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Labor Relations in Hard Times

By Michael J. Duggan, Julie E. Lewis & Mallory Milluzzi

I. Introduction

The worst economic downturn since the 1930s is forcing states and local governmental entities to make hard financial decisions and come up with creative solutions as to how to shrink record high budget gaps. Governmental entities are making dramatic changes and tough choices when faced with a multitude of competing interests and a recession that is cutting deeply. Hiring freezes, layoffs, and/or furloughs have become common in every state and at every level of government, but these are short-term fixes that often hurt the quality of service and staff morale.

However, government officials often lack the time for long-term planning because they are focusing on simply getting by month-to-month and may have balanced-budget mandates to meet. Add in collective bargaining agreements and tense labor relations, and you have the perfect storm. This article points to a selection of recent examples of dramatic cost control measures initiated by public employees in response to a reeling economy, reviews some of the responses of public sector unions to those initiatives, and discusses some commonly used cost reduction strategies from the public sector, as well as their pitfalls.

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II. Wholesale Attempts at Cost Reduction: A National Snapshot

Plainfield Community Unit School District 202, a district that includes 30 schools and 30,000 students, considered upwards of 200 cuts, to help offset a $16 million budget deficit. The Board received vocal opposition from parents and students and blamed the budget crisis on a drop in property tax revenues, the economy, and inadequate state funding.[1] Ultimately, the Board voted to cut 159 positions to save about $7.8 million and made other non-personnel adjustments that it anticipates will save the district about $13 million.

In New Mexico, Gov. Bill Richardson created a budget-cutting plan to save $11 million, which required most state employees to take five furlough days. The furlough days in New Mexico gave employees long holiday weekends. The dates were Dec. 24, Dec. 31, Jan. 15, 2010, April 2, 2010 and May 28, 2010. Only 4,100 employees in various departments were exempted from the plan, including state police officers, along with corrections and hospital officials. New Mexico is far from alone in making workers stay home. More than 728,500 employees of state governments in at least 21 states have or will take furloughs, according to www.stateline.org.

California, for example, has furloughed 238,000 employees for 34 days over 18 months to save $1.3 billion, according to the site. Wisconsin expects to save nearly $121 million by having about 69,000 Wisconsin state employees take eight unpaid days off over each of the next two years. New Jersey Gov. Jon Corzine furloughed 60,000 state workers for two days last fiscal year and reached an agreement with the state's largest union to furlough employees for nine to 10 days this fiscal year in exchange for no layoffs during 2010. If other unions agree, the furloughs will save the state more than $300 million.

Nevada state employees, starting July 1, 2009, will take off one unpaid day each month. Teachers and higher education employees are taking a four-percent pay cut rather than furloughs. Originally, Gov. Jim Gibbons wanted a six- percent pay cut for all employees, but lawmakers instead instituted the furloughs, which cut salaries by 4.6 percent. Savings of $333 million are expected. Maine will save about $10 million with 20 unpaid "shutdown days" for about 7,000 state employees over the next two years. The plan also freezes merit and longevity pay.

In Colorado, the governor is calling for eight furlough days of 15,500 workers. The unpaid leave is expected to save $27.2 million. Public safety, parks, unemployment, and state hospital employees are exempted. In Oregon, the state is furloughing all employees for 10 to 14 days during the next two years. Corrections workers will take "floating" furlough days instead of taking them on the designated furlough days. The move is expected to save $71.5 million. All

university employees are being furloughed eight to sixteen days during the next two years. Some of the furloughs may have serious repercussions. In Hawaii, some criminal trials may have to be rescheduled because public defenders are being furloughed or forced to take unpaid days off – three Fridays per month. In Georgia, state prosecutors have been furloughed at least one day a month since September, which has caused a backlog of approximately 500 criminal cases. As a result, petty, nonviolent criminal charges are in danger of being dismissed.[2]

In Schaumburg, Illinois, Trustees unanimously approved a $24 million tax levy – the first property tax in the village's history – in December due to decreased revenue from sales, hotel, and food and beverage taxes, as well as from the state's income tax, which together created a $17.6 million deficit in the budget. The property tax will cover about $7.5 million in payroll expenses to police, $6.7 million for the fire department, $1.2 million for public works, and $8.2 million for police and fire pensions. Mayor Al Larson stated, that despite the change, only Elk Grove Village residents will pay lower property taxes compared to Schaumburg and that the village's property tax will be lower than that in Arlington Heights, Hoffman Estates, Palatine, and Streamwood. Chicago area suburbs that have not yet levied a property tax include Campton Hills, Carol Stream, Deer Park, Gurnee, Oak Brook, Prospect Heights and Vernon Hills.[3]

In the State of Maryland, Governor O'Malley announced a furlough plan for state employees based on salary. State government operations were shut down on five scheduled days: the business days before Labor Day, Thanksgiving Day, Christmas Day, New Year's Day, and Memorial Day. The plan also imposes additional furlough days for employees earning $40,000 and above, with those earning between $40,000 and $49,999 taking three furlough days, those earning between $50,000 and $99,999 taking four furlough days, and those earning $100,000 or more taking five furlough days. This plan follows earlier cuts, which bring total reductions under his administration to more than $4.3 billion and 3,200 state government positions.[4]

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In the State of Hawaii, the Governor imposed budgetary restrictions on all state departments on June 1, 2009 in order to close the state's budget deficit. The Hawaii Department of Education is facing budget cuts of $473.7 million over two years for non-charter schools. On October 20, 2009, all bargaining units of the Hawaii Government Employees Association ratified their collective bargaining agreements with the State, which included 17 furlough days during the 2009-10 and 2010-11 school years for 10-month employees and 18 and 24 furlough days respectively each school year for 12-month employees. As such, approximately 13,000 non-charter school teachers began taking furlough days on October 23, 2009.[5] Parents sued to block the State's plan to furlough teachers, claiming that cutting school days without allowing special education students a hearing violates federal law. However, federal court Judge A. William Tashima, disagreed and denied a preliminary injunction that would have stopped the furloughs.[6] On February 11, 2010, the case was back in court before a three judge panel and the attorneys for special education families were seeking to overturn Judge Tashima's ruling.[7]

