employer --
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
(2) to dominate or interfere with the formation or administration of any labor organization or contribute

financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

The application of the statute has resulted in the following acts being defined as unfair labor practices by the NLRB:

Failure to re-employ striking employees. Western Cartridge Co. v. National Labor Relations Board, C.C.A.7, 139 F.2d 855, 858. Refusal of employer to reinstate union members who were evicted from plant unless members would withdraw from union. National Labor Relations Board v. J.G. Boswell Co., C.C.A.9, 136 F.2d 585, 590, 592, 596. Refusal of employer to bargain collectively in good faith. National Labor Relations Board v Griswold Mfg. Co., C.C.A.3, 106 F.2d 713, 724; National Labor Relations Board v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681, 688, 689. Threats by employer to close if union gained a foothold in plant. National Labor Relations Board v. J.G. Boswell Co., C.C.A.9, 136 F.2d 585, 590, 592, 596. Anti-union statements made by employer's supervisory employees during and after strike, together with statement to one of the strikers that he would never get a job in that town anymore. N.L.R.B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987, 992, 996. Refusal of employer to permit posting of a notice that employer would not discriminate against employees who wished to join union. National Labor Relations Board v. J.G. Boswell Co., C.C.A.9, 136 F.2d 585, 590, 592, 596. Discharge of an employee because of membership in or activity on behalf of a labor organization. National Labor Relations Board v. Newark Morning Ledger, C.C.A.3, 120 F.2d 262, 268; National Labor Relations Board v. Bank of America Trust & Savings Ass'n, C.C.A.9, 130 F.2d 624, 628, 629. Employer's interference with and his dominating formation and administration of new labor organization. National Labor Relations Board v. Swift & Co., C.C.A.8, 116 F.2d 143, 145, 146; National Labor Relations Board v. Blossom Products Corporation, C.C.A.3, 121 F.2d 260, 262; National Labor Relations Board v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, 173, 175. Refusal of employer which had refused to bargain with union which had been certified as the exclusive bargaining agent. National Labor Relations Board v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553, 558. Assault by persons employed by manufacturer upon union organizers or sympathizers. National Labor Relations Board v. Ford Motor Co., C.C.A.6, 114 F.2d 905, 911, 915. Discharge of employee because he would not become member of union in accordance with closed shop agreement. Virginia Electric & Power Co. v. National Labor Relations Board, C.C.A.4, 132 F.2d 390, 396. (Black's 1979)

It is clear from this brief list that the NLRB has taken a broad view

of what constitutes an unfair labor practice on the part of an employer.

Section 8(b) of the NLRA lists the unfair labor practices for employee organizations. Because of the nature of labor disputes in the private sector, not all of the provisions of Section 8(b) are pertinent to this discussion. However, the pertinent provisions make it an unfair labor practice for a labor organization to restrain or coerce employees in their Section 7 rights, to cause or attempt to cause an employer to discriminate against an employee with regard to hiring, tenure of employment, or conditions of employment or to refuse to bargain collectively with an employer. It is also an unfair labor practice to picket or cause to be picketed an employer, or threaten that action where an object of the picketing is to force the employer to recognize or bargain with a labor organization as the representative of his employees.

The application of the statute has resulted in the following employee acts being defined as unfair labor practices by the NLRB: an employee walkout protesting failure to transfer a supervisor, Communication Workers Local 2250, a strike to force the employer to concede on a subject which is not a term or condition of employment, NLRB v. Wooster Div. of Borg-Warner Corp., striking to induce alteration of contract terms without complying with the notice and cooling off provisions of Section 8(d), Local 113, United Elect. Workers v. NLRB, 1955, striking in violation of a no strike clause in the contract, NLRB v. Sands Mfg. Co., "wildcat" strikes, NLRB v.

Draper, engaging in violence, assault, and trespass, NLRB v. Fansteel Metallurgical Corp., an employee protest which is timed so as to create a risk of injury to the employer's plant or equipment, NLRB v. Wheeler Car Wheel Co., blatant disloyalty, insubordination, or disobedience, NLRB v. IBEW Local 1229, false accusations against the employer, Atlantic Towing Co. v. NLRB, and intermittent work stoppages or slowdowns, NLRB v. Montgomery Ward and Co.

Clearly, employee groups may be found guilty of committing unfair labor practices. However, the scope of practices found to be unfair by employees is narrower than the scope of unfair labor practices by employers. It is of passing interest to note that the courts have been willing to broaden the scope of unfair labor practices for employees much more than the NLRB has been willing to.

Illegal Strikes

Illegal strikes are not unfair labor practices under the NLRA. However, participants in unprotected strikes are not protected from being discharged as a result of their participation.

Filing of an Unfair Labor Practice Charge by an Employee

The NLRA is silent as to whether an individual may file charges. However, the NLRB regulations allow charges to be filed by any person. The NLRB and its agents, however, are not empowered to institute charges. The charges are usually filed by the employee or a representative from his union if the employer is the charged party

and by the employer or his representative if the union is the charged party.

After the complaint is made, an investigation is conducted to determine if a complaint and notice of hearing should be issued. The NLRB is given the power to investigate and issue a complaint in Section 10 of the NLRA.

Responsibility to Prosecute an Unfair Labor Practice Charge

If a complaint and notice of hearing is issued, the respondent is given the opportunity to file an answer. The hearing is conducted in a trial-like setting before an Administrative Law Judge. As far as practicable, the federal rules of evidence are applied in this hearing. (NLRA Section 10(b))

At the hearing, the charging party is represented by an attorney from the office of the General Counsel for the NLRB. Therefore, once a complaint and notice of hearing has been issued, it is the responsibility of the NLRB to prosecute the charge. In fact, the charging party is not even required to be present at the hearing. (Gorman, 1976)

A Breach of the Duty of Fair Representation as an Unfair Labor Practice

Section 9(a) of the NLRA provides that if a majority of the employees in an appropriate unit select a representative for bargaining purposes, then that representative becomes the exclusive

representative for all the employees in that unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

Because the majority representative has the power to speak for all the employees, it has been established that it has a corresponding duty to make a good faith representation of the interests of all the employees within the unit. This duty was first articulated by the Supreme Court in dictum in Wallace Corp. v. NLRB.

In 1962, the NLRB declared that it was an unfair labor practice on the part of the union to fail in that duty. The case in which that declaration was made was NLRB v. Miranda Fuel Co.. In that case, an employee began an extended leave three days early and the union requested that the employer drop the employee to the bottom of the seniority list. A synopsis of that case is provided in Meltzer:

The duty of fair representation is a corollary of the representative's exclusivity under Section 9(a) and is incorporated into Section 7. A bargaining agent's breach of that duty, regardless of whether it was influenced by an employee's union activities, violates Section 7 and Section 8(b)(1)(A) of the Act. Furthermore, a bargaining representative's attempt to secure employer participation or acquiescence in such a violation constitutes a violation of Section 8(b)(2), and resultant arbitrary employer action is derivatively a violation of Sections 8(a)(1) and 8(a)(3). (Meltzer, 1977, p.920)).

Recognitional Picketing as an Unfair Labor Practice

Recognition picketing is construed as picketing by a union

with the object of forcing the employer to recognize that union. This should be distinguished from organizational picketing which is directed at employees with the intent of persuading the employees that they should affiliate with a particular union. This distinction, relatively clear on its face, becomes very difficult to interpret in practice. There is an element of both types of picketing in situations where the picketing union is not recognized as the exclusive representative.

This difficulty is reflected in the legislative history of Section 8(b). (Gorman, 1976, pages 220-223) Congress attempted to clarify the situation by adding Section 8(b)(7) in 1959. That section outlaws recognition picket or organizational picketing if: 1) the employer has already lawfully recognized another union and there is not a question of representation under 9(c); 2) a valid representation election has taken place in the preceding twelve months and; 3) picketing is taking place without a valid representation election petition being filed within a reasonable period of time.

The statute clearly prohibits pure recognition picketing. However, picketing with the elements of organizational purpose as well as recognition are prohibited if it falls within any of the three categories discussed above.

The Standard of the Burden of Proof

The burden of proof refers to the duty of affirmatively

proving a fact or facts in dispute. That burden always belongs to the charging party in an unfair labor practice charge. The standard refers to the required level of belief that a trier of fact must have.

Section 10(c) of the NLRA states clearly that the standard for the burden of proof is a preponderance of the evidence. That standard is defined as "Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." (Black's, 1979)

Unfair Labor Practices Under the IELRA

The listing of unfair labor practices under the IELRA is contained in Section 14. Like the NLRA, the IELRA names practices that are unfair for both the employer and employee organizations. The listing of unfair labor practices for employers is found in Section 14(a):

Educational employers, their agents or representatives are prohibited from:

(1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act.

(2) Dominating or interfering with the formation, existence or administration of any employee organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.

(4) Discharging or otherwise discriminating against an employee because he or she has signed or filed an affidavit, authorization card, petition or complaint or given any information or testimony under this Act.

(5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit,

including but not limited to the discussing of grievances with the exclusive representative; provided, however, that if an alleged unfair labor practice involves, interpretation or application of the terms of a collective bargaining agreement and said agreement contains a grievance and arbitration procedure, the Board may defer the resolution of such dispute to the grievance and arbitration procedure contained in said agreement.

(6) Refusing to reduce a collective bargaining agreement to writing and signing such agreement.

(7) Violating any of the rules and regulations promulgated by the Board regulating the conduct of representation elections.

(8) Refusing to comply with the provisions of a binding arbitration award.

Much of the language in Section 1(a) is similar to that found in the NLRA, especially subsections (2), (3), (4), and (5). The section does not directly address any of the questions posed at the beginning of the chapter.

The unfair labor practices by employee organizations are listed in Section 14(b):

Employee organizations, their agents or representatives or educational employees are prohibited from:

(1) Restraining or coercing employees in the exercise of the rights guaranteed under this Act.

(2) Restraining or coercing an educational employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances.

(3) Refusing to bargain collectively in good faith with an educational employer, if they have been designated in accordance with an provisions of this Act as the exclusive representative of employees in an appropriate unit.

(4) Violating any of the rules and regulations promulgated by the Board regulating the conduct of representation elections.

(5) Refusing to reduce a collective bargaining agreement to writing and signing such agreement.

(6) Refusing to comply with the provisions of a binding arbitration award.

This language is similar to that found in the NLRA, especially subsections (2) and (3).

The procedure for handling charges of unfair labor practice charges is found in Section 15. The section provides that a charge may be filed with the IELRB by an employer, an individual or a labor organization. The IELRB is then supposed to investigate the charges and, if it states an issue of law or fact, the IELRB is to issue a complaint and notice of hearing. There is to be at least five days notice given to the parties. At the hearing, the charging party may present evidence in support of the charges and the responding party may file an answer to the charges and present evidence in defense against the charges.

The section also gives the IELRB the power to issue subpoenas and administer oaths.

If the IELRB finds that the charged party has committed an unfair labor practice it is empowered to issue an order requiring the party to stop the unfair practice and may require additional affirmative action. A charge of an unfair labor practice must be filed within six months of the alleged violation or the IELRB may not take action on the charge. If the IELRB finds that the charged party did not commit an unfair labor practice the IELRB must make findings of fact and dismiss the charge.

Section 15 also grants the IELRB broad powers to petition the circuit court of the county in which the violation occurred or where the charged party resides or transacts business, to enforce an order

and for other relief.

The actual mechanics of the processing of unfair labor charges are found in Section 1120.20-1120.50 of the Illinois Educational Labor Relation Rules and Regulations. The charge is to be made on a form provided by the IELRB. The form requires the names, addresses and affiliations of both the charging party and the respondent, a statement of the facts supporting the charge, and a statement of the relief sought. The complaint must be made within six months of the alleged unfair labor practice.

The IELRB has empowered its Executive Director to investigate charges and issue complaints. He, in turn, has empowered the Hearing Officers of the IELRB to issue complaints, make investigations of the charges and to recommend to him whether a complaint should be issued or dismissed. The test that determines whether the complaint should be issued was established in the IELRB's full board decision of Lake Zurich School District 95:

"....in order to support the issuance of complaint and to set the charge for hearing, the investigation must disclose adequate credible statements, facts, or documents which, if substantiated and not rebutted in a hearing, would constitute sufficient evidence to support a finding of a violation of the Act." (Lake Zurich School District 95, 1 PERI 1031.)

If a complaint is issued the responding party has 15 days in which to file an answer. The answer must include a specific admission, denial or explanation of each allegation of the complaint. If the respondent does not have sufficient knowledge to make that response the respondent must state that this is the case and the

statement will operate as a denial. The answer must also contain a specific, detailed statement of any affirmative defenses. A failure to file a timely answer will be considered as an admission of the material facts alleged in the complaint and the right to a hearing will be waived. If the respondent fails to answer any part of the complaint that part of the allegation will be considered to have been admitted.

The actual hearing will be conducted in front of a Hearing Officer. Interested persons wishing to intervene in the hearing may direct a request to the Hearing Officer who has the discretion to grant or deny the request. The Hearing Officer is to consider the timeliness of the request, the degree to which the person requesting the intervention has a real interest at stake and the ability of the parties to represent the interest of the person making the request.

Section 1120.40(c) encourages Hearing Officers to schedule voluntary prehearing conferences with the parties if such conferences might narrow or resolve the issues.

It is the responsibility of the Hearing Officer to make a full inquiry into all the matters that are in dispute. After the record is closed either party may move the removal of the case to the full IELRB. The Hearing Officer is to rule on such motions within 10 days after the close of the record. The Hearing Officer may also order the case removed on his own motion. If the case is not removed, the Hearing Officer is obligated to file and serve a recommended decision on both parties as promptly as possible.

After a recommended decision has been served the parties have 15 days in which to file exceptions. The parties may file briefs in support of those exceptions. If the exceptions are not filed within 15 days the exceptions will be considered as waived.

