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Robert Perkovich
Illinois Educational Labor Relations Board

Michael Provines
Illinois Educational Labor Relations Board

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Subcontracting within the Confines of the Public Labor Relations Acts

Robert Perkovich
Michael Provines

Robert Perkovich, executive director of the Illinois Educational Labor Relations Board, received a Bachelor of Arts degree in economics from Roosevelt University (Chicago) in 1976 and a Juris Doctor degree from John Marshall Law School (Chicago) in 1981. He is also an adjunct instructor of public sector labor law at Chicago-Kent College of Law.

Michael Provines joined the Illinois Educational Labor Relations Board as a labor relations investigator in September 1984. Since then, he has conducted numerous unfair labor practice investigations concerning mandatory subjects of bargaining and the duty to bargain.

Subcontracting is now occurring with increasing regularity in the public sector. Two types of this practice are common. The first is when the employer assigns work traditionally performed by a group of bargaining unit employees in one workplace to another group of employees *in a different* workplace. The second occurs when the work is transferred from employees in a bargaining unit to employees outside the bargaining unit *within the same* workplace. Since they impact upon employees in the bargaining unit represented by the union, both types of subcontracting will be discussed in this article.

An important distinction must be made between an employer's *decision* to subcontract or otherwise assign bargaining unit work elsewhere and the *impact* of that decision because the obligation to bargain may be affected. Before taking action, employers should consider certain requirements under both the Illinois Public Labor Relations Act (IPLRA) and the Illinois Educational Labor Relations Act (IELRA) if they are to meet their bargaining obligations when subcontracting. Employers who avoid or fail to consider these obligations may be found guilty of an unfair labor practice and ordered to take certain action described below. This article deals with some of the different forms of subcontracting, whether the matter has to be negotiated, and employers' obligations that result from the decision to transfer bargaining unit work.

In some of the cases set forth below, the employer has attempted to subcontract the work of a bargaining unit to a private contractor. In other cases, the employer has made subtle and seemingly minor modifications to the unit by creating new positions and transferring duties ordinarily performed by bargaining unit employees to these new positions outside the bargaining unit. Employers assert that the right to decide these matters is traditionally a management prerogative. Unions often argue that such changes are mandatory subjects of bargaining that involve job security, which is at the very heart of the collective bargaining process. Below we discuss

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the case law and, where applicable, the obligation to bargain these matters.

Subcontracting or the Assignment of Bargaining Unit Work as a Mandatory Subject under the IPLRA

In *State of Illinois (Department of Central Management Services)*, 1 PERI 2016 (Ill. SLRB 1985), the Illinois State Labor Relations Board (ISLRB) construed Section 4 of the Illinois Public Labor Relations Act and adopted the standards set forth by the United States Supreme Court in *First National Maintenance Corporation v. NLRB*, 452 U.S. 666 (1981) regarding the extent to which an employer must bargain a management decision that affects the terms and conditions of employment. Under that standard, an employer must bargain a decision that is amenable to resolution through the collective bargaining process; for example, a decision to assign unit work based upon labor costs or productivity. The rationale is that, if the essence of the decision turns upon cost, the employer could benefit from any of the union's economic proposals and concessions that may dissuade the employer from implementing the decision. Hence, when an employer assigns unit work outside the unit for economic reasons, there is a duty to bargain because the matter could be resolved through collective bargaining. In *State of Illinois*, supra, the newly created Department of Mental Health and Developmental Disabilities assumed the responsibilities of a then existing agency. The new agency enacted a change in job classification, thereby creating a new classification series. Employees in the old classifications were assigned to the new ones, and all employees were given the option of applying for a job within the new series. However, not all employees who applied were upgraded; their salaries were frozen and after one year would decrease.

The ISLRB found that there was no duty to bargain because the decision to change the job classifications was not amenable to collective bargaining. Rather, the ISLRB reasoned that the decision was an inherent managerial right that was at the heart of management's discretion "regarding what organizational structure was best able to achieve the new department's statutory purpose."