On January 8, 2010, Governor Linda Lingle proposed a plan to use $50 million from the state's Rainy Day Fund to return students to school for 24 of the 27 furlough days. However, under Hawaii's collective bargaining law, the governor cannot act alone in presenting a formal proposal to the

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Hawaii State Teachers Association (HSTA) and must have the vote of either the State Board of Education, the Department of Education, or both in order to make a formal proposal to the HSTA.[8] Lawmakers reacted to the uproar over furlough days by introducing a bill that would mandate the number of days and hours that children are to be in public school. Senate Bill 2336 would require the Department of Education to provide a minimum of 190 instructional days per year and 36 hours per week beginning in the 2011-2012 school year.[9] Eventually, 17 furloughs for the 2010-2011 school year were eliminated under a supplemental agreement and $57.2 million from the Hurricane Relief Fund and six planning days teachers agreed to give back to the state.[10]

With an $11 billion plus budget deficit, the State of Illinois was looking for ways to make budget cuts, including $1 billion in budget cuts announced in June of 2009 by Gov. Pat Quinn, which included layoffs and 12 unpaid furlough days for all employees. The American Federation of State, County and Municipal Employees Council (AFSCME) 31 filed a lawsuit on August 24, 2009 seeking an injunction to prevent the loss of more than 2,500 jobs. The court issued a preliminary injunction that put the layoffs on hold and Governor Quinn appealed.[11] A hearing was held on January 6, 2010, but both sides were told to work out an agreement. A mediated resolution was reached in regard to the outstanding issues related to the grievances, as well as the actual and potential layoffs. The agreement includes: (1) protection of a vast majority of AFSCME members from layoffs through June 30, 2011 – more than 2,400 of the 2,600 scheduled layoffs will be cancelled; (2) deferral of half the pay raises due on July 1, 2010 and January 1, 2011 – the AFSCME contract called for 2 percent increases on each of those dates; instead, workers will get a 1 percent increase on each date and the rest of the raises will be pushed back to June 1, 2011; (3) AFSCME members will be encouraged – but not required – to participate in a voluntary furlough program. As an incentive, workers will be eligible for "paid incentive days" (for every two unpaid furlough days taken by a worker, one paid incentive day can be taken adjacent to a state holiday); (4) no additional facility closures will occur until at least June 30, 2011; and (5) the union will have greatly increased ability to identify and eliminate personal service and vendor contracts and restore bargaining unit work. Quinn's office issued a statement saying that the agreement will save the state $200 million.[12]

III. The Prince George's County Case: An Unexpected Constitutional Obstacle to Municipal Cost Reduction

Meanwhile, in Prince George's County, Maryland, the Public Safety Unions, AFSCME, AFL-CIO, and five affiliated AFSCME local Unions sued the County for declaratory, injunctive and monetary relief as a result of the adoption and implementation of an Employee Furlough Plan ("EFP") proposed by the County Executive on September 15, 2008 and approved by the County Council on September 16, 2008. (*Fraternal Order of Police, et al., v. Prince George's County*, 2009 WL 2516788 (D. Md. 2009)). In response to a significant budget shortfall in the County, caused by severe economic downturn set in motion by the housing market, the County furloughed approximately 5,900 employees. The lawsuit brought by the Unions challenged the legality of the furlough in light of collective bargaining agreements between the County and the Unions. As part of the annual budget preparation process, the Spending and Affordability Committee ("SAC") reviewed the County's General Fund Revenue for FY09 and informed the County Executive and County Council that the County was "projected to experience an $80.1 million General Fund deficit" that could be larger than projected depending upon other cuts and the state of the economy. The SAC advised the County to place a "ceiling on total General Fund appropriations for FY09 at 2.626 billion . . ." On March 14, 2008, the County Executive submitted a Proposed Operating Budget to the County Council totaling slightly over $2.67 billion, and predicted that the County faced a $95 million deficit due to the economic slow-down. On April 8, 2008, the AFSCME Unions entered into contract with the County.

Prince George's County maintains three reserve funds due to mandates contained in the county code and strategic and fiscal policies: it has a 5 percent General Fund Contingency Reserve, a 2 percent General Fund Operating Reserve, and an Undesignated Fund Balance, all of which can only be used under certain circumstances. In May, 2008, the County Executive and other County officials went to New York City to give a presentation to the bond rating agencies. During the presentation, the County estimated that its Undesignated Fund Balance would total $35.8 million at the end of June, 2008. In response to questions from the rating agencies about its ability to maintain its reserves, the County told the rating agencies that it was "willing to take strong action to reduce expenditures . . . including things like furloughs."

On June 3, 2008, Standard & Poor's issued a AAA bond rating for the County. The County issued a press release announcing that for the first time in County history it achieved an historic AAA bond rating. The County's new rating applied to the $110 million in general obligation bonds that the

county issued the same week. In its official statement for the bonds, the County estimated that the UFB would total $70 million as of the end of June, 2008. One week before the bond rating was issued, on May 28, 2008, the County Council approved the Proposed Operating Budget and the Public Safety Unions' collective bargaining agreements covering the two-year period from July 1, 2007 through June 30, 2009 were approved by the county Council. After the budget was enacted, the County called the Unions and their principal representatives to a special meeting and announced that new projections were dramatically worse than what had been proposed in the budget and that to cover the shortfall, the County requested that each labor organization give up its merit step increases or cost-of-living adjustments (COLAs") as of July 1, 2008.

