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REPORT

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New Approaches to Compensation for Teachers

by Michael Kiser, Fred B. Lifton & Tracy Billows

I. Introduction

As the American public increases its expectations for the quality of the education provided by public schools, the quality of instruction provided by teachers receives increased scrutiny.[1] Those who view the quality of instruction as low often blame poor quality teaching and suggest solutions. A very common solution is to pay teachers based on the quality of their work because, "as long as the worst teachers earn roughly what the best earn" the quality will be low.[2] Thus, proponents say, pay for performance ("PFP") will improve teaching and, therefore, student achievement.

In non-scholarly literature and in political arenas, the arguments for PFP usually are expressed in unassailable, apple-pie-and-motherhood terms. Sometimes, the proponents are so strong in their belief in PFP and so immersed in it in their own workplaces that they find opposition to be irrational and indicative of isolation from the mainstream of work life. Proponents find the theories supporting PFP to be obviously and intuitively true. Proponents theorize that PFP increases the quality of work because, if better work is rewarded, it is more likely to occur. They usually contend that the use of PFP in the private sector results in improvements in the performance of a business entity and that PFP also will improve the performance of schools.[3] "Business can't imagine a system where there are no incentives or consequences for failure or success."[4]

Often proponents of PFP in public education are driven by the perception that, as a result of pay systems that offer automatic increases and the job security afforded by tenure, teachers have little accountability for the quality and outcomes of their work and little reason to work harder and improve the learning of their students.

The opponents of PFP also usually resort to apple-pie-and-motherhood arguments and rely on intuition for proof. However, contrary to the proponents' intuition, the opponents' intuition tells them that supervisors use qualitative assessments of performance that are biased against, for example, creative thinking and non-conforming, boat-rocking behaviors. Opponents also contend that PFP promotes competition, not the cooperation that they argue is better for the education of children. Finally, opponents contend that the public education environment is very different from the profit-driven, survival-of-the-fittest business environment and that it should be different. Often underlying these arguments against PFP is the belief that board proposals for PFP are based on perceptions that teachers do not deserve the pay that they receive and that teachers must increase both the quality and the quantity of their work to justify their pay. Many teachers also feel that PFP in public education, contrary to their view of private sector business, holds them accountable for variables over which they have no control.

This article begins with a review of the scholarly literature on the effects of PFP in the private sector. This literature review is limited to the private sector because there is a dearth of research on PFP in education settings.[5] The article then explores public school efforts with PFP. This section discusses the issues that arise when PFP is considered, particularly in organized settings. Also included are descriptions of the circumstances where PFP is most likely to be raised and, as a case study, the recent negotiating of PFP in a suburban Chicago school district. Finally, based on the authors' experiences in and information from public education and the private sector, the article provides an assessment of the viability of PFP in public education.

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II. Review Of The Research On PFP

The effectiveness of private sector pay-for-performance initiatives is difficult to assess. There are many studies and articles about pay-for-performance. Some say pay-for-performance programs in the private sector are very successful. Others say they are complete failures. Still others are somewhere in between. Assessing these positions is difficult because there is no one accepted definition of pay-for-performance. Definitions vary from company to company and from human resources professional to professional. The following definition is used in this article: "A compensation system that links specific, measurable job-performance criteria with permanent or temporary pay increases, bonuses, or other incentives."[6]

III. The Pros and Cons of Pay-for-Performance Programs

The idea behind pay-for-performance programs is that employees will be motivated to perform better or to achieve certain goals if there is a proper incentive, such as a pay increase or bonus, to do so. "The main argument for pay-for-performance plans is that they provide an opportunity to reward good performers and lessen dissatisfaction with pay."[7] Some of the pros of pay-for-performance or merit are: employees get a sense of ownership in the company's performance and goals; employees can track their own performance and know what is expected of them; organizations are getting better results for the money they invest (good performers get rewarded and stay, while poor performers do not get rewarded and either improve or leave); and employees are motivated to perform at their best.[8] Another reason for PFP programs, according to Paul Platten, who specializes in executive compensation and strategic human resources issues, is "[p]ay for performance allows organizations to retain employees while eliminating hierarchy. As corporate hierarchies are flattened, opportunities for promotion are reduced, eliminating a key retention and motivation tool."[9]

Proper program design and communication are critical for companies to achieve the above benefits from PFP. Further, there is no magic recipe for pay-for-performance programs. Organizations must realize that there is not a "one-size fits all" pay-for-performance program out there. "The type of pay for performance that is utilized needs to very much reflect the strategy, structure, business processes and management style of the organization."[10] Further, because organizations are dealing with many different types of employees with varying skill and experience levels, an organization should probably have multiple pay for performance programs in order to be successful.[11]

One of the main arguments against PFP programs is that they "cause people to focus on extrinsic goals rather than the job of making a contribution. . . . Research indicates that when people are focused on a reward, their inherent natural desire to do a task is eroded."[12] Other negative aspects of PFP programs that have been cited include: all employees are not motivated the same way; employees may not always do what is best for the customer or the organization if they are focusing on attaining a reward; and the plans can backfire and actually serve as de-motivators.[13]

Another problem with pay-for-performance programs is that they are difficult to administer. "It is unlikely that any organization will ever be completely satisfied with the approach it chooses. . . . Some of the plans that make the greatest contributions to organizational effectiveness do not make the greatest contributions to quality of work life, and vice versa."[14] Further, the objectives and criteria of the programs need to be monitored continuously to insure that the plan is living up to its intended expectations.