The full IELRB will review the recommended decision upon request by either party. It may also review the recommendation on its own motion. The full IELRB may adopt all, part, or none of the recommended decision.

If cases are removed to the full IELRB the parties are required to file briefs. The IELRB has the power to direct the manner in which the briefs are to be presented. Oral argument is not a right of the parties but may be allowed at the discretion of the IELRB.

The IELRB has determined a wide range of actions to be unfair labor practices. Some practices were particularly flagrant and it should be expected that they would be deemed to be unfair. Others are more mundane but still deserve mention because they reflect the approach taken by the IELRB.

One of the more flagrant examples is the case of Board of Education School District No. 1, 2 PERI 1029. In that case, the district's administration and school board were charged with several violations.

The district terminated the employment of three employees at the end of the 1983-84 school year. One of the teachers, Tamara Worchester, was warned early in the 1983-84 school year by a board

member to "watch out for the older teachers and that union." (2 PERI 1029, p.68) Worchester ignored the warning and joined the union. In March of 1984, during her second evaluation, her principal told her that she was doing a fine job but there was a problem about rehiring her "because of the way the Board felt about the union." (Id. at p.68)

The second teacher, William Wrate, was asked by his principal to be president of the PTA for the 1983-84 school year. At that point Wrate was not a member of the union because of his belief that there was disparate treatment of union and non-union teachers. (Id. at p.68) Wrate agreed to serve as president of the PTA and later joined the union. After Wrate stated his position on a controversial board policy matter in December 1983, his principal allegedly told Wrate that if he had known that Wrate was going to join the union that Wrate would never have been asked to become PTA president. Three months after this conversation Wrate received a letter of termination.

The third employee, Katherine Evans, was a school nurse. She was very active in union affairs. She had participated in the organizational process, picketed during contract negotiations and had served as an unofficial courier for union literature. Her employment was terminated in March and her position was eliminated.

The IELRB determined that each of the dismissals was in response to protected activity and thus a violation. The IELRB also found that the school district committed unfair labor practices when:

1) A school board member met with the union president and proposed that if she would resign her position and use her influence to get other teachers to resign from the union, the school board member would use his influence to help her get the teaching position she had requested for the coming year. 2) The school district conditioned wage increases for the teachers upon the local unit's willingness to bargain directly with the District and not rely upon the State affiliate. 3) The school district refused to offer wage increases during the negotiations. 4) Principals questioned prospective employees about their union sympathies and recommended against union membership. 5) The school district only agreed to meet once for negotiations during a six month period.

As a remedy to the violations, the IELRB issued a cease and desist order, required the posting of notices of the findings in all the school buildings, required the mailing of the notice to all the employees, and ordered the reinstatement of Worchester, Wrate, and Evans. This variety of remedial actions is an example of the powers that may be exercised by the IELRB under Section 15, discussed earlier.

Another example of an unfair labor practice is found in Oak Lawn Community High School District No. 218, 2 PERI 1014. The IELRB found that it was an unfair practice for a school district to continue to deduct dues on behalf of the incumbent union when employees had made a proper and timely request that the dues deductions be redirected to a rival union.

The IELRB also found an unfair labor practice when a school district discharged a part time librarian after she had assisted in the organizational campaign for a union and initiated negotiations for a collective bargaining agreement. The factual pattern leading to that determination is found in Balyki Community School District No. 125, 2 PERI 1047.

Judith Hilst, the librarian, was a member of the Illinois Education Association and the National Education Association at the time she was hired in 1973. She became president of the local in the late 1970's. At that time, the local was not recognized by the school district.

In October, 1983, the local sought recognition. The school district refused to grant voluntary recognition and the local then filed a recognition petition. The local was certified as the exclusive representative of all certified full-time and part-time teachers, excluding all administrative employees on December 20, 1984.

Hilst began preparation for negotiations in January, 1985. She surveyed the membership and requested financial information from the school district. In early March, she notified the Superintendent that the union was about to present its demands for collective bargaining. On March 13, 1985 the Superintendent informed her that she was not going to be recommended for re-employment. The school board accepted the Superintendent's recommendation and formally dismissed Hilst effective May 25, 1985.

The basis of Hilst's complaint was that the discharge was a discriminatory discharge and thus a violation under Section 14(a) of the IELRA. The test applied by the IELRB for establishing a prima facie case of discriminatory discharge was a three-prong test. It required that the evidence show: 1) That Hilst engaged in activity protected under Section 3 of the IELRA; 2) that the school district was aware of the activity; and 3) that Hilst was discharged for that activity.

The IELRB found that Hilst had engaged in activities protected under Section 3, (organizing activities and presenting a demand to bargain), and that she had maintained a very vocal and highly visible role in those activities. Furthermore, the school district knew of those activities by their own admission and by obvious inference. Finally, the discharge followed so closely on the heels of the protected activity that the IELRB construed the discharge as motivated by Hilst's union activity. Because Hilst had established a prima facie case of discriminatory discharge, the burden of proof shifted to the school district to demonstrate, by a preponderance of the evidence, that the discharge was for legitimate reasons.

The school district argued that the discharge was because of unsatisfactory work by Hilst. However, the IELRB found that the behavior complained of, maintaining a cluttered library that was not conducive to study and failure to promptly complete Title IV program forms, had been tolerated for eleven years and no attempt to

remediate had been made during that time period. Furthermore, before the successful organizational campaign, the superintendent had asked Hilst if she might be interested in a full time job as a librarian for the coming year. Because of those actions, the IELRB determined that the school district failed to meet its burden of proof and that the district was guilty of violating the provisions of Sections 14(a)(1) and 14(a)(3).

The case is significant not only because of its finding that the district was guilty of an unfair labor practice but also because of the articulation of the three-prong test to be applied in discriminatory discharge cases.

The case of Chicago Board of Education, 2 PERI 1089 is significant because it provides an exception to the six month filing requirement imposed by Section 15. In this case, the employee did not know that the employer had refused to comply with a grievance arbitration award until eleven months after the school district had made the refusal. The employee filed the complaint six weeks after the letter of repudiation was received. The IELRB held that the complaint was timely because the statute of limitations period was tolled when knowledge was imputed to wronged party, not when award was issued.

Another representative example of employer unfair labor practices is found in Goreville Districts Nos. 18 & 71, 1 PERI 1108. In this case, the union had filed a complaint alleging that the school district had altered the work load of teachers in violation of

the contractual agreement and had threatened reprisals unless the union dropped the complaint. The school district failed to answer the charge of an unfair labor practice until after the response date had passed and then failed to present good cause for its failure to make a timely response. The IELRB held that the failure on the part of the school district constituted an admission on the part of the school district. The case is significant because it indicates the IELRB's resolve to enforce the timely response provision of Section 15.

In Heyworth School District No. 3, 1 PERI 1069, the IELRB found that the unilateral change of the high school starting time, the unilateral addition of fifteen minutes to the teacher work day, and the unilateral requirement of teacher attendance at monthly meetings were all unfair labor practices by the school district.

The IELRB has been less willing to find unions guilty of unfair labor practices. The IELRB did not issue any findings of unfair labor practices by union in 1984 or 1985. In 1986, the IELRB did find one instance of where a union technically committed an unfair labor practice. That instance, reported in Catlin Unit District No. 5, 2 PERI 1023, involved a situation where the union failed to post a notice concerning fair share dues in violation of Section 1125.20 of the IELRB Emergency Rules. Although this was a technical violation, the IELRB found that there was no showing of prejudice because the non-union employees received adequate notice through receipt of the negotiated contract and the union's

enforcement of the contract. Because there was no prejudice, the IELRB dismissed the complaint.

It is also instructive to be aware of actions that the IELRB has determined are not unfair labor practices. One such action was complained of in Maine Township High School District No. 107, 2 PERI 1034. In that case, the IEA filed an unfair labor practice charge against the school district as a result of the district's action during a representation election. The IEA contended that the school district timed an announcement of increased salaries and benefits to precede the election when the announcement would usually have followed the election, that the school district granted materially greater benefits than had been granted in previous years, that the school district publicized the increases in a more extensive fashion than in previous years, and that the school district met with employees to solicit grievances in an attempt to resolve them before the election.

The IELRB dismissed the charges except for the contention that the school district had timed the announcement of the wages and benefit increases with the intent of affecting the representation election. The IELRB found that the increases were not materially greater than those of previous years. The publicity was accurate and not untoward. Because of these facts, the pre-election announcement did not constitute an unlawful conferral of benefits.

The case is significant because it recognizes the right of school districts to carry on business in a normal manner without the

fear of being found guilty of an unfair labor practice as long as the district does not deviate from past practices or act in any manner inconsistent with its normal procedures.

City Colleges of Chicago #108, Case No. 86-CA-0021-C, is another significant case. In this case, Melvin Malone, a training specialist with City Colleges, filed a complaint alleging violations of Section 14(1) and (3). He had been dismissed from employment. The stated reason for his dismissal was a lack of work.

The basis of Malone's complaint was that he was discharged in retaliation for his complaints about the inadequate cleaning of his classroom and the frequent transfers that he experienced. However, there was no evidence that he was engaged in concerted or protected activities when he complained. (City Colleges, p.2) On that basis, the Hearing Officer recommended that the 14(a)(1) charge be dismissed. In considering the Section 14(a)(3) charge, the Hearing Officer noted that although it was illegal for an employer to discriminate in regard to the hire or tenure of employment to encourage or discourage membership in any employee organization, the IELRA does not proscribe all types of employment discrimination. On that basis, the Hearing Officer recommended dismissal of the 14(1)(3) charges as well.

The significance of this case is that the IELRB recognized that there is not recourse for every perceived wrong and that unfair labor practices are only those practices proscribed under the IELRA. The procedures and sanctions available under the IELRA are only

available when the provisions of the IELRA are violated.

East St. Louis School District No. 189, Case No. 84-CA-0051-S deals with the standards a labor organization must meet if it is to attain successor status under the IELRA. In this case, the school district had refused to recognize a union as successor union on the basis that more than de minimis changes had occurred. The union that had been the exclusive representative filed unfair labor practices alleging violations of Section 14(a)(1), (2), (3), and (5). The IELRB upheld the dismissal of all the charges and provided a lengthy explanation of why the 14(a)(5) charges did not meet the Lake Zurich standard.

Local 253 had been the recognized union. The SEIU ordered that Local 253 be consolidated and merged with Local 50. Local 50 simultaneously imposed the following changes:

1. Former Local 253 became a division of Local 50.
2. Division 253 was governed by the constitution and by-laws of Local 50.
3. Local 50 assumed indebtedness incurred by former Local 253 including legal expenses, Illinois property tax and sewage bills.
4. The structure of elected offices at the local level was changed to reflect control by Local 50. The former offices of local president, vice-president, recording secretary (treasurer) and business representative became division chairperson, vice-chairperson, secretary and board members.
5. Local 50's existing officers were given authority over the day-to-day operations of Division 253.
6. Additionally, Local 50 appointed a full-time business representative to meet with the Employer to administer the contract on behalf of Division 253's employees. p.3

The IELRB first considered whether the union had attained the

status of exclusive representative under the IELRA and could invoke sanctions under Section 14(a)(5) of the IELRA.

The IELRB applied the test found in Triton College, 2 PERI 1013. That test states that a surviving union after a merger will attain successor status if the change involves nothing more than a de minimis change in name and structure. In this context, the IELRB has defined de minimis as "a modification in name or structure which does not result, directly or indirectly, in more than a minimal change in the focus of authority or control over either the internal affairs of the organization or its external relationship to the Employer in collective bargaining matters." (East St. Louis, p.2.) Using that test, the IELRB determined that the changes imposed were significant changes and that Local 50 did not qualify as a successor union.

The most significant change imposed was that Local 50 appointed the collective bargaining agent for Division 253 rather than allowing Division 253 to select its own agent. That fact, coupled with the other five imposed changes, convinced the IELRB that there was more than a de minimis modification of status.

The union also argued that its status as exclusive representative was determined by a federal court in a prior consent judgment. That action had been brought to keep former officers of Local 253 from interfering with the operation of Local 253 as a division of Local 50. That action had been settled by a consent judgment which acknowledged the status of Local 50 as the controlling body. However, the IELRB found that the consent judgment dealt with

internal matters rather than recognition status, so the judgment was not binding on the IELRB.

The case is significant for two reasons. The first is the IELRB's unequivocal statement that the federal court proceeding does not "deal dispositively with recognition under our statute." (Id., p.5)

The second important proposition this case stands for is that representation must be sought and won before an employer is bound to deal with a union if the union has changed in a significant way since it gained recognition.

Another case where no unfair labor practice was found is Carbondale Community High School District No. 165. In that case the school district decided to subcontract its custodial and maintenance services. The union, Service Employees International Local union #316, charged that the school district violated Sections 14(a)(1) and (5) of the IELRA. The IELRB, reversing the recommended decision of the Hearing Officer, dismissed the charges.

The school district had recognized the SEIU as the exclusive representative of its custodial and maintenance employees for many years and entered into successive labor agreements with SEIU on behalf of those employees.

The fact pattern leading to the school district's decision to sub-contract began in the fall of 1983. At that time, the district became aware of a deficit in revenues of \$177,000 for 1983 and an anticipated deficit of approximately \$100,000 for 1984. The school

district had budget deficits for the two previous years as well. As a result, the district began to look for more ways to reduce costs. At that point, the district and the union were beginning the last year of their collective bargaining agreement.

In February, 1984, the Board of Education directed the school district administration to look into the possibility of subcontracting custodial and maintenance services as a way of reducing costs. They directed the district's business manager, Donald Yost, to gather information regarding the advantages and disadvantages of subcontracting for cleaning services.

At the end of March, 1984, Yost reported to the Board of Education that the school district could save approximately \$27,000 by subcontracting its custodial and maintenance services. At the same time, Yost informed the business agent of the union, Elmer Brandhorst, that the Board of Education was exploring the possibility of subcontracting the work.

