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# The Early Years of the Illinois Educational Labor Relations Board (1984-1992) Part I

By Gerald E. Berendt

*Editor's Note: This is the first of a two-part article. Part II will appear in the Summer 2003 issue.*

## I. Introduction

In July 2002, Chicago-Kent College of Law invited me to speak at its annual Illinois Public Sector Labor Relations Law Program. Two months before, a middling functionary from Governor George Ryan's office had telephoned to notify me that Governor Ryan would name someone from his staff to replace me as Chairman of the Illinois Educational Labor Relations Board. My replacement's appointment would not be effective until January 2003. Thus, I could continue to sit as a lame duck until December 31, 2002, if I wished. After hearing I would not be reappointed, several friends urged me to disassociate from the Ryan administration sooner rather than later, and by the time the Chicago-Kent Law School asked me to appear at the conference, I had already decided to step down as Chairman of the IELRB at the end of July.

I was initially hesitant to accept Chicago-Kent's gracious offer to speak. I was determined to follow the example of former IELRB Member Edna Krueger, to make a clean break, walk away from the IELRB and not look back. I was anxious to start the next chapter of my career by turning my attention to academic endeavors and reviving the arbitration practice I was pursuing before Governor Jim Thompson appointed me Chairman in 1986. However, the conference director, Professor Martin Malin, convinced me that the members of the labor-management community would be interested in hearing an insider's account of the history of the Board and the evolution of the law under the Act during my sixteen-year association with the agency. So I agreed to speak. Chicago-Kent accommodated my request that I not speak alone and invited two articulate practitioners and knowledgeable experts, attorneys Gilbert Cornfield and James Franczek, to complete the panel.

At the Kent Conference, I was unable to address all that I wanted to cover, and therefore I was pleased when Chicago-Kent asked me to write for this publication. I shall use a conversational tone with the readers, many of whom are likely to be members of the Illinois public sector labor relations community. I shall highlight selected legal developments during the first eight years of the IELRB, but I shall do much more. There is more to the history of the IELRB than the Board's published decisions and related legal developments. Many of my professional friends, who were close to the agency over the years, have urged me to write a more intimate account of my experience in Illinois state government and to reflect on the operations of government.

The story of the IELRB is a valuable lesson in how state government operates. I am convinced that a fair-minded account could make readers aware of what is both good and bad about government and perhaps lead to improvements in public service. Thus, in addition to covering selected legal developments, I shall set forth an account of some of the important administrative, political, personnel and fiscal matters that punctuated the first eight years of the IELRB's existence.[1]

## II. Passage of the IELRA and the First IELRB (1983-1986)

Although I did not join the IELRB until June 1, 1986, I am somewhat familiar with the Board's early years due to accounts I heard from those who were there at the beginning. Instead of duplicating several fine substantive accounts of the passage of the Illinois Educational Labor Relations Act, I shall simply relate some basic facts necessary to understand subsequent developments.

In 1983, a number of political changes, principally Harold Washington's election as Mayor of

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Chicago, removed impediments that previously prevented passage of public employee bargaining laws in Illinois. Traditional labor interests, particularly the AFL-CIO, sought a public sector law that would extend collective bargaining rights and protections to virtually all public employees in the state. The Illinois Education Association sought separate collective bargaining legislation for educational employees. The AFL-CIO supported a bill creating two boards, a state board and a local board covering Chicago and Cook County. The IEA supported bill sought a third, separate board for educational employees. The Illinois General Assembly passed both bills, creating agencies whose jurisdictions overlapped. Governor Thompson exercised his amendatory veto to disentangle the contradictory strands of the legislation. When the dust settled, there were three labor boards: The Illinois State Labor Relations Board, with jurisdiction over most state and local government public employees except police and firefighters initially; the Illinois Local Labor Relations Board, with jurisdiction over public employees of the City of Chicago and Cook County; and the Illinois Educational Labor Relations Board, with jurisdiction over employees of public educational institutions.[2]

Governor Thompson appointed the first three IELRB Board members. For Chairman, the Governor selected Professor Martin Wagner of the University of Illinois, a highly regarded expert in labor relations with impeccable neutral's credentials. Governor Thompson also appointed Edna Krueger, a long-time teacher and IEA leader with a wealth of hands-on labor relations experience, and Wesley Wildman, a well-known management attorney who had many years' experience representing public schools in collective bargaining and arbitration. Wildman also taught labor relations at the University of Chicago.

The Educational Labor Relations Act provided for the first IELRB appointees' terms to be two, four and six years respectively. After those initial terms, subsequent appointments for all three seats would be six years. According to Edna Krueger, the first Board members' terms were determined by drawing pieces of paper with the numbers 2, 4 and 6. Edna drew the two-year term, Wes Wildman drew the four-year term, and Martin Wagner drew the six-year term. The first Board members then concentrated on the rapid set up of the agency.

Edna Krueger also told me about the hectic early days of the agency. Unlike the Illinois Public Labor Relations Act, the Illinois Educational Labor Relations Act went into operation virtually immediately, on January 1, 1984. Petitions for representation elections, unfair labor practice charges, and other filings flooded the Governor's office before the new Board could obtain office space in Springfield and Chicago and before staff could be hired. Edna remembers that the first location of the IELRB was a closet in the Governor's office where the Governor's staff stored filings for the new agency. During this formative period, the Board members were assisted by Governor Thompson's aides Terry Logsden and Terry Bedgood.