Linking pay with performance has long been an objective of compensation plans, but by and large, the link has not been well executed. One of the main reasons that "performance-based" plans have failed is that "the expectations of employers and employees have not been well matched, measured, or managed."[15]

IV. Does Pay-for-Performance Work in the Private Sector?

One area where pay-for-performance

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programs seem to have worked is CEO compensation. According to research done in 1999, "in companies where stock ownership was higher than the median, shareholder returns were significantly better than in organizations with low ownership."[16] In 1995, Walt Disney stock rose 28 percent and Walgreen's stock rose 37 percent. Michael Eisner, CEO of Walt Disney, experienced a 40 percent increase in compensation that year. Charles Walgreen did even better – an 82 percent increase in his compensation package.[17]

These results seem also to apply to some PFP programs for employees below the executive level. "Companies that treat their high-performing employees significantly better than those that don't are the best-performing companies around. They reside in the upper quartile of shareholder returns."[18]

One company that successfully implemented a pay-for-performance program is Research Cottrell, Inc. The executives at the company decided to design a performance review/pay-for performance program.[19] The company spent time researching programs, reviewing the company's previous results with respect to merit increases and performance management, designing a program to fit its needs, and communicating the program to the employees.[20] The corporation implemented the system in almost all of its seven companies. "In three of the four largest organizations in the company (employing 1,400 employees), the system was very successful."[21] In one of the companies where the system was not successful, the company's human resource professionals concluded that it was due to miscommunication or lack of communication.[22]

Another success story is Holiday Inn Worldwide. Holiday Inn developed a "Best Practices" program for compensating its employees. The program includes "base pay, incentives (short and long term), benefits, and deferred compensation. The company's philosophy is to offer an appropriate mix of base and incentive pay to drive the accomplishments of the company's strategic objectives."[23] The company tied incentives to the achievement of certain goals and performance results. The company also developed competencies "to create a true performance oriented culture."[24]

And it worked. Holiday Inn found improvement in customer satisfaction, profits, and turnover. Holiday Inn evaluated the program at twenty-three company-owned and managed Southern U.S hotels. Guest satisfaction was almost 10 percent higher at those hotels using the "Best Practices" system and performance management program than at hotels that did not do much performance management.[25] The turnover rate at best practices hotels was 38 percent lower, an estimated savings of $124,800 annually.[26] Another study which ranked sixty-one hotels in their use of best practices found that the top five hotels experienced a $2.4 million higher net operating profit over the prior year and a $3.6 million higher gross operating profit over the prior year than the bottom five.[27]

Pay-for-performance has worked in manufacturing settings as well. Corning implemented a program at one of its ceramics plants.[28] The employees started out at a base rate about 40 cents lower than other plants, but could earn additional bonus money for many things, including preventing defective product from proceeding through the production process. "[The] workers made at least an additional 72 cents an hour in bonuses last year [1990]. Three-quarters of that gain reflected the fact that workers met their production targets, and the rest was pegged to improvement in the company's financial results."[29]

The above results suggest that PFP programs are quite successful. However, there are also stories of frustration and failure of pay-for-performance programs. For instance, DuPont abandoned a program for one of its plants after receiving a very negative response from employees.[30] The employees would have started out with a 6 percent lower base rate than some of the other plants but could have made up that 6 percent plus an additional 6 percent under a program that was linked to profit goals.

Rob Rodin, CEO of Marshall Industries, implemented a "one-size-fits all" profit sharing program and did away with its previous system of incentives. "Everyone . . . gets a base salary and the opportunity for profit-sharing at the same percentage of salary."[31] Marshall Industries has experienced great results since the change. Productivity, sales, and profitability increased tremendously. Employees began working together. Turnover decreased by 80 percent.[32] Marshall Industries did not abandon pay-for-performance all together, but its program succeeded while going against what most professionals and scholars have said about the rules for such programs.

A transit organization with over 4000 employees spent a considerable amount of time developing a merit pay program linked to employee performance rather than company performance. About 30 percent of the organization participated in the merit pay plan. The program had been in place three years when an evaluation was conducted After surveying the employees, the evaluators concluded that employees were not entirely happy with the program. "Employees [did] not agree that their performance [was] reflected in their performance evaluation or in their merit increase."[33] The authors concluded that the transit organization needed to work on their program some more.

V. What Does All of This Mean?

There is no single answer or approach to pay-for-performance programs, at least not in the private sector. It appears that if a program is properly developed, researched, communicated, aligned with company culture, goals and employees, it can have very positive results. Further, "dissatisfaction with a merit program is not necessarily bad. If it is the poorest performers who are dissatisfied with their pay increases and the highest performers who are most satisfied, then the system is working. . . [t]he program is rewarding high performers and giving low performers the proper feedback."[34]

However, an organization must be very careful to do all of the above things, research, development, alignment to goals and employee needs, communication, evaluation (and more in many cases). Otherwise, not only will the program fail, but employee morale, performance and turnover will be negatively affected.