On May 17, 1984, the Board of Education directed the school district administration to seek bids on the custodial work so they could see whether the estimated cost savings could actually be achieved. It is not clear from the facts when the bid specifications were released to prospective bidders but Yost sent Brandhorst a copy of the bid specifications on June 4, 1984.

The bids were opened on June 11, 1984. The low bidder was City Wide Maintenance with a bid of \$109,000. It had cost the school district \$243,000 for the same services by its own employees in the

1983-84 school year.

On June 14, 1984, Yost sent Brandhorst a letter informing him that the school district was seriously considering the possibility of subcontracting the custodial services for economic reasons. The letter invited SEIU to bargain over the matter as soon as possible.

The school district and the union met for the first negotiating session on June 18, 1984. Representatives for the school district noted the potential savings of the district if the work were subcontracted. They urged the union representatives to make a proposal in light of City Wide's bid and also expressed a willingness to discuss effects bargaining if no agreement was reached.

On June 27, 1984, another session was held. At that meeting Brandhorst asked for additional information about the type of proposal desired by the school district and also asked for more time to make a proposal. The district representative explained that the union should make a proposal competitive with City Wide's bid and that the only factor concerning the district was cost. The district agreed to give more time to the union for preparation of the proposal and affirmed that the district was willing to consider and discuss proposals made by the union.

Yost called Brandhorst several times between June 27 and July 18. Brandhorst testified that the purpose of the calls was to suggest ways that the union might craft a proposal that would be acceptable to the school district.

The next negotiating session was on July 18, 1984. The union

presented a proposal providing the same services as proposed by City Wide, but at a cost of \$157,525. The Board of Education immediately considered and rejected the proposal.

On July 24, 1984, Yost informed Brandhorst that the union's proposal had been rejected and set a follow-up meeting for July 26. At the July 26 meeting the district informed the union that the proposal was rejected because it was too costly. Brandhorst presented a joint letter for Yost to sign, requesting mediation from the Department of Labor. Yost signed the letter and it was submitted to the Department of Labor.

A mediation session was held on August 14, 1984. At that meeting the SEIU informed the school district that the \$157,000 proposal was the last offer. Brandhorst also informed the school district that, unlike the City Wide bid, the SEIU proposal would not include a guarantee about the quality of work. The school district responded that the City Wide bid of \$109,000 was its proposal. At the conclusion of the session Brandhorst declared that the negotiations were at an impasse.

The School Board, at its regular meeting on August 22, accepted City Wide's bid and terminated the custodial and maintenance employees.

The school district and SEIU began "effects bargaining" on August 24. Both sides presented proposals on items such as severance pay, retraining programs and preference for hiring for SEIU employees by City Wide. After another session on August 28, a proposal was

presented to the union membership. The proposal was unanimously rejected and there was no further attempt by either party to bargain about the decision or the effects.

The IELRB took careful notice of all these facts when reaching its decision. It affirmed the finding of the Hearing Officer that the decision to subcontract is a mandatory subject of bargaining. (Id. at 11) However, the IELRB determined that the school district had in fact bargained in good faith about the topic.

The IELRB began its analysis by stating that in a subcontracting context, good faith bargaining means "the employer must give notice to the union, meet with the union, provide information necessary to the union's understanding of the problem, and consider, in good faith, any proposals that the union advances." (Id. at 11, 12)

In the opinion of the IELRB, the school district had met those requirements. The school district provided notice to the union that it was considering the possibility before it actually sought the information. The district met with the union as frequently as the union wished and the district provided any information sought by the union. In fact, Brandhorst acknowledged in his testimony that Yost had provided good faith suggestions for ways in which the union might prepare a proposal that would be acceptable to the district. In a footnote, the IELRB found it important that there was an economic reason for the district's decision and that there was an absence of bad faith:

It is significant to our decision that the Hearing Officer found that the District did not take its actions to undermine the union or to discourage union membership, but rather acted solely for economic reasons. Also, there was no evidence of any collusion between the District and City Wide to "low ball" the bid to oust the union. (Id. at 13, fn. 11)

The case is significant in two ways. First, it clearly establishes that an employer must follow certain procedures if it wishes to consider subcontracting work that has been performed by members of a recognized bargaining unit. The employer must give notice to the union that it is considering the possibility, meet with the union to discuss the possibility, provide information necessary to the union's understanding of the problem, and, in good faith, consider any proposals by the union.

The second important result of this case is the IELRB's recognition of the right of the employer to seek bids in this type of situation. The IELRB acknowledged that "it was a legitimate means of determining whether its beliefs or estimates about the outcome of subcontracting were founded in fact or merely speculative" (Id. at 14) This case allows a school district to seek bids and then to place the bid of its choice on the bargaining table as a proposal.

One final example of conduct that was not considered an unfair labor practice is found in Crystal Lake Community High School District 155, 2 PERI 1073. In that case the school district filed an unfair labor charge against the union because the union designated a department chair to sit as a representative on the union's bargaining team. This was in violation of a contractual agreement between the

union and the district which prohibited department chairs from participating on the collective bargaining team. The Hearing Officer dismissed the charge because the alleged conduct did not violate any terms of the IELRA.

The case is significant because it makes it clear that parties may not use the offices of the IELRB to seek redress for just any grievance. The conduct complained of must violate some provision of the IELRA before a party can use remedies afforded by the statute.

Illegal Strikes as Unfair Labor Practices Under the IELRA

Section 13 of the IELRA lists five prerequisites for a legal strike by educational employees. The five requirements are: 1. That the employees be represented by an exclusive bargaining agent, 2. That mediation be used without success, 3. That a five day notice be given, 4. That the collective bargaining agreement, if one exists, be expired, and 5. That the parties have not jointly submitted any unresolved issues to arbitration. All five of the requirements must be met or the strike is illegal.

There are two situations where the first requirement might be violated. The first is a "wildcat" strike, a strike when employees strike without the authorization of their union. In that situation the strike would be conducted by some party other than a labor union so the IELRB would not have jurisdiction. Without jurisdiction no unfair labor charges can be filed.

The second situation is when a union engages in

organizational or recognitional picketing. That situation will be discussed under a separate subheading.

The statute clearly requires the parties to engage in mediation. Refusal to participate in mediation would be a refusal to bargain in good faith. This would be a violation of Section 14(a)(5) by the employer and a violation of Section 14(b)(3) by the union. An outright refusal to comply with clearly stated requirements of the statute presents a prima facie case of an unfair labor practice.

The basic purpose of the five day notice requirement is to allow the IELRB to ensure that a good faith attempt at mediation has occurred and a failure to provide that notice presents another prima facie case of a failure to bargain in good faith.

A strike when a collective bargaining agreement exists presents a situation where there is both a contractual violation and a violation of the statutory requirements. Section 10(c) requires all contracts to have a no strike clause so every legal contract will have one. Under Crystal Lake, discussed supra, an intertwining of the facts will not necessarily make a contractual violation an unfair labor practice. However, an intertwining of legal issues will result in the IELRB having jurisdiction over the dispute as an unfair labor practice.

However, Section 10 of the statute also requires the contract to include binding arbitration of disputes concerning the administration or interpretation of the contract. This reflects a policy consideration in the drafting of the statute. The policy is

to assure students and educational employers that the educational process will not be disrupted while there is an enforceable contract in existence.

Therefore, it is likely that the courts will allow educational employees to seek an injunction pursuant to the provisions of Section 13(3) and the employer will not be forced to pursue its remedy through the administrative process.

Violation of the final provision will result in an analysis similar to the one just described. The requirement of interest arbitration is another one of the trade-offs for the no strike provision. A violation of this implicit agreement should result in the employer being given access to the process leading to injunctive relief.

Filing of an Unfair Labor Charge by an Employee

The original wording of the statute did not address the question of whether an individual employee could file an unfair labor charge. In the Board of Governors of State Colleges and Universities, 1 PERI 1175, the IELRB dismissed the charges filed by an individual. The charge had been filed pursuant to the provisions of Section 1120.20 of the Rules and Regulations which authorized individuals to file unfair labor charges.

The legislature recognized the problem caused by the statute's failure to address the question and amended Section 14 of the statute to expressly authorize an individual to file unfair labor

practice charges. This amendment was effective on July 1, 1985.

Responsibility to Prosecute an Unfair Labor Practice Charge

Section 15 of the IELRA provides that the charging party may, at the hearing, present evidence in support of the charges. Section 1100.60 of the Rules and Regulations provides that parties may be represented by counsel or any other representative of their choosing. The inference to be made from the statute and regulation, therefore, is that the charging party has the responsibility to prosecute the charges.

Indeed, that is the official position of the IELRB. Robert Perkovich, the Executive Director of the IELRB wrote a brief article entitled "Practice and Procedure Before the Illinois Educational Labor Relations Board." In that article, he stated unequivocally that "the Board does not prosecute the unfair labor charge, but rather the charging party is required to appear on its own behalf or through a duly designated representative and must prosecute the claim." (Perkovich, p. 5)

A Breach of the Duty of Fair Representation as an Unfair Labor Practice

Section 14 (b)(1) prohibits an employee organization from restraining or coercing an employee in the exercise of his rights under the statute. The statute does not address the question of whether a violation of the duty of fair representation is an unfair labor

practice. The IELRB has not conclusively answered that question but the indications are that the answer would be affirmative.

The IELRB first faced the question in Custodial & Maintenance Employees Organization of District 59, 1 PERI 1107. In that case an employee charged the union with violation of Section 14(b)(1) for failure to submit a grievance to arbitration. The IELRB dismissed the charge for failure to raise an issue of law or fact sufficient to warrant a however, in the concluding portion of the opinion, the IELRB addressed the issue of whether a breach of the duty of fair representation is an unfair labor practice:

The issue whether there is a duty of fair representation under the Act is one of first impression. It cannot be ignored that a number of various jurisdictions, both in the private and public sector, have found such a duty arising out of statutory language similar, if not identical, to that contained in Section 3, Section 8 and Section 14(b)(1) of the Act in which certain statutory rights are granted to the educational employees and their exclusive bargaining representative. See e.g.s. Steele v. Louisville and Nashville and Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944); Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369(1967); Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962); Kaufman v. Goldberg, 64 Misc. 2d 524, 315 N.Y.S. 2d 35 (1970); Belanger v. Matteson, 346 A.2d 124 (1975); Teamsters Local 45 v. Montana, 110 LRRM 2012 (Mont. 1981); Kaczmarek v. N.J Turnpike Authority, 99 LRRM 2159 (N.J. 1978).

The IELRB then assumed, arguendo, that such a duty did exist and went on to dismiss the charge because there was no apparent breach of the assumed duty.

Recognitional Picketing as an Unfair Labor Practice

The IELRA does not have a provision prohibiting recognitional or organizational picketing. An examination of the legislative record reveals that the legislature was well aware of the existence of this kind of picketing in the private sector but did not believe that it would occur in public education labor relations.

SENATOR SANGMEISTER:

Where are we on the ...I'm not exactly what you call it but..but I think there are such things as, you know, fights between labor unions aon representation strikes and picketing and that kind of stuff. Is there any prohibition? Its my understanding that the National Labor Relations Act prohibits those kind of strikes or picketing where there's union fights. Is there anything in this bill to prevent that or go along with the National Labor Relations Board regulation, or law, or rule?

PRESIDING OFFICER: (SENATOR SAVICKAS)

Senator Bruce

SENATOR BRUCE:

Recognition strikes are becoming a thing of the...the past and certainly is not a big item in the area of...of collective bargaining. This bill, in fact, would...would...would remove any necessity for a recognition strike, because the procedure sets forth an election procedure and it would be an unfair labor practice if the employer did not recognize the bargaining unit. So, I can...I can see no reason why there would ever be a recognition strike, you'd just submit names to the Educational Labor Relations Board and they shall conduct an election. So, there would never be a need for a recognition strike."

(Senate Debate on H.B. 1530, p. 23 June 27, 1982)

However, it is not impossible that such action might occur. If it does, employees might have to stand to file charges of unfair labor practices against the union for restraining or coercing them in the exercise of their statutory rights.

It is also possible that the employer might file unfair labor

practice charges alleging violations of Section 14(b)(2). That section prohibits employee organizations from restraining or coercing an educational employer in the selection of the exclusive representative of the employees.

Before a complaint could be issued, the investigation by the IELRB must disclose "adequate credible statements, facts or documents, which, if substantiated and not rebutted in a hearing, would constitute sufficient evidence to support a finding of a violation of the Act." (Lake Zurich) After the charge was issued, the charging party would have to prove a violation by a preponderance of the evidence.

Based upon the IELRB seeming unwillingness to find a union guilty of unfair labor practices (no violations have been found) it is unlikely that a violation would be found unless the union's actions were particularly egregious.

The Standard of the Burden of Proof

The statute does not make a declaration about the standard of the burden of proof in unfair labor practice proceedings. However, Section 1105.190 of the Illinois Educational Labor Relations Rules and Regulations provides that all the hearings shall be conducted in accordance with the rules of evidence applied in the courts of Illinois pertaining to civil actions. Under those rules, a charging party must prove his charge by a preponderance of the evidence.

A preponderance of the evidence is the standard specifically

required by the IPLRA and the NLRA. The IELRB has consistently applied this standard as well.

Conclusions

There are three conclusions to be drawn about unfair labor practices under the IELRA. The first is that the determination of whether an action is an unfair labor practice will be made on a case by case basis. The particular fact pattern leading to the charges will be considered individually by the IELRB before a decision is rendered. Therefore, it is difficult to absolutely define a particular practice as unfair unless all the facts are known.

The second general conclusion is that the IELRA is unclear regarding the mechanics for processing unfair labor charges. The Illinois Educational Labor Relations Rules and Regulations attempt to clarify the process. However, there is certain to be controversy about whether the statute enables the IELRB to develop regulations as comprehensive as they developed.

