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When Can a Public Employee Take Employment Disputes to Court, and Out of the Collective Bargaining Arena? With *Stahulak* and *Mahoney*, The Illinois Courts Inch Closer to Adopting the Federal Model

by James Q. Brennwald

I. Introduction

Since the enactment of the Illinois Public Labor Relations Act ("IPLRA") effective July 1, 1984,[1] the decisions of the Illinois courts have created a substantial measure of confusion regarding the circumstances under which public employees covered by a collective bargaining agreement may pursue individual causes of action against their employers. The current case law leaves employees, employers and unions with scant or conflicting guidance regarding such fundamental issues as: (1) whether the aggrieved employee must first exhaust the contractual grievance and arbitration procedures, and prove a breach by the union of its duty of fair representation ("DFR"); (2) if the employee is indeed required to first prove a breach of the DFR, whether the Illinois courts have jurisdiction to adjudicate the DFR claim before addressing the claim against the employer; and (3) the appropriate standard for proving a breach of the DFR.

Although abundant guidance on these issues is available by reference to the extensive federal case law developed in the private sector, the Illinois courts have been strangely reluctant to follow the federal model. This reluctance is particularly confounding considering that the IPLRA was patterned after the National Labor Relations Act ("NLRA")[2] and Labor Management Relations Act ("LMRA"),[3] and that the Illinois legislature intended for the IPLRA to be interpreted in accordance with applicable principles of federal labor law.[4]

With its recent decisions in *Stahulak v. City of Chicago*[5] and *Mahoney v. City of Chicago*,[6] the Illinois Appellate Court for the First District has taken a significant step toward adopting the federal framework for individual employment actions by represented employees, relying on the underlying policies favoring arbitration of labor disputes which have guided federal labor law since the *Steelworkers Trilogy*.[7] At the same time, the *Stahulak* and *Mahoney* decisions raise a number of other issues which remain problematic for public sector employers, employees and unions, and which may ultimately require resolution by the Illinois Supreme Court.

Using the *Stahulak* and *Mahoney* decisions as a departure point, this article examines the current Illinois case law regarding employment claims by individual public employees outside of the collective bargaining arena. It focuses on those areas of the law which are unsettled or otherwise problematic, and suggests that, for the most part, the appropriate resolution of these issues is to be found in the federal law upon which the IPLRA was based.

II. The *Stahulak* and *Mahoney* Decisions

The First District's opinion in *Stahulak v. City of Chicago*, issued on August 25, 1997, reversed an order of the Circuit Court of Cook County granting Stahulak's petition to vacate an arbitration award between the City of Chicago and the Chicago Firefighters Union, Local No. 2 ("CFFU"). Stahulak was a probationary firefighter who was discharged by the City. The City's collective bargaining agreement ("CBA") with the CFFU expressly precluded the Union from grieving any discharge of a probationary employee.

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The Union filed grievances on behalf of Stahulak and three other discharged probationary employees which were eventually arbitrated. At hearing, the CFFU did not challenge the substantive grounds for the grievants' discharge. It argued only that the City had failed to follow the detailed notification and rebuttal procedures provided under the contract for career service employees.

The arbitrator sustained the grievances and ordered the grievants reinstated, but only as probationary employees, and only for such time as it would take the City to complete the procedural steps outlined in the contract. The City reinstated the grievants, placed them on paid administrative leave, processed their discharges in accordance with the procedures specified in the contract, and discharged them once again.

Following his second discharge, Stahulak petitioned the circuit court to vacate the award, arguing that the arbitrator had exceeded his authority by reinstating Stahulak on a provisional, rather than permanent, basis. The City defended, arguing, among other grounds, that Stahulak lacked standing to vacate an arbitration award to which only the City and CFFU were parties. The circuit court summarily rejected the City's standing argument, and vacated the award.

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The views expressed in this article are the author's, and do not necessarily represent the views of the City of Chicago.

On appeal, the First District was confronted with the Second District's decision in *Svoboda v. Department of Mental Health and Developmental Disabilities*, a 1987 ruling which was squarely on point.[8] In *Svoboda*, the Second District had ruled that two employees of the State Department of Mental Health had standing to ask the court to vacate an arbitration award upholding their discharge, even though the employer and AFSCME were the only parties to the award, and despite Section 16 of the IPLRA, which provides that "suits for violation of agreements . . . between a public employer and a labor organization representing public employees may be brought by *the parties* to such agreement. . . . "[9]

The *Svoboda* court premised its ruling on Section 6(b) of the IPLRA, which provides:

> Nothing in this Act prevents an employee from presenting a grievance to the employer and having the grievance heard and settled without the intervention of an employee organization; provided that the exclusive bargaining representative is afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of any agreement in effect between the employer and the exclusive bargaining representative.[10]

The *Svoboda* court concluded that the plaintiffs had standing, reasoning:

> We are convinced that it was not the legislature's intent to allow suits to vacate an arbitrator's award to be brought by unions which have instituted grievance procedures on behalf of their members, but not suits by members who have brought grievance procedures on behalf of themselves. Thus, it is our opinion that the Illinois Public Labor Relations Act allows an individual employee to bring a grievance, compel arbitration, receive an award, and seek to vacate the award in a circuit court.[11]

In *Stahulak*, the First District declined to follow the *Svoboda* court's lead. Instead, the First District looked to the federal case law arising under the NLRA and LMRA, as well as two prior decisions of the First District, *Parks v. City of Evanston*[12] and *Cosentino v. Price*.[13] Both *Parks* and *Cosentino* arose prior to the effective date of the IPLRA, and were decided under applicable principles of federal labor law.

