Summer 2003

# Vol. 20, No. 3

Gerald E. Berendt
*John Marshall Law School*

Illinois Public Employee Relations
>> REPORT
Summer 2003 • Volume 20, Number 3

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

by Gerald E. Berendt

*Editor's Note: This is the second of a two-part article. Part I appeared in the Spring 2003 issue and covered passage of the IELRA, the first IELRB, subjects of bargaining and the appointment of Chairman Berendt. Part II picks up where Part I left off.*

## I. The Early Days of Chairman Berendt's Tenure

At the time of my appointment, there were tensions between the State Labor Relations Board and the IELRB. The SLRB Chairman Bill Brogan was an AFL official who supported merger of the Boards. Short of merger, he wished to call the shots at the IELRB. Nevertheless, when I was appointed, I took immediate steps to try to relieve some of the tensions between the Boards. I meet with Brogan in his Springfield office the day before my confirmation hearing and later had lunch with him in Chicago. Our relations were initially cordial, but I would not agree to Brogan's demand that I terminate staff members he did not like. My unwillingness to comply with his advice led Brogan to attempt to orchestrate my ouster four years later at the end of the Thompson administration.

When I was appointed, I also telephoned and met with various management and union attorneys who practiced before the IELRB. I reassured all that I came to the agency beholden to no one and would decide cases on the merits without regard to who the parties were in a particular case. But there were recurring problems with a few management law firms. The prominent management law firms had quickly adjusted to the new public sector collective bargaining statutes. I knew many of these attorneys from my days at the Illinois Office of Collective Bargaining (OCB) and enjoyed their respect and confidence. But there were some management attorneys who simply ignored the statute and exhibited what can best be described as outright hostility to the Act and the Board. In one memorable case, a management attorney went so far as to seek an order restraining the Board from employing professional staff, maintaining that individual Board members themselves had to investigate and hear cases. But this was the exception and far from the rule. Most management attorneys had few complaints about the IELRB. Indeed, I frequently heard praise from management attorneys for the IELRB's policy of suspending enforcement of its decisions pending judicial review.

To put out fires on the political front, I wrote House Speaker Madigan informing him I had been appointed Chairman of the IELRB and noting that we had a mutual friend, Jane Casey. I reminded the Speaker that he and I had met several times while sitting in adjacent seats at Wrigley Field where we talked about politics and bad relief pitching. I told him I had heard about an incident where the IELRB's legislative liaison had threatened the Speaker and the House Majority Leader. I told him the offending legislative liaison no longer represented the IELRB and apologized for any offense she gave.[1] Jane Casey later advised me that Speaker Madigan was pleased with my letter, and I had no problems with the Speaker during my sixteen years as Chairman.

A spat with Senator Howard Carroll was a harder nut to crack. As mentioned in Part I of this article, Senator Caroll was angry with the agency and its Executive Director over hiring issues. Ordinarily, the Executive Director would testify before the Senate Appropriations Committee in favor of the administration's appropriation request for the agency. But Senator Carroll, the Committee's Chairman, was so angry that the Board Members urged me to appear before the Committee instead of Executive Director Rocky Perkovich.

## INSIDE

The hearing took place two weeks after my appointment. The staff gave me a crash course in the agency's operations and I appeared before the Committee with the agency's fiscal officer, Linda Dodd.

Senator Carroll was famous for his knowledge of state government, his acerbic wit, and his ability to destroy a witness during intense questioning. Testifying before him was like riding a powerful bull at a rodeo. He bolted out of the chute with a series of questions about the agency's lease of the Springfield office, a lease that had been negotiated by the Department of Central Management Services on behalf of the IELRB two years earlier. He maintained that under the lease, the IELRB had illegally committed future fiscal year appropriations. Initially, I pled ignorance, pointing out that I was new to the agency and hadn't participated in the lease negotiation or signing. But the Senator persisted. Fortunately, I was prepared. I engaged him in discussion of the applicable law which I had studied before the hearing. I maintained that the law had not been violated, but the Senator insisted it had. Edna, Wes and I had anticipated this possible stalemate with the Senator, but I was prepared to end it. I offered to write the Illinois Attorney General for an advisory opinion concerning the lease's legality. Senator Carroll accepted, and I left the hearing rubber-legged but exhilarated. Several weeks later, the Attorney General responded that the lease was legal.

But this by no means ended the fracas with Senator Carroll. When one of the State's recurring fiscal crises led to appropriation cuts in July 1986, we were forced to lay off some staff. After lengthy discussions, we decided to lay off the two employees with the least seniority. One was a receptionist who had been sent to us by Senator Carroll. The feud intensified. This situation continued until the following spring when IEA lobbyist Ken Bruce urged me to meet Senator Carroll. I met privately with Senator Carroll in his Chicago law office in April 1987.

Senator Carroll was a different person in private. He was charming. We discussed the challenges of operating an agency. He told me he had heard good things about the IELRB's performance and joked ruefully that if the IELRB had performed poorly, the General Assembly would probably throw money at the agency as it had other agencies that underperformed. I responded that I wanted the agency to maintain high standards of performance and that I believed the IELRB could perform best with Perkovich as its Executive Director. Nevertheless, I offered to deal with him directly if he had any problems with the IELRB, and he asked me to testify on the agency's behalf instead of the Executive Director in the future. I did. Over several years, I tried to make peace between the Senator and Executive Director Perkovich. It was a long process, but eventually, Perkovich reappeared before the Senator and the Appropriations Committee.