The first Board members acted quickly to find competent staff. Martin Wagner telephoned me for my recommendations.[3] I recommended for either General Counsel or Executive Director my former student Robert (Rocky) Perkovich who was then an attorney in the Chicago office of the National Labor Relations Board. The Board members selected Perkovich as the agency's first Executive Director. They also selected Judith Jansen as the first General Counsel. Judith Jansen left the agency after about a year, and the Board selected management attorney Randi Hammer to replace her as General Counsel.

I "inherited" Perkovich when I was named Chairman in 1986. The IELRB could not have found a better Executive Director for its formative years. He handled the agency's day-to-day operations in a most competent manner, brought and applied substantial labor law expertise to his decisions, and conscientiously pursued the agency's broad objectives.

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Professor Berendt thanks The John Marshall Law School, Dean Robert Gilbert Johnston and Associate Dean John E. Corkery for their support of his academic and scholastic activities. He also thanks his research assistants, Carrie Pramuk-Volk and Anita Schausten, law students at The John Marshall Law School, for their assistance in preparing this article.

After the first few years, when he was satisfied that the case processing operations were up to his high standards, he applied himself to long-range planning. Perkovich and I immediately reached a perfect working relationship, a partnership based on a clear understanding of our respective roles in the agency hierarchy, but without concern about "territory." We frequently sought each other's advice on many matters. We shared a philosophy of government that emphasized public service, integrity, and scrupulous neutrality. With respect to personnel matters, we valued merit, performance and accomplishment over personal and political connections.[4]

The Board's General Counsel, Randi Hammer, had been an attorney with the management law firm of Vedder Price before coming to the IELRB about a year before my appointment as Chairman. I did not know Randi before my appointment, but I was indeed fortunate to inherit her and to work with her. Bright and personable, Randi brought immense legal expertise and knowledge of labor law to her work. She was an excellent writer, legal scholar and thinker. It was a joy to collaborate with her on many important decisions. As recounted below, she later replaced Wes Wildman on the Board. As General Counsel and later as a Board member, she was an important participant in the development of many important areas of educational labor law in Illinois. One of those areas was the distinction between mandatory and permissive subjects of bargaining.

## III. Mandatory Bargaining Subjects Under the IELRA

Shortly before Martin Wagner retired in 1986, the Board members tackled the mandatory bargaining puzzle presented in the Act. Section 10 of the IELRA requires public educational employers and exclusive representatives to bargain collectively with respect to wages, hours and other terms and conditions of employment. Section 4 designates employer rights and may be seen as a limitation on Section 10 because the first sentence of Section 4 states that the employer will not be required to bargain over matters that are inherent managerial policy. However, the second sentence of Section 4 requires collective bargaining of policy matters that *directly* affect wages, hours and other terms and conditions of employment. What policies directly affect wages, hours and other terms and conditions of employment?

In *Board of Education, Berkeley School District No. 87 and Berkeley Education Association, IEA/NEA,*[5] the IELRB interpreted these sections to guide employers and unions in distinguishing between mandatory and permissive bargaining subjects. There, the IELRB majority (Chairman Wagner and Member Wildman) concluded that the choice between an interscholastic or intramural sports program to be offered by the school district was the prerogative of the district. According to the majority, policy matters directly affecting wages, hours and terms and conditions of employment are those that have wages, hours and terms and conditions of employment as their primary subject. The majority concluded that the change in the nature of the school's athletic program did not. Wages, hours and conditions of employment were only indirectly affected as a consequence of this change in policy. Since the district's decision had an indirect effect on employees' working conditions, the district was required to bargain impact, but not the substantive decision.

Member Krueger dissented in *Berkeley.* She argued that the majority read the second sentence of Section 4 out of the statute, and concluded that although the choice of athletic program was a policy matter, the decision clearly had a direct and immediate impact on the employees.

The Board issued the *Berkeley* decision the day before Martin Wagner retired and I joined the Board. *Berkeley* was a constructive first effort at unraveling the mandatory bargaining mystery presented by Sections 4 and 10 of the Act. But my first day as Chairman, I read the decision and had reservations. I believed Member Krueger was fundamentally correct that the majority had effectively deleted the second sentence of Section 4. Moreover, I was concerned that the majority's major premise, that some matters could be identified as "primarily" decisions involving policy rather than wages, hours and conditions of employment, was unworkable as a practical matter. I believed that the General Assembly and Governor Thompson recognized that some decisions involved both policy choices and wages, hours and terms and conditions of employment, and that we would have to address the overlap and conflict more directly in the future.

A year after my appointment, the Board returned to the issue.[6] However, our first attempt to clarify the mandatory/permissive bargaining distinction only led to greater confusion. In *District 59 Education Association, IEA/NEA and Consolidated School District No. 59,*[7] the union alleged that the school district had violated the Act by refusing to bargain over the development and implementation of a teacher evaluation plan. Member Wes Wildman recused, leaving Edna Krueger and me to decide the case. But my thoughts on the accommodation

between employer prerogatives and union bargaining rights were still in development and differed from Edna's.[8] So Edna and I struggled to find a common basis for deciding the specific case before us. Edna and I sought to transcend our differences by employing a test under which all employer decisions could be placed somewhere on "a continuum of decision making," from wages, hours and conditions of employment on one end to employer prerogatives on the other end. We posited that by placing the subject along the continuum, we would be able to determine whether the particular subject was closer to matters involving employee rights (mandatory subjects) or to employer rights (permissive subjects). We held that teacher evaluations were subject to mandatory bargaining. We reasoned that "teacher evaluations are at the core of an employee's wages, hours and terms and conditions of employment"[9] because the evaluations not only affected the daily activities of the teacher by setting standards, but the evaluation could be used to terminate or discipline the teacher and require a remediation period. Thus, we concluded that there was a direct effect on the employee's terms and conditions of employment. A convenient device for papering over our differences at the time, the "continuum test" was too abstract, too impressionistic, and wholly unworkable. And in their briefs in subsequent cases, the parties told us so.