The third general conclusion is that, to date, unions are less likely than employers to be found guilty of unfair labor practices. That likelihood may be a function of the number of charges filed rather than being reflective of a posture by the IELRB. As more charges are filed and processed it will become easier to explore the reasons for this conclusion.

CHAPTER 5

UNIT DETERMINATION

INTRODUCTION

The question of unit determination, who will be included in a bargaining unit, is of great interest to both unions and employers. This chapter will begin with a discussion of the guidelines developed by the NLRB in response to questions dealing with unit determination. The statutory scheme of the IELRA and the significant cases issued by the IELRB in this area will then be presented and analyzed. The discussion of unit determination under the Illinois Educational Labor Relations Act (IELRA) will include answers to the following questions:

1. Will department chairmen be considered part of the professional unit?
2. Will academic deans be considered part of the professional unit?
3. Will student deans be considered part of the professional unit?

Unit Determination Under the NLRA

Section 9(a) of the NLRA provides the basic scheme for unit determination:

Representatives designated or selected for the purposes of collective bargaining by the majority (50%+1) of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the rights at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment. (NLRA, Section 9(a))

There are two particularly significant words in that section. The first is "majority." This binds all the members of the unit, whether the minority of the membership agrees or not. The provision that individuals have the right to seek redress of their grievances is an attempt to protect the rights of the minority.

The second is the word "appropriate." The statute does not say it must be the most appropriate, simply that it must be a unit appropriate for the purpose of collective bargaining. The NLRB has adopted this approach to avoid the excessive entanglement and conflict that would result if it had to determine the most appropriate unit.

Gorman notes that in the history of bargaining in the private sector, the jurisdiction of the NLRB to make decisions determining units is at the heart of our system of collective bargaining and has the most pervasive impact on our industrial system. (Gorman, p. 67.) He lists several reasons for this importance.

First, a large unit will be more difficult for a union to organize. The union must demonstrate a showing of interest before an

election can be held and that is more difficult in a large unit.

Second, the larger the unit the more diverse interests within the unit. Those diverse interests give rise to more internal conflict and make it more difficult for the union to adequately represent the interests of all the members.

Third, if there are several small units it is more likely that the employer will face the threat of several work stoppages over the course of time rather than facing only one every two or three years. It is also more expensive for the employer to be involved in several sets of bargaining cycles and negotiation sessions.

Fourth, large units carry the threat of such major work stoppages that production might be completely halted. For that reason, some employers may prefer smaller units because that could allow them to shift work between units.

Fifth, if there are a number of smaller units there may be jurisdictional disputes and other forms of rivalry that disrupt the production process.

All of these examples illustrate the important role of unit determination in the private sector.

The NLRA does not give very specific guidelines to assist the NLRB in determining what positions should be included in the unit. Section 9(b) simply directs the NLRB "to assure to the employees the fullest freedom in exercising the rights guaranteed by this Act." In an effort to satisfy this statutory requirement, the NLRB has developed an approach which seeks to create units which have a

community of interest.

Gorman has identified twelve factors which the NLRB considers when determining if a community of interest exists:

1. Similarity in the scale and manner of determining earnings;
2. Similarity in employment benefits, hours of work and other terms and conditions of employment;
3. Similarity in the kind of work performed;
4. Similarity in the qualifications, skills and training of the employees;
5. Frequency of contact or interchange among the employees;
6. Geographic proximity;
7. Continuity or integration of production processes;
8. Common supervision and determination of labor-relations policy;
9. Relationship to the administrative organization of the employer;
10. History of collective bargaining;
11. Desires of the affected employees;
12. Extent of union organization.

(Gorman p.69)

Although the NLRB has a great deal of freedom in determining what constitutes an appropriate unit, there are some limitations on that freedom. Section 9(b) prohibits the inclusion of professional employees in a unit with non-professional employees unless a majority of the professional employees vote for inclusion in a separate representation election. The section also prohibits the inclusion of guards in a unit with non-guards and sets up some limitation on severance elections involving workers involved with the crafts.

The NLRA also requires that certain individuals not be included in a bargaining unit as they are excluded from coverage by the statute. Section (3) specifically excludes supervisors from

coverage. Section 2(11) provides the statutory definition of supervisor:

(11)The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In NLRB v. Textron, the Supreme Court extended the exclusion to "managerial" employee, defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. In the landmark case of NLRB v. Yeshiva University, the Supreme Court applied this test and found that the university faculty members were managerial employees by virtue of the fact that they participated in the making and implementation of decisions through their participation in the faculty senate and committee structure.

In NLRB v. Hendricks County Rural Electric Membership Corp., confidential employees who assisted and acted in a confidential capacity to persons exercising managerial functions in labor relations matters were also excluded.

However, probationary and regular part-time employees are not excluded under the NLRA. Chemical Workers v. Pittsburgh Plate Glass Co.

An awareness of the exclusions and guidelines found under the

NLRA is reflected in the legislative history and final wording of the IELRA. However, there is also an awareness of the unique nature of the relationship between public education employers and employees.

Unit Determination Under the IELRA

Section 7 of the IELRA provides the basic statutory framework for unit determination under the IELRA. The prefatory statement of Section 7 gives the IELRB the right to administer the recognition of bargaining representatives of employee school districts, public community colleges, state colleges and universities, and any state agency whose major function is providing educational services. This power is limited by the provision that the IELRB must make certain:

That each bargaining unit contains employees with an identifiable community of interest and that no unit includes both professional employees and nonprofessional employees unless a majority of employees in each group vote for inclusion in the unit. (IELRA, Section 7)

It is of particular interest to note that the drafters of the IELRA made the community of interest a statutory requirement and that it requires a majority vote of both the professional employees and the non-professional employees before they can be included in the same unit.

It is also of interest, that unlike the private sector setting, there is a trend among unions representing educational employees to seek a wall- to- wall bargaining unit. The reason for this difference is the historical lack of co-operation between different groups of educational employees when one of the groups was

involved in labor disputes. That lack of co-operation was due in part to the fact that relatively few of the non-professional employees were unionized and so subject to employer discipline if they did not cross picket lines. It is the apparent intent of the major unions representing educational families to seek to represent the "educational family."

Section 7(a) provides the parameters for the decision making process of the IELRB:

(a) In determining the appropriateness of a unit, the Board shall decide in each case, in order to ensure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as historical pattern of recognition, community of interest, including employee skills and functions, degree of functional integration, interchangeability and contact among employees, common supervision, wages, hours and other working conditions of the employees involved, and the desires of the employees. Nothing in this Act shall interfere with or negate the current representation rights or patterns and practices of employee organizations which have historically represented employees for the purposes of collective bargaining, including but not limited to the negotiations of wages, hours and working conditions, resolutions of employees' grievances, or resolution of jurisdictional disputes, or the establishment and maintenance of prevailing wage rates, unless a majority of the employees so represented expresses a contrary desire under the procedures set forth in this Act. This Section, however, does not prohibit multi-unit bargaining. Notwithstanding the above factors, where the majority of public employees of a craft so decide, the Board shall designate such craft as a unit appropriate for the purposes of collective bargaining.

It is significant to note that the statute uses the definite article "the" when referring to "appropriate unit." Arguably, this would require the IELRB to select the most appropriate unit.

It is also of significance that although the statute lists factors which are to be considered when making the decision, the statute also makes it clear that the list is not necessarily exhaustive.

Sections 7(b) and (c) provide the process for recognition of representatives by the employer and for recognition by election. Neither of these processes will be discussed since the focus of the chapter is on how the IELRB will analyze questions of unit determination.

Exclusions From Bargaining Units

Section 3 extends the right to organize to educational employees. Section 2(b) provides a definition of educational employee:

"Educational employee" or "employee" means any individual, excluding supervisors, managerial, confidential, short term employees, student, and part-time academic employees of community colleges employed full or part time by an educational employer, but shall not include elected officials and appointees of the Governor with the advice and consent of the Senate. For the purposes of this Act, part-time academic employees of community colleges shall be defined as those employees who provide less than 6 credit hours of instruction per academic semester.

(IELRA, Section 2(b))

Unlike the NLRA, the IELRA provides a statutory exclusion for managerial, confidential and part-time employees.

To date, most of the controversy in interpreting the exclusions has revolved around the questions of who will be considered supervisors, managerial employees, and confidential

employees.

Section 2(g) provides the statutory definition of supervisor:

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

In the original version of the statute, the supervisory exclusion was the only statutory exclusion. That exclusion was not nearly as explicit, the definition only provided that "No employee or group of employees shall be deemed to be a supervisor because the employee or group of employees participates in decisions with respect to course, curriculum, personnel, or other matters of educational policy." (H.B. 1530, as enrolled, Section 2(9).)

This provision was obviously intended to negate the application of Yeshiva to public school employees. The language was changed to its present form by the governor's amendatory veto. (Governor's Amendatory Veto, pp. 2-3) The change was an attempt, in his words, "to create a workable and fair system that balances the rights of educational employees with the unique managerial problems that beset educational employers and the taxpayers who ultimately pay the bill." (Id. at p. 2)

The effect of the change was that now the IELRB was to apply a percentage of time test. If an individual devotes a preponderance

of her time to exercising supervisory authority, she is to be considered a supervisor. In order to understand the legislative intent of the meaning of the definition, it is necessary to look at the House debates on the IPLRA. The language was taken directly from the IPLRA and at the time the language was debated, the IPLRA provided for coverage of educational employees. The following exchange took place during the floor debates:

Representative Hoffman:

"I'm chairman of a social studies department at a small suburban high school where I spend...40% of my time in the classroom and then...10% of the time...with the responsibility as the chairman of the department or, to translate it into total percentage, I guess it would be 80% and 20%. And that's fairly typical of the supervisors or the department chairmen in our high school. Would this language prohibit the department chairmen in the high school where I teach from organizing their own bargaining unit?"

Representative Grieman:

"Are you presently organizing a supervisory unit?"

Representative Hoffman:

"No."

Representative Grieman:

"Then you could not under this Bill...(S)upervisors, unless they are presently in a supervisory unit, cannot organize in supervisory units after this Bill."

Representative Hoffman:

"But since a preponderance of my time is not spent in supervision, I would be required to become part of the teachers bargaining unit. Is that correct?"

Representative Grieman:

"I guess if you're a teacher, you're a teacher. You would not have been a supervisor before either.

83rd Gen. Assem. House Debate on S.B. 536.pp.287-88
(June 24, 1983).

The debates on the House floor reflect a general intent that department chairs should not be considered supervisors unless they could meet the preponderance of time test. The Senate debates that

took place after the amendatory veto made the intent even more explicit:

Senator Davidson:
Question of the sponsor.

President:
Indicates he will yield, Senator Davidson.

Senator Davidson:
Senator Bruce, when you were asked earlier about supervisor, and you said it would depend on the...preponderance of employment time. The question I have, would that include a department chairperson in that title?

Presiding Officer: (Senator Demuzio)
Senator Bruce.

Senator Bruce:
Senator Davidson, it would be my feeling since that we were talking about determination by actual function and not title, and since we're talking about whether a person has the right to hire, fire and effectively recommend a...an individual, that under NLRA rules, regulations and prior court decisions, I don't believe that department chairs in either K through twelve or community colleges would...would be considered supervisors; they rarely could be, and I think that if they were to have spent a preponderance of their employment time, as it was defined by the Governor in this amendatory veto, they could be, but I don't believe that they...that they do. The Yeshiva decision which dealt with New York seemed to say that they would be, but it is clear under Illinois law and the proceedings here that that is an entire different situation. They do not have the input in its administrative or managerial decisions which the Supreme Court found determinative in that case.

83rd. Gen. Assem., Senate Debate on H.B. 1530, p. 61, 62 (Nov. 2, 1983).

It is clear from this exchange that it was the legislative intent that department chairmen should rarely, if ever, be considered as supervisors.

Section 2(0) provides the statutory definition of managerial employee:

"Managerial employee" means an individual who is engaged

predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices.

(IELRA, Section 2(0))

This exclusion was also added by the amendatory veto.

(Amendatory Veto Message, p. 3)

The legislative history of this section also indicates that this was intended to be a very narrow exclusion. The following exchange took place on the Senate floor following the Governor's amendatory veto message:

Senator Luft:

Question, please, Mr. President.

President:

Indicates...the sponsor indicates he'll yield. Senator Luft.

Senator Luft:

Managerial employee, the definition, is it determined by his title or by the role of the individual?

President:

Senator Bruce.

Senator Bruce:

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

President:

Senator Luft.

Senator Luft:

Okay. As a managerial employee, is that normally the central management team?

President:

Senator Bruce.

Senator Bruce:

That...when we are...I believe that we will develop and using NLRA decisions, the National Labor Relations Act, that they have...they have very narrowly defined managerial employees, and I believe that that will be the case here...that that function of management would

be limited to and kept within a central management team. We're not talking about excluding everyone, just those very limited people that are central management, at the very highest level.

83rd. Gen. Assem, Senate Debate on H.B. 1530, p.45-6 (Nov. 2, 1983)

The intent to make this a narrow exclusion is reflected in the statement that it is limited to the central management team. Not only is it to be a very narrow exclusion, the IELRB is to use the same preponderance of time test that is to be used in determining the supervisory exclusion.

The statutory definition of confidential employee is found in Section 2(n):

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

(IELRA, Section 2(n))

The legislative history reflects an intent to follow the decisions of NLRB which would result in a relatively narrow exclusion. This intent is reflected in the following exchange:

Senator Welch:

Question of the sponsor, Mr. President.

President:

Indicates he'll yield, Senator Welch.

Senator Welch:

...Senator Bruce, I have a question concerning your section on confidential employees. Could you tell me whether or not that section refers to only those persons who work with collective bargaining materials?

President:

Senator Bruce.