## II. Complying With the Open Meetings Act

One of the first matters facing the Board after my appointment was deciding how we would conduct Board meetings. The Illinois Open Meetings Act requires agencies to meet in open session when there is a quorum of agency members present.[2] At the time I joined the Board in 1986, the Illinois Open Meetings Act had no exception for agencies adjudicating cases.

Before I arrived, the IELRB had complied with the Open Meetings Act like most other state agencies. The Board members met with the General Counsel and staff on an individual basis, exchanged written memoranda and decision drafts, and then met together in open session to cast formal votes on final drafts. I proposed to Board Members Edna Kruger and Wes Wildman that we discuss pending cases in open session. When I had been Chairman of OCB, we had taken this step following a request from AFSCME attorneys Stephen Yokich and Tom Edstrom in 1984. The OCB members were initially reluctant to make decisions in open meetings, but later became convinced that there were advantages to actually discussing the cases in front of the parties and other

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Gerald E. Berendt is Professor of Law at The John Marshall Law School in Chicago, Illinois. He served as Chairman of the Illinois Educational Labor Relations Board (IELRB) from 1986 to 2002 and has been an arbitrator and mediator. He was Chairman of the Illinois Office of Collective Bargaining from 1982 to 1984, Executive Director of the Illinois Office of Collective Bargaining from 1977 to 1978, Member of the Illinois Impasse Resolution Panel from 1977 to 1978, and counsel to a member of the National Labor Relations Board from 1973 to 1975. He obtained his A.A. from the University of Florida, his A.B. and J.D. from the University of South Carolina, and his LL.M. from New York University.

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

observers. Such open meetings reassured the parties that the Board members had read their filings, thoroughly considered the parties' arguments and decided the cases on the merits. The parties would observe that such open meetings were unscripted, and the IELRB would establish that its processes were fair, regular and impartial. Moreover, I maintained, why deprive ourselves of the pleasure of spontaneously exchanging our opinions on the important legal issues we would face when interpreting the IELRA? Wes and Edna agreed.

The IELRB's decision to conduct truly open meetings was a tremendous success. I am convinced that the spontaneous and sometimes animated discussions of cases between Board members and staff, even in front of observers, led to better decision making. I remember many instances of Board members' minds changing based on those open meeting discussions. In one important discharge case,[3] Wes Wildman and I initially staked out opposite positions. Wes proposed we find no violation; I proposed that a violation had occurred. Edna was inclined to find a violation, but wanted to hear more discussion. We could not reach agreement on how to dispose of the case and held it over to our next meeting. At the next meeting, Wes declared that our discussion had changed his mind, that he now believed the discharge was unlawful. But at that second meeting, I declared that Wes had convinced me there was no violation. We continued to discuss the matter without resolve and put the case over to a third meeting where we decided that there was no violation.

There was another advantage to discussing cases in open meetings. The parties who heard the Board members' deliberations sometimes settled their cases based on the discussion. When we became aware of this potential to induce settlements, we successfully employed the open meeting format in another area, requests for injunctive relief.

## III. Standard for Issuing Complaints

One area that might be overlooked in the early history of the Board is the evolution of the standard for issuing complaints in unfair labor practice cases. This area of the law is extremely important both to the parties and to the efficient operations of the agency.

The statute provides that unfair labor practice charges may be filed by an employer, an individual or a labor organization. "If the Board after investigation finds that the charge states an issue of law or fact, it shall issue and cause to be served upon the party complained of a complaint . . . and thereupon hold a hearing . . . "[4]

Were the Board and courts to read this standard broadly, nearly every charge filed would result in the issuance of a complaint. In cases where the facts are not in doubt, a charging party could assert a "novel" legal theory that has little to do with the rights protected by the statute. For example, the charging party could assert that a termination motivated by racial animus violates the IELRA. Such a termination might violate other laws, but clearly has nothing to do with the IELRA. Should the IELRB issue a complaint and hold a hearing if it has no case law stating the obvious, that such a discharge is not a violation of the Act?

Similarly, where the law is not in doubt, the charging party could allege "facts" which if true could establish a violation. But what if the "facts" alleged are not credible or are unsupported by the evidence acquired during the investigation? For example, an employee asserts she was discharged for supporting a labor organization, but the investigation discloses little or no employee association with the union and no nexus between any asserted union activity and the employee's termination. Should the IELRB issue a complaint and afford the employee a hearing where the investigation indicates the charging party has no evidence to support her bare assertion?

These were the questions facing the original Board (Wagner, Krueger and Wildman) which first fleshed out the standard for issuing a complaint in 1984 in *Lake Zurich School District No. 95 and AFSCME*.[5] There, the Board announced, "in order to support the issuance of a complaint and to set the charge for hearing, the investigation must disclose adequate credible statements, facts, or documents which, if substantiated and not rebutted in a hearing, [could][6] constitute sufficient evidence to support a finding of a violation of the Act."[7] Thus, the Board effectively delegated to the Executive Director and the IELRB's investigators initial responsibility for determining whether a charge merited a complaint and hearing. This standard afforded the Executive Director significant discretion in making the initial determination of whether the charge raised an issue of law or fact. Of course, the Executive Director's dismissal of charges was subject to appeal to the Board itself.