A workable test governing the mandatory/permissive distinction finally began to emerge in 1988 in *Decatur Education Association, IEA / NEA and Decatur School District No. 61.*[10] The union in that case had demanded to bargain class size.[11] The three Board members agreed that the continuum test did not work where the matter involved an overlap of managerial rights and important employee interests. Instead, in such "overlap cases" we agreed that a balancing test should be employed. We explained that "we must strike a balance between the educational employer's need and right to establish and implement educational policy and the interests of educational employees, expressed by their exclusive representative, when such decisions affect employees' wages, hours and terms and conditions of employment."[12] Employing that balancing test, Edna Krueger and I concluded that class size was a mandatory subject of collective bargaining. Although she concurred with the majority regarding the adoption of a balancing test, Randi Hammer Abramsky dissented from the majority's application of the test, maintaining that decisions regarding class size were permissive rather than mandatory.[13]

In 1989, the test further evolved in the Board's decision in *Central City Education Association, IEA-NEA and Central City School District No. 133.*[14] In this case, the union had demanded bargaining over the school district's decision to reduce in force (RIF) for economic reasons. Elaborating on its *Decatur* decision, the Board stated a three-part test for determining whether a subject is a mandatory subject of bargaining:

> 1. Is the subject wages, hours and terms and conditions of employment?
> 2. If the answer to the first question is yes, then is the subject also a matter of inherent managerial policy?
> 3. If the answer to the second question is also yes, then the Board must balance the educational employer's need and right to establish and implement educational policy against the interests of the employees, expressed by their representative, to determine whose interests are greater. If the interests of the employer are greater, there is no obligation to bargain. However, if the employees' interests are greater, the subject directly affects wages, hours and terms and conditions of employment, and the matter is a mandatory subject.

With respect to the employer's economically motivated decision to reduce in force, the three Board Members agreed that the first two steps of the tests were satisfied. Randi Hammer Abramsky and I agreed that the employer's need to act outweighed the employees' interests, and concluded that the decision to RIF was not a mandatory subject. Specifically, we reasoned that "RIF decisions are inseparable from the District's responsibility and ability to determine its standards of services and overall budget."[15] We concluded that requiring bargaining over such RIFs "would impinge heavily on management's need to freely determine educational policy decisions and choices."[16] Edna Krueger employed the same balancing test and maintained that employee interests outweighed employer needs. She concluded that the decision to RIF was a mandatory subject.

The union appealed to the First District Appellate Court, which purportedly approved the balancing test, but reversed the Board as to its application.[17] However, the appellate court substantially altered the third step of the test. Borrowing from private sector law, the appellate court employed an "amenability to bargaining" approach, reasoning "that mandatory bargaining over [a decision to RIF] may well advance the policies of the Act by allowing the employees' representative to suggest cost-saving alternatives to the layoff."[18] The appellate court then reversed the IELRB's decision and held that the decision to RIF was a subject for mandatory bargaining.

The district appealed to the Supreme Court of Illinois which took over two years to decide the case.[19] The Supreme Court adopted a version of

the three-part test which differed significantly from both the Board's and the appellate court's third step. Instead of balancing the relative needs of the parties or applying a labor costs analysis, the court instructed the IELRB to "balance the benefits that bargaining will have on the decisionmaking process with the burdens that bargaining imposes on the employer's authority."[20] The Supreme Court then remanded to the IELRB to apply this test and reassess the result in *Central City* and a companion case, *LeRoy*.[21] The court suggested that the IELRB "make a more detailed inquiry into the bargaining practices and experiences concerning teacher evaluation plans and RIF decisions in other school districts in order to determine whether these issues are amenable to fruitful bargaining."[22] The court observed that the IELRB was better equipped to make such a fact specific determination.[23]

Thus, the Illinois Supreme Court announced a version of the three-step test that may be summarized as follows:

> 1. Is the subject wages, hours and terms and conditions of employment?
> 2. If the answer to the first question is yes, is the subject also a matter of inherent managerial policy?
> 3. If the answer to the second question is also yes, the IELRB must balance the benefits bargaining will have on the decision making process against any burdens bargaining will have on the employer's exercise of its authority.

The Supreme Court's decision left many puzzled. It affirmed the appellate court but substituted a third-step balancing test that resembled the IELRB's competing interests balancing test more than the appellate court's labor costs test. But the Supreme Court also characterized its test as an inquiry into whether the subject was amenable to fruitful bargaining, which suggests a possible labor costs component. Most observers declared the decision a victory for unions that sought to bargain a wide range of decisions, including RIFs.

By the time the Supreme Court issued its decision, Randi Hammer Abramsky and Edna Krueger had stepped down, and the Board consisted of Gene Flynn and me.[24] Employing the test set forth by the Supreme Court in *Central City*, the IELRB found that the RIF was a mandatory subject for collective bargaining.[25] Following the Supreme Court's strong suggestion, we reasoned that "[d]uring collective bargaining over an economically-motivated decision to reduce in force, an exclusive representative can provide options and information which are not available to the employer. An exclusive representative can offer concessions in other areas which compensate for the cost of not implementing the reduction in force."[26] We also relied on our administrative experience, observing that when school districts and unions had bargained RIFs, they had avoided reductions in force by achieving economic savings elsewhere in the schools' budgets.[27] Thus, we concluded bargaining such RIFs could have significant benefits for the bargaining process. Moreover, we observed that "a school district does not have an urgent need for speed, flexibility or confidentiality which bargaining would obstruct." Thus, we concluded that the benefits of bargaining the decision to RIF outweighed the burdens on the decision-making process.