Senator Bruce:

Thank you. Both...both this question and the earlier

one bring to mind the National Labor Relations Act, and when we start talking about confidential employees, professional employees, managerial employees, I believe that...that all of us should be aware that under National Labor Relations Act, we have had more than thirty years of decisions. Other states, when they have enacted collective bargaining bills, have looked to the prior decisions under the National Labor Relations Act, and I believe that the State of Illinois should also do that. We don't have to reinvent the wheel when it comes to deciding what is a confidential employee. The purpose of that exclusion as it exists in the section is...is to ensure that people are not put in any sort of position of being compromised. The definition within the Statute says that they must have access to the confidential labor relations material of the employer, and so that would probably mean the secretary to the head of the labor relations section would be a confidential employee. It would not and should not include people who have access to the budgets, planning documents and other general material of a...a...an educational institution.

President:

Senator Welch.

Senator Welch:

Then your specific intent is to exclude any person who would be an otherwise confidential employee if they don't deal with...collective bargaining.

President:

Senator Bruce.

Senator Bruce:

That is correct. Again, we should look to the private sector where we have a...a good case history. The matter has been well debated and decided. The definition, for example, is not even within the National Labor Relations Act at all. This has been done on a case-by-case basis, and I believe Illinois, in interpreting this law, their courts and the agencies of the State of Illinois should not be bound by the private sector; but where those prior decisions under the National Labor Relations Act can be used to give appropriate guidance to the courts and agencies of the State of Illinois on how a matter should be...decided as to whether or not an individual is a confidential employee, those private sector cases should be utilized.

President:

Senator Welch.

Senator Welch:

So, your intent is to include other case decisions in NLRB references in interpreting the...the provision of

the Statute dealing with confidential employees, is that correct?

President:

Senator Bruce.

Senator Bruce:

I would assume that the courts of the State of Illinois and the Educational Labor Board would certainly want to look at the National Labor Relations Act and develop from that, where they can, a definition of confidential employee. We do not need to reinvent the wheel, it's thirty years of case decisions.

83rd Gen. Assem., Senate Debate on H.B. 1530, p. 46-48 (Nov. 2, 1983)

It is important to note that the confidential exclusion has two alternatives for satisfying the requirement. The employees may be excluded if they regularly assist an individual who has managerial responsibilities with regard to labor relations or if the employee has access to information relating to the effectuation or review of collective bargaining responsibilities.

Appropriate Units Under the IELRA

Section 7 of the IELRA requires the IELRB to find an identifiable community of interest among employees within any bargaining unit it certifies. The first question to be discussed is when an employer with multiple facilities must recognize one unit for all of its employees. The most significant published decision dealing with this question is Tri-County Special Education Cooperative, 2 PERI 1046.

The case arose out of a recognition petition filed by the Tri-County Special Education Association at Anna. The petition requested recognition of a unit including all full and regular

part-time employees employed by the employer at its Anna, Illinois facility.

Tri-County Special Education Cooperative objected to the unit on the basis that recognition of the unit would bring about a fragmentation and proliferation of bargaining units. This would result in a substantial burden on the Cooperative because it operated a number of separate facilities. The Cooperative also argued that the proposed unit was inappropriate because it was an artificial and arbitrary separation of a larger appropriate unit because the employees at the other facilities shared a community of interest with the employees at the Anna facility.

As always, the Hearing Officer began the analysis by considering the factual background. The Cooperative has been in existence since 1968. It serves three counties and provides services to approximately 2,000 students. The Cooperative has approximately seventy certified employees and operates six centers.

The center at Anna employs approximately thirty certified employees. Unlike the other centers, the center at Anna is a residential placement center.

The policy making body of the Cooperative is the Executive Board comprised of the superintendents of the local districts served by the Cooperative. There is an Executive Director responsible to this Board who is directly responsible for all of the programs operated exclusively by the Cooperative. The other managerial personnel include a project coordinator for the program at Anna, and

three program coordinators. All of those individuals are supervised by the Executive Director.

There are specialized teaching positions at Anna that do not exist at other programs operated by the Cooperative and there are positions at the other centers that do not exist at Anna. The authority for administration of the Cooperative rests primarily with the Executive Board. This is despite the fact that the Administrative District has the authority to sanction or disapprove the actions of the Executive Board. Although the project coordinator and the program coordinators at the Anna Center interview prospective employees, they do not have the authority to hire employees. That authority, as well as the authority to terminate the employment of individuals, rests with the Executive Director. Evaluations and day to day personnel matters such as requests for personal leave are handled by the immediate supervisors of all employees. The Executive Director does not become involved in these matters unless a problem arises. The budget for each of the centers is prepared by the on site managerial personnel, the Executive Director and the central office bookkeeper. Those budgets are subject to approval by the Administrative District and the Executive Board.

At the time the petition was filed there was not a history of formal or informal bargaining between the Cooperative and its certified employees. All of the salaries for certified employees are paid on the same salary schedule and receive the same benefits. The only distinction is that teachers working in local school districts

work the same calendars as those districts so that students can be mainstreamed and go to school with their peers.

Based on these facts, the Hearing Officer found that the proposed unit was inappropriate because the employees working at Anna shared a community of interest with employees working at the other facilities operated by the Cooperative.

The Hearing Officer noted that although there were positions unique to the center at Anna, the positions all served the same basic function as those in other facilities. All of the teachers in the Cooperative were required to have the same certification, that of teaching the student with severe behavior disorders or severe and profound learning disabilities. Therefore, the teachers at Anna did not have certification requiring special expertise or qualifications that would justify establishing a separate unit.

The Hearing Officer also found it significant that all of the teachers worked under the same salary and fringe benefit scale. This indicated that there was no bifurcation of control over labor relations as between the Anna Center and the central administration.

The Hearing Officer also addressed the question of whether the employees had the right to create smaller units if it would enhance their fullest exercise of their statutory rights. Relying upon Downers Grove Community High School District No. 99, 1 PERI 1105, the Hearing Officer first acknowledged that the statutory requirement was that the petitioned for unit meet the minimum standards necessary for appropriateness. However, the Hearing

Officer relied upon the finding in Elgin Community College District #509, 1 PERI 1085 in finding that the requested unit would result in the separating out of individuals that would be more appropriately included in a comprehensive potential certified unit of all certified employees of the Cooperative. The portion of Elgin relied on is:

"even though the Act does not literally command that factors other than those specifically enumerated in Section 7(a) (historical pattern, community of interest, desire of employees) be considered in making unit determinations, the Act wisely allows for the weighing of factors 'not limited to' those specifically identified in the Act. We will, of course, consider allegations that a proposed bargaining unit is inappropriate based on claims of gerrymandering or arbitrary fragmentation or based on allegedly compelling efficiency needs dictated by the structure and organization of the employer. In weighing these factors as well as those that the statute specifically requires us to consider in making unit determinations, it will be our intent to establish units which are 'appropriate for the purpose of collective bargaining.'" (Id. at p. 168)

The Hearing Officer acknowledged that there were, in fact, differences between the employees at the different facilities operated by the Cooperative. Those differences included little functional integration, a lack of interchange among facilities, special characteristics of each program and geographical separation of the facilities.

However, these differences were outweighed by very significant community of interest factors. Those factors included central administration of all the facilities, uniform employment policies, and the same educational objective shared by all the personnel at each facility.

The case is significant because it stands for the proposition that the IELRB is willing to engage in a balancing test to determine if the community of interest factors are outweighed by the differences.

Another significant question in the area of appropriate units is whether employees teaching in a joint program, working under the auspices of an administrative district, should be included in the unit of that district's teachers or should be in a separate unit. The most significant case in this area is Sterling Community School District No. 5, 2 PERI 1051.

This case arose out of a unit clarification petition filed by the Sterling Education Association. The petition sought the inclusion of all teaching personnel employed at the Whiteside Area Vocational Center in a bargaining unit consisting of all teaching personnel, excluding administrative personnel, employed by the Sterling Community School District.

The Whiteside Area Vocational Center was created pursuant to a joint agreement authorized by Section 10-22.31a of the School Code. Seventeen school districts are parties to the joint agreement and three private schools participate to a lesser degree in the program. The Center is directed by a Board of Control comprised of the district superintendents of each of the seventeen districts. It has the responsibility to develop general policies not in conflict with the policies of the individual Boards of Education and is to advise the Administrative District relative to the administration of the

Center. The Sterling School District was designated as the Administrative District but the Board of Control has the right to change the Administrative District.

The 1982-83 joint agreement provided that the staff of the Center, for legal purposes, should be considered as employees of the Sterling school district and would be subject to all the policies adopted by Sterling's Board of Education.

The 1983-84 joint agreement changed that portion to make the employees subject to Sterling's policies except where those policies conflicted with the Center's policies.

It was unclear whether collective bargaining agreements between the school district and the union covered Center teachers. The language consistently referred to "regularly employed, certificated teachers" and referred to vocational teachers only in the "miscellaneous" section of the contract.

The hiring procedure of the Center was found to be of particular significance in the IELRB's decision that the Board of Control should be considered a separate employer for purposes of unit determination. The Board of Control has to approve the filling of a position before the position can be posted. The Director of the Center, legally an employee of the Administrative District although hired by the Board of Control, then interviews candidates for the position. The Director recommends an individual to the Administrative District's Board of Education who has the authority to approve the employment of the candidate. However, the Board of

Control also has the authority to approve the hiring of an individual before the district's Board of Education considers the matter.

The Director recommends discharges of Center employees as well. The Board of Control then approves the action and then the district's Board of Education approves the action.

The Board of Control has a reduction in force policy different than the district's. The Center teachers have tenure at the Center only and the seniority lists at the district and the Center are different.

The salary schedule for Center teachers is the same as that of the district teachers. However, Center teachers also receive supplemental pay, set by the Board of Control, and their entire salary is paid for with Center funds.

The IELRB relied upon Section 2(a) of the Act which provides that "the governing body of joint agreements of any type formed by two or more school districts" may be considered an educational employer. Although the Administrative District displayed some attributes of an employer as program administrator, the Board of Control possessed sufficient decision making authority to obtain separate employer status. Characteristics of that authority included the right to vote on the hiring and firing of employees, the adoption of governing policies that were substantially different than those of the district's, the element of financial control exhibited by the right to determine supplemental pay, and the supervision of Center teachers by Center supervisory personnel rather than district

personnel.

The IELRB also noted that a recent court decision had found that the Center, as the educational employer, could only grant tenure within the Center and did not have the power to confer tenure in member districts. Koppi v. Board of Control of Whiteside Area Vocational Center, 133 Ill. App. 3d 591.

The case is significant because it discusses factors the IELRB will consider when determining whether employees working in a joint agreement setting should be considered employees of the Administrative District or of the governing body of the joint agreement.

The question of what employees qualify as regular part-time employees is also important for questions of unit determination. The case of Mt. Zion Community School District No.3, 1 PERI 1013 reveals some of the factors the IELRB will consider in coming to a conclusion. The case arose when the employer refused to consider regular part-time employees working less than thirty hours a week as members of a unit comprised of full and part-time cafeteria workers, custodial and maintenance employees, mechanics, bus drivers and secretaries.

The statement of facts reveals that all part-time employees are appointed on a yearly basis, are scheduled to work a set number of hours each day, receive the same benefits and are subject to the same evaluation and personnel policies. Because of the common nature of their employment with other employees, the Hearing Officer found

that the part-time employees working less than thirty hours a week shared a sufficient community of interest that they should be included in the unit with other full and part-time employees.

The case is significant because it makes it clear that the test for community of interest is shared characteristics and is not a function of hours of employment.

The question of whether part-time certified employees possess a sufficient community of interest with full-time certified employees is another issue that was addressed by the IELRB. The case of Pleasant Valley School District No. 62, 2 PERI 1020 addressed that question.

In that case, the Pleasant Valley Federation of Teachers filed a representation petition. The petition sought the right to represent all full-time certified teachers. The petition sought to exclude the statutory exclusions as well as substitutes and part-time employees. The district had three part-time employees - a music teacher, band teacher, and school nurse.

The findings of fact established the following:

1. Full-time certified employees normally work Monday through Friday from 8:10 a.m. until 3:20 p.m. (tr.6).
2. Carol Wagaman is a certified teacher of vocal music. She normally works on Monday and Tuesday from 8:10 a.m. until 3:20 p.m. She is on the nontenure track (tr.6).
3. Diane Roeder is a certified teacher of band. She normally works on Friday from 8:10 a.m. until 3:20 p.m. She is on the nontenure track (tr.6).
4. Carol Tjaden is a certified school nurse. She normally works on Tuesday afternoons for two hours (Emp. 4).
5. Salaries for part-time employees are based on their

- years of service and education commensurate with full-time teachers and then prorated accordingly (Tr. 13).
6. Wagaman and Roeder signed contracts substantially similar to those signed by full-time tenured and nontenured classroom teachers, i.e., providing for an annual salary (Emp. 7,8).
 7. Tjaden signed a contract for an hourly wage (Emp. 6).
 8. Wagaman, Roeder and Tjaden receive the same paid days off as full-time employees except such are prorated (Tr. 20, 28).
 9. Wagaman, Roeder and Tjaden do not receive the insurance benefits, prorated or otherwise, provided to the full-time employees (Tr. 21-22, 38-39).
 10. Wagaman and Roeder are eligible to participate in extracurricular programs (Tr. 15).
 11. Full- and part-time employees have the same supervisors (Tr. 14).
 12. There is recurring interaction between full- and part-time employees. Wagaman and Roeder make arrangements with the classroom teachers for students' release for vocal music, band and related programs (Tr. 16-18). Tjaden interacts with the classroom teachers in terms of both nursing and providing supplemental instruction (Tr. 26-27).
 13. Wagaman and Roeder grade students and communicate the grades to classroom teachers for placement of the grade on report cards (Tr. 20).
 14. Roeder and Tjaden are also employed at other school districts (Tr. 36). (Id. at 50)

Based on these facts, the Hearing Officer found that there was a sufficient community of interest to warrant the inclusion of the part-time certified employees in the unit. The salaries of the part-time staff are determined on the same basis, they are located within the same buildings, the skill levels are similar, the calendar length of employment and expectations of re-employment are similar, the supervision is identical, benefits are substantially the same, there are regularly recurring work schedules and there is regular interaction between the two groups. There was only one factual

difference and that was that one group was full-time and the other group was part-time.