In *Illinois Department of Central Management Services*, 3 PERI 2003 (Ill. SLRB 1986) citing *State of Illinois*, supra, the ISLRB applied a similar rationale to an employer's right to promote bargaining unit members into newly created positions classified as supervisory and outside the bargaining unit without first bargaining with the union. The ISLRB found no violation because the employer merely reorganized its structure and selected employees from the unit in a nondiscriminatory manner on the basis of their qualifications to be supervisors. Nevertheless, there was a duty to bargain the *impact* of the decision to promote bargaining unit employees out of the unit and the reduction of bargaining unit work that resulted from the removal of the work.

The first case where the ISLRB found that an employer violated the State Labor Relations Act by unilaterally transferring bargaining unit work out of the unit was *City of Peoria*, 3 PERI 2025 (Ill. SLRB 1987). In that case, the ISLRB upheld the hearing officer's decision that the employer did not lawfully restructure the organization and the work of existing employees both within and outside the bargaining unit. Rather, the employer impermissibly transferred work to increase productivity and to reduce staff. The hearing officer held that the economically inspired decision was based upon labor costs and was therefore a mandatory subject of bargaining. Furthermore, the ISLRB found that the employer was required to give the union a meaningful opportunity to bargain the effects of the decision.

The hearing officer ordered that the work be returned to the unit and that the decision to transfer the work be the subject of bargaining. The hearing officer also held that, in addition to transferring work out of the bargaining unit, the employer failed to bargain over a decision that increased the employees' work load and expanded their duties beyond their normal responsibilities. This decision, economic in nature, affected the employees' condition of employment and was thus "amenable to collective bargaining which must be negotiated."

Subcontracting under the Illinois Educational Labor Relations Act (IELRA)

Under the IELRA, the lead case for establishing the employer's obligation to bargain over eliminating jobs and allocating work to employees outside the bargaining unit is *Jacksonville District 117*, 4 PERI 1075, Case Nos. 85-CA-0025-S, 85-CA-0029-S (IELRB Opinion and Order, March 17, 1988). In a divided opinion, the Illinois Educational Labor Relations Board (IELRB) found the employer's decision to restructure and eliminate a maintenance foreman position did not require bargaining. The IELRB concluded, inter alia, that labor cost was not the major test for deciding such matters.

In *Jacksonville*, the IELRB held that labor cost analysis is not as impor-

tant in the educational public sector as it is in the private sector, which operates under a system of "unfettered entrepreneurial control so as to make a profit." Because no such profit motive exists in the public sector, the driving force behind the employer's obligation to bargain in the educational public sector is the statutory language in Sections 10 and 4 of the Illinois Educational Labor Relations Act. Under Section 4, the Act contemplates a balancing test for determining the employer's obligation to bargain if a subject is "wages, hours, terms and conditions of employment" under Section 10, and an "inherent managerial policy" that "directly affects wages, hours and terms and conditions" under Section 4. Section 4 of the Act sets forth areas of an employer's authority exempted from the duty to bargain as discretionary matters of inherent managerial policy. The employer rights clause of Section 4 reads as follows:

> Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives. To preserve the rights of employers and exclusive representatives which have established collective bargaining relationships or negotiated collective bargaining agreements prior to the effective date of this Act, employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained for and agreed to in a collective bargaining agreement prior to the effective date of this Act.

Accordingly, whenever a subject matter is on the one hand a term and condition of employment and on the other a managerial prerogative, it is necessary to "strike a balance between the educational employer's need and right to establish and implement educational policy and the interest of educational employees, expressed by their exclusive representative, when such decisions affect employees' wages, hours and terms and conditions of employment." *Decatur School District No. 61*, 4 PERI 1076 (IELRB Opinion and Order, May 17, 1988) (appeal pending).