When the Director of OMB presented the revised budget action plan, it included an elimination of the Unions' COLAs, a reduction to the Board of Education totaling $14 million, deferral of hiring public safety and police classes, and a reduction in overtime. When he was asked if those were the only options explored, the Director addressed other options considered but ruled out. The Unions took the position that renegotiation of contractual wage increases was not possible unless and until the County could demonstrate that there were no reasonable alternatives. The Unions refused to re-open the CBAs to reduce employee compensation, and the County ultimately agreed to provide the Unions their negotiated wage increases.

On September 5, 2008, the County again revised its revenue estimates and called for another meeting with the Unions to discuss implementation of a furlough plan. On September 16, 2008, the County Council approved the Employee Furlough Plan ("EFP") and a letter from the County Executive to all County employees explained that it was important to meet the budget shortfall in order to retain the County's AAA bond rating. The EFP reduced the salaries of all County employees by a cumulative total of $20 million in FY09, and cut annual salaries of all employees by 3.85 percent. The Director of OMB testified in a deposition that the EFP was an alternative to eliminating COLAs. When asked why the undesignated fund balance was not used to address the budget shortfall, the Director stated that it is the County's "policy … not to use fund balance to pay for ongoing expenditures … unless you absolutely have to because it goes away." When the EFP was enacted, the three reserve funds totaled approximately $230 million. On September 18, 2008, the Unions filed this lawsuit, alleging violations of the County's Personnel Law, and a violation of the Contract Clause of the U.S. Constitution.

The Unions alleged that the County violated Section 16-233(e) and 16-229 of County Personnel Law because the provisions of the CBAs that set the wages and hours preempt any contrary provision of the personnel law and the EFP was not required given the existence of the County's reserve funds and because the ascertained shortfall in revenue was not newly discovered.

The Court concluded that the County did not violate Section 16-233(e) or Section 16-229 of County Personnel law when it chose to implement the EFP because general wage provisions of CBAs do not supersede general provisions of County Personnel Law and because the County Executive has significant discretion under Section 16-229 to determine what is required. Next, in determining whether the EFP violated the Contract Clause of the U.S. Constitution, the Court undertook a three part inquiry: whether the legislation at issue impairs a contract; whether the impairment constitutes a substantial impairment of a contractual relationship; and whether the impairment is nonetheless permissible as a legitimate exercise of the County's sovereign powers.

In so doing, the Court found that the EFP constituted an impairment of the Unions CBAs and that the EFP substantially impaired the Unions' contracts with the County. It then determined that the EFP was not reasonable in light of the surrounding circumstances because it was not a narrowly tailored response to an arguably foreseeable budget shortfall and there were other alternatives that would have served its purposes equally well. The Court cited *Condell v. Bress*, 983 F.2d 415, 419-20 (2nd Cir. 1993) for the proposition that among the available alternatives, it could not impair "contract rights to obtain forced loans to the [County] from its employees." The Court distinguished this case from *Baltimore Teachers Union v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1022 (4th Cir. 1993), in which a two-judge panel for the Fourth Circuit Court of Appeals determined that the furlough plan did not violate the Contract Clause because it was "an impairment permitted by article I, section 10." In that case, the Fourth Circuit found that the plan was reasonable in light of the circumstances because it was narrowly tailored to meet the City's unforeseen shortfalls and that it was less drastic than at least one alternative.

The Contract Clause analysis is a surprising development, following the court's conclusion that the furlough plan did not run afoul of the express provisions of the collective bargaining agreements involved or the county personnel law. If the Contract Clause of the U.S. Constitution prohibits this plan, it could prohibit any cost reduction plan that affects the compensation of organized public employees, except for those plans that receive judicial sanction as "narrowly

tailored" and the least drastic alternative available.

IV. Revenues and Costs: Some Fundamentals and Some Thoughts on Frequently Used Cost Control Techiniques and Their Pitfalls

It is important to have a basic understanding of the principal revenue sources for the different types of public body employers in Illinois in order to appreciate the different ways revenue pressures come to bear on the management side. This portion of the article will also discuss some frequently used cost control measures employed by Illinois Public Bodies, and the considerations and pressures that have an impact on the effectiveness – or even the practicality – of those measures

A. The Education Side

Public Education in Illinois is financed by local property taxes, augmented by general state aid. Property taxes are fundamentally driven by tax rates associated with the various funds of the school district, with a maximum statutory rate for each such fund.[13] School Districts located in Cook and its collar counties are further limited in their tax extensions by the Property Tax Extension Limitation Law (PTELL).[14] This complex scheme is conceptually simple. The growth in the District's property tax extension is limited to the lesser of the increase of the Consumer Price Index for All Urban Consumers (CPI) in the previous year or 5 percent.[15] This limitation can also be adopted by counties outside of the greater Chicago area by referendum.[16]

State aid is driven by a formula taking into account average daily attendance in the school of the district, adjusted to account for property tax revenue,[17] often termed "local effort." Suffice it to say for our purposes that it is generally accurate that school districts in more affluent areas are less dependent on state aid because of the availability of local resources, and that state aid is a far more significant factor in areas with less equalized assessed valuation (EAV) per student to draw upon. State aid is driven from the legislature, and there is little that local school districts can do to influence the revenue outcomes (other than to ensure that attendance is appropriately credited). Property taxes are the key factor in understanding the financial pressures that influence local choices on issues of school services.

Property taxes are fundamentally a less volatile revenue source than municipal revenue sources, many of which are transaction driven. Although one would understand viscerally that the difficulties of the housing markets in recent years would have some influence on housing driven revenue streams, the fact that, for instance, the foreclosure rate increases does not really have an immediate impact on the revenue stream other than short term collections. A home has a static assessed value (until reassessment, anyway) regardless of the status of the mortgage that it supports. The property taxes are still owed, are secured by the property, and will eventually be collected on behalf of the school district.