The Hearing Officer distinguished this finding from that of Downers Grove, 1 PERI 1105. In that decision, the IELRB found that a musical accompanist used on an occasional basis did not have a sufficient community of interest to be included in a unit of full and part-time employees. In that case, the pianist worked only on a need basis and there was no contractual obligation to use her when the need did arise. The Hearing Officer characterized that type of position as casual and short term.

All school districts have occasion to use substitute teachers. Therefore, it is of interest to both substitute teachers and school districts whether substitute teachers have the right to organize under the IELRA. The IELRB has addressed that question regarding on-call substitutes in Rockford School District No. 205, 2 PERI 1031.

The case arose when the Rockford Council of Substitute Teachers filed a representation petition for a bargaining unit consisting of all regularly employed, on-call substitute teachers. The school district objected to this petition on the basis that employees were short term and thus not educational employees under Section 2(b).

The statement of facts reveals that substitute teachers in the district are listed on a roster kept by the district. In order to be on the approved roster, a teacher must be a certified teacher.

She is also required to complete an application, take a physical examination and be interviewed. After the teacher is approved by the Board of Education and placed on the list, she may substitute for up to ninety days in any one position. Substitutes do not sign employment contracts nor are they eligible for tenure.

Substitute teachers are paid on a salary schedule separate from the regular teachers' salary schedule. Placement on that schedule is a function of education and experience. After a substitute accumulates a total of 170 days of substitute teaching (the total may be over a period of time) she becomes eligible for step increases.

A letter is sent to every person on the list at the end of the school year and the person must respond affirmatively if she wishes to remain on the list.

The Hearing Officer first considered the district's contention that the substitutes were short-term employees and thus not covered by the statute. Bismarck Community School District #1, I PERI 1163 provides a definition of short-term employee. The elements of that definition are 1)employment for a definite period of time, 2)in place of another employee who is expected to return, and 3)who does not share an adequate community of interest with the rest of the bargaining unit. In Bismarck, a long-term substitute teacher was seeking the same rights as regularly employed teachers and was denied that right. The Hearing Officer distinguished the case in Rockford from Bismarck for several reasons.

The first reason was that the substitute list comprised an exclusive pool of workers that the district would draw from as the need arose. Based on NLRB decisions and an ISLRB decision, the Hearing Officer found that by virtue of being in that exclusive manpower pool, "Substitutes can be considered employees despite the fact that the actual work they perform does not occur daily or even regularly." (Rockford at p.88)

The Hearing Officer also found that the substitutes had a reasonable expectancy of employment. The district maintains a list of between 200 and 300 substitutes and had in excess of 13,000 substitute days in school year 1984-85. Based on those numbers, the Hearing Officer found that although the substitutes do not have a certain expectancy of employment they do enjoy a reasonable expectancy of employment by virtue of their placement on the list.

The Hearing Officer also found that the existence of salary steps provided some reason for expectancy of employment. Indeed, the district had ten steps on its salary schedule which the Hearing Officer interpreted as holding out the promise of a long term relationship between the district and the substitutes.

The Hearing officer also distinguished Rockford from the situation in Bismarck on the basis that work performed by per diem substitutes is more on-going than that of long-term substitutes:

The focus should not be placed upon the expected return of the absent teachers. Rather, the focus should be on the fact that absences are continuous. In fact, they occur daily throughout the school year and, presumably,

from school year to school year. In that sense the work is not temporary. (Id. at p. 88-89)

In summary, the Hearing Officer found that:

The substitutes share common qualifications, a common salary schedule, similar working conditions, are interchangeable, and share common supervision. Substitutes do not receive fringe benefits such as sick leave days, personal leave days, hospitalization or pension. They are selected from a common pool and the employees desires have been demonstrated through the requisite showing of interest. In addition, during the pendency of this matter, no other labor organization has sought to intervene. (Id. at 89)

The case is significant because while it acknowledges the definition of short-term employee under Bismarck, it substantially expands the coverage of the statute by providing an exception to the short-term exclusion if the employees can demonstrate an expectancy of employment.

One of the early IELRB decisions dealing with unit determination was Jacksonville District No. 117, 1 PERI 1106. This case arose out of a representation petition filed by the IEA-NEA. The petition sought an election to represent a union comprised of all full and part-time secretaries, custodians, maintenance employees and teacher aides. The IELRB granted an election but ordered that three separate units would be most appropriate. The units found to be appropriate were (1) custodial and maintenance employees; (2) bus drivers; and (3) secretaries.

The IELRB reached the decision based on the fact pattern shown by the record.

First, custodial and maintenance workers work out of the

maintenance shop in the Central Administrative Office and are part of the Buildings and Grounds Department. They are supervised by the Supervisor of the Buildings and Grounds Department. They are paid by the hour and receive overtime pay for any hours worked in excess of forty hours per week. They are scheduled for work during the winter and spring vacations and receive Good Friday, Thanksgiving, and Christmas as paid holidays. They receive pay raises for every five years of service to the district and are entitled to a paid vacation based on the number of hours of employment.

Bus drivers work out of the transportation building and are supervised by the Director of Transportation. Most of them work from 7:00 a.m. until 8:15 or 8:30 a.m. and again from 2:30 p.m. until 4:00 p.m. They are paid by the trip for their regular assignments and receive an hourly rate for Saturday work or other extra assignments. Like the custodial and maintenance workers, bus drivers are entitled to pay raises for every five years of service to the district. They are not formally evaluated on their work performance and do receive paid vacation time. They do receive ten days sick time as do the other employees of the district.

The secretaries in the district all work regular eight hour days. They work in individual school buildings and are supervised by the administration center administrator or building principal for whom they work. Their work year varies from ten months to a year-round schedule. Those secretaries who work at least ten and one-half months receive paid vacations and approximately fifty per

cent of the secretaries are entitled to paid vacations. Most of the secretaries do not work during Thanksgiving, winter and spring vacations.

The IELRB found that the differences in terms of wages, supervision, hours, skills and functions and degree of contact were sufficient to direct an election for each of the units. Within each of the units, the IELRB found a sufficient community of interest.

This case is significant because it was the first full IELRB decision to address the appropriate unit question and established the analytical approach the IELRB would take. The IELRB will consider the way pay is determined, commonality of supervision, work hours and the comparability of fringe benefits.

Section 7 of the IELRA provides, in part, that no unit shall include both professional and non-professional employees unless a majority of both groups vote for inclusion in the unit. There are three particularly important decisions that deal with attempts to include professional and non-professional employees in the same unit. The decisions are Niles Elementary School District No. 71, 2 PERI 1009, Alton Community Unit School District No. 11, 2 PERI 1048 and Kankakee Area Special Education Cooperative, Case No. 84 UC 0007-C.

The Niles decision arose out of a representation petition filed by the Niles Council of Teachers. The petition sought the recognition of a unit comprised of all full and part-time professional instructional personnel including classroom teachers, special education teachers, librarians, nurses, social workers,

psychologist, speech therapists and reading specialists. The Hearing Officer directed an election for a bargaining unit including all those positions and the health aide. Every member of the unit except the health aide holds a teaching certificate.

The district excepted to the inclusion of the health aide on the basis that she did not have a teaching certificate so could not be considered a professional employee under Section 2(1) of the statute. Without a vote to determine if professional and non-professional employees desired to be in the same unit, the district maintained that the health aide could not be considered as part of the unit.

The district also maintained that the health aide lacked a community of interest with the other employees because she did not contribute to the district's educational programs except in an incidental manner.

In her findings, the Hearing Officer found that the health aide was a registered nurse but did not hold a teaching certificate. She found that the health aide provides emergency health care, answers the phones when the secretary is not present, monitors student absences, and maintains and reviews student health records. She also found that there was not instruction of classes by the health aide.

Because the health aide is a registered nurse and because of the nature of her duties, the Hearing Officer determined that the health aide is a professional employee and shared a community of

interest.

The full IELRB reversed the decision of the Hearing Officer to the extent that the health aide was included in the bargaining unit. The basis of the reversal was that the health aide did not meet the standard of a professional employee as set by Section 2(1) of the statute. Because the health aide was not a professional, the statute requires a majority vote of both the professional and non-professional employees in the unit. No such vote was ever conducted so the health aide must be excluded from the unit.

The Alton decision marked the first time the IELRB extended recognition to a "wall to wall" bargaining unit that included all of the professional and non-professional employees (with statutory exclusions) of a district. The decision arose out of a representation petition filed by the Alton Education Association (AEA). The petition sought a unit consisting of:

All full and part-time certificated and educational support personnel including but not limited to: teachers, counselors, nurses, librarians, social workers, psychologist, coordinators, department chairpersons, secretaries, aides, special education aides, safety aides, bus aides, clerks, food service workers, custodians, maintenance workers, crossing guards, warehouse workers, and drivers. (Alton at 119)

The district contended that there were major differences in the duties, responsibilities and working conditions of the certificated and non-certificated personnel and that no community of interest existed. The district also argued that the historical pattern of recognition and bargaining confirmed the significance of

those differences.

The Hearing Officer found that the district recognized the AEA as the representative of its certified employees in 1972 and had negotiated collective bargaining agreements with them since that time. The Hearing Officer also found that the district recognized the Alton Association of School Personnel (AASSP) as the representative of its non-certificated employees in 1977 or 1978. In 1978 the AASSP affiliated with the IEA and, with the assistance of the IEA, negotiated a collective bargaining agreement with the district. In 1981, the AEA and the AASSP voted to merge into a single organization, the AEA. Since that time the district has bargained with, and entered into separate collective bargaining agreements with the AEA for the certificated and non-certificated employees.

The Hearing Officer found that there was a significant community of interest between two groups of employees with regard to wages, hours and other working conditions. Although the levels of pay are different, pay for both groups is influenced by longevity. Medical and life insurance, sick leave, personal leave and leaves of absence are very similar. Employees in both groups may volunteer for extracurricular duty such as loading buses and taking tickets at athletic contests. Both groups are paid the same rate of pay for those duties. Both groups attend orientation days, participate in safety and other committees, and have access to the same procedures for resolving differences not covered by the collective bargaining

agreement.

The Hearing Officer also found that the history of bargaining in the district reflected an interrelationship between the two groups. There had been separate sets of negotiations but the same members on both sides often participated as bargaining team members or as observers. Virtually identical language was contained in many sections of both contracts.

Based on these findings, the IELRB affirmed the Hearing Officer's decision, pending approval by a majority of both groups, to extend recognition to the combined unit of professional and non-professional employees. The IELRB acknowledged that there were many differences between the duties, responsibilities and conditions of employment between the two groups. However, the community of interest and historic patterns of bargaining combined to outweigh those differences and warrant the inclusion of both groups in a single bargaining unit.

The IELRB also noted that H.B. 701, the predecessor to the IELRA had sanctioned wall to wall units. The IELRB stated that the General Assembly was clearly aware of that fact and that the IELRA's provision for wall to wall units was a manifestation of the General Assembly's intent to provide for precisely the type of unit proposed in this case.

This case is particularly significant because it isolates the factors the IELRB will consider when faced with decisions about wall to wall units, which are primarily community of interest, historic

patterns of bargaining and the wishes of employees.

Kankakee arose as a result of a unit clarification petition filed by the employer. The existing unit, recognized pursuant to the provisions of H.B. 701, consisted of all regularly employed professional, non-supervisory employees and teacher aides, occupational therapists, and music therapists. The creation of the unit had been approved by a majority vote of both professional and non-professional employees. The employer sought a unit clarification on the basis that there was not a shared community of interest between the groups. The Hearing Officer denied the petition and the IELRB upheld the Hearing Officer's decision.

The Hearing Officer found that all employees in the unit work directly with children to improve the children's physical or mental condition. Teacher aides assist teachers with instruction and perform similar duties in the classroom. They prepare classroom materials, correct work and assist students on an individual basis.

Teachers and teacher aides are paid on a salaried basis although they are on different pay scales. They work the same schedules and the same number of days. With the exception of belonging to different retirement systems, they receive the same benefits. Teachers are eligible for professional leave and can accrue seniority while aides cannot. Teachers can obtain tenure but aides cannot.

Teacher aides and teachers are in almost constant contact. Teacher aides attend faculty meetings, in-service training with the

teachers and participate in the annual reviews of students where their input is given equal weight to that of the teachers.

The teachers do have some oversight responsibilities vis a vis the teacher aides. They are responsible for assigning work to the aides and may participate in the interview process. They may also have some informal input into the evaluation of the aides. However, the ultimate responsibilities in these areas belongs to the Program Coordinator. The teachers have no authority to hire, transfer, suspend, lay off, recall, promote, discharge, or discipline teachers aides or increase aides' salaries.

These oversight responsibilities, the IELRB found, do not negate the community of interest demonstrated by the factors considered. Therefore, the combined unit was held to be appropriate.

This case is significant because it reaffirms the IELRB's willingness to weigh differences against factors indicating a community of interest.

Supervisory, Managerial and Confidential Exclusions

Supervisory, managerial, and confidential exclusions play a major role in the determination of professional units. The legislative history makes it clear that these are to be narrow exclusions. However, school districts would prefer to broaden those exclusions since many school personnel act in more than one capacity.

Four Rivers-Jacksonville District No. 117, 2 PERI 1058 is an example of a case where all three of the exclusions are dealt with.