The *Stahulak* court concluded that, as is the case under federal law, a public employee in Illinois has no standing to "collaterally attack their union's resolution of a grievance" unless he establishes that his union breached its duty of fair representation in processing the grievance.[14] Because Stahulak had failed to allege a DFR breach, the court ruled that he lacked standing to request that the court vacate the arbitration award.[15]

The *Stahulak* court dismissed the Second District's reading of Section 6(b) of the IPLRA, noting that the language of Section 9(a) of the LMRA[16] is virtually identical, and has never been interpreted to confer standing on individual employees covered by collective bargaining agreements in the private sector. To the contrary, the court determined that the language of Section 6(b)

> demonstrates that the ability of an individual union member to act outside the union in such matters is not absolute. For example, any settlement made without the union must be consistent with the relevant CBA. Perhaps most important for the purposes of this case, nothing in Section 6(b) grants individual union members the right to take further action in the event that the grievance is not settled without the intervention of the union.[17]

In reaching its decision, the *Stahulak* court invoked the broader underlying policies favoring judicial deference to collectively bargained grievance procedures, citing the U.S. Supreme Court's decision in *Vaca v.*

Sipes,[18] and echoing the defining federal labor policies articulated by the Court in the *Steelworkers Trilogy*:[19]

> It is legislation such as the IPLRA that has made inroads into the employment-at-will doctrine, with employees gaining bargaining strength and job security through union representation and the collective bargaining process. Allowing individual unionized employees to collaterally attack their union's resolution of a grievance (including acquiescence in an arbitration award) without showing that the union thereby breached its duty of fair representation would substantially undermine the settlement machinery provided by a CBA, destroy the public employer's confidence in the union's authority and ultimately return employees to the vagaries of independent, unsystematic negotiation.[20]

The First District's decision in *Mahoney v. City of Chicago* was issued on October 30, 1997.[21] The plaintiffs in *Mahoney* were twenty-seven non-minority firefighters who were passed over for promotion in favor of minority firefighters, pursuant to the terms of a 1980 consent decree and the affirmative action provisions of the CBA. Unlike *Stahulak*, the *Mahoney* plaintiffs' complaint did not, at least on its face, "collaterally attack the outcome" of a grievance procedure, or otherwise directly implicate the terms of the collective bargaining agreement. Rather, the plaintiffs alleged that, by denying them the promotions at issue, the City violated their constitutional rights to equal protection and due process, and breached an implied contract based on the City's personnel rules.

Mahoney was the only plaintiff who had filed an individual grievance alleging that the City violated the CBA. However, the CFFU had also filed a class grievance challenging the promotion on behalf of all adversely affected firefighters. The grievances were never processed to arbitration.

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The circuit court dismissed the claims of twenty-six plaintiffs for failure to exhaust their remedies under the CBA. However, the circuit court found that, by filing an individual grievance, Mahoney had properly exhausted his contractual remedies, notwithstanding the Union's failure to take his grievance to arbitration. The court then dismissed Mahoney's claim under the doctrine of collateral estoppel, finding that a prior arbitration award on the subject of affirmative action promotions precluded Mahoney from re-litigating the issue in court.

The First District affirmed the dismissal of all of the plaintiffs' claims, but on different grounds. The court focused its inquiry on the "controlling" question of whether the plaintiffs had standing to sue, "even though they do not challenge their union's failure to pursue final and binding arbitration of the promotion dispute."[22] Citing *Vaca*, Section 6(d) of the IPLRA,[23] and its own decision in *Stahulak*, the court in *Mahoney* concluded that, because none of the plaintiffs alleged a DFR breach in the CFFU's handling of the promotion grievances, they lacked standing to challenge the promotions in court. The *Mahoney* court reasoned that, to allow an employee to sue without first proving a breach of the DFR

> would give the employee the ability to compel arbitration regardless of the merit of the claim. This would cause the settlement machinery provided by the collective bargaining agreement to be substantially undermined, destroy the employer's confidence in the union's authority, and return the individual grievant to the vagaries of independent and unsystematic negotiation.[24]

Although the *Mahoney* plaintiffs argued that, unlike *Stahulak*, they were not challenging the Union's resolution of a grievance, the court concluded that they nevertheless "end up in the same place."[25] Finding that the collective bargaining agreement "rests at the heart of this controversy," in that the contract "defines the rights" of the plaintiffs with respect to their promotion claims, the court reasoned that the plaintiffs' "failure to allege the Union breached its duty of fair representation is no minor defect or trifling oversight that can easily be corrected. It is a matter of substance, grounded deeply in principles of collective bargaining."[26]

III. The State of the Law in Illinois After *Stahulak* and *Mahoney*: Are Public Employees Effectively Barred From Pursuing Individual Suits For Breach of a CBA?

The Illinois Supreme Court recently granted Stahulak's petition for leave to appeal. Whichever way the court rules on the standing issue, the First District's decisions in *Stahulak* and *Mahoney* will, at some point, require clarification on the question of the appropriate forum for bringing a DFR claim, and the appropriate standard in Illinois for finding a breach of the DFR.

The Appropriate Forum

The court in *Stahulak* noted in passing that "under Illinois law, a union's breach of duty of fair representation is an unfair labor practice under the IPLRA, which initially falls under the exclusive jurisdiction of the Illinois State Labor Relations Board, not the circuit court."[27] The only citation for this proposition is the First District's 1990 decision in *Foley v. AFSCME Council 31, Local No. 2258.*,[28] a case which represents a significant and

potentially troublesome departure from well established principles of federal labor law.

The two plaintiffs in *Foley* had filed grievances through AFSCME, alleging that their employer, the Illinois Department of Corrections, had violated the collective bargaining agreement by denying them promotions. AFSCME processed the grievances through the grievance procedure, but declined to take them to arbitration. The plaintiffs sued in circuit court, alleging that the Union had breached its DRF in declining to arbitrate their grievances, and that the State had breached the CBA by denying the requested promotions.