Greater impact is felt by the slowing in the growth of the CPI in recent years. The CPI increase for 2008 was 0.1 percent,[18] a catastrophically low number which then was applied to the PTELL formula to limit the growth in tax extensions for 2009 to, essentially, nil. (The figure for 2009 is a somewhat more robust 2.7 percent).[19] Given, as we all know, that multi-year collective bargaining agreements universally posit an increase in personnel costs from school year to school year even with a completely static population of employees, a zero-level increase in revenue simply will not do. Even with the CPI seemingly back on track, this constriction on the revenue stream will have continuing effects.

B. The Municipal Side

As noted above, municipal revenue sources are primarily transaction based. Municipalities that we think of as financially healthy do not depend on the property tax as a primary revenue source. The most significant municipal tax revenue is typically the sales tax (or the Municipal Retailers Occupation Tax).[20] The tax is tied to the fortunes of the economy and the consumer, and is volatile in the sense that transactions that do not occur because of lack of consumer wherewithal or confidence result in expected revenues not being generated. Virtually all municipalities report significant declines in this core revenue source as a result of the economic downturn.

Although the elementary solution to problems of local government finance is to increase the revenues, that avenue is not open to municipalities and school districts facing the current economic conditions. Focus inevitably swings to expenses in these circumstances, and the largest expense of any public body will inevitably be personnel costs.

V. Reductions in Force, Furloughs, Layoffs, and Considerations Raised by Them

An obvious response to an impending deficit is to at least raise the question of whether a reduction in the number of employees or the amount paid to employees will allow the budget to balance. The obvious corollary of that inquiry is to explore the question of how different levels of workforce reduction will affect on the operations of the local government involved.

A. Reduction in Force/Education/Statutory Predicates

The reduction in force of educational employees is governed by a reasonably complex statutory scheme that must be considered along with the collective bargaining implications of evaluating and implementing a RIF in response to revenue woes. The reduction in force of tenured teachers is governed by Section 24-12 of the Illinois School Code.[21] That section provides that, before a tenured teacher may be removed "as a result of a decision of the board to decrease the number of teachers employed by the board or to discontinue some particular type of teaching service," all nontenured teachers must be dismissed, at least before the dismissal of a tenured teacher who is "qualified" to hold any teaching position held by a nontenured teacher.[22]

The statute's reference to qualifications refers to legal qualification (certificates and endorsements required by the Illinois State Board of Education in order to hold a particular position or teach a particular subject) and not a subjective assessment of the relative quality of a teacher's performance as compared with other teachers. The tenured teacher may be dismissed on receipt of a notice of honorable dismissal at least sixty days before the end of the school term. Tenured teachers facing honorable dismissal also have a right to "bump" into positions that they are legally qualified to hold if the positions are held by less senior tenured teachers who are not being dismissed. The fact that a particular teacher may have a particular certificate or endorsement in an area or subject in which they have never taught can become a key factor in identifying which teachers, exactly, are to be honorably dismissed and which are to be retained.

Non-teaching school personnel (termed "Educational Support Personnel" or "ESP's") also have a statutorily dictated procedure that governs any layoff involving them.[23] ESP's need to be given a notice of honorable dismissal at least 30 days before what is to be their last day of work.[24] Both tenured teachers and ESPs have recall rights that are in effect until one year from the first day of the school term following the reduction in force under their respective statutes.[25]

Education collective bargaining agreements typically have elaborate reduction in force provisions that augment the statutes in one way or another. Historically, periods of declining enrollment generated by demographic changes in different areas of the state have made reductions in force a factor in educational bargaining from time to time. Such provisions sometimes involve obligations greater in scope than those imposed by statute.

The practicality of reductions in force in the educational setting is affected by a number of factors. Foremost, class size is an issue of keen interest for teachers, administrators and parents. Current educational thought holds that students learn more effectively in an instructional setting with fewer students. It is a political truism that allowing class sizes to creep upward will lead to the parental perception that educational quality is being sacrificed. That perception will result from the numbers alone and will be difficult to overcome even if other metrics seem to show that the quality of the product is as good as it has ever been. This is the main reason we often see parents passionately uniting with faculty to head off reductions in teaching staff.

The quality issue aside, collective bargaining agreements place constraints on the ability of management to simply increase class size and expect only positive economic consequences. Although few contracts have hard and fast class size limits, increases in class size can drive other economic features of the contract, such as triggering a contractual obligation to add aides to classrooms exceeding a certain number of students or triggering overload pay for the classroom teacher after a certain threshold is reached. These contractual consequences will often deflect the deficit reducing effect of a reduction in personnel and reallocation of the work somewhat.

Further, special education has an impact on a district's ability to save money by simply reducing staff. The services required in a special education student's Individualized Education Program ("IEP"; if educators could only save money by reducing the number of acronyms used!) must be delivered without regard to cost or even consideration of the proportionality of the cost to the benefit conferred. If, for instance, an IEP requires the services of a one-to-one aide, that is, an aide dedicated to serve that particular student, one must be provided. Therefore, one-to-one aides are often categorized as a separate job classification than general population aides, and the two classifications have separate seniority lists. The Illinois State Board of Education has also promulgated rules that govern the teacher to student ratio in classes with a certain level percentage of special education students.[26]

Finally, most workforce reductions in the education setting are not simple reductions in employee headcount. In most instances, the decisions on where to save money turn on the perceived difference between services that are part of the core mission of the school and programs that are, inarguably, enhancements to the educational program. Invariably, programs classed in the latter group will be cut and the remaining resources will be devoted to the core program. The loss of the enhancements are painful and are always

perceived as the sacrifice of qualities that make a school special in some way, and will be politically difficult for that reason.

B. Reductions in Force-Municipal/Statutory predicates

Reductions in force are also provided for in the case of the police and fire services in municipalities.[27] In either case, strict inverse seniority is used to select the police officers or firefighters who are to be reduced in force. Those reduced are considered to be on unpaid furlough from the department and have recall rights to any positions that open up by reason of attrition. The recall rights do not expire. Non-sworn municipal employees do not have any statutory predicates governing layoffs; they may be laid off by virtue of the inherent power of the municipality as an employer, subject to constraints contained in a collective bargaining agreement.