The first case to apply the balancing test after *Jacksonville* and *Decatur* was *Danville Community Consolidated School District 118*, 4 PERI 1105, Case Nos. 86-CA-0033-S, 87-CA-0016-S (Hearing Officer's Recommended Decision and Order, July 7, 1988). The hearing officer was called upon to determine whether eliminating the positions of department head and unit leader and transferring their work to other employees of the employer was a policy matter exempt from bargaining within the meaning of Section 4 of the Act or whether the decision was not a policy matter subject to beneficial bargaining under Section 10(a). The hearing officer ruled that the matter was bargainable and therefore directed the employer to bargain its decision and the effect of that decision. To remedy the unfair labor practice, the hearing officer put the employees back into their former positions, required the employer to make them whole, and then ordered the employer to bargain over the decision. The hearing officer found that the Illinois Educational Labor Relations Act requires that Section 10 must be read in conjunction with Section 4 to establish the employer's legal obligation to bargain before it may freely enact a change. When the balancing test was applied, the employer was also found to have impermissibly created a new classification that included many of the duties of the positions that were eliminated. These duties were to be performed by bargaining unit members at a lower wage. The hearing officer reasoned that the creation of the new classification could be regarded as an inherent managerial policy but that the discussion did not end there because of the way the Act is worded. Rather, the hearing officer found that the matter was subject to negotiation before making the change, which in this instance directly affected the wages, hours, and terms and conditions of employment of the bargaining unit employees.[1]

The lead case under the IELRA that established the employer's duties and obligations and that also addressed the issue of subcontracting unit work to a third party is *Service Employees International Union Local 316 v. IELRB*, 153 Ill. App. 3d 744, 505 N.E.2d 418, 106 Ill. Dec. 112 (4th Dist. 1987); referred to herein as "Carbondale." The specific issue here was whether the school district bargained in good faith its decision to subcontract bargaining unit work. The district sought bids on its custodial and maintenance work in an effort to cut costs and meet a growing financial crisis in the district. Since the custodial and maintenance employees were then represented by

a union with a contract soon to expire, the district notified the union of its intent to consider subcontracting. The employer met with the union several times to discuss its decision and the reasons for subcontracting long before actually finalizing its plan. The employer also gave the union the necessary information so that it could make an informed counterproposal to the bids that were let. Once the bid was let, both the union and a contractor presented proposals. The contractor's proposal was eventually accepted and resulted in a savings of more then $100,000 over the union's best offer. The court upheld the IELRB's decision that the employer had bargained in good faith before subcontracting out the custodial and maintenance work. Specifically, the court found that adequate notice was provided, that the district discussed with the union the reasons for subcontracting, that it gave the union information necessary for preparing a proposal, and that after implementing the decision it discussed and considered proposals regarding the impact that the decision had on bargaining unit members.[2]

Defense for Failing to Bargain: Special Circumstances

Compelling reasons may sometimes legitimize the employer's decision to subcontract union work without first bargaining with the union. If an emergency arises that does not allow the parties to engage in meaningful negotiations before the employer takes action, that emergency excuses the employer's failure to bargain. In *City of Wood Dale*, 4 PERI 2025 (Ill. SLRB 1988), the employer contracted out security-type work that would have been performed by the city's police personnel under normal circumstances. A major flood inundated the community, and the area was declared a federal disaster area. Initially the National Guard was sent in to provide extra security in areas where homes were abandoned. Police personnel also worked overtime to meet the needs of the city. When the National Guard unit was recalled, a private security force was hired to perform similar security duties. The hearing officer found that the hiring of the private security force was not a normal situation where the employer subcontracted unit work without first bargaining. Rather, this was an unusual occurrence caused by a major emergency, thus justifying the employer's decision and failure to notify the union about that decision.

Citing the *City of Wood Dale*, supra, the IELRB in *Kewanee Community Unit School District No. 229*, 4 PERI 1136, Case No. 86-CA-0081-C (IELRB Opinion and Order, September 15, 1988) established that it would also consider an emergency or necessity as a defense for implementing a change unilaterally and prior to impasse. Nevertheless, the IELRB found that this type of defense occurs "only in extremely limited circumstances" and "requires a showing of an actual emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before the action is taken." Therefore, under the circumstances in *Kewanee* and *Wilmette School District No. 39*, 4 PERI 1038, Case No. 86-CA-0073-C (IELRB Opinion and Order, February 11, 1988), the IELRB found that the employer's necessity defense was not justified and thus the subject matter had to be bargained.

Also, if the employer has bargained with the union to the point of impasse over the subcontracting or removal of unit work, the employer's unilateral action will be excused. *Kewanee*, supra.