The First District affirmed the circuit court's dismissal of the plaintiffs' complaint, holding that the ISLRB had exclusive jurisdiction over the DFR claim. The court based its holding upon the language of Section 5 of the IPLRA,[29] and the following policy considerations:

> Inconsistent judgments and forum shopping will be inevitable if we pronounce a rule whereby breach of the duty of fair representation claims can be maintained in the circuit courts, as well as before the Board. Furthermore, our already overburdened court system would face increased amounts of unnecessary litigation.[30]

In support of these considerations, the *Foley* court cited *Board of Education of Community School District No. 1 v. Compton*,[31] in which the Illinois Supreme Court had ruled that, under the Illinois Educational Labor Relations Act ("IELRA"), the Illinois Educational Labor Relations Board has exclusive jurisdiction to vacate or enforce arbitration awards.

Where does all of this leave public employees who want to sue for breach of a collective bargaining agreement? Under the holdings in *Stahulak* and *Mahoney*, such a claim will be dismissed in the absence of a showing that the employee attempted to exhaust the grievance procedure, and that the union breached its duty of fair representation. However, under the holding in *Foley*, cited with approval in *Stahulak*, the employee's DFR claim will be dismissed for lack of subject matter jurisdiction. In other words, when faced with an individual suit for breach of a CBA, a public employer in the First District can trump the employee's claim by playing the *Stahulak* card, in the event that the employee fails to allege breach of the DFR. If, on the other hand, the employee properly pleads breach of the union's DFR, the employer can prevail by playing the *Foley* card, arguing that the court lacks jurisdiction to hear the predicate DFR claim.

Does this mean that, before suing the employer for breach of the CBA, the employee must first obtain a final finding by the Labor Board that the Union breached its DFR?

Does this mean that, before suing the employer for breach of the CBA, the employee must first obtain a final finding by the Labor Board that the Union breached its DFR? If so, will the statute of limitations for the contract action be tolled, pending final resolution of the DFR charge by the Board? Or should the employee file his DFR charge with the Board at the same time he files suit, and ask the circuit court to hold the lawsuit in abeyance, pending final resolution by the Board?

In *Stahulak* and *Mahoney*, the First District relied on well established principles of federal labor law in determining that *Svoboda* had been wrongly decided, and that a plaintiff must prove a breach of the duty of fair representation as a condition predicate to suing for breach of the collective bargaining agreement. In contrast, the *Foley* decision represents a significant departure from the rule under federal labor law, first established in *Vaca v. Sipes*, whereby the courts retain concurrent jurisdiction with the National Labor Relations Board ("NLRB") to hear DFR claims.[32] Having jurisdiction over DFR claims in the private sector, the courts are able to adjudicate "hybrid" DFR/breach of contract claims without resorting to the pointless shuffling between Board and court apparently contemplated by *Foley*. For a number of reasons, the *Foley* court's departure from the federal model merits re-examination.

As recognized in several decisions issued since the IPLRA was enacted, it was clearly the intention of the State legislature, in drafting the IPLRA, to "attempt to follow as closely as possible language found in the NLRB (sic), or National Labor Relations Act, and labor law provisions interpreting that Act."[33] Accordingly, because there is a presumption that the legislature adopted the IPLRA "with knowledge of the construction previously enunciated in the federal courts,"[34] where the IPLRA and NLRA are "similar in language," the IPLRA "can be interpreted in conformity with Federal decisions."[35]

As noted above, under federal labor law, courts have long shared with the NLRB concurrent jurisdiction over DFR claims. This principle of concurrent jurisdiction was first established by the U.S. Supreme Court in *Vaca*, the seminal labor case which created the concept of the "hybrid" DFR/breach of contract cause of action, and which was cited extensively by the First District in both *Stahulak* and *Mahoney*.

In *Vaca*, the Court recognized that, in deference to concerns over the potential for conflicting substantive standards and procedural rules, the

NLRB is generally accorded exclusive jurisdiction over claims directly involving activity which would constitute an unfair labor practice under the NLRA.[36] However, the Court went on to note several exceptions to this general rule, and concluded that DFR claims should be an additional exception, whereby the courts may exercise jurisdiction concurrently with the NLRB.[37]

This holding was based on four considerations. First, the Court determined that the desire for uniformity is not a concern with DFR claims, because the DFR doctrine was first created by the courts, and has only been adopted and applied by the NLRB as developed by the courts. Second, the Court noted that DFR cases often entail review of substantive positions and policies taken by a union in negotiating and administering a collective bargaining agreement, and that the NLRB possesses no greater expertise in these areas than do the courts, "which have been engaged in this type of review since the *Steele* decision."[38] Third, the Court cited its concern that, because the NLRB had unreviewable discretion to determine whether to issue a complaint on a DFR claim, an individual complainant would be foreclosed from judicial review of his claim.

Fourth, and most significantly, the Court cited the "intensely practical considerations . . . which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts"; specifically, the fact that the DFR claim "will in many cases be a critical issue in a suit under L.M.R.A. § 301 charging an employer with a breach of contract."[39] With respect to these practical considerations, the Court reasoned as follows:

> Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong — slight deterrence, indeed, to future union misconduct — or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong.[40]

Since *Vaca*, the Illinois courts have consistently exercised their jurisdiction over hybrid DFR/breach of contract claims arising under Section 301 of the LMRA.[41] There is nothing in the language of the IPLRA which evinces any intent on the part of the Illinois legislature to divest the Illinois courts of their historical jurisdiction over DFR claims. To the contrary, in drafting the jurisdictional provisions of Section 16 of the IPLRA, the legislature tracked very closely the corresponding jurisdictional language of LMRA Section 301.[42] By doing so, the legislature has given every indication that it intended to adopt, *in toto*, the existing federal model with respect to hybrid DFR/breach of contract claims, including the prevailing rule, established in *Vaca*, that the courts may exercise jurisdiction over DFR claims.