It is sometimes said that "the devil is in the details." I believe that the most important part of the IELRB's decision on remand was in the details. We observed that although under the School Code, school districts must give written notices to employees it intends to reduce in force sixty days before the end of the school year,[28] in practice the terminations may not be necessary and may not happen. We concluded, therefore, that issuance of the notices did not control the employer's bargaining obligation and would not be a unilateral change nor an event-driven impasse. Instead, bargaining may and must continue after such notices have issued, until legitimate impasse or an agreement. We concluded that requiring bargaining over a decision to reduce in force, between the date the notices issue and the date the reduction in force must be implemented, does not impose an additional burden on the employer's authority. Thus, we devised a way to keep the parties at the table, negotiating alternatives to a RIF, for as long as possible without impeding the school district's preparations for the coming school year. At some point, if the parties have not reached agreement on an alternative way to cut costs, impasse will occur, freeing the school district to implement the proposed RIF before starting the next school year.

The reaction to our implementation of the Supreme Court's test came swiftly. Astonishingly, representatives of labor and management declared the guidelines workable. And the bargaining system fleshed out in the *Central City* remand appears to be working well to this day. It would be impossible to determine as an empirical matter whether this and other IELRB decisions led to a reduction in educational employee strikes in Illinois, but the numbers did drop in the years after the decision.[29]

The *Central City* decision and its aftermath illustrate a point I have asserted for many years. The objectives of labor peace and the effective delivery of educational services are generally better served by collective bargaining than by excluding matters from bargaining. The early IELRB

Members shared this view, as do most experienced labor and management representatives and attorneys.

Similarly, the collective bargaining system we have in Illinois public education works better for both labor and management with a right to strike. Without the right to strike, collective bargaining becomes "collective begging," as the teachers like to say. The employer is less likely to take the exclusive representative's proposals seriously, and the employee's representative is actually more likely to strike, even though the strike is "illegal," in order to obtain serious consideration of its bargaining proposals. Thus, there is a greater likelihood of strikes, albeit illegal ones, if the strike is outlawed, than under our present system where the strike is possible. The pre-Act and post-Act statistics bear this out.[30]

Experienced management attorneys have also told me that they regard the strike as preferable over interest arbitration as a device for resolving differences in public education collective bargaining. When the union has a right to strike, management has the concomitant "right to take a strike." In other words, the union can "demand," but management can say no to union proposals and put the union to the test. The resort to economic self-help will then determine whose proposals prevail. Where interest arbitration is substituted for the right to strike, management effectively loses the right to say no and cedes determination of wages, hours and terms and conditions of employment to an arbitrator.

## III. Appointment of Gerald Berendt as IELRB Chairman in 1986

When Martin Wagner decided to step down as Chairman of the IELRB, I had been out of state government for nearly two years, after the new State Labor Relations Board replaced OCB. During those two years, I had stayed in touch with Bill Brogan, Chairman of the State Labor Relations Board and his fellow SLRB member Claire Manning, whom I knew from OCB days. And I had occasionally talked to Martin Wagner and Rocky Perkovich when they called for advice. But otherwise, I had no contacts with the Thompson administration between June 1984 and the spring of 1986.

I recall that the first contact in the spring of 1986 came from Terry Bedgood, telling me that Martin Wagner was retiring from the IELRB and asking whether I wished to be considered to replace him. I later learned that Governor's aide Jerry Blakemore and former Deputy Governor Jim Fletcher had also recommended me. I knew Bedgood from my earlier service as Chairman of OCB. Blakemore had been my student at The John Marshall Law School in the late 1970s. But I went back furthest with Jim Fletcher, who had solicited me to serve as Executive Director of the OCB from 1977 through 1978.[31]

Events moved quickly toward my appointment and confirmation. Governor Thompson's aide Kevin Wright invited me to the Governor's Chicago office where I filled out the requisite appointment forms. I met another aide, Ed Duffy, who was quite helpful. The Thompson staff arranged to introduce me to representatives of various groups who had an interest in the IELRB, including Ken Bruce, who was the in-house lobbyist for the Illinois Education Association and whose brother, State Senator Terry Bruce, had been a sponsor of the IELRA.

Ken Bruce did not know me, but when we met he told me he had heard positive comments about me from the IEA professional staff who had experience with me as an arbitrator. Bruce told me that there were tensions between the IELRB and the State Labor Relations Board. He suggested that I meet with the Chairman of the State Labor Relations Board, Bill Brogan, who was a high level leader in the AFL-CIO and was extremely influential with Governor Thompson. I told Bruce I already knew Bill Brogan, and I would be happy to talk to Chairman Brogan.

My appointment as Chairman of the IELRB was to take effect June, 1, 1986. In the early evening on May 31, 1986, I met Martin Wagner at a restaurant near the IELRB's Chicago office. Martin had spent the day, his last as Chairman, working with the other Board members and the staff to complete several important IELRB decisions, including *Berkeley*,[32] which issued that afternoon. Exhausted, Martin nevertheless extended the courtesy of meeting to educate me concerning personnel, fiscal and other matters at the Board. He told me about a number of pressing matters.

First, the IELRB attorneys and investigator had organized an independent union and had filed a petition for representation. The ISLRB had dismissed the petition by a two-to-one vote, concluding that the IELRB's professional employees were not covered by the Public Labor Relations Act.[33] The staff union petition notwithstanding, Martin spoke warmly of the staff and singled out several staff members for their ability and competence.