Duty and Extent of Bargaining Over a Subcontracting Decision

Under the Illinois Public Labor Relations Act, if the employer's objective in subcontracting is solely economic — that is, to reduce cost without intent to alter the structure of the organization — the matter is generally a mandatory subject, and the decision must be negotiated (see ISLRB cases above). Under the Illinois Educational Labor Relations Act, negotiation does not necessarily turn upon economic reasons, but upon whether management's need to establish educational policy under the circumstances of the case and to determine organizational structure is greater than the effect on employee wages, hours, and terms and conditions of employment. The difference between subcontracting and assigning out unit work is essentially one of degree; the same rule of law generally applies as to whether the subject matter requires the employer to bargain. When an issue is determined to be a mandatory subject of bargaining, the parties have a statutory duty to negotiate in good faith. One must therefore consider what constitutes negotiations and when that duty begins.

An employer must notify the union when considering a decision that involves a mandatory subject of bargaining. *City of Peoria*, supra; *S.E.I.U.*, supra. However, should the union fail to request to negotiate, its right to bargain could be waived. For example, although notified of an impending change, the union never expressed a desire to negotiate the decision or the impact of the decision and thereby waived its right to

bargain. *State of Illinois*, supra. If the union does request bargaining on the decision, such a request is also an implicit request to bargain the impact. *Jacksonville*, supra.

A distinct difference exists between decision bargaining and impact bargaining. The case law under the State Labor Relations Act and the Educational Labor Relations Act provides that, although there may not be a duty to bargain over the decision itself, there is most likely an obligation to bargain over the impact of the decision on employees.

Implementation of a Decision to Subcontract

In spite of an employer's obligation to bargain about a decision and/or its effects, the case law is clear that the employer is not compelled to agree to any proposal or make any concession regarding bargaining (see generally *S.E.I.U.*, supra). The courts have specifically held that the employer had no obligation to agree to the union's proposal or to meet the union's proposal and the subcontractor's bid halfway. In essence, *S.E.I.U.* stands for the proposition that if the employer cannot reach an agreement with the union and has bargained to impasse, then the employer is free to implement its decision even if the union does not consent during bargaining to the change or transfer (see also, *Kewanee*, supra).

Where an employer has failed in its duty to bargain about the decision and the decision has had an adverse effect on bargaining unit employees, the remedy that the boards fashion will restore the employees as nearly as possible to their status before the decision. The remedy would require the employer to rehire any employees terminated and pay them for any loss of wages and benefits caused by the change. Also, the employer would be required to bargain in good faith until it has met its bargaining obligation. *Kewanee*, supra; *Heyworth School District 4*, 1 PERI 1182 Case No. 84-CA-0044-S (IELRB Opinion and Order, October 9, 1985).

Remedies for Failure to Bargain

In *Lombard School District No. 44*, 5 PERI ___ , Case No. 86-CA-0106-C (IELRB Opinion and Order, February 3, 1989), the IELRB held that, where there has been a failure to bargain over the impact of a decision, a bargaining order alone does not constitute an adequate remedy to "recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences . . . " (citing *Transmarine Navigation Corp.*, 170 NLRB 389, 1968). Therefore, in such circumstances the IELRB will order the employer to pay affected employees at the rate of their normal wages from five days after receipt of the order to bargain until the earliest of the following conditions occurs:

1) the date the employer bargains to agreement;
2) a bona fide impasse;
3) failure of the union to request bargaining within five days of the decision or to begin negotiations within five days of the employer's notice of its desire to bargain; or
4) the subsequent failure of the union to bargain in good faith.

Clearly, the economic liability for the failure to bargain over a decision or its effects can be staggering.

Conclusion

As new cases are heard by the various public labor boards, the employer's duty to bargain and the extent of the employer's obligation to bargain will continue to evolve as new and novel issues are explored. The questions that might be raised as part of that evolution are not easily answered, and future cases will serve to guide us in this important area.

The cases described above set forth the fundamental objections of the parties in bargaining regarding subcontracting. Where the employer has notified the union of its decision, considered and discussed the union's proposals, and has otherwise bargained in good faith to the point of impasse, its obligation will be satisfied.

Notes

1. On appeal, the IELRB affirmed the hearing officer's finding. However, it did so without using the balancing test because it found that there was no "true reorganization." Rather, the IELRB found that the employer removed work from the bargaining unit and then returned it to the unit without any monetary compensation to unit employees.