In both *Stahulak* and *Mahoney*, the First District relied extensively on *Vaca* in ruling that the plaintiffs lacked standing in the absence of a showing that the Union breached its duty of fair representation. It is difficult to reconcile this recent reliance on *Vaca* with the First District's somewhat tortured attempt to distinguish *Vaca* in *Foley*.

In ruling that the Labor Boards have exclusive jurisdiction over DFR claims, the *Foley* court cited only a general concern that allowing the courts to entertain DFR claims would result in inconsistent judgments, forum shopping, and overburdened courts.[43] However, in so ruling, the court ignored the Supreme Court's determination in *Vaca* that uniformity is not a concern with DFR claims, since the DFR doctrine was created and developed in the courts. The holding in *Foley* also turns a blind eye to the substantial similarity between the jurisdictional provisions of LMRA Section 301 and IPLRA Section 16, and the presumption that the IPLRA was intended to incorporate federal labor law except where expressly indicated otherwise.

The *Foley* court declared that *Vaca*'s holding was based "primarily" on the Supreme Court's concern with the NLRB's unreviewable discretion to deny issuance of a complaint on a DFR claim. Because the IPLRA provides for judicial review of a board decision denying issuance of a DFR complaint, the court found *Vaca* inapplicable.[44]

However, the unavailability of judicial review was only one of *four* factors cited in *Vaca* for granting the courts concurrent jurisdiction over DFR claims, and it was hardly the "primary" consideration. The *Foley* court completely disregarded the other three overriding considerations: (1) the potential for lack of uniformity in the development of the DFR doctrine is not a concern, since the DFR is a judicially-created doctrine which the Illinois courts have been applying since *Vaca*; (2) the Labor Boards have no preeminent expertise in reviewing the union collective bargaining policies often implicated in DFR cases; and, most significantly and obviously for present purposes, (3) as the First District held in *Stahulak* and *Mahoney*, the DFR claim is part and parcel of any claim by an employee that the employer breached a collective bargaining agreement.

In short, it would appear that *Foley* represents an unwarranted departure

from federal law which was never intended by the Illinois legislature, and which creates an unworkable conundrum for the adjudication of hybrid DFR/breach of contract claims. With the First District having now turned to federal law to resolve the standing issue, ruling that an employee may only sue for breach of a collective bargaining agreement if he proves a breach of the union's DFR, there is simply no reason to abandon the federal model on the question of the courts' jurisdiction to hear the DFR claim.

The Intentional Misconduct Standard Under the IPLRA

One area in which the State legislature clearly *did* intend to map its own course is in defining the appropriate standard for finding a DFR breach. In 1989, the legislature amended Section 10(b)(1) of the IPLRA to provide that

> a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act.[45]

Curiously, in both *Stahulak* and *Mahoney*, the First District referred to the appropriate standard for proving a DFR claim in terms of a showing that "the union's conduct in processing the grievance was arbitrary, discriminatory or in bad faith."[46] This articulation of the standard was taken directly from *Vaca v. Sipes*.[47] The First District's failure to cite the stricter standard expressed in the IPLRA is likely to generate some confusion in the lower courts.

The 1989 amendment of Section 10(b)(1) followed the ISLRB's decision in *AFSCME (Mathis)*,[48] in which the Board held that it would find a DFR violation "when the union, through inadvertence or gross negligence, virtually ignored a member's rights."[49] This standard, although similar to that adopted by other federal judicial circuits, was substantially more liberal than the prevailing standard in the Seventh Circuit, first articulated in *Hoffman v. Lonza*.[50]

One area in which the State legislature clearly did intend to map its own course is in defining the appropriate standard for finding a DFR breach.

In *Hoffman*, the Seventh Circuit held that, to prove a breach of the DFR in the private sector, an employee must produce "substantial evidence of fraud, deceitful action or dishonest conduct" by the union.[51] Ruling that mere negligence is not enough to constitute the type of "arbitrary" conduct proscribed by the Court in *Vaca*, the Seventh Circuit concluded that "[t]he legal action based on the union's duty to fairly represent might be more properly labeled as an action for the union intentionally causing harm to an employee in a grievance proceeding."[52]

By adopting the "intentional misconduct" standard in both the IPLRA and the IELRA, the State legislature rejected the ISLRB's holding in *Mathis* in favor of the much more stringent rule applied by the Seventh Circuit in *Hoffman*.[53] The State legislature's express adoption of the "intentional misconduct" standard is significant, as it shields unions from liability for all but the most egregious types of behavior in representing, or failing to represent, public employees.

Under the holdings in *Stahulak* and *Mahoney*, of course, an individual public employee may not bring a breach of contract claim against his employer without first proving a breach of the DFR. By making it all but impossible for a public employee to make out a DFR claim against his union, the legislature has provided corresponding protection to employers who may otherwise be forced to defend against frequent individual lawsuits arising under collective bargaining agreements. Although somewhat harsh, this result is fully consistent with the overriding policies expressed in the IPLRA, and articulated in *Vaca*, *Stahulak* and *Mahoney*, favoring resolution of collective bargaining issues through grievance and arbitration, rather than the courts.

IV. When Can a Represented Public Employee Sue His Employer Without Having to Prove a Breach of the DFR?

As the Supreme Court stated in *Vaca*, "collective bargaining . . . of necessity subordinates the interest of an individual employee to the collective interests of all employees in a bargaining unit."[54] In both *Stahulak* and *Mahoney*, the First District recognized the Illinois legislature's incorporation of this policy as a linchpin of the IPLRA, and cited the primacy of collective over individual rights in ruling that an employee must prove a breach of the union's DFR before recovering against his employer for a breach of a collective bargaining agreement.[55]

However, public employees covered by collective bargaining agreements have not ceded to their unions all discretion over any individual, employment-related claims. For instance, it is well-established that, regardless of the terms of the collective bargaining agreement, a represented employee may bring an individual court action against his employer for claims arising under Title VII[56] or the Fair Labor Standards Act.[57] In addition, where a cause of action otherwise exists independent of the terms of the collective bargaining agreement, an employee is not required to resort to the grievance and arbitration process before taking his employer to court. The difficulty arises in discerning which employment claims may properly be deemed to arise independent of the CBA.