The case arose out of a representation petition filed by the Illinois Federation of Teachers (IFT). The petition sought certification of a bargaining unit consisting of all certified and non-certified employees excluding supervisors, managerial and confidential employees.

The Hearing Officer held a hearing on the petition and reached the following conclusions:

1. Under the Act, the "employer" is the Four Rivers Council rather than the Operating Board of Directors or the Administrative District;
2. Administrative Secretary Eleanor Abel is a confidential employee under the Act, but Administrative Secretaries Velma Smith and Marilyn Johnson are not confidential employees;
3. Program Supervisors Pat Baptist, Delores Hill and Edward Randorf are not managerial employees under the Act;
4. Program Supervisors Donald Bryan, Janet Engle, Robert Everett, Beverly Johns and Veva Siria are not supervisory employees under the Act;
5. The unit petitioned for by the IFT, which includes professional and nonprofessional employees of the Cooperative, is appropriate under the Act.
(Four Rivers-Jacksonville at p. 143)

Four Rivers-Jacksonville School District No. 117 (the Cooperative) filed exceptions to those findings, asserting that administrative secretaries Velma Smith and Marilyn Johnson are confidential employees, that all of the program supervisors named in the third conclusion are managerial employees, that all of the program supervisors named in the fourth conclusion are supervisors, and that the IELRB should find separate units of professional and non-professional employees to be appropriate for collective

bargaining.

The IELRB affirmed the Hearing Officer's decision that the employees alleged should be included in the unit and affirmed the decision that a combined unit was appropriate. The IELRB reversed the Hearing Officer's decision regarding the inclusion of certain program supervisors named in the petition. The basis of the reversal was that although those positions were neither managerial nor supervisory they had duties and responsibilities which made it inappropriate to include them in a bargaining unit with other employees.

The Cooperative consists of twenty-four school districts which combined to provide special services for students requiring such services. The Cooperative is governed by the Four Rivers Council (Council) and by the Operating Board of Directors (Operating Board). The administrative staff consists of the Director of Special Education and two assistant Directors.

Prior to the filing of the petition, a personnel committee of the Operating Board met on an informal meet-and-confer basis with a personnel committee of elected representatives of certified and non-certified employees.

The IELRB considered the issue of confidential employees first. The Hearing Officer found that the Director has substantial input into the formulation, determination and effectuation of the Cooperative's management policies regarding labor relations. He makes recommendations regarding the hiring, firing and transfer of

personnel. He has the day-to-day responsibility for implementing labor relations policies and acts as an advisor to the personnel committee involved in the meet and confer sessions.

The three administrative secretaries keep the files for the administrative personnel, type reports and correspondence and keep the financial records.

Abel is the secretary to the Operating Board. Her duties include acting as recording secretary for the Operating Board and acting as the personal secretary to the Director. As his secretary, she types all of his confidential memos and has access to all the administrative files, including those dealing with labor relations. As recording secretary to the Operating Board she is privy to confidential information dealing with preparations for the meet and confer sessions. Based on the nature of these duties the IELRB affirmed the decision of the Hearing Officer that she is a confidential employee.

Smith's main administrative responsibility is handling personnel files. There is no evidence that she regularly assists the Director regarding his responsibilities dealing with labor relations. She provides no direct assistance to the Operating Board. Her mere handling of personnel files was found to be insufficient to qualify her as a confidential employee.

Johnson works for the Cooperative as a financial secretary. Her duties include the preparation of the payroll, maintaining accounts, the payment of bills, and the keeping of a general and a

master ledger. Most of the documents she keeps are open to inspection by the public. She does not handle personnel files or type documents dealing with labor relations. She does not prepare financial information for the meet and confer sessions.

Based on these facts, the Hearing Officer found that Johnson, as financial secretary, does not perform a single duty relating to confidential labor relations. Therefore, Johnson is not eligible for exclusion as a confidential employee. The IELRB also affirmed the Hearing Officer's decision that Baptist, Hill, and Randorf, the program supervisors, are not managerial employees. All three of the program supervisors have similar responsibilities. They all spend the majority of their time in local school districts, prepare curricula, monitor students and prepare program goals. Hill recommends the attendance of teachers at particular training programs, evaluates non-tenured teachers, participates in the interview process and makes employment recommendations. However, recommendations by Hill are subject to approval by the local school boards. Baptist and Randorf do not evaluate teachers unless they are requested to do so by local school districts. They are not involved in personnel decisions at all unless the local school district requests their input.

None of the three have any administrative authority over Central Service personnel. Their only participation in the administration of the Cooperative is through their participation in the following advisory committees and groups:

1. An "administrative/supervisory group" to which all administrators and program supervisors belong. This group discusses such topics as job vacancies, current status of rules and regulations governing special education, status of Committees of the Cooperative, in-service training procedures and proposed personnel policies (before these policies are proposed to the Operating Board).
2. Committees of the Cooperative. These committees, to which Cooperative administrators, teachers and secretaries and local district superintendents and principals may also belong, serve a wide variety of purposes, including development of procedures and guidelines for evaluation of Central Service personnel, guidelines for evaluation of students and development of forms.
3. Annual multidisciplinary staff conferences, attended by both Central Service and local district personnel, which develop individual education plans for students in special education programs or terminated from programs.
4. Administrative Roundtables, sponsored by the Cooperative and coordinated by the Director, Assistant Director and several supervisors, which inform local school districts of programs offered by the Cooperataive, and discuss the views and concerns of the local districts.

(Four Rivers-Jacksonville at p. 145)

Each of the program supervisors is on the teachers' salary schedule and receives an additional stipend for acting as a supervisor.

In affirming the Hearing Officer, the IELRB relied upon the statutory definition of managerial employee and the interpretation of that definition that was provided in Niles Township. Niles Township interpreted the definition to cover those employees who "exercise substantial and continuing authority over relatively crucial aspects of the Employer's operations which impact on, or have the potential for impacting on, the wages, hours or terms and conditions of

employment of significant numbers of bargaining unit employees" Niles Township at p. 92.

Based on this interpretation, the IELRB found that the supervisors were not managerial employees. Any managerial functions served by them were incidental to their primary job responsibilities and only took the form of providing advisory services.

The IELRB also affirmed the Hearing Officer's decision that program directors Bryan, Engle, Everett, Johns and Siria were not entitled to be excluded as supervisory employees.

The duties of these program directors differ from those of Baptist, Hill and Randorf in three respects. They have the power to evaluate subordinate teachers, to make non-binding recommendations based on the evaluations and to hear grievances at the first and second steps.

The Hearing Officer made factual findings concerning the specific duties of these program supervisors. Those findings are:

1. Donald Bryan works as a part-time field psychologist (which accounts for 70% of his work time) and spend the remainder of his workday as a part-time supervising psychologist. As Supervising Psychologist, Bryan annually evaluates other school psychologists, submits recommendations based on these evaluations, and provides monthly in-service training to the other psychologists. The psychologists working under Bryan set their own schedules, and Bryan may not alter these schedules. Bryan has interviewed eight of the fifteen psychologists whom the Cooperative has hired since he assumed this present position. The Cooperative has not acted in accordance with his recommendations that one candidate be hired and that another currently employed psychologist be discharged. One transfer of a psychologist

occurred without Bryan's prior knowledge or recommendation. Bryan can recommend changes in work behavior to his subordinates but he cannot unilaterally impose discipline.

2. Janet Engle works as part-time Program Supervisor for the Hearing Impaired Program (40% of work time), and as part-time In-Service Coordinator. The Hearing Impaired Program uses the services of three teachers and two aides, whom the Cooperative hires but who work in buildings of the Administrative District. Engle evaluates the teachers but not the teacher aides. She may not unilaterally order changes in the work behavior of her subordinates. In addition to her evaluative duties, Engle provides teachers with necessary forms and reports, gives teaching advice when needed, participates in development of Individual Educational Plans (IEPs) for students in the hearing impaired programs, follows up on students who need hearing screening, and provides transportation for students who need hearing tests. Engle does not recruit job applicants and the Cooperative does not consult her before making hiring decisions.

Engle's duties as In-Service Coordinator do not appear to involve supervision or evaluation of other employees. Her duties include planning and appropriating adequate funds for the in-service committees described in the preceding section. As part of an in-service proposal, Engle has prepared a hearing-impaired curriculum. Engle is also in charge of a "Material Center" of the Cooperative which functions as a lending library.

3. Robert Everett is employed by the Cooperative as the Coordinator of the Child Find Services Center. This Center screens children between the ages of three and five who are suspected of having disabilities. There are two components to the Center: a Developmental Screening Component, which identifies children with handicaps, and a Diagnostic Clinic component, where diagnostic tests are performed. The Developmental Screening Component is headed by the Developmental Screening Coordinator, who is assisted by a second-level screening technician and two part-time screening technicians. The diagnostic staff includes a speech and language therapist and a clinical diagnostician. Everett, who splits his work time equally between the Center's two components, evaluates both the Developmental Screening

Coordinator and the clinical diagnosticians.

4. Beverly Johns is the program supervisor for programs in the areas of learning disabilities, behavioral disorders and educational handicaps. These programs are scattered throughout the participating local school districts. In addition, Johns supervises Central Service programs for severe and alternative behavior disorders which are instructed by four teacher aides, a part-time social worker and a contractual psychiatrist. Approximately 65% of her working time, Johns advises the local school districts and approximately 35% of her time she supervises Central Service Programs. Although she formally evaluates teachers in the Central Service programs, Johns makes no evaluations of local district teachers unless requested to do so. Johns has helped to develop a teacher evaluation form. She has assisted in interviewing teacher aide applicants, but has no unilateral authority to hire. Suspensions, layoffs, promotions or discharges are not within her authority. Johns has dealt with one grievance, which she transferred to the jurisdiction of the Director prior to making a ruling. She has submitted to Jan Engle proposals outlining the cost of specific in-service programs, but is not involved in developing proposals for the Cooperative's budget or in submitting recommendations how the budget should be divided between various items.
5. Veva Siria supervises programs for Early Childhood educational intervention, which are located throughout the local school districts. The Cooperative directly employs eight teachers and eight teacher aides who work in this program area. Siria evaluates Cooperative employees under her jurisdiction. She is involved in interviewing applicants, but has no final hiring authority. Similarly, she can recommend discipline, but cannot unilaterally impose significant disciplinary measures. As part of her duties, Siria offers suggestions to the Director on which programs should be expanded to meet students' needs. She consults with Central Service and local district personnel concerning problems in the area of early childhood education and suggests procedures, materials and equipment to be used in connection with the early childhood education curriculum.

(Four Rivers-Jacksonville at p. 146)

The IELRB agreed with the Hearing Officer that the duties listed do not meet the statutory requirement for the supervisory exclusion. The program supervisors formally evaluate the teachers working under their direction but do not have the authority to unilaterally direct or to effectively recommend the hiring, suspension, lay off, recall, promotion, discharge, reward or discipline of other employees. The final authority to make personnel decisions rest solely with the Operating Board acting either directly or upon the recommendation of the Director. The record also showed a number of instances where the Operating Board did not consult the supervisors before making personnel decisions or acted against the recommendations of the supervisors.

The IELRB affirmed the Hearing Officer's decision that a community of interest existed between the professional and non-professional employees. The IELRB considered three factors to be significant in reaching this decision. First, the meet and confer sessions had always involved a committee representing both groups of employees. Although not technically a bargaining team, the IELRB viewed it as indication that there was a historical pattern of recognition.

Second, there is significant contact between the two groups. They work jointly in multidisciplinary staff conferences and in the Diagnostic Clinic. The specialized nature of the educational services provided by the Cooperative requires that the two groups work closely together as a team.

The third factor considered significant by the IELRB is the similarity of work schedules, fringe benefits and scheduled holidays.

Although the IELRB found that the unit was appropriate and that the program supervisors did not qualify under the managerial or supervisory exclusions, the IELRB found that it was not appropriate for the program supervisors to be included in the unit. They based this finding upon the fact that the supervisors, through their participation in the groups, committees and conferences have a degree of involvement in the formulation and implementation of educational policy that impacts both the Cooperative and the participating school districts. This involvement is not shared by the other members of the unit.

In addition, the program supervisors exercise some degree of true supervisory authority. The evaluations made by Bryan, Everett, Engle, Johns and Siria serve as formal measures of work. The Cooperative may, at its discretion, use those evaluations as the basis for personnel decisions. The role played by Baptist, Hill and Randorf in monitoring curriculum and teaching methodology has some potential for impacting the working conditions of teachers in the Cooperative.

Based on this potential for tension and conflict, the IELRB essentially created a new category of exclusions:

The "quasi-managerial" and "quasi-supervisory" status of the program supervisors, within the context of the District's overall special education program, establishes a potential for tension and conflict in the performance of their duties and responsibilities were

they to be included in the same unit with the other employees that is of greater significance than the community of interest they share with the other employees. Therefore, we shall exclude them from the unit.

(Four Rivers-Jacksonville at p. 148)

The case is significant for two major reasons. First, the IELRB created a new exclusion based on the facts of the case. They are willing to exclude positions if they are of a quasi-supervisory or quasi-managerial nature. The IELRB has thus developed a sort of sliding scale to be applied in cases of this sort.

The second major reason for the significance of this case is the application of a balancing test in cases of this sort. The IELRB will weigh the potential for conflict as a result of this status against the community of interest. If the potential for conflict and tension outweighs the community of interest the IELRB will exclude the positions.

There is nothing in the opinion to indicate that the program supervisors could not petition for recognition of a unit composed of program supervisors. Arguably, they share a community of interest and are not barred by the statute from being members of a recognized unit. The opinion simply states that it would be inappropriate for the program supervisors to be included in the unit petitioned for in this case.

The other major case dealing with supervisory exclusion from a professional unit is Indian Prairie Community Unit School District 204, Case No. 86-UC-0001-C. The case arose out of a unit

clarification petition sought by the school district. The petition sought to exclude the newly established classification of Instructional Supervisor from the professional employee bargaining unit.