Martin also expressed his concern that the agency was unpopular with elements within the AFL-CIO due to differences with the IEA which had supported a separate board governing educational labor relations. For example, there was an on-going spat with a local of the Service Employees International Union because the IELRB had dismissed some of that

union's late filings as untimely.

Martin also informed me that Senator Howard Carroll was angry with the agency and Executive Director Rocky Perkovich over hiring issues. Senator Carroll was the Chairman of the Senate Appropriations Committee which would pass on the agency's budget request for the coming fiscal year. And the IELRB's recently departed legislative liaison had managed to insult and antagonize Illinois House Speaker Michael Madigan and House Majority Leader Jim McPike. Thus, there were several pressing matters that needed attention.

Martin Wagner's advice was most valuable to me, both at the outset of my service and through the years. His invitation to meet with me as he was stepping down set an example I sought to follow at the end of my service in 2002.

On June 1, 1986, the Governor submitted my appointment to the Senate and filed the appointment with the Secretary of State. That morning, I walked from The John Marshall Law School over to the IELRB's Chicago office. As I approached the building on Randolph Street, I encountered handbilling by the disgruntled SEIU local, protesting the IELRB's dismissal of some of its filings. Apparently unaware that the IELRB had a new Chairman, the union skewered Martin, Edna and Wes on its handbill. When I arrived upstairs at the IELRB's offices, there was a funeral wreath sent by the angry SEIU president.

I met with Executive Director Rocky Perkovich and General Counsel Randi Hammer and then walked around the office to introduce myself to the staff. Understandably, there was considerable concern among the staff over the arrival of a new Chairman, and I took great pains to reassure everyone that I was no ogre. Some of the professional staff asked my opinion of the IERLB staff union, but I demurred explaining that I could express no opinion until I met with the other Board members.[34]

My first meeting with the sitting Board members, Edna Krueger and Wes Wildman, went extremely well. I had met Edna once before, but I had never met Wes. After I joined the Board, Edna and I quickly became friends. Our comfortable friendship permitted us to tackle many difficult personnel and political matters together. Edna brought a wisdom born of firsthand experience to all of our deliberations. Her confidence in the collective bargaining system came from her experience with it. Edna's commitment to a system of voluntary dispute resolution infused her philosophy and decision making. I relied heavily on her advice and always valued her opinions. There were few times that I declined to follow her advice, but in retrospect I would have been better off if I had. We have remained good friends.

When news of my appointment slipped out, some observers expressed concern over how Wes Wildman and I would get along because Wes sought to replace Martin Wagner as Chairman after Martin decided to step down. Fortunately, Wes and I had several friends in common, Thompson aide Terry Bedgood, IELRB Executive Director Rocky Perkovich, and attorney Jane Carfano Casey.[35] Wes and I hit it off immediately. We found that we both loved baseball and classical music. With respect to labor relations, we shared an interest in accommodating legal theory with practical realities, a challenge that Edna Krueger also relished. Our Board's early open meetings must have been something for the observers to behold. There was a free flow of ideas, and the discussions were always on the highest level. Occasionally, we engaged in knock down, drag out debates right in front of observers. On one occasion our discussion became so animated that a secretary outside the meeting room expressed concern that Wildman and Perkovich were actually having a brawl. We never fought, but we always invested a great deal of energy and passion into our decision making. Wes frequently served as agent provocateur. I regret that Wes and I served together for only three years, but I am pleased that our friendship has survived his departure from the IELRB.

Some AFL leaders and attorneys, particularly from the American Federation of State, County and Municipal Employees knew me well from OCB days, and they seemed to have confidence in the neutrality and competence of the IELRB. When I was appointed, I reached out to the leaders of the Illinois Federation of Teachers, particularly Ed Geppert with whom I established an easy rapport. But due to the politics surrounding its creation, the IELRB was not popular with other AFL-CIO unions.

Shortly after my confirmation, I met with representatives of the SEIU to reassure them of the agency's neutrality. I explained to them that the agency's rules and regulations applied equally to all parties appearing before the Board. Thus, if they missed a published deadline for a filing, they would be given no special treatment and their filing would be dismissed like anyone else's. However, I told them they could avoid such missteps in the future by simply telephoning the agency and asking for the "officer of the day" who was assigned the responsibility of answering questions about the agency's operations and rules. This effectively ended the dispute with the SEIU.

The State AFL-CIO periodically sought to have the IELRB consolidated with the State Labor Relations Board.

However, the IELRB apparently managed to earn the respect of many in the AFL-CIO since the momentum for consolidation gradually receded over the years, at least until recently.

Prior experience at OCB led me to propose to the other Board members that we establish an IELRB Advisory Committee made up of representatives of labor, management and neutrals. Wes and Edna agreed. The Advisory Committee has been an extremely effective communications device. It not only allows the parties and labor relations experts to critique the agency and make suggestions for improvements, it also permits the agency to solicit the advice and assistance of the committee members. Several changes in the statute and many changes in the IELRB's Rules and Regulations have emanated from the Advisory Committee. I am grateful to the many members of that committee who have volunteered and served without compensation. ◆

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## Notes

[1]Some of my observations are based on second-hand accounts; however, I was personally involved in most of the events after June 1986. In addition to allowing for the hazards of memory, the reader should note that this account reflects my perspective of events. Others may have different memories of the same events. I shall generally weave the legal developments and events in chronological order with as few flash backs and ahead as possible.