In *Mahoney*, the plaintiffs attempted to finesse this issue by couching their

complaint as a constitutional claim, coupled with a claim that the City had violated its own personnel rules. The court, however, was not buying, noting that the promotion and affirmative action provisions of the collective bargaining agreement were "at the heart" of the controversy, and defined the rights being asserted by the plaintiffs.[58] Accordingly, the court held that the plaintiffs could not proceed on their claims without first establishing that the union had breached its DFR in handling the plaintiffs' grievances.[59]

In *Daniels v. Board of Education of the City of Chicago*,[60] the First District took a much more liberal view. The plaintiffs alleged that the Board of Education had violated Section 5 of the Illinois Wage Payment and Collection Act[61] by failing to pay their accrued vacation earnings upon termination of their employment. The circuit court dismissed the complaint on the ground that the plaintiffs had failed to file a grievance with respect to their claim. The First District reversed, finding that, although the CBA defined how vacation was accrued, it was "silent" on the issue of payment upon separation.[62] Distinguishing its 1987 decision in *Uehlein v. Shwachman*,[63] the court concluded that

> requiring plaintiffs to file a grievance and to exhaust their contractual remedies is fruitless here since this dispute does not arise entirely out of the collective bargaining agreement and it is certainly not clear, as it was in *Uehlein*, that this dispute can be fully resolved through the grievance and arbitration procedures of such agreement.[64]

A workable standard with respect to these issues may well be found in the private sector federal preemption cases The preemption cases typically involve employment-related tort claims arising under state common law, brought by employees covered by a CBA. In those cases, the primary issue is whether the employee's state law claim is preempted by Section 301 of the LMRA, which governs suits for breach of a collective bargaining agreement in the private sector. If the essence of the state law claim is really a claim for breach of a CBA, the claim will be preempted by Section 301. As discussed above, to prevail in a Section 301 suit, the plaintiff must establish that he attempted to exhaust his remedies under the CBA, and that his union breached its duty of fair representation.

In *Lingle v. Norge Division of Magic Chef, Inc*,[65] the U.S. Supreme Court ruled that a state law retaliatory discharge claim was not preempted even though the relevant CBA contained a "just cause" provision, and resolution of both the retaliatory discharge claim and the grievance "would require addressing precisely the same set of facts."[66] The court held as follows:

> as long as the state law claim can be resolved without interpreting the agreement itself, the claim is `independent' of the agreement for Section 301 pre-emption purposes.[67]

Recognizing that federal preemption of state law is not an issue with respect to employment disputes in the public sector, in *Local 1274, Illinois Federation of Teachers v. Niles Township High School, District 219*,[68] the First District nevertheless applied the same analysis. In *Niles Township*, the court held that the IFT could sue District 219 under the Freedom of Information Act ("the Act"), seeking information on parents and students in the school district. The First District found that the IFT was not required to exhaust the contractual grievance and arbitration procedures, even though the CBA contained an express provision pertaining to the IFT's right to information for use in collective bargaining. Borrowing directly from the U.S. Supreme Court's rulings in *Lingle* and *Allis-Chalmers Corp. v. Lueck*,[69] and the Illinois Supreme Court's applications of those rulings in *Ryherd v. General Cable Co.*[70] and *Krasinski v. United Parcel Service, Inc.*,[71] the court in *Niles Township* held as follows:

> As is clear from the complaint, this case will turn upon whether or not the desired information is subject to disclosure under the provisions of the Act, and the Act alone. There is no reference to the collective bargaining agreement, and resolution of the claim will not require analysis of the agreement's terms. Further, the plaintiff's claimed right to information derives not from the agreement but from a statute reflecting a policy that all persons are entitled to reasonable access to government information, with no restriction based upon intended use of that information.[72]

The court discounted the significance of the fact that the CBA also provided a general right to information related to collective bargaining, noting that "nothing in the agreement suggests that the parties intended a waiver of the right to seek information independently under the Act, even if such a provision were enforceable."[73]

V. Conclusion

With its decisions in *Stahulak* and *Mahoney*, the First District has adopted a strong policy in favor of judicial deference to collectively bargained dispute resolution procedures, one of the core principles of the federal labor law on which the IPLRA was based. By declining to follow the Second District's holding in *Svoboda*, and instead ruling that an employee must first prove a breach of his union's DFR before recovering against his employer in court, the First District has taken a significant step toward protecting the integrity of the grievance and arbitration process, and insulating the process from unwelcome scrutiny by the judiciary.

Coupled with the IPLRA's express incorporation of the "intentional misconduct" standard for proving a breach of a union's DFR, the First District's ruling on the standing issue provides employers and unions with virtually absolute protection from individual lawsuits arising out of collective bargaining agreements, a result which is

consistent with long-standing principles of federal labor law, and which appears to be precisely what the drafters of the IPLRA intended. It remains to be seen whether the Illinois Supreme Court will endorse the First District's approach when it decides *Stahulak*.