VI. Public School PFP Efforts

In light of the varied experience with PFP programs in the private sector, it is not surprising that PFP in public education is very controversial. Any PFP may be viewed as contrary to such a system and, thus, even a modest PFP proposal usually receives a strongly—negative union reaction.

Over many years the equality of pay concept has rankled many school board members and citizens who, in their own employment, are accustomed to individual salary adjustments reflective of their actual (or perceived) contributions. Obviously, there are differences in quality of performances between teachers, notwithstanding identical years of experience and training, just as there are among employees in any enterprise. Those who have felt that these differences should be recognized salary-wise have typically argued for what is frequently identified as "merit pay."

Merit pay requires essentially a subjective judgment as to quality of performance. This is almost always extremely distasteful to teachers. Indeed the very factors which gave rise to the onset of collective bargaining in education, and before that to tenure laws (favoritism, paternalism and politics) amply demonstrate that teachers as a group do not believe merit pay can be fairly or effectively administered.

It must be remembered that teaching is one of the very few unionized occupations where the practitioners are highly trained, exercise substantial intellectual autonomy, and share traits common to many professions—without the concomitant economic rewards. This may limit the ability to analogize from private sector PCP experiences.

Merit pay is by no means an acceptable compensation format for teachers in public education. Current chances for negotiating such a system of payment to replace the single salary schedule seem to rank somewhere between zero and nil, except possibly in a relatively small school system where a consequential trust relationship has been well established. (It also may require a system which is extremely well financed, and in terms of public education, this may almost be an oxymoron.)

Let us look at a specific case history of recent vintage. The issue arose in the negotiation of a successor collective bargaining agreement in the East Aurora School District No. 131, approximately 40 miles west of Chicago. This K-12 district with a dozen schools is not a suburban school district where many of the parents are upwardly mobile. To the contrary, the district was in a location which was relatively stagnant economically, lacked opportunity for growth in tax base, had to contend with serious gang problems, included large numbers of students coming from homes below the poverty level, and where English was not the language spoken at home. In the 1970's the District resisted teacher unionization in every way possible. A new administration had since made strong efforts to build bridges to the teachers' union, but adverse economics and difficult working conditions, plus the attractiveness of many nearby suburban districts, generated high teacher turnover.

With the advent of state-wide testing of students, it became evident from initial disappointing results that some changes had to be made. With the support of the union, a significant tax referendum was passed, salaries became more competitive, and supplies and instructional materials were vastly augmented. But many students were significantly disadvantaged and needed every bit of help they could get. Test scores, particularly at the elementary school level, did improve. But there was still much room for improvement, particularly at the secondary level.

In the forefront of the effort was the Superintendent, Dr. Charles Ponquinette. He insisted that the students in the district fully deserved the extra effort required to bring them quickly to a higher level of performance. He was convinced that improvements in the physical plant and instructional materials had produced demonstrable affirmative results in several of the schools. He believed that with a continued concentrated effort, these improvements could be implemented district wide.

At the Superintendent's urging, this issue was brought to the bargaining table. The first hurdle — and it was a major one —was to design a system that might avoid being labeled "merit pay" by the union. The main element here was to chart goals, and provide that if met, certain economic benefits would flow, not to just to one individual or to the teachers of one school, but to *all* of the teachers. In addition, it was agreed that these benefits would extend — if the goals were met — to teacher aides, and that administrators would have part of their compensation dependent upon meeting these goals. The concept was to build a unity of purpose and avoid having any one teacher or school or group of employees working for its sole benefit at the possible expense of some other group.

There was initial teacher resistance centering on the code word "demographics," not implying any discriminatory attitudes, but emphasizing the perceived difficulties in raising the level of student accomplishment. The reference was to asserted cultural factors in the community which can obviously work against educational improvement—low family income, crime and gang activity, and many homes where English was not the norm.

There was much give and take in determining what these goals might reasonably be. After much effort —and here the union deserves credit for getting on board with a concept that all knew would be most difficult to sell to the membership (and in a contract not overflowing with other benefits in

language or compensation)—the parties evolved a two-year program. Rather than characterizing the program, let us simply note the pertinent language ultimately included in the agreement.

Administrative-Union Partnership Towards Improving Student Academic Achievement

Preamble: All Children Can and Will Learn

The parties to this agreement share a fundamental and abiding commitment to the education of the children of East Aurora School District 131. They recognize and greatly appreciate the extraordinary commitment of teachers, administrators, support staff and other employees of the District. The contributions of the members of the Board of Education, administrators, staff, parents and community are important to the success of our students. Currently, however, standardized test scores show that the skills of many students in the district are well below their potential. Additionally, failure rates for many courses, especially at the high school, are too high. This agreement is dedicated to doing better. The parties to this agreement believe that the East Aurora School District, as a whole, must do more to meet the educational needs and raise the academic expectations for all students.