The record established that the three instructional supervisors make budget recommendations for their divisions, conduct teacher evaluations, participate in the hiring and dismissal procedures for teachers within their divisions and participate in the scheduling of teacher assignments. They each teach two periods out of a seven period day and are paid on the administrators' salary schedule rather than on the teachers' salary schedule

The Hearing Officer relied upon the test of Four Rivers-Jacksonville, discussed supra, after determining that the Instructional Supervisors satisfied the definition of "quasi-managerial" or "quasi-supervisory" as interpreted by that decision.

Using that test, the Hearing Officer determined that the potential for tension or conflict outweighed the community of interest shared by the Instructional Supervisors and the other members of the bargaining unit. Therefore, the Hearing Officer excluded the positions from the unit.

The case is significant because it shows the application of the Four Rivers-Jacksonville test in another context. It also is an indication of how department chairmen might be excluded from a bargaining unit.

There is one particularly important decision dealing with the managerial exclusion and professional units. That case is Niles Township High School District No. 219, 2 PERI 1033. The case arose out of a unit clarification petition filed by the IFT. The petition sought to include the districts' six deans in the historically recognized bargaining unit. The deans had never been part of the unit nor covered by the collective bargaining agreement.

The record shows that the primary duties of the deans are to oversee student discipline and attendance. This is the only area in which they have substantial discretion and independence.

The deans monitor the day to day work of their own secretaries but they do not evaluate them. They serve on various administrative and managerial committees but there is no evidence that they can substantially influence district policies concerning wages, hours or working conditions of other employees. The deans do not have the "Type 75" certificates held by other administrators in the district. Based on these facts, the IELRB affirmed the decision of the Hearing Officer that the deans had only minimal managerial responsibilities and did not meet the statutory requirements for managerial exclusion.

In order to overcome the fact that the deans had historically not been part of the bargaining unit the IELRB engaged in a balancing exercise. It weighed the fact of historical exclusion against the factors favoring a finding of a community of interest. Those factors included the facts that there is a substantial interchangeability of

job duties, identical certification requirements, comparable benefits, similar hours and wages, shared job purposes, and shared authority to discipline students. The conclusion was that the shared community of interest outweighed the fact of historical exclusion.

The case indicates that the IELRB intends to heed the expressed legislative intent that these exclusions are to be narrow. It also indicates a willingness to allow a shared community of interest to overcome historical patterns of recognition.

It may be of interest that this decision was delivered six weeks before the Four Rivers-Jacksonville decision. The inference to be drawn is that the "quasi" exclusion fashioned in Four Rivers-Jacksonville is only applicable in cases where there is truly potential for tension or conflict.

At this point, there are no reported decisions dealing with the confidential employee exclusion and professional units. Presumably, this is because any professional employee dealing with confidential matters is excludable on another basis. However, there are many cases dealing with confidential employees and non-professional units. Three cases to be discussed are: Vermillion Occupational Technical Center, 1 PERI 1041, Plainfield Community Consolidated School District No. 202, 1 PERI 1157, and Avon School District 176, 2 PERI 1072

Vermillion Occupational Technical Center arose out of a unit clarification petition filed by the VOTEC Education Association. The petition sought to include the administrative secretary, Mona

Collins, as a member of the unit on the basis that she is not a confidential employee. Collins is the secretary to Paul Wasser, the Director of VOTEC.

The record shows that Wasser is involved in the formulation, determination and effectuation of management labor policies. The record also shows that Collins types and maintains minutes, agendum, and records, for VOTEC's Board of Control. However, confidential labor related matters are given to the secretaries of the Board of Control chairman and negotiator for the Board of Control. Wasser expressed an intent to expose Collins to confidential labor related matters in the future.

The IELRB concurred with the Hearing Officer's finding that although Collins works for a manager handling labor relations policies, she does not act in a confidential capacity regarding such matters. Although Wasser expressed an intent to use her in a confidential capacity she was not working in that way at the time of the petition. Decisions dealing with confidential exclusions must deal with the employee's present activities.

The case is significant for three reasons. The first is the ruling that an employee working for a manager handling labor related matters must act in a confidential capacity to that manager. The second item of note is the ruling that the exclusion must be based on the employee's present activity rather than what might later develop. The third noteworthy aspect of the case is the IELRB's stated intention to "adhere to a very narrow definition of confidentiality."

(Id. at p. 204.)

Plainfield arose out of a representation petition filed by the Plainfield Association of Clerical and Secretarial Support Staff. The petition sought recognition for a unit consisting of all regularly employed secretaries employed by Plainfield School District. The only secretary excluded by the petition was the secretary to the superintendent. The district sought to exclude the secretary to the assistant superintendent.

The record shows that the assistant superintendent is involved in the determination, formulation, and effectuation of management policy regarding labor relations. It also shows that the secretary is not regularly exposed to confidential labor related matters. However, on occasion she does handle the overflow work and is then exposed to confidential labor related matters.

The IELRB established a two step analysis for determining when an employee can be considered as confidential. The first step is to determine whether the person for whom the employee in question works does in fact determine, formulate and effectuate management policy regarding labor relations. The second step is to determine whether the employee in question acts in a confidential capacity to that person.

Using that analysis, the IELRB held that the assistant superintendent is a confidential employee but that his secretary is not because she does not regularly handle matters which, if divulged, would give bargaining unit members advance notice of the district's

policies with regard to labor relations. The principals in this district, however, are not confidential in this sense because their role in labor relations is not at the level of determining and formulating the policies. At best, their role is in effectuating the policies. The IELRB left unanswered the question of whether the secretary to a principal on the bargaining team could be excluded.

This decision by the IELRB was recently reversed by the Fourth District of the Illinois Appellate Court. (494 N.E.2d 1130.) The court held that the secretary should be deemed confidential since her regular duties include handling the overflow work of a confidential nature.

Avon arose out of a representation petition filed by the IEA. The petition sought recognition of a unit composed of all full-time and part-time certified and non-certified staff. The important issue for the purpose of this discussion is whether the secretary to the district superintendent is a confidential employee. The Hearing Officer found that the secretary is a confidential employee.

Wayne Buhlig, the superintendent, also acts as the part-time elementary school principal. Besides acting as chief administrative officer, he has the primary responsibility for labor relations in the district. Approximately ten to fifteen per cent of his time is spent handling labor related matters.

Zella Whistler is Buhlig's secretary and is the part-time grade school secretary. She spends approximately fifty per cent of her time assisting Buhlig. Her duties include typing his official

correspondence, typing his responses to school board inquiries regarding personnel matters, filing personnel documents and typing personnel evaluations.

The IEA argued that Buhlig can not be considered an employee who determines, formulates or effectuates policies with regard to labor policies because he only spends ten to fifteen per cent of his time on labor related matters. The Hearing Officer rejected this argument, stating that "there is no requirement in the Act that Buhlig spend a majority of his time in labor relations matters." (Id at p. 210.)

The Hearing Officer found the Whistler could, in the regular course of her duties, gain and convey information that could have potential impact on the bargaining relationship. Therefore, she could be excluded from the bargaining unit. He distinguished this situation from Vermillion by noting that her regular duties involved much more than mere access to confidential personnel data.

The legislative history makes it very clear that the supervisory exclusion is to be very narrow. However, the IELRB has shaped a quasi-supervisory exclusion that may make it easier to exclude department chairmen. In order to satisfy the statutory exclusion, the chairman will have to satisfy the preponderance of time test. In order to qualify for the quasi-supervisory exclusion the chairman will have to face the clear potential of tension or conflict with other members of the bargaining unit. It is unlikely that a department chairmen in most schools will satisfy either

requirement if his primary responsibility is managing curricular supplies, curriculum development and scheduling testing.

Mere membership on administrative committees will not satisfy the statutory requirements for exclusion. In order for an academic dean to be excluded he will have to engage in supervisory acts such as hiring, evaluating and terminating employees. Those actions must be a result of his independent judgment. If those actions are subject to review, the possibility of exclusion is enhanced if his decisions are rarely if ever reversed. If different certification is required for the position, that will also increase the possibility that he will be excluded from the bargaining unit. Other factors that work in favor of exclusion are different work schedules, different salary schedule and different fringe benefits.

Niles Township makes it very clear that deans whose only sphere of independent judgment is the discipline of students, and whose certification is no different than a teacher will not be excluded from the bargaining unit. However, if his duties also include evaluations and he differed from the members in terms of salary, work schedule and fringe benefits he may be excluded on the basis that there is a lack of a community of interest.

CONCLUSIONS

There are six general conclusions that can be drawn at this point.

The first is that the IELRB intends to consider and weigh

nine factors when faced with deciding what constitutes an appropriate unit. Those factors are: (1) Historical pattern of recognition; (2) Employee skills; (3) Employee functions; (4) Degree of functional integration; (5) Interchangeability; (6) Contact among employees; (7) Common supervision, wages, hours and other condition; (8) Desire of employees; and (9) The fact that nothing shall interfere or negate the current representation rights or patterns and practices of employee organizations which have historically represented employees for the purposes of collective bargaining.

The second is that a stated objective of the IELRB is to carry out the legislative intent to have a very narrow scope of exclusions.

The third is that despite the objective of providing a narrow scope of exclusions, the IELRB significantly broadened the exclusions when it shaped the quasi-supervisory and quasi-managerial exclusions.

The fourth general conclusion to be drawn is that the IELRB will not concern itself with finding the most appropriate unit. Rather, it will be concerned that the unit simply be appropriate.

The fifth general conclusion is that the IELRB is unwilling to broaden the definition of "professional employee." It will insist that employees meet the statutory requirement of holding a certificate issued under Article 21 or Section 34-83 of the School Code.

The sixth conclusion is that the IELRB will give great deference to the expressed wishes of the employees if the statutory

requirements have been met and the employees can demonstrate that the unit sought is appropriate.

CHAPTER 6

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS FOR FURTHER STUDY

This chapter briefly summarizes the nature of the study and the conclusions which developed from the findings. Recommendations for further study concludes the chapter.

SUMMARY

Illinois is a relatively late addition to the ranks of states which have adopted statutes governing the employment rights of public school teachers. However, although there are many states with existing statutes, the Illinois statute is unique enough that it will have to be interpreted by its own administrative agency and court system before teachers, administrators and other school employees will truly understand how it will be applied in the workplace of public schools.

The legislative history and the decisions of the IELRB make it clear that although the IELRB will look to the body of private sector labor law and to the decisions of other states for guidance, the IELRB should not and will not be bound by those decisions. The IELRB will interpret the statute in light of what the legislative intent was and by applying with particularity, the words of the Illinois statute.

In order to develop a basis for discussing probable interpretation of selected provisions of the IELRA, the study

combined an analysis of the legislative history, the consideration of published IELRB decisions, relevant court decisions from other states and appropriate law from the private sector. These analyses lead to the conclusions discussed in the next section.

Conclusions

The sections in each chapter have conclusions dealing with the subject discussed in that section. Those conclusions should be referred to for conclusions regarding those particular topics. However, in addition to those conclusions, there are some general conclusions that can be drawn.

First, it is apparent that the IELRB is not going to be hesitant about going beyond the actual words of the IELRA to create law that it believes accurately reflects the intent of the statute. This is most clearly apparent in its decision to create a quasi-supervisory status when there is no mention of such a classification in either the statute or in the legislative history.

Second, the IELRB will certainly be willing to look to the body of the law under the NLRB and other states for approaches and analytical tools. However, the IELRB will not consider itself to be bound by those approaches or by the substantive law of other agencies or states.

Third, the IELRB is going to be particularly sensitive to the expressed desires of the employees in determining whether a bargaining unit is appropriate. This attitude is reflected most

clearly in the Alton decision and has been substantiated in subsequent decisions.

Fifth, a considerable length of time will elapse before there is a comprehensive list of what topics are mandatory subjects of bargaining. After fifty years of collective bargaining under the NLRA, the list is still not final for the private sector. Because the IELRB has made it clear that it is not bound by the decisions under the NLRA, and because of the unique nature of collective bargaining in public education, the determination of what is mandatorily bargainable will likely be determined on a case by case basis.

Sixth, the legislature is clearly sensitive to how the statute is being applied and is willing to take legislative action to correct perceived shortcomings. Evidence of this willingness includes the amendment of the statute to allow an individual to file an unfair labor charge and the amendment proposed in the 1987 session to require binding arbitration if a strike is not resolved by the fifteenth day of the strike.

Recommendations for Further Study

The first recommendation is obvious. There needs to be a continued reading of IELRB decisions in the areas discussed to determine if the statute is, indeed, interpreted as it is suggested it might be. Because the statute does not provide a comprehensive list of unfair labor practices or mandatory topics of bargaining, a

student or practitioner must be aware of the pronouncements by the IELRB in these areas.

A second recommendation is that there needs to be an analysis of what must be bargained under the category of impact bargaining. It is clear that matters of inherent managerial policy need not be bargained but the impact of those decisions must be bargained. It is not so clear, however, what must be bargained under the term "impact." As this body of law grows, it will be of major significance in those situations where a decision was found to be a matter of inherent managerial policy.

The third recommendation is that an analysis be made of what, precisely, are the factors that the IELRB will weight most heavily when determining whether a unit is appropriate. The early indications are that the desires of the employees will count heavily but there is no clearly discernible trend yet regarding how the IELRB will weight other factors.

The fourth recommendation is that a study be conducted to determine patterns of decisions rendered by individual hearing officers. That was beyond the scope of this study but it is likely that there is a pattern to the processes and decisions of individual hearing officers. A determination of what those patterns are will be very helpful to practitioners who present their cases before those officers.

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APPROVAL SHEET

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The final copies have been examined by the director of the dissertation and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the dissertation is now given final approval by the Committee with reference to content and form.

The dissertation is therefore accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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