Reductions in force are even more likely to be constrained by service provision issues in the protective services than they are in education. Most collective bargaining agreements in the protective services have some sort of shift-manning component which dictates, in one way or another, the minimum staffing of a particular shift. A simple minimum shift-manning clause is the most common approach, although apparatus-manning clauses (requiring minimum staffing to put a piece of apparatus into service) appears in some instances in the fire service. The shift -manning principle will typically operate only in the case where the number of personnel scheduled for a shift is reduced to an unusual level by the use of paid leave and scheduled days off. If the shift staffing falls below the minimum number, the deficiency is corrected by holdover or hiring in. A reduction in overall personnel will not, without concessions, relieve management of the operation of the staffing provisions of the CBA, and will result in the frequent need to achieve minimum staffing through overtime. The ultimate effect on the overall cost of operations is difficult to predict into the future, but the possibility of overtime driving a net increase in operating costs after a reduction in force is a very real one. Obviously, then, minimum staffing considerations must be dealt with before any reduction can be safely implemented.

As in education, staff reduction leads to the reduction of service. In particular, response times for police and fire will be degraded, with a loss in the perception of public safety. Economic consequences can follow for the municipal residents, as well. A decrease in the ability to protect property from loss or destruction is an obviously predictable consequence. Municipalities with a favorable Insurance Services Office ("ISO") rating for fire insurance purposes will see that rating deteriorate as response times rise, with a consequent increase in premiums for residents.

C. Privatization

Subcontracting school or municipal services to a third party is theoretically possible, but there is not much more than that one can say about it. Although theoretically possible, there will invariably be a duty to bargain the proposition regardless of what the existing collective bargaining agreement has to say about the topic.[28] Given the fact that bargaining must ensue on the topic and the availability of interest arbitration, subcontracting the work of organized employees is something of a non-starter.

On the educational side, subcontracting instructional services is simply beyond consideration. As for non-instructional services, the General Assembly recently amended the School Code[29] to provide that a Board of Education must engage in a dizzying and difficult series of procedural steps in order to subcontract non-instructional services it currently provides by employees (whether organized or not) to a third party. Without reviewing the details of the statute, suffice it to say that a fair reader would characterize the intent of the General Assembly to be that school districts would be unable to subcontract non-teaching services if they weren't doing it prior to the time the statute became effective.

D. Hiring Freezes, Promotion Freezes and Overtime Freezes

These devices, often implemented in the municipal setting, are cost control measures that often result in less of an impact than initially predicted. First, each of these devices is driven by the minimum staffing considerations discussed above in the context of reductions in force. Second, there are other statutory forces at work that tend to be at cross purposes with the cost saving intention of these devices. A hiring freeze, for instance, will be seen as an austerity measure, reducing the size of the workforce by refusing to authorize the filling of vacancies as they occur. However, maintaining the same staffing procedures will require the use of overtime to maintain shift coverage. The shift coverage issues will quickly be exacerbated when vacancies occur in the ranks above the reentry level rank. Promotional vacancies in the protective services are filled by the operation of law, or nearly so.[30] The creation of a promotional vacancy generates a vacancy in the next lowest rank, and so on. Declining to fill vacancies in the entry level ranks simply and inexorably generates overtime in that rank.

Promotion freezes are essentially impossible in the fire service since the passage of the Fire Promotion Act, and they are effectively impossible in the police service, unless funding for the positions is to be eliminated or the

position abolished. Overtime freezes work only to the extent that the various forces that drive shift staffing discussed above allow it to work.

E. Concessions

Effective reduction of personnel cost in most instances will require the negotiation of some concessions in order to preserve the enterprise. Some public bodies may have a history of decrying their finances at the bargaining table, which creates issues with credibility now that the financial integrity of all local governments in Illinois seem to be at risk, but most management groups are in a position to empirically demonstrate a difficulty with the ability to pay.

One approach to "give-backs" or "stand stills" was suggested by a union business agent who actually produced the contract language in force for examination. The essential approach was that in return for the union's agreement to a freeze in wages and benefits, the municipal department in which the employees were employed would agree to open the books to the union on a quarterly basis. Any quarter in which a surplus was shown would see a fifty-fifty split of that surplus with the union. This practice continues until a specified bench mark payment to the union is reached that represented the increases that the union would have agreed to had the economy been "normal." The approach is not ideal from management's point of view, but all sides will have to do more things that are less than ideal in the difficult times in which we find ourselves. ♦