2. In *Fenton Community High School District 5*, 5 PERI 1004, Case No. 87-CA-0009-C (IELRB Opinion and Order, November 29, 1988) and *Waverly Community Unit School District 6*, 5 PERI 1002, Case No. 86-CA-0014-S (IELRB Opinion and Order, November 29, 1988), the IELRB further refined the holding of *Carbondale* to provide that the removal of bargaining unit work, whether implemented by the use of a subcontractor or shifting the work to employees outside the unit, is bargainable if the conduct of the employer "effected a change in the

conditions of employment or resulted in a significant impairment of job tenure, employment security or reasonably anticipated work opportunities for those in the bargaining unit."

Privatization: A Management Perspective

Alan M. Levin
James K. Stucko, Jr.

Alan M. Levin and James K. Stucko, Jr., practice law in Chicago with the firm of Laner, Muchin, Dombrow and Becker, Ltd., which concentrates exclusively in the representation of public and private employers in labor and employment matters. Mr. Levin, who is a partner in the firm, received his law degree from the University of Chicago and his undergraduate degree from Yale University. Mr. Stucko, who is an associate with the firm, received his law degree from the University of Notre Dame and his undergraduate degree from Denison University.

Overview

There has been growing public sector interest recently in the concept of *privatization* — the contracting out of previously public functions to private enterprise. Garbage collection and janitorial services are two of the most common examples of privatization at the municipal level. Federal and state governments have also contracted out for personnel ranging from airport control tower staff to prison employees.

Privatization is becoming increasingly important for several reasons. Among these are the reduced federal funding available for state and local services and increased taxpayer pressure to control government spending. This has forced governments to seek the most cost-effective and efficient ways to provide essential services while staying within the parameters of a tight budget. In our experience, 70 to 90 percent of municipal budgets are generally allocated for labor costs (wages and benefits). Thus privatization can be one solution to the problem, because using a private contractor can be cheaper than hiring and maintaining a unionized public sector work force to do the same work.

Another reason that privatization is in vogue today is the desire to provide a higher quality of service to the public. Better service is often a direct result of increased efficiency, which privatization may be able to provide. When privatization occurs, the following results are usually expected:

1) Decisions can be made without wading through multiple layers of bureaucracy.
2) Employers can reward good performance by rewarding only those employees who deserve recognition, rather than granting an across-the-board award to all employees, whether they deserve it or not, as is often done in the public sector. (Of course, private unionized businesses are often in the same position.) This results in a better work force doing better work.
3) An employment pool can be created so that when there is employee turnover, trained individuals will be ready to fill the vacancies. Employment pools are not readily used by governmental agencies, because it usually takes much time and paper work before an employee who is trained and ready to work can be put on the payroll
4) Private sector employers can create a part-time employee program that can save money in wages and benefits. Most governmental agencies do not have the flexibility to have a successful part-time or job-sharing program.[1]

Unfortunately for Illinois public employers seeking to contract out services where employees are unionized (as is increasingly the case), limitations may be placed on privatization by the State, Local, and Educational Labor Relations Boards under both the Illinois Public Labor Relations Act, Ill. Rev. Stat., ch. 48, §1601 et seq., and the Illinois Educational Labor Relations Act, Ill. Rev. Stat., ch. 48, §1701 et seq. Arbitration law must also be considered, because the collective bargaining agreement may contain — or be interpreted as containing — restrictions on subcontracting.

The Law

In many areas of the law, the Illinois State and Local Labor Relations Boards have generally followed decisions under the National Labor Relations Act (by the NLRB) as a guideline. Because of recent state and local board decisions, much of the same can be expected in the area of subcontracting.

In *FibreBoard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the landmark Supreme Court case involving subcontracting in the private sector, the court held that an employer has a duty to bargain before making and implementing the *decision* to subcontract. In this case, upon contract expiration, the employer was planning to have outside employees do maintenance work, which had been previously done by inside employees.