Partnership Expectations: Administration

- *That administrators clearly articulate their school's academic target goals, after input by school improvement teams comprised of both teachers and administrators, to all staff in their building at the beginning of each school year.*
- *That administrators closely monitor classroom instruction and the academic achievement of students.*
- *Administrators will regularly meet with grade levels, teams, or departments.*
- *Administrators will review and analyze assessment reports on a quarterly basis and provide assistance and direction as teachers develop prescriptive plans for student achievement.*
- *Administrators will require minutes from grade/team/department meetings and will review and respond to them in writing and/or verbally in a timely fashion.*
- *Administrators will develop a written plan for providing assistance to teachers that are experiencing difficulty. Mentor teachers will be used during this process when necessary.*
- *Administration and Union will work to explore using recently retired teachers in mentor and training roles where appropriate.*
- *Administrators will provide initial and ongoing training on the use of TIE2000, the reports and the classroom strategies for utilizing the data generated.*
- *Administrators will ensure that teachers have the core district instructional materials and resources. Requests for additional resources which support State Standards will be provided when possible.*
- *Administration will continue to facilitate the sharing of best practices in teaching. The practice of allowing release time for teachers to observe one another will continue.*
- *That administrators will hold periodic meetings with the building representative in order to share information and discuss possible issues.*

Academic Improvement:

It is the desire of the parties that each student in District 131 would perform to the maximum of his or her potential each and every day, and that he or she leave high school with all the skills and prospects possible. The parties accept that goals for student performance need to be set if progress is to be made.

- *A school is said to have met its minimal goal if it meets or exceeds the State Standards in the areas of reading, writing and mathematics, as measured by the ISAT. (Category 1 School)*
- *Schools in this category must maintain the meets or exceeds status in the ensuing years.*
- *SITs in schools in this category will set internal goals for improving scores.*
- *A school which fails to meet State Standards in one or more of the three areas (reading, writing and mathematics) is a Category II School and will have the following goals:*
- *Maintain meets or exceeds status in any one or two of the three areas, if applicable.*

AND

- *Raise test scores so that one of the following two conditions is met:*
- *The areas which previously did not meet, now meet(s) or exceed(s) State Standards*

OR

- *The sum of the percent of students moving from does not meet to meets, combined with those moving from meets to exceeds will show an actual gain of 10 percent. This "ten percent" goal is an annual goal until the school meets or exceeds State Standards on all three tests. Should the ISAT not be available at the high school level, the high school will use the local assessments to determine the percent of growth from historical data for the duration of the contract.*

Based upon the results of the local assessment for 1998-1999 and using historical IGAP data as a baseline (56 percent in English and 75 percent in Math), the percent of students not meeting in each of the years of the contract will be reduced a minimum of 15pecent annually.

- *At the end of the 1999-2000 school year, the goal for East High will be for a maximum of 46 percent of the students not meeting local standards in English and 65 percent in math.*
- *At the end of the 2000-2001 school year, the goal for East High will be for a maximum of 36 percent of the students not meeting local standards in English and 55 percent in math.*
- *At the end of the 2001-2002 school year, the goal for East High will be for a maximum of 26 percent of the students not meeting local standards in English and 45 percent in math.*

There are some basic benchmarks to measure success. In cases where a school does not meet their individual school goal, the portfolio team (SSC administration and SIP team) will meet to analyze and determine whether or not the school designated is meeting the goal. If consensus cannot be attained, the Superintendent shall make the final determination. It is a goal that all 16 schools show actual gains.

- *At the end of the 1999-2000 school year, the goal will be for 8 out of the 16 schools in District 131 to either be a Category I school, or meet their individual school goal under Category II. In addition, it shall be the goal that the remaining eight schools will show no less than 5 percent actual gain.*
- *At the end of the 2000-2001 school year, the goal will be for 12 out of the 16 schools in District 131 to either be a Category I school, or meet their individual school goal under Category II. In addition, it shall be the goal that the remaining four schools will show no less than 5 percent actual gain.*
- *At the end of the 2001-2002 school year, the goal will be for 16 out of the 16 schools in District 131 to either be a Category I school, or meet their individual school goal under Category II.*

High School Failure:

The high school will put in place a committee in each of the departments that will consist of the department chair, teachers, and an administrator. Union building representatives will collaborate with the principal and the individual department chairs to ensure teacher participation. Each department committee will develop a plan that will address the percent of failures within that department. The plans should focus on instructional methods and techniques used to increase student achievement and reduce student failure. Before implementation of any plan, the building principal will acquire approval from the Director of Secondary Programs. Should a plan fail to receive this approval, the Director of Secondary Programs will become a member of said committee until an acceptable plan is developed.

Administration will set a schedule during 1999-2000 for the development and implementation of these departmental plans based upon the availability of administration to serve on several committees, size of department, failure rate or other reasonable criteria. It is the expectations that the two departments with the highest percentage of failures have approved plans by the end of the first quarter, and implement them during the second quarter. The next two departments with the highest percentage of failures will develop their plans by the end of the second quarter with implementation to occur during the third quarter. All other plans should be approved and ready for implementation by the end of the third quarter.