Notes

1. *Plainfield to hold off on school cuts*, WLS-TV, Jan. 27, 2010. See <http://www.psd202.org/dist202/newsletter.pdf>.
2. *State Workers Brace for Furlough Grinch*, Kate Nash, The New Mexican, 11/27/2009; www.stateline.org.
3. *Schaumburg passes first-ever property tax*, Ashok Selvam, Daily Herald, 12/22/09.
4. *Maryland – Gov. O'Malley Announces Plan for Furloughs, Layoffs of State Employees*, National Public Employer Labor Relations Association Newsletter.
5. http://doe.k12.hi.us/news/furlough/index/htm.
6. *Parents of Special-Education Students Sue State*, KITV.com, Nov. 9, 2009.
7. *School Furloughs Back in Court*, Loren Moreno, Honoluluadvertiser.com, Feb. 11, 2010.
8. *Governor's office refutes Toguchi's statements*, Hawaii247.org, Feb. 1, 2010.
9. *Hawaii Senate Measure Requires at Least 190 School Days*, Loren Moreno, Honoluluadvertiser.com, Feb. 11, 2010.
10. Source: Hawaii Board of Education News Release, May 25, 2010.
11. *AFSCME Council 31 Wins Court Round - Judge Halts Governor Pat Quinn's Planned Layoffs*, David Ormsby, Illinois Observer, Sept. 28, 2009.
12. *State, union reach deal to avoid mass layoffs*, Doug Finke, GateHouse News Service, Jan. 27, 2010; http://www.afscme31.org/.
13. See 105 ILCS 5/17-2 *et seq*. The principal operating fund of the school district is the education fund. Maximum tax rates can be increased by referendum, see 105 ILCS 5/17-3.
14. See 35 ILCS 200/18-185 et seq.
15. 35 ILCS 200/18-185.
16. *Id*.
17. See 105 ILCS 5/18-8.05.
18. Bureau of Labor Statistics, Consumer Price Index Detailed Report. (Dec. 1, 2008) ,*available at* <http://www.bls.gov/cpi/#data>.
19. Bureau of Labor Statistics, Consumer Price Index Detailed Report. (Dec. 1, 2009), *available at* <http://www.bls.gov/cpi/#data>.
20. See 65 ILCS 5/8-11-1 (Home Rule) and 65 ILCS 5/8-11-1.3 (Non-Home Rule).
21. 105 ILCS 5/24-12.
22. *Id*.
23. 105 ILCS 5/10-23.5.
24. 105 ILCS 5/10-23.5(a)(ii).
25. 105 ILCS 5/10-23.5 (b); 105 ILCS 5/10-12.
26. 23 Ill. Adm. Code 226.730.
27. See 65 ILCS 5/10-2.1 -18.
28. For instance, in *City of Chicago v. ISLRB and Illinois FOP*, 22 PERI 82, the appellate court affirmed the ISLRB's decision that the express reservation of the right "to contract out work when essential in the exercise of police power" was not a "clear and unequivocal waiver" of the right to bargain, and submit to interest arbitration, the precise subcontracting plan at issue in the case.
29. See 105 ILCS 10-22.34c.
30. See 65 ILCS 10-2.1-14: see also the Fire Department Promotion Act, especially 50 ILCS 742/20: A vacancy shall be deemed to occur in a position on the date upon which the position is vacated, and on that same date, a vacancy shall occur in all ranks inferior to that rank, provided that the position or positions continue to be funded and authorized by the corporate authorities. ♦

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 focuses on developments under the IPLRA and the equal employment opportunity laws.

IPLRA Developments

Managerial Employees

In *AFSCME, Council 31 and State of Illinois, Dept. of Cent. Mgmt. Servs.*, No. S-RC-10-046 (IPLRB 2010), the State Panel adopted the ALJ's Recommended Decision and Order finding that employees in the position of Administrative Law Judge V ("ALJ-V"), Illinois Commerce Commission ("ICC"), were not managerial employees within the meaning of Section 3(j) of ILRA ("Act").

The Board addressed the ALJ's findings regarding (1) whether the ALJ-Vs should have been found managerial under the traditional test; and (2) whether they should have been found managerial pursuant to the "managerial as a matter of law" test. It recognized that the traditional test derives from the statutory language of Section 3(j), which defines "managerial employee" as "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." The Board emphasized that executive and management functions are those relating to running a department, such as preparing the budget, or otherwise involving use of discretion to

make policy decisions. Applying the traditional test, it agreed that ALJ-Vs are not managerial positions because they issue *recommended* decisions subject to review by the ICC. The Board rejected the proposition that the rulemaking ability of ALJ-Vs amounts to policymaking within the meaning of Section 3(j) of the Act for the same reason: ALJ-Vs have the power to issue only tentative decisions, even in rulemaking.

The Board also rejected the Employer's argument that, separate and apart from Section 3(j), ALJ-Vs are managerial as a matter of law. The Employer argued that ALJ-Vs are managerial under the Act because they fit within a line of cases holding managerial those employees who are, "in essence, surrogates for an office holder." *See Cook County State's Attorney v. ILLRB*, 166 Ill. 2d 296 (1995). The Board rejected this argument because the official responsibilities of ALJ-Vs did not include factors typically present in the managerial-as-a-matter-of-law cases, such as close identification of the office holder with actions of subordinates and power of subordinates to act on behalf of the officer holder. Accordingly, ALJ-Vs did not qualify as managerial under the Act as a matter of law.

Duty to Bargain

In *SEIU, Local No. 73 and County of Cook*, L-CA-07-049 (IPLRB 2010), the Local Panel reversed the ALJ's Recommended Decision and Order finding violations of Sections 10(a)(1) and 10(a)(4) of the ILRA (Act) when the County allegedly refused to bargain a change of work hours for employees in the Department of Animal Control, Law Library, and Office of the Public Administrator. The ALJ determined that the County failed to provide the Union with adequate notice and a meaningful opportunity to bargain over the change; the Board reversed, finding meritorious the County's claim that the Union waived its opportunity to bargain the change in hours.

The Board recognized the established principles regarding bargaining in good faith under the Act: (1) Section 7 imposes an obligation to bargain in good faith over employees' wages, hours, and other terms and conditions of employment — the mandatory subjects of bargaining; (2) a public employer violates its duty to bargain when it makes a unilateral change to the mandatory subjects without granting notice and an opportunity to bargain to the Union; and (3) notice to the Union will not avoid a violation of the duty to bargain if the Employer has no intention of altering its decision with regard to the proposed change.

As applied, the Board found no violation of the County's duty to bargain. The County had announced its proposed change to the Union in a letter prior to the effective date of the change, and the Union notified the County that it wished to bargain over the change. Accordingly, the County postponed the change. The County thereafter repeatedly offered to discuss the proposed change with the Union, but the Union refused to commence discussion because the County reserved the right to contend that the hours change was not a mandatory subject of bargaining. Under these facts, the Board held that reservation of the issue of whether the hours change was a required subject did not amount to a violation of 10(a)(4). There was no evidence that the County did not intend to alter its decision at the bargaining table, since it was the Union that refused to commence discussions. As a result, the Board found that the Union acquiesced to the proposed change and waived its opportunity to bargain.