In the wake of the decisions in *Stahulak* and *Mahoney*, the courts will be forced to revisit the First District's 1990 holding in *Foley*, which deprives the courts of jurisdiction to adjudicate the requisite DFR claim. The *Foley* case represents an anomalous departure from the long-standing federal policy granting the courts jurisdiction over hybrid DFR/breach of contract claims. Because there is nothing in the language of the IPLRA to suggest that the legislature intended to deprive the Illinois courts of their traditional jurisdiction over such claims, there is no reason that the Illinois courts should not be able to continue to adjudicate DFR claims, particularly given the legislature's express adoption of the bright line "intentional misconduct" standard applied by the Illinois courts since *Hoffman v. Lonza*.

Finally, it should be noted that, under *Vaca*, *Stahulak* and *Mahoney*, the courts are likely to accord deference to grievance and arbitration procedures only to the extent that the collective bargaining agreement stipulates that the union has the exclusive right to process grievances to arbitration, and that the grievance and arbitration procedures are the sole and exclusive means for resolving disputes arising under the contract. In addition, as discussed in the last section of this article, the courts will continue to entertain individual claims by represented employees which arise independent of the terms of the collective bargaining agreement. ◆

Notes

1. 5 ILCS 315/1, et seq.
2. 29 U.S.C. § 151, et seq.
3. 29 U.S.C. §§ 141-191.
4. See *Jones v. IELRB*, 272 Ill. App. 3d 612, 650 N.E.2d 1092 (1st Dist. 1995); *City of Burbank v. ISLRB*, 128 Ill. 2d 335, 538 N.E.2d 1146, 1149 (1989); *County of Kane v. ISLRB*, 165 Ill. App. 3d 614,619-20, 518 N.E.2d 1339, 1342 (2d Dist. 1988); *Rockford Township Highway Dept. v. ISLRB*, 153 Ill. App. 3d 863, 874-75, 506 N.E.2d 390, 397 (2d Dist. 1987); *Laborers' Int'l Union Local 1280 v. ISLRB*, 154 Ill. App. 3d 1045, 507 N.E.2d 1200 (5th Dist.), *rev. denied*; 116 Ill.2d 559, 515 N.E.2d 109 (1987).
5. 291 Ill. App. 3d 824, 684 N.E.2d 907 (1st Dist. 1997), *rev. allowed*, 175 Ill.2d 555 (1997).
6. 293 Ill. App. 3d 69, 687 N.E.2d 132 (1st Dist. 1997).
7. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).
8. 162 Ill. App. 3d 366, 515 N.E.2d 446 (2d Dist. 1987).
9. 5 ILCS 315/16 (emphasis added). In addition, the court noted that, under the Illinois Uniform Arbitration Act ("UAA"), only a "party" may petition to vacate an arbitration award. 710 ILCS 5/12. Under Section 8 of the IPLRA, 5 ILCS 315/8, arbitration awards arising under the IPLRA are to be governed by the UAA.
10. 5 ILCS 315/6(b).
11. 162 Ill. App. 3d at 369, 515 N.E.2d at 448.
12. 139 Ill. App. 3d 649, 487 N.E.2d 1091 (1st Dist. 1985).
13. 136 Ill. App. 3d 490, 483 N.E.2d 297 (1st Dist. 1985).
14. 291 Ill. App. 3d at 332, 684 N.E.2d at 912.
15. Having already determined that *Stahulak* lacked standing, the court nevertheless went on to address Stahulak's claim on the merits, finding that, even if *Stahulak* had standing, there was no basis under Illinois law for vacating the award.
16. 29 U.S.C. § 159(a).
17. 291 Ill. App. 3d at 831, 684 N.E.2d at 911.
18. 368 U.S. 171 (1967).
19. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).
20. 291 Ill. App. 3d at 832, 684 N.E.2d at 912 (citation omitted).
21. 293 Ill. App. 3d 69, 687 N.E.2d 132 (1st Dist. 1997).
22. *Id.* at 72, 687 N.E.2d at 135.
23. Section 6(d) of the IPLRA provides as follows:

Labor organizations recognized by a public employer as the exclusive representative or so designated in accordance with the provisions of this Act are responsible for representing the interests of all public employees in the unit. Nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious.

24. 293 Ill. App. 3d at 73, 687 N.E.2d at 136.
25. *Id.* at 74, 687 N.E.2d at 136.
26. *Id.*
27. 291 Ill. App. 3d at 831, 684 N.E.2d at 911.
28. 199 Ill. App. 3d 6, 556 N.E.2d 581 (1st Dist. 1990).
29. 5 ILCS 315/5.
30. 199 Ill. App. 3d at 11, 556 N.E.2d at 584.
31. 123 Ill. 2d 216, 526 N.E.2d 149 (1988).
32. *See Vaca*, 386 U.S. at 186-188.
33. *Kane County*, 165 Ill. App. 3d at 620, 518 N.E.2d at 1342 (quoting statements of Senator Collins during the Senate debates prior to enactment of the IPLRA, 83d Ill.Gen.Assem., Senate Proceedings, May 27, 1983, at 300-01); *Rockford Township Highway Dept.*, 153 Ill. App. 3d at 874-75, 506 N.E.2d 397; *City of Burbank*, 128 Ill. 2d at 345, 538 N.E.2d at 1149.
34. *Laborers' Local 1280*, 154 Ill. App. 3d at 1050, 507 N.E.2d at 1204; *Jones v. IELRB*, 272 Ill. App. 3d 612, 627, 650 N.E.2d 1092, 1102 (1st Dist. 1995).
35. *Kane County*, 165 Ill. App. 3d at 620, 518 N.E.2d at 1342.
36. *Vaca*, 386 U.S. at 178-79, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).
37. *Vaca*, 386 U.S. at 179-88.
38. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944).
39. 386 U.S. at 183.
40. *Id.* at 187-188.
41. *See, e.g., Fisher v. Illinois Office Supply Co.*, 130 Ill. App. 3d 996, 474 N.E.2d 1263 (3d Dist. 1984); *Swieton v. City of Chicago*, 129 Ill. App. 3d 379, 472 N.E.2d 503 (1st Dist. 1984). Although the plaintiff's hybrid claim in *Swieton* was not governed by Section 301, as the claim arose in the public sector, the court nevertheless applied principles of federal labor law in ruling that the plaintiff had failed to prove a breach of the duty of fair representation. The *Swieton* case arose prior to the enactment of the IPLRA.
42. LMRA Section 301(a) reads as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Under Section 16 of the IPLRA,

After the exhaustion of any arbitration mandated by this Act or any procedures mandated by a collective bargaining agreement, suits for violation of agreements including agreements entered into pursuant to Section 13(c) of the Urban Mass Transportation Act, between a public employer and a labor organization representing public employees may be brought by the parties to such agreement in the circuit court in the county in which the public employer transacts business or has its principal office.