Celebration:

The District Advisory Council will explore the idea of celebrating and rewarding the buildings which continually meet or exceed State Standards, (Category I schools), or schools that meet their goals under Category II.

How well did all of this work? By one standard, it didn't. The goals set forth in the bargained agreement were not met in their entirety during the 1999-2000 school year. Hence the incentive was not paid to anyone.

In a broader sense, however, there was accomplishment here. The school administration believes the effort did pay off in several of the schools as demonstrated by higher test scores, even in the face of some heightening of standards at the state level. This was taken as further evidence that by additional effort of teachers, administrators and other staff, improvement was possible, notwithstanding the high hurdles of difficult economic and demographics.

This should not be read as a pollyannaish response. There isn't evidence of a surge in educational attainment, but there are signs of at least marginal improvement. There was little, if any, gain at the high school level. But there was enough of a spark overall that the administration has already concluded that when the contract is renegotiated, retention of this incentive pay concept will be strongly pursued.

PFP is not a panacea; it is not for everyone. Most likely, there are only a relatively small number of school districts where an incentive plan is needed. However, for this district at this time it appears to have been a most worthwhile experiment, hopefully one from which all will learn and benefit. In

contrast to most of the omnipresent political rhetoric about education, it represented a practical, down-to-earth effort. Not earth-shattering, but a real effort to positively affect children.

We frequently encounter articles in the educational journals which extol the concept of paying for outstanding performance. Unfortunately, these typically still often confuse merit pay for the individual with a group incentive program. Like it or not, we should not anticipate the teacher unions climbing on such a bandwagon. However, we note that very recently the American Federation of Teachers announced it was "encouraging its affiliates to explore the use of new pay systems that include some forms of pay for performance and differentiated pay for teachers in high-demand areas."[35]

Yes, this national union does couple the above with the comment that "such supplements should add to, rather than replace, the traditional system of paying teachers for their seniority and education."[36] And the AFT is fearful of tying incentive pay exclusively to test score gains. But this does represent an openness of approach (much of which is traceable to Sandra Feldman who took over the reins of the union several years ago).

At its annual convention in the summer of 2000, the National Education Association defeated a resolution for more flexibility in teacher pay programs. However, we have heard of some continuing studies of this issue by some of the NEA's state affiliates.

If the shortage of teacher persists, as now seems likely, we should expect greater demands from management for pay differentiation as between subject areas and for signing bonuses in various guises. We're not talking NBA levels here, but the shibboleth of the single salary will likely be tested - and here is another area where the collective bargaining process can produce answers if some blinders are removed.

VI. Conclusions and Recommendations

Management representatives who are directed by boards to seek PFP in bargaining should expect strong opposition from teachers, but not the level of emotion that proposing "merit pay" brought in the past. Unions will view PFP as a threat to the seniority system, which they view as the best basis, or even the only legitimate basis, for differentiating pay and other benefits. The strength of the union commitment to seniority is evident in the nearly-universal step-and-lane salary schedules that give automatic salary increases for accrual of teaching experience and coursework. Almost any PFP is contrary to such a system and, thus, even a modest PFP proposal will receive a strong union reaction.

Union representatives should be ready for boards to put PFP on the table in some form. They should come to bargaining having developed strategies for representing their constituents, who will usually be in strong opposition immediately upon receiving a PFP proposal. Union representatives should also anticipate a very firm board commitment to PFP.

The tenor of the relationship between the parties both at and away from the bargaining table can be affected adversely by a proposal for PFP and the reaction to the proposal. The likelihood of an adverse effect can be reduced if bargainers on both sides have knowledge of the arguments for and against PFP and can present reasoned positions on the issue.

A board can gain little with a position that treats PFP as a no-brainer and a condition for settlement. A union can gain little with a position of absolute opposition. As is almost always productive when bargaining over any issue, each side must explain the reasons for its point of view and listen to the other side's point of view. Each party must treat the others point of view as legitimate and tease out the details so as to find aspects upon which agreement may exist. For example, even if they disagree on the specific amount of compensation, the two sides might both believe that teachers who are meeting expectations should receive some minimum level of compensation and that poor teachers should not be compensated at that level. Sometimes, if agreement can be reached on the minimums, the parties can participate in reasoned discussions about additional pay for higher levels of performance. When this solution is not tenable, another, common-interest based solution should be found. Without such an outcome, PFP is likely to be an issue that drives serious, long-term uncooperativeness and animosity.

The common thread through the research on the private sector experience use is that employee opposition often makes PFP ineffective and that PFP is frequently a morale-breaking negative issue around which employees rally. The experience in public education is similar, with little evidence that PFP improves employee or—more importantly—student performance. The case study is reflective of the general experience that the considerable efforts needed to gain PFP are only justified in certain situations. Board bargainers face the difficult challenge of convincing their constituents of this. Teacher bargainers have the equally—difficult challenge of convincing their constituents to remain calm when PFP is proposed. ♦

NOTES

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[20] *Id.* 20-21.

[21] *Id.* at 26.