Confidential Employees

In *AFSCME, Council 31 and State of Illinois, Dept. of Cent. Mgmt. Servs.*, No. S-UC-08-460 (IPLRB 2010), the State Panel affirmed the ALJ's finding that the Employer had presented no factual claims warranting a hearing as to whether four employees in Executive Secretary III ("ES-III") positions were confidential employees within the meaning of Section 3(c) of the ILRA ("Act"). The Board remanded a claim as to a fifth ES-III.

The Board stated that the purpose of the confidential employee exclusion is to ensure that such employees do not have their loyalties divided. It recognized that the Illinois Supreme Court has endorsed the Board's use of two exclusive tests in assessing whether an employee is a statutory "confidential employee": (1) the *labor-nexus* test, which examines whether an employee, in the regular course of duties, assists in a confidential way a person who formulates labor relations policies, and (2) the *authorized access* test, which examines whether the employee has authorized access to information relating to the collective-bargaining process. The Board agreed with the ALJ that both tests focus only on an employee's *regular duties*; accordingly, it agreed that employees who infrequently substitute for a confidential employee might not themselves qualify as confidential.

Applying both tests, the Board found that an ES-III who took notes at labor-management meetings did not assist a person who formulates policy within the meaning of the *labor-nexus* test, since such meetings involve a cooperative labor-management process. The Board found that another ES-III was not confidential where she only "if needed" assisted a person who formulates labor policy. A third ES-III was officially responsible for opening mail marked "confidential" and transcribing bargaining negotiations; however, the Board found that no hearing was necessary where evidence also showed she had done neither task for years. With respect to a fourth ES-III who typed grievance responses, the Board concluded that "it is highly doubtful" such work warrants a

finding of confidentiality. Finally, the Board found a confidentiality hearing necessary per a fifth ES-III, where it was possible that she had regular access to e-mail containing management's labor-related proposals.

Duty of Fair Representation

In *Adam Gold and SEIU, Local 73*, No. L-CB-09-013 (IPLRB 2010), the Local Panel affirmed the Executive Director's dismissal of an ULP charge under Section 10(b)(1) of the ILRA ("Act") brought by a number of individuals on behalf of the Committee of Chicago Aviation Police Officers ("CCAPO") against the Union. The CCAPO alleged that the Union violated its duty of fair representation by representing aviation police in a unit including non-peace officers, when the Illinois Council of Police consistently took the position that such positions qualify as statutory peace officers. CCAPO argued that the Union had repeatedly refused to argue that the officers were peace officers in order to further the Union's own interests, rather than those of its members. Section 3(s)(1) of the Act generally precludes a bargaining unit from including both peace officers and non-peace officers. The Union responded that two decades of Board precedent established that aviation officers were not statutory peace officers, and that it could not breach its duty of fair representation by taking a position so supported.

Section 10(b)(1) provides that a labor organization commits an ULP in duty of fair representation cases only on proof that the organization engaged in intentional misconduct in representing employees. The Board recognized that proof of intentional misconduct requires that a Charging Party establish by a preponderance that (1) "the union's conduct was intentional, invidious and directed at [an employee]; and (2) the union's intentional action occurred because of and in retaliation for some past activity by the employee or because of the employee's status. . . ." *Quoting Metro. Alliance of Police v. ILRB*, 345 Ill. App. 3d 579 (1st Dist. 2004). The Board concluded that even though the Union's refusal to argue that the aviation officers were statutory peace officers was intentional, there was no evidence that the Union took that position out of retaliation or because of animosity to the members. Notably, the Board emphasized that even in the absence of precedent holding that aviation officers are not statutory peace officers, it would be reasonable, "indeed expected," that a union would not advance a position that had repeatedly proved unsuccessful. Accordingly, the Board upheld dismissal of the charge.

Representation and Clarification Petitions

In *IBEW, Local 21 and City of Chicago*, No. L-AC-10-006 (IPLRB 2010), the Local Panel accepted the ALJ's Recommended Decision and Order dismissing IBEW, Local 21's ("Local 21") representation and clarification petitions seeking to remove certain job classifications from a pre-ILRA coalition unit of City of Chicago employees governed by Local 21 and SEIU, Local 73 ("Local 73").

In dismissing the petitions, the Board extensively discussed *City of Chicago (Unit II Coalition)*, 16 PERI ¶ 3016 (IL LLRB 2000), *aff'd sub nom.*, *Illinois Frat. Order of Police* ("FOP") v. ILRB, 319 Ill. App. 3d 729 (1st Dist. 2001). In that case, FOP filed a representation petition seeking to certify City of Chicago employees in various classifications already represented in a pre-ILRA coalition unit governed by several labor organizations. FOP argued that the unit encompassed three separate units with some classifications linked to certain labor organizations within the coalition. Accordingly, FOP argued that it could be certified as the exclusive representative of the petitioned-for classifications. The Board reviewed the origin of the unit and its bargaining history and held that the evidence demonstrated that the three labor organizations in the coalition intended to jointly represent the employees FOP sought to represent. The Board especially noted that there was no evidence the incumbents forming the coalition represented the unit as anything other than a coalition, and that there was a single CBA referring to the unit as a single unit. The Board dismissed FOP's representation petition.

In the instant case, the Board first noted that Local 21 could not seek to remove the classifications from the pre-ILRA coalition unit through a majority interest petition because under Board rules such petitions "may not be utilized where another labor organization is recognized in accordance with the Act," and, here, the other labor organization was Local 73, part of the coalition governing the unit. *See* 80 Ill. Admin. Code §1210.20(b). Secondly, the Board emphasized that the unit was governed jointly by a coalition of unions, all of which *collectively* represent each member in the unit. Therefore, Local 21 would need a showing of interest from thirty percent of all the employees *in the entire* coalition unit in order to obtain a representation election for the subset it sought to certify.