When I joined the Board, I was concerned that *Lake Zurich* did not give the parties a clear explanation of what was necessary to meet that standard for issuing a complaint. I was also concerned that the delegation to the Executive Director might be too broad. I was particularly troubled that the *Lake Zurich* standard invited the Executive Director to make credibility resolutions when an investigation produced conflicting accounts of events. Important contested facts

should be determined by an administrative law judge after hearing and observing witnesses, I maintained. I urged my colleagues to elaborate on the standard for issuing a complaint, and we did. In *Brown County Community Unit School District No. 1*,[8] we explained:

> The standard, as we envisioned it and applied it in *Lake Zurich*, requires the Executive Director to make an assessment of all of the evidence presented during an investigation by both the charging party and the respondent to determine whether the charging party has presented "adequate credible statements, facts or documents which, if substantiated and not rebutted in a hearing, would constitute sufficient evidence to support a finding of a violation of the Act." As a threshold matter, the charging party must present facts that establish a prima facie violation; but the inquiry does not end there. The respondent's evidence must also be considered. If a respondent presents objective evidence during an investigation which shows that the charging party's material "facts" are erroneous, and the charging party cannot or does not rebut respondent's evidence, then no complaint should be issued, since what is left of charging party's case does not state a prima facie case.
>
> This does not mean, however, as the Employer contends, that the Executive Director may make credibility resolutions in the sense of crediting one witness's version of an event over another's. That is not what we meant by our use of the word "credible" in *Lake Zurich*. Where the parties present conflicting statements that go beyond mere opinion . . . on a material issue of fact, then an "issue of fact" is created which can only be resolved through a hearing. In *Lake Zurich*, we used the words "credible statements" to mean that a charging party's "facts" will not be accepted wholesale if the respondent presents objective evidence that those "facts" are wrong.[9]

The explanation in *Brown* provided the parties the guidance they needed for determining the charging party's obligation to assert "credible facts" in support of the charge. Moreover, it also set parameters for the Executive Director, affording the Executive Director the discretion needed to dismiss charges clearly lacking in merit while preventing the Executive Director from performing the function of the administrative law judges in cases where there are unresolved credibility issues with respect to pertinent facts.

## IV. Injunctive Relief Cases

Under Section 16 (d) of the IELRA, after an unfair labor practice complaint has issued, the Board may seek temporary relief or a restraining order in the appropriate circuit court. Thus, a charging party may request injunctive relief before the actual adjudication of the unfair labor practice. The IELRB determined that it would seek such relief on behalf of the charging party where it is just and proper, but only after an unfair labor practice complaint has issued. The statute itself requires issuance of an unfair labor practice complaint as a prerequisite for injunctive relief. But before an unfair labor practice complaint is issued, the charge must be investigated. If the Executive Director and staff investigators determine the charge has merit, a complaint issues and the Board may then take up the request for injunctive relief. However, if the Executive Director determines that the charge raises no issue of law or fact, the charge is dismissed, and no injunctive relief is possible. A charging party may appeal an Executive Director's dismissal of a charge to the IELRB which could reverse, order the issuance of a complaint, and then take up the request for injunctive relief.

A clever attorney discovered how to manipulate the foregoing process to speed up consideration of charges he filed. When a charging party seeks injunctive relief in its charge, the Executive Director and the Board's investigators give that charge priority, in effect moving the case ahead on the investigation docket and investigating it before earlier filed cases in which the charging parties have not requested injunctive relief. Such expedited investigation makes sense if the charging party has an urgent, legitimate need for injunctive relief to prevent irreparable harm due to a serious on-going violation. In pressing cases, it is important to speed the investigation along, issue the complaint and promptly take up the request for injunctive relief. But the clever attorney was routinely asking for injunctive relief in cases that did not warrant this expedited process, speeding up the process for no reason other than to get his charge investigated early. This problem led the Board to mimic the process of the federal district courts in Section 10 (j) and (l) proceedings under the National Labor Relations Act, requiring a hearing before the Board members when a charging party sought injunctive relief. This brought the charging party's attorney before the Board, prepared to defend the injunctive relief request. Unfortunately, the Respondent had to appear as well to defend against some pretty trivial injunctive relief requests. Moreover, the respondent was pressured to cooperate in speedy investigations, pressure it frequently resented. But the oral argument requirement in injunctive relief requests eventually achieved its objectives. We afforded a

speedy process to charging parties in serious cases while deterring charging parties from making frivolous injunctive relief requests.

We later discovered that the oral argument requirement in injunctive relief cases could also induce the parties to settle their differences. During oral argument and afterwards in open meeting discussion, the Board members and the General Counsel could steer the parties back to the table, to arbitration, or to settlement by disclosing the Board members' thinking on the matters presented. For example, in one case a school district sought to enjoin what the district characterized as a partial strike by teachers. During collective bargaining, the teachers had ceased performing extra-curricular functions, such as acting as faculty advisor to the French Club. The district maintained that the refusal to do this work was an illegal partial strike and an act of bad faith bargaining that should be enjoined due to the irreparable harm inflicted on the students. The union maintained that the refusal was not a partial strike at all, but simply individual teachers deciding not to take on extra-curricular activities for which they had previously volunteered. In the open meeting following the injunctive relief request, the General Counsel and Board members mused that if the teachers had engaged in a partial strike, then under analogous private sector law, they were engaged in unprotected activity for which they could be terminated. Since this case raised important factual issues and a major statutory issue as yet undecided by the IELRB, the IELRB voted to deny the request for injunctive relief because it was unclear that the district would prevail on the merits. But the Board members' open discussion of the risks, both to the teachers and the district, led the parties back to the table where they settled their new agreement, leading the district to withdraw its charge. There were many other examples of such oral arguments leading the parties to settle.