Today, following the principles set forth in two cases not strictly involv-

ing subcontracting — *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (termination of an operation) and *Milwaukee Springs II*, 268 NLRB 601 (1984), *aff'd.*, 765 F.2d 175 (D.C. Cir. 1985) (relocation of operations to another plant) — and *Otis Elevator Company*, 269 NLRB 891 (1984), the NLRB's position is that, if there is no clear and unmistakable contractual waiver of the right to bargain, an employer must bargain, upon request, regarding both the *decision* to subcontract or relocate and the *effects* of the decision on employees, if that decision is based solely on labor costs or other factors that the union or employees can affect (and thereby influence the decision). If the contract contains provisions restricting subcontracting, those must of course be followed. NLRB law also affects cases where the contract does *not* contain language resolving the issue and where a subcontract would not modify a contract in midterm in violation of the NLRA. In a case where the contract is silent or otherwise not dispositive of the issue, if the decision to subcontract is not entirely based on labor costs or other factors that the union or employees can affect, then the employer must still bargain with the union regarding the *effects* on the employees of the decision to subcontract.

Under the Illinois Public Labor Relations Act, the employer has an obligation, before subcontracting out "unit work," to bargain over the decision and its effects on the employees if the decision is based solely on an attempt to reduce labor costs. *City of Wood Dale*, 4 PERI, ¶2021 (1988). In addition, the employer is obligated to bargain over the decision to contract out when the decision is based *only in part* on labor costs. In addition, an employer must bargain with the union for reasons including: the scope or nature of the service involved, overhead costs, emergency needs, efficiency of the operation, eliminating duplication of work, obsolete equipment, the cost of capital investment, or the lack of qualified employees. *Waverly Community School District 6*, 4 PERI, ¶1115 (1988). Even when an employer has no duty to bargain over the decision, it must bargain over the *effects* that the decision might have on the employees. *Berkeley School District 87*, 2 PERI, ¶1066 (1986).

Arbitration decisions, for practical purposes, may be more important than board law in the area of privatization. Under arbitration law, an employer may lawfully subcontract bargaining unit work unless a collective bargaining agreement prohibits it. (Arbitration cases deal with midterm subcontracting, naturally.) Arbitrator Sinclair Kossoff, in *Singer Company*, 71 L.A. 204, 208 (1978), stated:

> Most courts who have considered the issue have held that where a contract contains no express prohibition of subcontracting, there is no violation where an employer replaces employees covered by the contract by giving out work to an independent contractor.

The contract prohibition may be expressed or implied. If a clause expressly states that subcontracting unit work is a violation of the agreement, it is clear that the arbitrator will find the employer in violation if it decides to subcontract union work. However, even in the absence of such a clause, arbitrators may attempt, under some circumstances, to construe the recognition clause and similar language as an obligation to prohibit subcontracting, at least in a way that would undermine the bargaining unit. The argument unions make is that the recognition clause, under which the employer recognizes the union as the representative of employees doing certain enumerated types of work, contains the implicit understanding that the employees have the right to continue doing the work as long as it is done for the employer. Thus, in a number of arbitration decisions where, despite the absence of an express contractual prohibition on subcontracting, the arbitrator ruled subcontracting to be improper.

Where the contract is silent, arbitrators have considered many factors in determining whether the employer has violated the collective bargaining agreement by subcontracting work outside the bargaining unit. The typical factors cited are as follows:

1) Whether the employer was acting in good faith
2) What the past practice has been regarding subcontracting
3) Whether skilled employees and equipment were available without subcontracting (this includes but is not limited to emergency conditions)
4) Whether (and how many) layoffs occur as a result of the subcontracting
5) The length of time the work is to be transferred out of the bargaining unit
6) Whether the work is temporary or permanent

The consequences of an adverse ruling by the labor board or an arbitrator can be severe, including reinstatement of laid-off employees with back pay and benefits.

Practical Considerations

Because the union contract may be pivotal, one of the most impor-

tant factors to consider is contract negotiations with the union and the wording of the language (if there is to be any) on subcontracting. Generally, the language must be clear and mean exactly what the parties mean to say. Naturally, given free rein either in the management rights clause or elsewhere in the contract, the employer will want a clear right to subcontract, with the union waiving any rights to bargain, and the union will seek to restrict or prohibit subcontracting. This has major implications in negotiating strategy, because the employer (like the union) must consider the consequences if the other side is unwilling to agree.