[2]I happened to be in state government in 1983 at the time of these events, serving as Chairman of the Illinois Office of Collective Bargaining, the agency responsible for regulating the collective bargaining of state public employees under a 1973 Governor's Executive Order. OCB, as it was called, would be replaced by the new State Labor Relations Board in the spring of 1984. Before exercising his amendatory veto, Governor Jim Thompson asked the OCB members to advise him concerning possible changes in the legislation. OCB Members Arthur Malinowski, Herb Borovsky and I responded with several pages of commentary and proposed amendments. During this period, OCB communicated with the Thompson administration through the Governor's aide for labor relations matters, Terry Bedgood, who was always helpful to OCB and later invaluable as an advisor during trying times at the IELRB. Bedgood later served Secretary of State and Governor Jim Edgar in a similar capacity before moving out of state government to become a lobbyist.

[3]Martin Wagner knew me from my days as Executive Director and later Chairman of the OCB. Martin's colleague at the University of Illinois, Milton Derber, had introduced us when Milton Derber served as a Board member at the OCB.

[4]Perkovich was dogged in his adherence to his principals. He once told me that he had never lost sleep over important decisions he had made while Executive Director. I often remembered this comment when faced with tough choices.

[5]2 PERI ¶ 1066 (IELRB 1986).

[6]Rather than adhere to the sequence of events surrounding Martin Wagner's retirement and my appointment in 1986, I shall jump ahead to complete the story of the evolution of the law governing mandatory bargaining under the IELRA.

[7]3 PERI ¶ 1094 (IELRB 1987).

[8]Edna still adhered to her two-step approach set forth in her *Berkeley* dissent. I was beginning to develop a three-step approach that ended in a balancing test.

[9]*Id.* at VII-269.

[10]*Decatur Educ. Ass'n, IEA/NEA, and Decatur Sch. Dis.t No. 61*, 4 PERI ¶ 1076 (IELRB 1988).

[11]When the Board began consideration of this case, Wes Wildman was on the Board, but Wes was replaced by Randi Hammer Abramsky during deliberations.

[12]*Decatur Educ. Ass'n*, 4 PERI at IX-322.

[13]The Illinois Court of Appeals for the Fourth District affirmed the use of a balancing test as announced by the Board and also affirmed the majority's decision that class size was a mandatory subject for collective bargaining under the Act. *Decatur Board of Education v. IELRB*, 180 Ill. App. 3d 770, 536 N.E.2d 743 (1989).

[14]5 PERI ¶ 1056 (IELRB 1989).

[15]*Id.* at IX-121.

[16]*Id.*

[17]*Central City Educ. Ass'n. v. IELRB*, 199 Ill. App. 3d 559, 557 N.E.2d 418 (1990).

[18]*Id* at 574, 557 N.E.2d at 427.

[19]*Central City Educ. Ass'n v. IELRB*, 149 Ill.2d 496, 599 N.E.2d 202 (1992).

[20]*Id.* at 523, 599 N.E.2d at 905.

[21]In *LeRoy*, the IELRB held that the content for teacher evaluations was a mandatory subject for collective bargaining. *LeRoy Education Association, IEA/NEA, and LeRoy Community Unit School District No. 2*, 5 PERI ¶ 1131 (IELRB 1989). The Appellate Court for the Fourth District reversed, holding the matter permissive rather than mandatory. *LeRoy Community Sch. Dist. No. 2 v. IELRB*, 199 Ill. App. 3d 347, 556 N.E.2d 857 (1990). The Supreme Court reversed the appellate court's decision, remanding to the IELRB in the consolidated case with *Central City*. On remand in *LeRoy*, the parties advised the Board they came to a settlement which the Board accepted.

[22]*Central City*, 149 Ill. 2d at 524, 599 N.E. 2d at 905.

[23]*Id.*

[24]Gene Flynn had replaced Randi Hammer Abramsky in 1990. Edna Krueger had retired. Edna's seat remained vacant until Mary Ann Louderback was appointed by Governor Edgar in 1993.

[25]*Central City Sch. Dist. No.* 133, 9 PERI ¶ 1051 (IERLB 1993).

[26]*Id.* at IX-165.

[27]*Id.*

[28]Chapters 24-11 and 24-12 of the Illinois School Code require that school districts notify employees who are going to be dismissed, in writing by registered mail, at least 60 days before the end of the school term. See *Educ. Ass'n of Round Lake, IEA/NEA and Round Lake Sch. Dist. No. 116*, 8 PERI ¶ 1047 (IERLB 1992).

[29]See Chairman's Message, *Illinois Educational Labor Relations Board Annual Report* 1 (1996).

[30]*Id.*

[31]During my first association with OCB from 1977-1978, I was mentored by three truly exceptional experts in labor relations: Hilton Hotels Vice President Jack Cullerton; Loyola University Professor Art Malinowski; and University of Illinois Professor Milton Derber. These individuals and former NLRB Chairman Ed Miller were the examples I consciously sought to emulate in public service.

[32]*See supra* note 5 and accompanying text.

[33]Illinois Dept. of Central Mgmt. Servs., 2 PERI ¶ 2020 (ISLRB 1986). The IELRB staff union had sought review of that decision in Cook County Circuit Court. The judge later dismissed the staff organization's action.

[34]Some staff members were visibly nervous when I introduced myself. It seems that word had circulated that I had fired a couple of employees when I was with the OCB (true), and this had caused consternation. One employee actually asked me if I would fire her. I reassured her that I was merely there to meet her and had no intention of discharging anyone on my first day.