Finally, the Board dismissed Local 21's unit clarification petition because under the Board's rules only "[a]n exclusive representative. . . .may file a unit clarification petition to clarify or amend an existing [unit]." Despite that Local 21 was a member of the coalition representing the petitioned-for employees, it was not the exclusive representative for all the unit employees; accordingly, Local 21 lacked standing to file a clarification petition.

Supreme Court Employment Law Update

In *Lewis v. City of Chicago*, ____ S.Ct. ____, 2010 WL 2025206 (May 24, 2010) (No. 08-974), in a unanimous decision, the Supreme Court reversed the Seventh Circuit and held that plaintiffs may file a Title VII disparate impact claim based upon the *application* of a discriminatory written examination, even where the employees did not challenge the employer's implementation of the examination within the 300 day filing deadline.

Lewis concerned the City of Chicago's 1995 administration of a written firefighter examination, which ranked candidates in three tiers according to their test scores as either "well-qualified," "qualified," or failing. Although the city administered the examination in 1995, it did not announce that it would hire randomly from only the "well-qualified" pool of applicants until January of 1996. The city then began hiring applicants in May 2006 and continued to use the examination results to hire candidates thereafter. Plaintiffs, a class of African American applicants in the "qualified" tier, did not file their first suit until March of 1997. The district court had denied the City's motion for summary judgment , which was based on the grounds that plaintiffs claims were untimely. The Seventh Circuit reversed. The appellate court held that the claims were untimely because the only discriminatory act occurred when the candidates were first sorted according to their test scores. The Supreme Court disagreed and reversed again.

The Supreme Court noted that the sorting of candidates by score might have been a freestanding violation of Title VII, however that was not the claim being raised by the plaintiffs. The Court recognized that the plaintiffs were challenging the City's individual hiring decisions, events that occurred well after the administration of the examination and presumably within 300 days of each plaintiff's complaint. The Court then framed the issue as simply whether or not the hiring decision itself was an "employment practice" within the meaning of Title VII's disparate impact language. The Court found that "clearly" a hiring decision, even one based strictly upon a numerical classification, was an "employment practice" within the meaning of Title VII. Therefore, the Court found that plaintiffs had stated timely claims for discrimination under a disparate impact theory.

Seventh Circuit Employment Law Update

In *Poer v. Astrue*, ___ F.3d ___, 2010 WL 2104256 (7th Cir. May 27, 2010) (No. 09-3473) the 7th Circuit held that an employer did not retaliate against an employee under Title VII where the employee's supervisor provided incorrect information to the decision maker who then denied the plaintiff a promotion.

The plaintiff, an Attorney-Advisor worked for the Social Security Administration's Office of Disability Adjudication and Review, applied for a promotion to a GS-13 Senior Attorney-Advisor position. Two other candidates applied for the same position. Two years prior to his application, the plaintiff had testified on behalf of two female African American employees who had filed suit against the Plaintiff's supervisor.

At the time of the promotion decision the supervisor inaccurately reported to the decision maker that the plaintiff was the only candidate of the three possible choices from the local region. Because the employer would not pay for moving expenses for the other two candidates, this information effectively eliminated the two other candidates from consideration. Shortly thereafter the decision maker chose not to hire anyone for the position because she felt she "should be able to select a candidate based on merit rather than elimination."

However the court found there was no causal connection between the protected activity and the adverse employment action. Specifically, the court noted that the employer had offered testimony from the decision maker that she would have cancelled the promotion anyway, even absent the supervisor's false statement because of budget constraints. Because the plaintiff did not rebut this evidence, the court affirmed summary judgment for the employer.

In *Kodish v. Oakbrook Terrace Fire Protection Dist.*, ___ F.3d ___, 2010 WL 1838804 (7th Cir. May 10, 2010) the Seventh Circuit interpreted the Illinois Fire Protection Act and held that the Act gave a firefighter a protectable property interest in continuing employment after he held a position for one year, regardless of the employer's policy which purported to extend the firefighter's probationary period to make up for a significant leave of absence during that period.

In *Kodish*, the Oakbrook Terrace Fire Protection District had extended the plaintiff's probationary period, pursuant to its own policy, which allowed for extensions up to 90 days where an employee was absent from duty for over 30 days during the probationary period. The plaintiff had taken a four month long leave of absence due to a work-related injury. Near the end of the extended probationary period the District terminated his employment. The plaintiff then brought suit under 42 U.S.C. § 1983 for violation of his due process and First Amendment rights, claiming he was terminated because of his pro-union speech.

The district court granted summary judgment for the employer, holding that the firefighter was an employee-at-will without a protectable interest in continuing employment,

and also that no reasonable trier of fact could have found that the plaintiff was terminated for his pro-union views. The appellate court reversed on both grounds.

With respect to the plaintiff's property interest in his job, the court applied similar Illinois precedent to the Fire Protection Act and held that the language requiring a firefighter to "hold a position" for one year must be read literally, and did not require an employee to *perform* as a firefighter before receiving a protectable property interest in continued employment.

With respect to the district court's finding of insufficient evidence, the Seventh Circuit held that when viewed in a light most favorable to the plaintiff, sufficient to create an inference of discrimination under the direct method.

Notably, the court rejected the employer's argument that the plaintiff's pro-union speech should not be protected because the district employed less than 35 firefighter's and therefore could not be required to recognize a bargaining unit under the IPLRA. The court recognized that although the IPLRA does not require the district to recognize such a small bargaining unit, the district had the discretion to do so. Thus, where the plaintiff's efforts to unionize were not "per se futile," and where the District did not claim the plaintiff's union advocacy was disruptive to its operations, plaintiff's pro-union speech was entitled to First Amendment protection. ♦

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