## V. The Role of Labor Arbitration

If space permitted, I would write at length about the Board's development of the role of labor arbitration under the IELRA. But I have already written in this area with co-author David Youngerman, and I direct the reader to that publication.[10] In sum, the early Board members were determined to give labor arbitration the prominent place in dispute resolution that the legislature clearly intended. To that end, the IELRB sought to distinguish between the arbitrator's and the Board's roles. The Board assumed responsibility for determining substantive arbitrability, particularly where there was a possible conflict between the arbitration process or award and another statute. Thus, the Board reserved to itself, subject to judicial review, questions of post-arbitration deferral to awards. However, the Board was careful to render unto the arbitrator virtually exclusive authority to interpret the parties' contracts.

One would think that this separation of authority between the IELRB and arbitrators would be well established by now, particularly since the courts have embraced it as well. The statutory objective of making arbitration an effective and reliable method for resolving the parties' contract disputes is better served by deference to the arbitrators' contract interpretations than by unbridled second-guessing by the agency and the courts.

## VI. Fair Share Cases

I would be remiss in this account of early IELRB developments if I did not mention the IELRB's assertion of jurisdiction over so-called "Fair Share" cases. The union has a duty to represent everyone in the bargaining unit, including non-members. Yet some bargaining unit members who are not union members may not wish to pay union dues. Although such "objectors" are not required to pay full union dues, they are not entitled to be "free riders." They may be required to pay their "fair share" for services the union renders in its capacity as their exclusive representative.

When passed, the IELRA did not explicitly authorize the IELRB to determine which union charges could be assessed to objectors. Yet, the Board implicitly had such authority under the broadly worded unfair labor practice provisions of the Act.[11] The first Board (Wagner, Krueger and Wildman) responded to the request of labor and management by asserting jurisdiction over such cases.

When I arrived at the Board in 1986, fair share was a problem. Although the Board had assumed the daunting task of hearing and deciding hundreds of objectors' fair share cases, the General Assembly had not appropriated funds for the Board to hire staff to process the cases. Moreover, the Board's assertion of jurisdiction was problematic. Nevertheless, I joined my colleagues Wes Wildman and Edna Krueger in deciding the first fair share cases. This area of law deserves a lengthy law review article explaining the complex issues and law developed by the IELRB in its early years. It suffices to report that the Board determined many issues in this area, including the labor organization's responsibility to post proper notice of its fees and the major categories of charges, how those fees are calculated, and the labor organization's obligation to prove up chargeable expenses relating to bargaining and contract

administration. The Board's decisions in this area were well received by the appellate courts.

However, there is one area of the Fair Share deliberations I would like to address since Jim Franczek brought it up during the Kent Conference, that is, IERLB consideration of the assertions of religious objectors. Some Fair Share objectors protest collection of fees on the ground that their religious beliefs preclude support for any secular organization or any group that espouses certain views or causes. The protests of religious objectors led the Board to address the bona fides of their objections. I was most uncomfortable with this. I made my views known in *Schoschat and Triton College Faculty Association,*[12] where I dissented from my colleagues' disallowance of an objection, stating:

> [The religious objector] has cogently set forth his religious tenets, sufficiently to establish that his objection is not a transparent attempt to avoid fair share fees solely for nonreligious reasons.... We should inquire no more. We needlessly risk abridging freedom of religion if we engage in closer scrutiny of the bona fides of an objector's religious beliefs. In this country, the government does not sit in judgment of one's religious beliefs. In any event, I decline to do so.

Nothing has happened to change my mind. The IELRB should not be in the business of passing on the sincerity of an objector's religious beliefs.

## VII. New Board Members and Personnel Changes

When Wes Wildman declined to seek reappointment in 1989, Governor Thompson selected Randi Hammer Abramsky to replace him on the Board. Randi graciously continued to serve as acting General Counsel while we searched for a General Counsel to replace her.

After extensive interviews, the IELRB narrowed the choice of Randi's replacement to a handful of highly competent attorneys. It was an extremely difficult choice, but the Board voted to hire Julie Hughes who had been a trial attorney with the National Labor Relations Board in its Kansas City and Chicago offices. I spoke of Julie's accomplishments at length at the memorial service for her in July, 2002. I understand my remarks have been reprinted in other publications. Here, I will simply say that Julie, by sheer force of her intellect and personality, became the face of the IELRB during the thirteen years she worked for us. At the Board she will be remembered for her work ethic and many professional achievements. Outside the agency she was known for her accessibility to everyone, from the partners in the largest law firms to the individual charging parties. In the professional circles in which we ran, she was credited as "knowing her stuff."

In those early years, I came to value and rely heavily on many other staff members as well. I have already described the contributions of Executive Director Rocky Perkovich and General Counsel Randi Abramsky in the first part of this article. Dave Youngerman, the agency's first Chief Administrative Law Judge, brought an intellectual creativity and a problem solver's approach to the IELRB. Attorneys Mark Stein and Susan Donnelly Willenborg were the heart of the legal staff. To this day, I marvel at how productive Mark and Susan were and at the high quality of their work product.

Early legal staff members Helen Higgins, Patty Supergan, Eileen Bell, Avonne Seals, Caleb Melamed, Cecilia Kasmierski, Roger David, Tom Planera, Gail Rabinowitz, Larry Petchenik, and Katherine Levin also provided excellent service as decision writers and administrative law judges. Mike Provines, Eileen Libby, Sharon Dayton, Mike Davidson, Craig Arndt, Bill Mattingly, Ralph Locke, Don Berry and Mike Meyers provided excellent public service as investigators.