Bargaining history is relevant to arbitrators' decisions on the meaning of contracts. Thus, if the contract is silent but the union can show that, at negotiations, the employer unsuccessfully sought to put in the contract a clause setting forth its right to subcontract, the arbitrator may well conclude that the employer does not have the right to subcontract. The employer may be better off arguing its position later with a silent contract and no relevant bargaining history. (The same considerations apply to union bargaining strategies.) The moral is: Sometimes less is more — *unless* one is prepared to go to impasse or risk a strike. And, where impasse resolution involves interest arbitration, it may still be very difficult to get the language one wants.

If subcontracting is to occur, an employer should notify the union, if feasible, reasonably in advance about its contemplation of subcontracting work. Since even the decision could be bargainable in any close or questionable case, notice should precede a *final* decision to subcontract. When discussing the possibility of subcontracting with the union, the employer should give cogent reasons for the decision, but should take care not to give reasons for contemplating the transfer of work outside the bargaining unit that later can be shown to be pretextual or untrue.

The union may have viable suggestions and solutions; its responses must therefore at least be heard and considered. The union may suggest reasonable solutions that would benefit both the union and the employer — suggestions that might satisfy the employer's objectives while saving jobs for the employees who would be affected by the subcontracting of bargaining unit work. (The wisest unions attempt to follow such an approach.) And, of course, the employer should provide necessary, relevant information so that the union is fully aware of the reasons, basis, and effect of the decision to subcontract. Many of these practical approaches make sense even where the employer has the legal right to subcontract, because they help minimize defense costs and delays for legal proceedings and are designed to maintain a working relationship with the union, which in most cases remains on the scene.

Thus, where the employer has the right to decide to subcontract unilaterally, the employer may still talk to the union and can use its legal rights as an "insurance policy" in any situation where the union takes an unreasonable position. If there is no prohibition on subcontracting in the collective bargaining agreement, and if the employer has bargained in good faith, the employer can subcontract in the event of an impasse.

Bargaining in good faith does not mean that one must agree with any of the union's demands or make any concessions, although making at least a few minor concessions may help demonstrate good faith if charges are filed later. If the union bargains for conditions that the employer cannot or will not agree to, the employer is not required to give in. But denial of demands should be accompanied by an explanation of the reasons; as in *any* negotiations, the goal should be to explain and persuade, not just to take legally defensible technical positions.

The union does have the legitimate right and political need to protect employee interests and will often have a continuing relationship with the employer. It therefore makes sense for the employer to be reasonable when bargaining with the union over the decision or the effects of the decision to subcontract. The union may be concerned with transfer rights, job bidding, seniority provisions, severance benefits, and bumping rights, to name just a few. If the employer is unreasonable or intransigent when meeting to discuss the union's proposals, fails to give requested reasonable information, refuses to meet, or is generally uncooperative, it may be held in violation of the applicable Illinois Act for failing to bargain in good faith. The state and local boards will look to the "totality of circumstances" to determine whether the employer's bargaining conduct was legal.

Conclusion

Knowing the factors that the board and arbitrators apply when deciding cases involving subcontracting is merely a starting point. That knowledge should be used to help devise practical strategies for negotiations and operational decisions.

In contract negotiations, it is critical to weigh the advantages of what one wants against the risks of failing to get it — and to prepare fallback or

alternative strategies in advance. The timing of notice and "subcontracting" negotiations should be similarly planned. At all times, these should be viewed as *practical* challenges at least as much as *legal* challenges. It is the wise employer who anticipates the union's response and is prepared to deal with it in practical ways — not just with a lock-step legal defense. Similarly, unions best serve their members when they work with employers to find pragmatic solutions to real problems, and many do so. Except in unusual cases, labor relationships are continuing ones, and the parties cannot afford to make permanent enemies of each other.

Note

1. Paraphrased from a speech made by Lawrence E. Royston, Jr., at the winter meeting of the American Corrections Association, January 11, 1988.

FURTHER REFERENCES

Blum, Albert A. "Education Councils: A Participative Process for Better Education." *Labor Law Journal*, vol. 40, no. 5, May 1989, pp. 316–319.

Unionized teachers have historically demanded that they be treated as professionals and participate in educational policy making. However, this may be seen as conflicting with educator and community desire to determine educational goals. To resolve this conflict, the author suggests the establishment of education councils, consisting of representatives of all three constituencies, similar to the workers' councils in Europe.