[35]Jane Casey and I became friends when she was a member of The John Marshall Law School Faculty from 1979 through 1982. She had more friends than anyone I have known and was truly adored by all who knew her. Jane acted as go-between for Wes and me before we met, telling each of us that the other wasn't such a bad guy. ◆

## Recent Developments

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

## IELRA Developments

### Scope of Bargaining

On April 16, 2003, Public Act 93-0003 of the 93rd General Assembly amended 115 ILCS 5/4.5 and 115 ILCS 5/12. The amendments to Section 4.5 changed that Section's focus from one identifying prohibited subjects of collective bargaining to one that identifies permissive subjects of bargaining. Specifically, the amendments removed the word, "Prohibited" from the title of Section 4.5, and effectively renamed that Section "Subjects of Collective Bargaining." The amendments changed the language of Section 4.5(a). Expressly, it now begins with, "Notwithstanding the existence of any other provision in this Act . . . collective bargaining between an educational employer . . . and an exclusive representative of its employees may include any of the following subjects." The new permissive subjects of bargaining include:

> • Decisions to contract with a third party for one or more services otherwise performed by employees in a bargaining unit and, the procedures for obtaining such contract or the identity of the third party.
> • Decisions to layoff or reduce in force" employees and "Decision to determine class size, class staffing, and assignment, class schedules, academic calendar, hours and places of instruction, or pupil assessment policies.
> • Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide the technology.

Clearly, these amendments broadened the scope of what educational employers in the Chicago Public Schools and exclusive representatives of its employees may bargain. Several subjects of collective bargaining that were formerly prohibited subjects of bargaining are now permissive. Section 4.5(b) expresses that the subjects listed in Section 4.5(a) are permissive subjects and are within "the sole discretion of the educational employer to decide to bargain," as long as that employer is required to bargain over the impact its decision would have on the bargaining unit if the exclusive representative requests such bargaining. However, it does mandate bargaining over the impact of the decisions delineated as permissive subjects.

Section 4.5(b) does not preclude the employer from implementing its decision unilaterally during bargaining. The amendments also detail that disputes and impasses over these permissive subjects of bargaining will not end in a strike under Section 13 of the Act, but will be "resolved exclusively" by procedures set forth in Section 12(b).

Section 4.5(c) provides language that addresses how the amendments will affect existing collective bargaining agreements and prohibited subjects of bargaining. The impasse procedures referred to in Section 4.5 were delineated in Section 12 of the Act. The Section was split into four subsections. Subsection (a) was changed slightly to properly refer to the split into subsections and limited the impasse and mediation time frame and procedures in subsection (a) to include only those not "otherwise provided [for] in subsection (b)." Subsection (b), details that, if the parties are in dispute or at impasse "after a period of bargaining of at least 60 days," over a matter listed in Section 4.5, those parties shall use the dispute resolution procedure they have agreed to. It also sets out the minimum requirements for such a procedure.

## IPLRA Developments

### Duty to Supply Information

In *Policemen's Benevolent Labor Committee and City of Bloomington*, No. S-CA-01-072 (ILRB State Panel 2003), the State Panel (Board) upheld the Executive Director's dismissal of an unfair labor practice charge filed by the Policemen's Benevolent Committee (Union), rejecting the Union's assertion that the City of Bloomington (City) violated Section 10(a)(4) and (1) of the IPLRA when it failed to furnish to the Union a copy of the written portion of a recently administered Lieutenant promotional exam which the Union considered relevant for the fair representation of its members.

The Board approached the issue by probing "whether the information is directly related to the union's function as a bargaining representative and reasonably necessary for the performance of that function." While an employer's failure to produce information requested by a union does not automatically constitute a violation of the duty to bargain in good faith, a violation of the duty to bargain will be found where the employer's failure to produce "has meaningfully interfered with the union's ability to fulfill its representative's role." It was emphasized that an employer need not turn over information relevant to a union if the employer's legitimate interest in restricting access to the information outweighs the union's need to have the information for statutory purposes, such as the duty of fair representation.

Relying on *Village of Franklin Park v. ISLRB*, 265 Ill. App. 3d 997,638 N.E. 2d 1144 (1st. Dist. 1994), where the Illinois Appellate Court held that employers need not bargain over the design, administration or grading of promotional exams, the Board held that that the Union failed to demonstrate that receipt of the old exam was reasonably necessary for its performance as bargaining representative. Since the formulation of test questions constitutes a non-bargainable examination technique, the Board reasoned that the Union "is not entitled to the test questions and answers for the purpose of bargaining over unit members' terms and conditions of employment." In addition, because the format of the exam and its questions was not a subject in the Union's collective bargaining agreement with the City, the Board found that the Union did not have a contractual basis for filing a grievance.

The Board recognized that the City provided a "rational and compelling basis" for its refusal to provide the Union with a copy of the exam. By stressing the importance of exam security and exam integrity, the City advanced interests that have been "recognized and found determinative by the U.S. Supreme Court." *See Detroit Edison v. NLRB*, 440 U.S. 301 (1979). Thus, the Board ruled that, "the City's interests in protecting the integrity of the testing process outweigh any perceived interests the Union has in obtaining a copy of the exam."

## Interest Arbitration

*In Town of Cicero v. Illinois Association of Firefighters, IAFF Local 717*, 2003 WL 1701432 (1st Dist. App. Ct. 2003), the Appellate Court for the First District enforced an interest arbitration award on residency.

The Town challenged the award on a number of fronts, including that the arbitrator's decision was arbitrary and capricious and/or exceeded his statutory authority, that the arbitrator lacked jurisdiction to decide the issue of residency requirements, and that the IPLRA violates the Illinois Constitution because it violates the single subject rule and constitutes special litigation. The trial court held the arbitrator's award to be arbitrary and capricious and in excess of the arbitrator's authority. Specifically, the trial court found that the Arbitrator had failed to consider certain factors contained in section 14(h) of the IPLRA, that his application of other factors was arbitrary and capricious, and that he had relied on the liberty interests of the firefighters as a factor, though it is not specifically enumerated in the statute.