Among the support staff, I must single out Board Administrative Assistant Eileen Brennan and Chicago Office Manager Renee Strickland whom I could always trust to do their best and to act in the best interests of the agency. In Springfield, I came to rely on fiscal officer Linda Dodd and personnel officer Carol Matejka to keep the agency operating on an efficient basis. In addition, Lori Blankenhorn, Edna Grant, Lynn DeMarco, Cindy Handy, Diane Canavan, Carrie Werndt, Ann Brennan, Tanthany Tonie and Sandra Burgess were a great help to me.

I served the remainder of Martin Wagner's term from 1986 to 1990, when I came up for reappointment. That reappointment came just before Governor Thompson left office. Initially, Governor Thompson decided to replace me with Gene Flynn who was labor ombudsman for the University of Illinois. However, Randi Hammer Abramsky decided to move to Canada and step down as a Board member, thus making room for my reappointment as Chairman.

After Governor Thompson reappointed me, new Board Member Gene Flynn and I worked at getting to know each other, to overcome the tensions due to competition for the Board seat before Randi's departure. It took us no time at all. Flynn, as he's known to his friends, is a gentleman in the finest sense. He brought with him a wealth of firsthand experience in labor relations and a lot of common sense. But more than that, Flynn brought a calm, mature approach to the agency's

business. He was much respected and loved by the staff as well. I deeply regretted when he left the Board in 1996 and have since called on him frequently for his advice.

Edna Krueger, Gene Flynn and I sat as the Educational Labor Relations Board until Edna decided to retire in 1992. We had an excellent working relationship, and consciously sought to maintain the standards of efficiency and excellence set for us by the first Board. Edna's retirement broke the link with the original Board, although several staff members from the early days have remained with the agency. Her value to the Board cannot be overstated. In addition to her experience in educational labor relations, she had a presence that was both authoritative and conciliatory. When Edna Krueger was a Board member, the IELRB worked as a team.

Not long after Governor Edgar took office in 1991, Rocky Perkovich decided to step down as Executive Director to pursue a career as a labor arbitrator and educator. After a lengthy search, the Board convinced John Albrecht, then an investigator for the NLRB in Chicago, to take the Executive Director's position. John had many years of experience in regulating labor relations and came well-equipped for the job. But shortly after hiring John, the history of the Educational Labor Relations Board nearly ended.

In 1992, several highly placed individuals in the Governor's office convinced Governor Edgar to issue an executive order consolidating the IELRB with the State Labor Relations Board. However, Gene Flynn and I used some of our contacts in State government and in the labor/management community to convince Governor Edgar to recall the executive order before it was formally filed with the Senate.

## VIII. Conclusion

This concludes my account of the first eight years of the Illinois Educational Labor Relations Board. I have omitted much in order to "take the high road," to emphasize the IELRB's accomplishments. Untangling the threads wasn't easy, since many of the developments involved sensitive or personal matters as well as important events. I have decided that this will be my last word on my experiences at the Educational Labor Relations Board. As attorney Jim Franczek advised me not long ago, "It is time to move on." ◆

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### Notes

[1]The legislative liaison was terminated before I joined the Board.
[2]5 ILCS 120/2 (2003).
[3]*Hardin County Educ. Ass'n, IEA-NEA, and Hardin County Community Unit Sch. Dist. No. 1,* 3 PERI ¶ 1076 (IELRB 1987), *aff'd,* 174 Ill.App.3d 188 528 N.E.2d 737 (Il. App. 1988).
[4]ILCS 5/15.
[5]1 PERI ¶ 1031 (1984).
[6]In the published *Lake Zurich* decision the word "would" appeared in the quoted portion. However, this was a typographical error later corrected by the Board. See *Elementary Teachers' Ass'n of W. Chicago, IEA-NEA and West Chicago Sch. Dist. 33,* 3 PERI ¶ 1088, at VII-257 n. 3 (1987). In preparing this article, I have discovered other errors in PERI. For example, PERI indicates that I participated in the *Lake Zurich* and *Berkeley* decisions discussed in this article. Martin Wagner was Chairman and participated in both those decisions which were decided before I joined the Board on June 1, 1986.
[7]I PERI ¶1031 at VII-66.
[8]2 PERI ¶ 1096 (IELRB 1986).
[9]*Id.* at VII-278-79.
[10]Gerald E. Berendt & David A. Youngerman, *The Continuing Controversy over Labor Board Deferral to Arbitration - An Alternative Approach,* 24 STETSON L. REV. 175 (1994).
[11]115 ILCS 5/14.
[12]6 PERI ¶ 1074 (ILERB 1990). ◆

## Recent Developments

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

## IELRA Developments

### Duty to Bargain

In *Harlem Federation of Teachers, Local 450, and Harlem Consolidated Schools, District No. 22,* Case No. 2001-CA-0030-C (IELRB, 2003), the IELRB affirmed the ALJ's decision that the district did not violate Section 14(a)(5) of the IELRA, 115 ILCS 5/1 by discontinuing a health insurance subsidy provided to retirees.

The Board concluded that the retirees' health insurance subsidy was a mandatory subject of bargaining. Citing the Illinois Supreme Court's decision in *Central City Education Association v. IELRB,* 149 Ill.2d 496, 599 N.E.2d 892 (1992), the Board determined that the retirement benefits that currently active employees received was a matter of their wages, hours, and terms and conditions of employment. The Board further determined that benefits that employees would receive during their retirement did not involve such areas of discretion as the functions of the employer, standards of services, the employer's overall budget, the organizational structure, and the selection of new employees, and therefore was not a matter of inherent managerial authority. Consequently, the retirees' health insurance subsidy was a mandatory subject of bargaining.