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DiLauro, Thomas J. "Interest Arbitration: The Best Alternative for Resolving Public-Sector Impasses." *Employee Relations Law Journal*, vol. 14, no. 4, Spring 1989, pp. 549–568.

The author examines various arguments against compulsory interest arbitration, among them that it is an unconstitutional delegation of legislative power, that it has a chilling effect on bargaining, that there is no way to enforce compliance, and that it is costly. He evaluates final-offer arbitration with its variations and alternatives and state legislation on interest arbitration. He concludes that any form of compulsory arbitration is preferable to the potential damaging effects of a public employee strike.

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Edwards, Linda N. "The Future of Public Sector Unions: Stagnation or Growth?" *American Economic Review*, vol. 79, no. 2, May 1989, pp. 161–165.

Will union membership in the public sector decline as it has in the private sector? The factors encouraging growth historically, such as the enactment of enabling legislation and the increasing demand for public services, will be offset by the unfavorable public opinion of unions, changing composition of the labor force, and privatization. The author foresees a continuation of the "no-growth" path of the past decade.

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Epp, Daniel L. "The Duty to Arbitrate Public Sector Employee Grievances After Expiration of the Collective Bargaining Agreement." *Labor Law Journal*, vol. 40, no. 4, April 1989, pp. 195–207.

Situations in which the duty to arbitrate continues beyond the expiration of the contract fall into two categories: those that are anchored on some remaining contractual right and those that are based on the employer's duty to bargain. The author examines the situation in the public sector, as expressed in state labor relations board opinions and through reference to court decisions in the private sector that have influenced public-sector law. He concludes with some advice for negotiators and contract drafters.

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Geppert, Edward J., Jr. "Overview: Five Years Under Illinois' Public Employee Bargaining Laws." *Illinois Union Teacher*, vol. 52, no. 7, April 1989, pp. 15–16.

This article looks at how the Illinois Federation of Teachers has fared under the Illinois Educational Labor Relations Act. Collective bargaining has increased, strikes have decreased, and membership is growing. With the new law, however, has come a new need for expertise in administrative labor law.

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Montgomery, Edward, and Mary Ellen Benedict. "The Impact of Bargainer Experience on Teacher Strikes." *Industrial and Labor Relations Review*, vol. 42, no. 3, April 1989, pp. 380–392.

Using data on public school negotiations in Pennsylvania, the authors examine how negotiators' experience affects the frequency and duration of teacher strikes. The results of their empirical study indicate that use of more experienced negotiators on either or both sides reduces both the frequency and duration of strikes. Also, the greater the degree of equality in experience of the negotiators, the less likelihood of a strike.

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O'Neill, June, Michael Brien, and James Cunningham. "Effects of Comparable Worth Policy: Evidence From Washington State." *American Economic Review*, vol. 79, no. 2, May 1989, pp. 305–309.

In 1987, Washington State began implementing wage adjustments based on a comparable worth study. This research examines the effect of implementing comparable worth on the level and structure of wages and on employment in government occupations in the state. The findings indicate a narrowing of the gender gap, but a reduction in employment in the occupations receiving pay adjustments.

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Schachter, Hindy Lauer. "Win-Win Bargaining: A New Spirit in School Negotiations?" *Journal of Collective Negotiations in the Public Sector*, vol. 18, no. 1, 1989, pp. 1–8.

The author explores the strengths and weaknesses of this method of negotiation and assesses the potential problems faced when shifting from an adversarial bargaining model to an integrative bargaining model.

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Volz, William H., and David Costa. "A Public Employee's 'Fair Share' of Union Dues." *Labor Law Journal*, vol. 40, no. 3, March 1989, pp. 131–137.

The authors examine the major court opinions on the constitutionality of fair share fees as well as state legislation authorizing such fees. In order to circumvent the litigation involved in determining the chargeable amount of fees on a case-by-case basis, the authors propose that state statutes specifically establish a fair share fee of 85 percent of union dues.

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(Books and articles annotated in *Further References* can be obtained on interlibrary loan through ILLINET by contacting your local public library or system headquarters.)

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