[22] *Id.*

[23] People Management Resources, Performance Measurement and Rewards: Best Practice Case Study, Holiday Inn WorldWide (1988), *available at* <www.workindex.com/pmr/july/20329980034.shtml> (Last visited Dec. 13, 2000).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] John Greenwald, et al., *Workers: Risks and Rewards*, TIME, April 15, 1991, at. 42

[29] *Id.*

[30] *Id.*

[31] *A Unique Entry in the Ongoing Debate over Pay-for-Performance*, PAY FOR PERFORMANCE REPORT, Oct. 1998, at. 2, *available in* LEXIS, News library, NWSLTR file.

[32] *Id.*

[33] Frederick S. Hills et al., *Merit Pay: Just or Unjust Desserts: An Empirical Examination of a Pay-for-Performance Program*, PERSONNEL ADMINISTRATOR, Sept. 1987, at. 53, 58.

[34] *Id.*

[35] Jeff Archer, *AFT to Urge Locals to Consider New Pay Strategy*, EDUCATION WEEK, Feb. 21, 2001.

[36] *Id.*

RECENT DEVELOPMENTS

by the Student Editorial Board

Recent Developments is a regular feature of T*he 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

Arbitration

In *Illinois Nurses Association v. Board of Trustees of the University of* Illinois,741 N.E. 2d 1014 (Ill.App. 1st. Dist. 2000), the Illinois Appellate Court for the First District affirmed the IELRB's decision to enforce arbitrators' orders reinstating two University of Illinois employees, and to reverse an order reinstating a third employee.

The university argued that the grievance arbitration procedure contained in the collective bargaining agreement conflicted with the State Universities Civil Service Act, 110 ILCS 70/360. That act grants exclusive jurisdiction to the University Civil Service Merit Board to determine matters pertaining to the discharge of nonacademic university employees.

The court rejected this argument, relying on *Board of Governors of State Colleges & Universities v. IELRB*, 170 Ill. App. 3d 463, 524 N.E. 2d 758 (4th Dist. 1988). In that case the court concluded that while the "arbitration procedure is radically different from the civil service procedure, the mere fact that an alternative procedure exists does not mean the two systems are in conflict . . . with each other." Thus, the court held that the arbitration provisions are a permissible supplement to the employees' rights under the Civil Service Act.

The University also argued that the arbitrators' awards were contrary to public policy. The IELRB and the court agreed with the University's argument with respect to Joyce Tomanek's reinstatement. Tomanek was a nurse in the University's hospital. The court found that reinstating Tomanek violated the well-defined and dominant public policy favoring safe nursing care which is evidenced by sections 2 and 25(b)(7) of the Illinois Nursing Act. The court stated that Tomanek's reinstatement violated public policy because her misconduct, which ultimately led to one patient's death, endangered the lives of patients and the arbitrator's award lacked a rational basis for concluding that Tomanek would refrain from endangering lives in the future.

The court found that the reinstatement of Linda Leonard, a staff nurse at the University hospital, did not violate the public policy of the Illinois Nursing Act. Leonard was discharged because she attended to a co-worker's child who had a cut finger without admitting him into the clinic, and she signed her own name and a physician's name to a "return to school" note. The court stated that her misconduct, unlike Tomanek's, did not endanger the lives of patients, and Leonard had a twenty year employment record without discipline which supported the arbitrator's finding that she would refrain from this conduct in the future.

The court found that the reinstatement of Diana Perez, an admitting clerk at the University department of pediatric dentistry, did not violate the public policy against perjury and malicious prosecution. Perez had filed a police report charging her supervisor with assault for his earlier conduct towards her during a disciplinary meeting. At trial, the supervisor, was found not guilty. The University then discharged Perez for filing a false police report, filing a false misdemeanor claim, and making false statements under oath. The court adopted the arbitrator's findings that Perez did not commit perjury or malicious prosecution. Therefore, the court held that her reinstatement did not violate public policy.

Duty to Bargain

In the consolidated case of *Lake County Federation of Teachers Local 504 v. Special Education District of Lake County,* No. 2000-CA-0071-C, *Parkview Council of Teachers, Local 1274 v. Morton Grove School District No. 70,* No. 2000-CA-0072-C, *Woodland Council, Local 504 v. Woodland School District No. 50,* No. 2000-CA-0076-C, *Lake Villa Federation of Teachers, Local 504 v. Lake Villa School Districts No. 41,* No. 2000-CA-0077-C (IELRB 2000), the IELRB held that the school districts did not violate their duty to bargain in good faith by postponing bargaining until the State Board of Education adopted rules concerning teacher recertification.

On July 29, 1999, the Illinois Legislature passed Public Act 91-102 which provided that teachers could renew their teaching certificates at five year intervals based upon proof of professional development and/or continuing education. The Act provided

that each school district establish and implement "local professional development committees" to oversee recommendations for renewal or non-renewal of teacher certificates. Each committee was to be composed of classroom teachers, an administrator of the school district and a member of the community at large.

In each case, the union sought to bargain over the impact of the Act but the school district refused until the State Board of Education issued its final regulations implementing the Act.