43. 199 Ill. App. 3d at 10-11, 556 N.E.2d at 584.
44. Id. at 11-12, 556 N.E.2d at 585.
45. P.A. 86-412, eff. Aug 30, 1989; also amending IELRA.
46. *Stahulak*, 684 N.E.2d at 912; *Mahoney*, 687 N.E.2d at 137.
47. *Vaca*, 386 U.S. at 190.
48. 4 PERI ¶ 2049 (ISLRB 1988).
49. *Moore v. ISLRB*, 206 Ill. App. 3d 327, 333,

564 N.E.2d 213, 216 (4th Dist. 1990).

50. 658 F.2d 519 (7th Cir. 1981); see also *Jones v. IELRB*, 272 Ill.App.3d at 626, 650 N.E.2d at 1101-1102.

51. 658 F.2d at 522.

52. *Id.*

53. *Moore*, 206 Ill. App. 3d at 333.

54. 386 U.S. at 182.

55. *Stahulak*, 684 N.E.2d at 910-912; *Mahoney*, 687 N.E.2d at 135-137.

56. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

57. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

58. *Mahoney*, 687 N.E.2d at 135.

59. *Id.*

60. 277 Ill. App. 3d 968, 661 N.E.2d 468 (1st Dist. 1996).

61. 820 ILCS 115/5.

62. 277 Ill. App. 3d at 973, 661 N.E.2d at 471.

63. 156 Ill. App. 3d 274, 5099 D.E.2d 493 (1st Dist. 1987). In *Uehlein*, which arose in the private sector, the plaintiff sued for unpaid wages under the Wage Payment and Collection Act. The First District affirmed the circuit court's dismissal of the complaint, based on its finding that the wages claimed were due under the terms of the collective bargaining agreement, and that the plaintiff had failed to allege that he had exhausted his remedies under the CBA, or that the union had breached its duty of fair representation.

64. 277 Ill. App. 3d at 974, 661 N.E.2d at 472. Similarly, in *Carnock v. City of Decatur*, 253 Ill. App. 3d 892, 898-99, 625 N.E.2d 1165, 1169-70 (4th Dist. 1993), the Fourth District reasoned that, because the plaintiff was retired, and the union had no duty to represent him under the terms of the collective bargaining agreement, it would be "fruitless" to require the plaintiff to exhaust the contractual grievance procedures before suing for payment of unused sick days. 625 N.E.2d 1165 at 1169-1170.

65. 486 U.S. 399 (1988).

66. *Id.*

67. *Id.*

68. 276 Ill. App. 3d 714 (1st Dist. 1995).

69. 471 U.S. 202 (1985).

70. 124 Ill. 2d 418, 530 N.E.2d 431 (1988).

71. 124 Ill. 2d 483, 533 N.E.2d 468 (1988).

72. 276 Ill. App. 3d at 719, 659 N.E.2d at 21.

73. *Id.*

RECENT DEVELOPMENTS

by the Student Editorial Board

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 two collective bargaining statutes.

IELRA Developments

Mandatory Subjects of Bargaining

In *Illini Bluffs Support Staff, Local 4554 and Illini Bluffs Community Unit School District No. 327*, No. 96-CA-0022-5 (IELRB 1997), the IELRB held that the District violated Section 14(a)(5) when it unilaterally subcontracted transportation services.

The District's bus drivers transported students who traveled outside the District to and from classes. The bus drivers also drove students with behavior disorders. Historically, the District had subcontracted transportation services to a private company without including the Union in the decision making process. However, since the 1991-1992 school year the private company has only transported the one student at issue in the case. The contract between the District and the private company did indicate that the District anticipated the transportation of other special needs students in the future. Such special needs included students who required wheelchairs, car seats, special restraints and/or monitors. The contract even specified the cost of a monitor, if required. The District indicated that the decision to utilize the private company was historically based on whether the District had the necessary equipment. The District's prior subcontracting had only included students with wheelchairs due to the need for a lift.

In November 1995, the student at issue enrolled in the District. The District determined that the student would need to be transported out of the District to attend special education classes for students with behavioral disorders. In accordance with the collective bargaining agreement, the route was posted for bidding and given to the most senior bidder.

Approximately three days after the student began attending classes the student's records were located. The records indicated that the student had "a very volatile temper" which required close supervision during transportation. Thus, a monitor was required on the bus during the student's transportation.

The District considered a live adult monitor versus a live transmission video monitor. The District then contacted the union member and notified her that she would no longer transport the student. The District indicated that the decision was made to subcontract the student's transportation because it was less expensive.

The IELRB determined that the decision to subcontract the work affected wages, hours and terms and conditions of employment. The IELRB stated that the District departed from its previously established operating practice, because its prior subcontracting only dealt with students in wheelchairs. The District's decision eliminated a position, and the route was a reasonably anticipated work opportunity for the Union. Unionized bus drivers had driven students with behavior disorders in the past.