However, the Board determined that the district's change in this mandatory subject of bargaining did not constitute a refusal to bargain. Adopting the ALJ's findings of fact, the Board examined the bargaining history and determined that the parties did bargain over the retirees' health insurance subsidy. The union made proposals under which the district would have been required to keep the subsidy as an option. The district consistently opposed the proposals and eventually the union dropped the health insurance subsidy. Thereafter, the parties reached an agreement on retirement incentives. The Board found that the district's discontinuation of the subsidy was consistent with the agreement that the parties reached.

Further, the Board determined that the district was not required to engage in mid-term bargaining over the retirees' health insurance subsidy. Quoting *Rock Falls Elementary School Dist. 19*, 2 PERI ¶ 1150 (IELRB 1986), the Board stated that "mid-term bargaining is required 'over mandatory subjects of bargaining which are neither fully negotiated nor the subject of a clause in an existing collective bargaining agreement.'" The Board found that because the parties exchanged proposals encompassing the issue and ultimately reached agreement, retirees' health insurance subsidy was fully bargained and therefore mid-term bargaining was not required.

The union argued that there was no reference in negotiations to discontinuation of the insurance subsidy as a requirement for obtaining continuation of another benefit. The Board disagreed, concluding that regardless of whether it was a quid pro quo for the continuation of another benefit, the exchange of written proposals demonstrated that the union dropped continuation of the subsidy during the negotiations. The Board remarked that "what the dropping of the subsidy was exchanged for is not significant."

The union also argued that the contractual language concerning retirement incentives was a supplement to, rather than a replacement of, the district's retirement policy. The Board concluded that the characterization of the language as either a replacement of or a supplement to the policy was irrelevant. The fact that the district bargained with the union over the continuation of the subsidy remained unchanged. Because the parties bargained over the continuation of the subsidy, the Board reasoned that the district did not commit an unfair labor practice.

## IPLRA Developments

### Arbitration

In *Casanova v. City of Chicago,* 2003 Ill. App. LEXIS 827 (1st Dist. June 30, 2003), the First District Appellate Court held that: (1) a last chance agreement (LCA) was not a separate agreement from the collective bargaining agreement (CBA), and therefore the LCA did not give Casanova standing, independent of his union, to sue to vacate an arbitrator's award; and (2) the arbitrator did not exceed his authority when he found that the City was not required to perform a urine test to confirm breathalyzer test results.

The LCA subjected Casanova to random testing for drugs and alcohol for a year. If Casanova tested positive for drugs or alcohol during this one-year period, he would be subject to immediate discharge. Twenty days after signing the LCA, Casanova tested positive for alcohol. Shortly thereafter, the employer discharged Casanova. His union filed a grievance challenging Casanova's discharge and it was submitted to arbitration.

At arbitration, Casanova argued that cough syrup and his slowed absorption of alcohol due to hepatitis were responsible for the positive result. He also argued that the City was obligated to perform further tests to verify the positive tests. The arbitrator determined that even accounting for Casanova's impaired absorption of alcohol due to hepatitis, the small dosages of cough syrup he claimed he consumed before the test did not account for the .04 positive test results. The arbitrator also determined that the City was not required to perform a confirmatory test for alcohol on Casanova's urine specimen. The arbitrator denied the grievance, finding just cause for discharge. The Union did not challenge the arbitrator's decision.

Casanova filed a petition in circuit court to vacate the arbitral award. He argued that because the arbitrator exceeded his authority in determining that a confirmatory test was not required; he asserted that he had a property interest in his employment, and that the arbitrator's denial of his grievance without requiring the confirmatory test amounted to taking of this property interest without due process of law; he also argued that the union breached its duty of fair representation by failing to file a petition to vacate the arbitral award.

While Casanova's petition to vacate the arbitral award was pending in circuit court, he filed an unfair labor practice charge with the Illinois Labor Relations Board alleging a breach of its duty of fair representation. A few months later, the Labor Board dismissed Casanova's unfair labor charge. The Board's decision was upheld through the state court appellate system. Casanova filed a second amended petition to vacate the arbitral award with the circuit court. The circuit court dismissed the second amended petition

The First District Appellate Court affirmed the circuit court finding the LCA to be a supplement to the CBA. Given that finding, in order to

challenge the arbitral award Casanova would either have to be a party to the CBA or be able to show that the Union breached its duty of fair representation. Because the Labor Board did not find a breach, the doctrine of collateral estoppel bared Casanova from relitigating the fair representation claim in the Appellate Court.

Casanova urged the Appellate Court to find that he had a property interest in his employment and that the arbitrator's denial of his grievance without requiring the City to perform a confirmatory urine test amounted to a taking of property without due process. The Appellate Court found that for Casanova to prevail on his due process claim, he would have to show: (1) a cognizable property interest; (2) a deprivation of that property interest; and (3) a denial of due process. The Appellate Court found that the LCA provided Casanova with a limited, but enforceable property interest and Casanova lost the interest when he was discharged. In determing whether due process was satisfied, the Appellate Court applied the three-part test articulated by the Supreme Court in *Mathews v. Eldridge*, 429 U.S. 39 (1976). This test required the court to balance (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3), the government's interest, including the function involved and the fiscal and administrative burdens that the addition or substitute procedural requirement would entail.

Casanova argued that the risk of erroneous deprivation of property was high, because the urine test was necessary to validate the accuracy of the breathalyzer test results. The Appellate Court, while sympathetic to Casanova's argument, acknowledged that courts have determined that the risk of error is low where a termination decision turns squarely on the result of routine, standardized medical and clinical procedures conducted by qualified unbiased healthcare specialists. Because the Appellate Court was not presented with any evidence that the breathalyzer machine was working improperly or that the tests were administered improperly, it could not say that the City's failure to give Casanova a urine test to confirm the results of his breathalyzer tests violated his due process rights.