The IELRB determined that the duty to bargain includes a duty to meet at reasonable times. A delay in bargaining may constitute an unfair labor practice under the proper circumstances. However, because no no fruitful negotiations could have taken place without final rules from the State Board of Education, there were no "reasonable times" to meet to bargain the issue of teacher re-certification.

IPLRA Developments

Backpay

In *Illinois Fraternal Order of Police Labor Council and Sheriff of Jackson County*, Case No. S-CA-96-052C (ILRB, State Panel 2000) the State Panel left open the question of whether overtime pay earned during a backpay period should be deducted from a backpay award in a discrimination case. In reaching the decision, the State Panel split 3-2.

The Sheriff of Jackson County, took exception to an administrative law judge's refusal to offset a backpay award which resulted from a discriminatory denial of promotion of a sergant to the rank of lieutenant.

The Sheriff argued that backpay should be reduced by the overtime the employee worked as a Sheriff's jail sergeant following the denial of promotion. The Sheriff maintained that the overtime pay constituted interim pay. The State Panel recognized, the "well-established rule in calculating backpay awards, holds that a discriminatee is entitled to the earnings she would have received but for the unfair labor practice, less what she actually earned in other employment during that period, or rather, less her interim earnings."

However, the State Panel also noted that an exception exist to that rule. The exception "holds that where a discriminatee works substantially more hours for an interim employer than she would have worked for the original employer, only interim earnings based on the same number of hours that would have been available at the original employer should be offset against backpay."

Finding that the question of "whether and how to apply this exception are issues of first impression for the board," the State Panel majority remanded the case for an evidentiary hearing so that the issue could be "decided based on a full record and briefing of the legal issues involved." The majority also concluded that because the lieutenant's position was paid on a salary basis, it was necessary to consider whether paid overtime in an hourly position can ever offset a backpay award where the denied position is a salaried position where overtime is not compensated.

The two dissenting board members disagreed on the need for a hearing on remand. They believed that the administrative law judge's decision should have been affirmed. In addition, the two dissenters addressed the salary question, stating that they "seriously questioned whether overtime earned in an hourly position," could ever offset a backpay award where the denied position was paid on a salary basis.

Supervisors

In *Metropolitan Alliance of Police, Chapter No. 291, and Northern Illinois University (Department of Safety), and Illinois Fraternal Order of Police, Lodge No. 86,* No. S-RC-00-045 (ILRB, State Panel 2000), the State Panel held that corporals at Northern Illinois University (NIU) were not supervisors.

NIU employed a system in which three corporals reported to five sergeants. Below the corporals, but still reporting directly to the sergeants, were 22 police officers. Above the sergeants were lieutenants.

The university department operated three regular shifts with an additional relief shift available. The four shifts varied in their composition, but they usually were headed by a sergeant. However at the time, shift "C" had only a corporal and four police officers. While this shift makeup was a normal occurrence when a sergeant vacancy existed, or a sergeant was sick, absent or on vacation, shift "C" had been headed by a corporal for over six months.

The State Panel divided the corporals into two classes: those who occasionally substituted for absent sergeants, and one corporal who had filled in for over six months. The Panel then applied the two-prong supervisory test outlined in *City of Freeport v. ISLRB.* 135 Ill.2d 499,544 N.E. 2d 155 (1990). Under that test, the principal work of the employees at issue is analyzed. If it is found to be "substantially different than that of their subordinates," the inquiry turns to whether those employees "have authority in the interest of the employer to perform one or more of the eleven enumerated supervisory indicia, or to effectively recommend such action, with the consistent use of independent judgement in the exercise of that authority."

With respect to the corporals who occasionally substituted for sergeants, the Panel found, "The principal work of these individuals is performing the regular duties of the corporal position, with infrequent substitutions for an absent sergeant."

The Panel found that that corporals' duties were not obviously different from those of the police officers who they supposedly supervised. Both groups patrolled university property, answered assistance calls, wrote police reports, issued parking tickets, performed arrests, investigated automobile accident investigations, and directed traffic.

"The record does not reflect that the corporals exercise more discretion than police officers in making their patrols, or that their primary purpose for patrolling is not to search for criminal activity but to provide backup or to

monitor their subordinate's performance," the Panel noted. In addition, there was no evidence that the two corporals had "significant administrative duties" that differentiated them from the police officers.

Turning to the one corporal who had filled in for six months, the Panel first concluded that his "stepping into a sergeant's shoes on a daily basis for well over six months," made those duties his primary function. However, the Panel concluded that the corporal did not possess and exercise the authority "to direct" employees because he was not responsible for his subordinates' work. First, the Panel noted the corporal did no more than merely observe or monitor his subordinates. He did not exercise the requisite independent judgment in monitoring or oversight. The evidence did not show that he was "actively involved in checking, correcting and giving instructions to subordinates, without guidelines or review by others," the Panel wrote. It did not show that he regularly reviewed, corrected the police officers' work, or that he was held accountable for the performance of the police officers.

In addition, while the corporal approved overtime, he acted within guidelines, with lieutenants handling any real disputes. Consequently, the Panel found that the corporal in forwarding overtime request forms to lieutenants only acted in a "routine and clerical" manner, and not in a supervisory capacity.