However, the IELRB also concluded that the decision was a matter of inherent managerial authority. The IELRB pointed to the economic basis for the District's decision. It noted that the District had neither an adult avail-

able to act as a monitor nor the equipment necessary to provide live video monitoring without incurring increased costs. Therefore, the IELRB balanced the benefits of bargaining to the decision-making process against the burdens bargaining imposed on the District's authority.

The IELRB concluded that with respect to the District's immediate decision to subcontract, the burdens of bargaining outweighed the benefits. The IELRB noted that once it was determined that the student required a live monitor due to his "volatile temper" the District was required to act immediately. The IELRB cited other statutes which required the District to act to provide educational needs of children whose adaptive behavior restricts their effective functioning. Therefore, the IELRB stated that an exigency existed which justified the District's not providing the Union notice and opportunity to bargain before it subcontracted the route.

However, the District also decided to contract the route over an extended period of time. The IELRB concluded that the benefits of bargaining over the decision to subcontract the route over the long-term outweighed the burdens on the District's authority. The IELRB noted the economic basis for long-term subcontracting but stated the Union could have made concessions. The Union's ability to address the District's economic concern outweighed the burden on the District's authority. Thus, the District's decision to subcontract over an extended period of time was a mandatory subject of bargaining.

Protected Concerted Activity

In *Township High School District, No. 211 v. IELRB*, No. 1—96—2689 (Ill. App. 1st Dist. 1997), the First District Appellate Court reversed the IELRB and held that an employee's discussion with co-workers about the size of their pay raise in comparison to the superintendent's raise was not protected concerted activity.

The court, relying on its definition of concerted activity in *Board of Education of Schaumburg Community Consolidated School District No. 54 v. IELRB*, 247 Ill. App. 3d 439, 453, 616 N.E.2d 1281 (1st Dist. 1993), determined that "an activity is concerted only if it contemplates some group action to address terms and conditions of employment and only if it is done with or on the authority of other employees." It reasoned that the discussion over the pay raise did not contemplate any type of group action. Therefore, it held that the IELRB did not have jurisdiction over the case.

IPLRA Developments

Strike Injunctions

In *City of Naperville and International Brotherhood of Electrical Workers, Local 9*, Case No. S-SI-98-001 (ISLRB 1997), the State Board held that a clear and present danger to the health and safety of the public would exist if the Union did not make available 4 dispatchers and 5 linemen for each 24-hour period during a strike by employees of the municipally-owned electric utility.

The Board held that the Union must make available all four of the dispatchers in the bargaining unit to obviate any possible danger to the health and safety of the public. The municipality needed one dispatcher per shift to perform the regular dispatch duties and a fourth to act in relief of the other three. The Board also held that, although all linemen did not have to work during the strike, five linemen per each 24-hour period had to be on call to perform emergency work. Their duties during the strike would only include the restoration of electrical power and emergency locate work which could not be postponed until the cessation of the strike. The five linemen were to be drawn from the bargaining unit on a rotational basis. Moreover, during a major emergency, the Union must make available as many employees as necessary to restore service. ◆

FURTHER REFERENCES

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

Barnett, Larry D. ARE TEACHING EVALUATION QUESTIONNAIRES VALID? ASSESSING THE EVIDENCE. Journal of Collective Negotiations in the Public Sector, vol. 25, no. 4, 1996, 15 pp.

Student evaluations of faculty teaching are often used by higher education institutions for decision making on faculty salary increases and promotions. Are these questionnaires valid? This author reviews studies of the validity of these questionnaires and discusses the methodological flaws and limitations associated with them. He suggests that, because of their questionable accuracy, student evaluation questionnaires should not be used in evaluating faculty performance.

Byrne, Dennis, Hashem Dezhbakhsh, and Randall King. UNIONS AND POLICE PRODUCTIVITY: AN ECONOMETRIC INVESTIGATION. Industrial Relations, vol. 35, no. 4, October 1996, 19 pp.

Using data from published and unpublished government sources, as well as from their own survey of the 137 largest metropolitan areas, the authors develop an empirical model of police department productivity. Comparing unionized and nonunionized police departments on the basis of the number of arrests related to serious crimes and to minor crimes as defined in FBI statistics, they find that unions appear

to have an insignificant productivity effect for serious crimes and a significant negative productivity effect of about 26% for minor crimes. The results also suggest that, in cities with higher crime rates, there may be a greater loss of productivity in unionized police departments than in cities with lower crime rates.

Jurkiewicz, Carole L., and Tom K. Massey. WHAT MUNICIPAL EMPLOYEES WANT FROM THEIR JOBS VERSUS WHAT THEY ARE GETTING; A LONGITUDINAL COMPARISON. Public Productivity & Management Review, vol. 20, no. 2, December 1996, 10 pp.

The authors repeated a study that had originally been conducted in 1976 of public employees in five Midwestern suburban municipalities regarding their attitudes toward their jobs. The new survey revealed that, although what public employees were getting had changed little, what they wanted from their jobs had changed markedly. Factors such as a stable and secure future, a chance to use special abilities, a high salary, and participation in decision making had increased in importance over the twenty years since the original survey. The implications of these findings for public sector managers are discussed.

Olson, Craig A., and Barbara L. Rau. LEARNING FROM INTEREST ARBITRATION: THE NEXT ROUND. Industrial and Labor Relations Review, vol. 50, no. 2, January 1997, 15 pp.

What do the parties learn from the final offer selection of an arbitrator, and what effect does this have on later bargaining behavior? The authors compare data from Wisconsin teacher wage settlements resulting from final offer arbitration procedures to settlements arrived at without arbitration, but where there had been an award in the previous negotiations. The results of their empirical analysis suggest that the expectations of the parties are shaped by their previous experience with the final offer process. The variance in wage settlements in subsequent negotiations declined and the wage structures were more likely to reflect the factors considered important in the arbitrator's decision making.

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

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