In *Grchan v. AFSCME, Council 31, Local 2025*, 2003 III. App. Lexis 634 (3d Dist. May 20, 2003) the Third District Appellate Court reversed the trial court's order that granted the plaintiffs' motion to stay arbitration. AFSCME filed a grievance alleging that the employer violated Article I, section 2, of the collective bargaining agreement (CBA) when it required correctional officers to dispense medication to inmates. Article I, section 2 provided that Rock Island County may "make and enforce reasonable rules of conduct and reasonable regulations."

In reviewing the trial court's order *de novo*, the Appellate Court found that the trial court erred when it found that the sole issue for resolution was whether Rock Island County's medications policy violated the Illinois Controlled Substance Act (720 ILCS 570.100 *et seq.*). Furthermore, the Appellate Court held that the trial court was incorrect in holding that the issue was not arbitrable under the CBA because it was statutory in basis and therefore specifically excluded from arbitration. The Appellate Court found the issue to be whether the CBA and the IPLRA required arbitration of the grievance at this stage of the dispute. The Appellate Court found that they did because the parties did not mutually agree to resolve their disputes in a forum other than arbitration.

## ULP Procedures

In *ILRB*, v. *Chicago Transit Authority*, 2003 Ill. App. LEXIS 817 (1st District, June 30, 2003), the First District Appellate Court held that the Cook County Circuit Court should determine whether documents ordered produced by the ILRB contained privileged information. This ruling reversed a decision by the circuit court that an Administrative Law Judge selected by the Labor Board's hearing ALJ should determine which documents were privileged.

Amalgamated Transit Union Local 241 filed an unfair labor practice charge against the Chicago Transit Authority, based on the CTA's refusal to sign a collective bargaining agreement that the CTA had negotiated with the union. The ILRB issued a complaint for hearing and assigned the case to an ALJ. The ILRB subsequently issued a subpoena ordering the CTA to produce documents in existence since January 1, 2001, including bargaining notes taken by CTA representatives, containing "any and all notes or memoranda concerning collective bargaining with Local 241 for a successor agreement, except those privileged as attorney client communications or attorney work product." The CTA filed a motion to revoke the subpoena, arguing that the documents were related to its bargaining strategy, and were therefore privileged.

When ruling on the motion to revoke, the hearing ALJ noted that the IPLRA did not provide a procedure for the review and determination of claims of privileged materials. The hearing ALJ recognized that the person or entity called upon to decide the merits of the case should not also decide the issues related to bargaining strategy privilege, so the hearing ALJ ordered the CTA to produce the documents to another ALJ within the

ILRB, to determine the extent of the privilege. The CTA refused to comply with the order, so the ILRB filed a petition in the circuit court to enforce the subpoena. The CTA moved to dismiss the petition, arguing that the circuit court, not the ALJ, should perform the inspection of the documents. The trial court denied the CTA motion to dismiss and ordered the CTA to comply with the subpoena by turning the requested documents over to the ALJ designated by the hearing ALJ. The trial court stayed its order pending the CTA's appeal to the Appellate Court.

The Appellate Court held that the Illinois Supreme Court decision in *IELRB v. Homer Community Consolidated School District No. 208*, 132 Ill.2d 29, 547 N.E.2d 182 (1989) was controlling. In *Homer*, the Supreme Court held that the circuit court was better suited to perform an in camera review of documents because the circuit court was in a position of detachment from the underlying controversy, and has greater experience in determining evidentiary privileges. If the IELRB had to decide whether the documents were privileged, the IELRB as a body would have knowledge of the privileged documents' contents when adjudicating the underlying dispute.

The Appellate Court reached the same result in this case because of the significant similarities between section 15 of the IELRA and section 11 of the IPLRA. The Appellate Court rejected the argument of the ILRB and the union, participating as an intervenor, that the ILRB had sufficient authority and experience to make its own determinations of privilege without prejudice to the underlying dispute. The court also rejected the argument that referral of the in camera inspection to a different ALJ was sufficient to safeguard the rights of the CTA.

## FMLA Developments

### Sovereign Immunity

In *Nevada Department of Human Resources v. Hibbs,* 123 S. Ct. 1972 (2003), the U.S. Supreme Court held that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family care provisions of the Family and Medical Leave Act of 1993 ("FMLA"). The court rejected the state's claim of Eleventh Amendment sovereign immunity

William Hibbs was employed in the Nevada Department of Human Resource's Welfare Division in April and May of 1997, when he sought leave under the FMLA to care for his wife, who was recovering from an automobile accident and subsequent surgery. The Department granted his request for twelve full weeks of FMLA leave, and authorized that he use the leave intermittently as needed between May and December of 1997. Mr. Hibbs used the leave until August 5, 1997, after which he did not return to work. In October, the Department informed Mr. Hibbs that his FMLA leave was exhausted, and that he must return to work by November 12, 1997. Mr. Hibbs failed to do so, and his employment was terminated. Mr. Hibbs sued in the United States District Court for damages, injunctive, and declaratory relief.

The district court awarded summary judgment to the Department because the Eleventh Amendment barred the FMLA claim. Mr. Hibbs appealed, and the Ninth Circuit Court of Appeals reversed. The Supreme Court granted certiorari to resolve a conflict between the circuits, and affirmed the Ninth Circuit ruling.