Further, the Panel found that the evidence failed to show that the corporal's verbal reprimands of subordinates were recorded, or that they affected the terms and conditions of subordinate employees. The evidence did not show that the corporal's recommendations for discipline were ever adopted as a matter of course without or with very little independent review. Consequently, the Panel found that the corporal did not "exercise the authority to discipline or effectively recommend discipline with the requisite independent judgment."

ULP Procedures

In *Grchan v. ISLRB*, 315 Ill.App.3d 459, 734 N.E.2d 33 (3d Dist. 2000) the Appellate Court for the Third District held that it was proper for the State Board to proceed with an unfair labor practice charge even though there had been proceedings before the Rock Island County Sheriff's Merit Commission concerning the same matter. The court further held that the Board properly determined that an unfair labor practice had occurred and had the authority to impose sanctions against the Sheriff. Rock Island County was also found to be liable as a joint employer for the Sheriff's unfair labor practice.

The court determined that the proceedings before the Sheriff's Merit Commission did not preclude the proceedings before the Board. An officer was grieving a number of issues, including a reassignment and unjust discipline. Although the Merit Commission made a determination as to the appropriate discipline for some alleged misconduct by the officer, the Merit Commission did not have the power to determine whether an unfair labor practice had been committed by the Sheriff against the officer. The Board was the proper forum to hear such matters and make that determination. Therefore, the court rejected the Sheriff's and the county's res judicata argument.

The court then examined whether the Board's determination that an unfair labor practice had occurred was proper. The court found that the Board's finding was not clearly erroneous because the Sheriff admitted to making hostile statements about the officer's union activity. Further, the Board looked at the short interval between the officer's successful arbitration proceeding regarding his reassignment, the first discipline that was imposed upon him, and the repeated discipline and suspensions that were imposed upon him over a seven month period. The court also affirmed the sanctions imposed on the Sheriff by the Board.

The final question before the court was whether the county should be considered a joint employer for purposes of the Board's order. The court looked at the IPLRA for guidance. The IPLRA's, definition of employer provides, "County boards and county sheriffs shall be designated as joint or co-employers of the county peace officers appointed under the authority of a county sheriff." The court rejected the county's argument that a joint employer's liability is limited to unfair labor practices arising out of the bargaining process. The court found no legislative history or prior case law to support this argument. The court concluded that "the legislature intended that a county board be liable as a joint employer for any unfair labor practice involving a sheriff's peace officer." ♦

FURTHER REFERENCES

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

Clark, Paul. DO FEDERAL LABOR LAWS APPLY TO STATE AND LOCAL GOVERNMENTS? Government Union Review, vol. 19, no. 1, 2000, pp. 1-34.

This article is a very detailed legal analysis of the U.S. Supreme Court's rulings on the federal government's power to regulate state and local governments. The author shows that, over time, the clause of the Constitution giving power to the federal government to regulate interstate commerce was used to extend federal labor laws in several ways, including to employees of state and local governments. Recently, however, beginning with a case in which some state employees filed a suit attempting to force their employer to pay them overtime according to the provisions of the Fair Labor Standards Act, the Court has leaned toward a stricter interpretation

which emphasizes the Constitution's Eleventh Amendment immunity of states from suits against them being brought in federal courts. "If FLSA and similar measures cannot be enforced in Federal court, and will not be enforced in State court, then indeed they have been written in disappearing ink",the author concludes.

Kochkodin, Michael C. A GOOD POLITICIAN IS ONE THAT STAYS BOUGHT: AN EXAMINATION OF PAYCHECK PROTECTION ACTS & THEIR IMPACT ON UNION POLITICAL CAMPAIGN SPENDING. University of Pennsylvania Journal of Labor and Employment Law, vol. 2, no. 4, Spring 2000, pp. 807-835.

Decisions of the U.S. Supreme Court dealing with both the private sector and the public sector have upheld an employee's right to object to having a portion of his or her union dues or agency fees used to support political activity, and legislation has been introduced at both the federal and statelevel to require a union to obtain written permission before using uniondues for political purposes. The author examines the arguments on both sides in the debate on such "paycheck protection" measures and argues that supporters of paycheck protection laws are wrong in their assessment of what effect the laws will have on union political expenditures. In fact, he claims, experience in California and the State of Washington shows that such legislation may allow unions to increase the amount of money from dues and agency fees that they could use for political purposes without an employee's consent.

Thompson, James R., and Charles W. LeHew. SKILL-BASED PAY AS AN ORGANIZATIONAL INNOVATION. Review of Public Personnel Administration, vol. 20, no. 1, Winter 2000, pp. 20-40.

Skill-based pay, or as it is sometimes called, knowledge-based pay, is a system by which the primary basis for wage determination is the variety of skills and the skill level of an employee. The authors discuss the elements of skill-based pay plans and assess their suitability for public sector employers by examining three case studies of skill-based pay implementations in the public sector. Two of the cases are unionized federal government agencies and the third is a nonunion state transportation department. The authors conclude that skill-based pay is not automatically precluded in the public sector but that certain unique characteristics of public sector wage determination may present obstacles to its implementation.

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

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