The Appellate Court reversed. The court found that section 14(i) of the IPLRA specifically determines the negotiability of residency requirements for firefighters; and that even if the language were merely permissive the *Central City/Belvidere test,* if applicable, would favor mandatory bargaining on residency requirements.

The Town also made much of the arbitrator's reliance on the firefighters' liberty interests as a factor in his decision. The Town's position was that "liberty interests" was not among the factors listed under section 14(h) of the IPLRA, and therefore the Arbitrator's reliance on it was improper. The court, however, found that factor 8 under section 14(h) – "Such other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining . . . or otherwise between the parties" – to be a "catch-all," intended by the legislature to encompass a wide variety of disputes and concerns.

As to the Town's contention, and the trial court's finding, that the arbitrator had failed to consider certain other factors enumerated under section 14(h) – specifically, comparability of wages, hours and working conditions in comparable communities and the interests and welfare of the public – the Appellate Court examined the Arbitrator's opinion and concluded that he had, in fact, considered both issues carefully and that his decisions with respect to each were reasonable. "That this court or the circuit court might have decided the issue differently does not make the Arbitrator's decision arbitrary or capricious."

Finally, the court rejected both challenges by the Town to the constitutionality of the IPLRA. The Town argued that section 14 of the IPLRA violates the Illinois Constitution's requirement that legislation be confined to one subject because the public act that contained the language mandating interest arbitration of residency disputes was enacted together with mattters related to animal control and diseased animals. The court, however, noted that section 14(i) previously contained such a provision, and that enactment of a subsequent amendment with unrelated matters did not render the original provision unconstitutional. The Town's second constitutional challenge alleged that the exemption in section 14(i) for municipalities with a population of at least 1 million constitutes special legislation in violation of Article IV, §13 of the Illinois Constitution. According to the court, the test for whether legislation is prohibited as special legistlation is whether the classification in the statute is rationally related to a legitimate state interest. Finding that

there were rational bases for the population classifications in section 14(i), the court again found the statute constitutional. ♦

## FURTHER REFERENCES

(compiled by Margaret A. Chaplan, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Allred, Stephen. END OF AN ERA: THE 11TH AMENDMENT AND PUBLIC PERSONNEL ADMINISTRATION. Public Personnel Management, vol. 31, no. 3, Fall 2002, pp. 263-274.

Four decisions of the U.S. Supreme Court are analyzed by the author, beginning with Seminole Tribe of Florida v. Florida, and followed by the cases developed from it—Alden v. Maine, Kimel v. Florida Board of Regents, and University of Alabama v. Garrett. In each of these cases, a state employee sued the state in federal court over alleged violations of federal wage and hour laws or civil rights laws. The Supreme Court ruled that, under the 11th amendment's recognition of a state's sovereign immunity, the state could not be sued. The author explores the implications of this doctrine for the situation of state employees who claim violations of federal employment laws by their employer.

Eberts, Randall W., Kevin M. Hollenbeck, and Joe Stone. TEACHER PERFORMANCE INCENTIVES, COLLECTIVE BARGAINING, AND STUDENT OUTCOMES. Proceedings of the 54th Annual Meeting of the Industrial Relations Research Association, 2002, pp. 180-192.

Does merit pay for teachers improve student achievement, as its advocates argue? The authors examined the experience at two high schools in the same county, one of which established a merit pay system, while the other retained the traditional teacher pay system. Course retention percentage, average daily attendance rates, grade point averages, and course pass ratesof the two schools were compared for two years before the implementation of the merit pay system and two years after the implementation. The results indicate that merit pay increased retention, had no effect on grade point averages, reduced daily average attendance rates, and increased the percentage of students who failed to pass the course. The authors suggest that, in contrast, the working conditions usually contained in collective bargaining agreements, such as restrictions on class size and increased teacher preparation time, are positively associated with student achievement.

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Gutekanst, Norine. THE CHICAGO TEACHERS UNION: ONE YEAR OF REFORM. Labor Notes, #283, October 2002, pp. 8-9, 11.

A reform caucus in the Chicago Teachers Union was elected to head the union in May 2001. The author assesses how well the new leadership has fared after one year in office, including how well they have lived up to their election campaign promises, the state of their effort to restore some lost collective bargaining rights for Chicago teachers, and their attempts to prevent the closing of three schools in the African American community Also discussed is what the leadership will need to do to accomplish the rest of its ambitious program.

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Hertenstein, Edward, and Michelle Kaminski. VICTORY IN THE HEARTLAND: AFSCME COUNCIL 31 WINS AT BEVERLY FARM. WorkingUSA, vol. 6, no. 2, Fall 2002, pp. 103-110.

An affiliate of AFSCME Council 31 won the right to represent workers at Beverly Farm Home for the Developmentally Disabled in Godfrey, Illinois, in 1994, but management's strong opposition and stalling tactics prevented a first contract from being negotiated until 1999. The authors describe the strategy and tactics used in the multi-pronged campaign, including a four-month long strike, that finally resulted in an agreement. Legal action, political action, striker support, and appeals to community groups were all utilized in the campaign.

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(Books and articles anotated in Further References are available on interlibrary loan through ILLINET by contacting your local public library or system headquarters.)

### *The Report* Subscription Form (Volume 20, Numbers 1-4 )

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