The Supreme Court restated the doctrine that Congress may abrogate the states' Eleventh Amendment immunity from suits in federal court under section 5 of the Fourteenth Amendment. For Congress to exercise this authority, it must pass a two-pronged test. First, Congress must make its assertion to abrogate the states' immunity unmistakably clear in the statute. Second, Congress must act pursuant to a valid exercise of its Fourteenth Amendment powers. The Supreme Court reiterated that it, and not Congress, is responsible for defining the substance of the constitutional guarantees under the Fourteenth Amendment.

The Court then held that the FMLA protects the rights of workers to be free from gender-based discrimination in the workplace. The Court noted that classifications that distinguish between men and women are subject to heightened scrutiny. Because gender-based discrimination is examined under heightened scrutiny, Congress need show only that the FMLA was congruent with and proportional to the goal of eliminating gender-based discrimination by the states and other agencies.

The Court held that the evidence provided in the Congressional hearings was compelling in its proof of systematic gender-based discrimination by the states. Gender-based discrimination persisted despite the enactment of Title VII of the Civil Rights Act of 1964 and its later amendment by the Pregnancy Discrimination Act.The legislative history of the FMLA and predecessor legislation showed that Congress substantiated the fact that parental leave for fathers was rare before the enactment of the FMLA, and that men in "both in the public and private sectors receive notoriously discriminatory treatment in their requests for such leave." States based their discrimination on pervasive sex-role stereotypes and not on the physical differences between men and women. The States' record of unconstitutional participation in gender discrimination was significant enough to justify the

enactment of prophylactic legislation.

The Court distinguished this case from its prior cases that had preserved the States' Eleventh Amendment immunity from claims under the Americans with Disabilities Act (ADA) (*Univ. of Ala. v. Garret*, 531 U.S. 356) and the Age Discrimination in Employment Act (ADEA) (*Kimel v. Florida Board of Regents*, 528 U.S. 62). The Court evaluated age and disability discrimination under the rational basis test, and under rational basis analysis, Congress had not provided evidence of pervasive discrimination against the protected classes sufficient to justify the legislation. However, because the Supreme Court examines gender-based discrimination under heightened scrutiny, it was easier for Congress to provide evidence showing a pattern of state gender-based discrimination. Congress determined, "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."

The Court held that the FMLA is narrowly tailored and limited in scope, targets the boundary between work and family responsibility where stereotypes remain the strongest, and deals with only one component of the employment relationship. The FMLA requires only unpaid leave and applies only to employees with one year's tenure who had provided at least 1250 hours of service in the past year. Therefore, the family-care provisions of the FMLA were congruent with and proportional to the remedial object of eliminating gender discrimination in the workplace, and therefore its application to the States was constitutional. ◆

## FURTHER REFERENCES

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

Brand, Norman, ed. HOW ADR WORKS. Washington: Bureau of National Affairs, 2002. 1100p.

This book is a collection of chapters written by experts explaining the process of alternative dispute resolution step by step. Part 1 contains chapters on how advocates start the process; part 2 covers mediation; part 3 covers arbitration; and part 4 covers drafting policies and agreements. Both union and nonunion situations are discussed, and the point of view both of advocates for the plaintiff and the employer is presented. Appendices include examples of ethics rules, agreements for mediation services and mediator instructions, excerpts from

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

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collective bargaining agreements, and other documents used in the ADR process.

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Brimelow, Peter. THE WORM IN THE APPLE: HOW THE TEACHER UNIONS ARE DESTROYING AMERICAN EDUCATION. New York: HarperCollins, 2003. 298p.

The author claims that the decline in educational achievement over the past thirty years in spite of large increases in spending is due to the rise in influence of teacher unions, especially the National Education Association. He describes the teacher unions as a kind of trust, with a political and economic monopoly that is ruining the education system. The remedy, he says, is to hold the unions accountable and to open up the public schools to market forces.

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Gore, John. LET TEACHERS' UNIONS PAY FOR UNION BUSINESS. Government Union Review, vol. 21, no. 1, 2003, pp. 53-84.

Why should taxpayers pay for union officers to take time off for union business and to attend union functions, asks the author. Not only does this replace experienced teachers who are union officers with less experienced substitutes while they're gone, but it also costs a lot of money. This article reports a study of clauses in collective bargaining agreements in school districts in Colorado undertaken to determine the actual costs for a year of paying for leaves of union presidents while in office and for teachers' leaves for union business. The total for all the districts examined is over $661,000. The author advocates passing state legislation to prohibit school districts from providing released time with pay for union service, from releasing employees from regular duties for union business for more than a year, during which time the union will be responsible for the full salary and benefits of the employee, and eliminating released time with pay to attend union meetings unless it is charged to accrued vacation or personal days.

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SPECIAL SECTION ON PUBLIC EMPLOYEE BENEFITS. Employee Benefits Journal, vol. 28, no. 1, March 2003, pp. 3-15.

The three articles in this section examine specific topics related to public employee benefits. The first discusses new standards issued by the Governmental Accounting Standards Board on the way in which governments report post-employment health benefits in external financial statements. It looks at current practice, the objectives of the new standards, and the implementation of the new standards. The second article describes a multistate coalition formed by the West Virginia Public Employees Insurance Agency in an effort to contain prescription drug costs. The final article examines efforts of public employee pension funds to influence corporate governance and decision making.

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

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***Illinois Public Employee Relations Report***

Published quarterly by The Institute of Labor and Industrial Relations University of Illinois at Urbana-Champaign and Chicago-Kent College of Law, Illinois Institute of Technology, 565 West Adams Street, Chicago, Illinois 60661-3691.

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