Winter 1991

Vol. 8, No. 1

J. Stuart Garbutt
Katten, Muchin & Zavis

Robert Perkovich
Federal Mediation and Conciliation Service

The Illinois Public Employee Relations Report

WINTER 1991
Volume 8, Number 1

Published jointly by IIT Chicago-Kent College of Law and the Institute of Labor and Industrial Relations, University of Illinois at Urbana Champaign.

Rutan v. Republican Party of Illinois: Does The Supreme Court's Decision Signal The Demise of Political Patronage?

J. Stuart Garbutt

As of January 14, 1991, new hands took the helm throughout the executive branch of State government. Likewise, offices at the local level have been changing hands based on last Fall's elections. In March, an election will be held for Mayor and other officials of the City of Chicago. In short, this is a season of political change in Illinois.

Historically, political change has had significant implications for public employees. A change in the control of an office has often meant a change in the composition of its workforce. This phenomena, of course, is what is known as political "patronage."

Illinois is widely associated with political patronage, including in the caselaw regarding the subject.

J. Stuart Garbutt is an attorney with the Chicago law firm of Katten, Muchin & Zavis. He previously served as General Counsel of the Illinois Local Labor Relations Board and, before that, General Counsel of the Illinois Department of Human Rights. He is also a part-time lecturer at the Institute of Human Resources and Industrial Relations, Loyola University of Chicago.

Several years ago, one Justice of the United States Supreme Court observed that, in Illinois, "party regimentation on an extensive scale is legendary."[1] In *Elrod v. Burns,*[2] a 1976 case involving the Cook County Sheriff, the Supreme Court first declared unconstitutional the wholesale dismissal of non-policymaking employees holding over after a change in administrations. Most recently, in *Rutan v. Republican Party of Illinois,*[3] the Supreme Court has extended that reasoning to condemn political preferences in hiring, promotion and other decisions.

In the wake of *Rutan,* the question arises whether public employee patronage is a dead letter. Moreover, what is the import of the Supreme Court's decision for public employee collective bargaining? For answers it may be helpful to review the caselaw culminating in *Rutan.*

Inside Report

Elrod and *Branti*

Elrod v. Burns was decided by a fragile, five-member majority of the Supreme Court. The Justices in the majority agreed that patronage dismissals of nonpolicymaking public employees violate the employees' First Amendment freedoms of expression and association. However, the *Elrod* majority was split two ways, between a three-member faction which was prepared to condemn all patronage practices among lower-level employees, and a two-member faction which pointedly declined to pass upon the constitutionality of "confin[ing] the *hiring* of some governmental employees to those of a particular political party."[4] Three dissenters argued that the "beneficiaries of a patronage system [should] not be heard to challenge it when it comes their turn to be replaced," and, in any event, that the contribution of patronage to the stimulation of local political activity outweighed its "relatively modest intrusion on First Amendment interests."[5]

Even the *Elrod* majority did not condemn *all* political dismissals. It recognized an office-holder's interest in insuring that his policies are not undercut by employees with antagonistic loyalties. The majority reasoned, however, that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end."[6] The Court went on to acknowledge:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.7

Four years after *Elrod,* the Supreme Court returned to the problem of identifying government jobs which may be made to depend on politics. In *Branti v. Finkel,*[8] two Republican assistant public defenders sued to prevent their dismissals after Democrats obtained control of local county government. The new administration argued that, under *Elrod,* it should be free to dismiss the Republican holdovers because, as attorneys, they were confidential and/or policymaking employees. The Supreme Court disagreed, and took the opportunity to refine the criteria for distinguishing "political" jobs. The Court stated:

> Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. . . .
> It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa . . . On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.[9]

The Court concluded that the assistant public defenders were not exempt "policymakers" because "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests."[10]

"Confidential" v. "Policymaking" Employees

Interestingly, *Branti* was decided by a six-member majority of the Supreme Court, including Justices Brennan, White and Marshall, who had joined the majority in *Elrod,* as well as Justice Stevens who skipped Elrod, and Chief Justice Burger who had dissented in *Elrod.* The *Branti* majority excluded Justice Stewart, who had been with the majority in *Elrod.* Justice Stewart explained:

> I joined the judgment of the Court in *Elrod* because it is my view that, under the First and Fourteenth Amendments, "a nonpolicymaking, nonconfidential government employee can[not] be discharged . . . from a job that he is satisfactorily performing upon the sole ground of his political beliefs." That judgment in my opinion does not control the present case for the simple reason that the respondents here clearly are not "nonconfidential" employees. The respondents in the present case are lawyers, and the employment positions involved are those of assistants in the office of the Rockland County Public Defender. The analogy to a firm of lawyers in the private sector is a close one, and I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association. I believe that the petitioner, upon his appointment as Public Defender, was not constitutionally compelled to enter such a close professional and necessarily confidential association with the respondents if he did not wish to do so.[11]

Extending The Rule

Since both the *Elrod* and *Branti* opinions confined themselves to the constitutionality of political dismissals, and avoided addressing whether a public employer could legitimately maintain "a political sponsorship system for filling vacancies,"[12] some lower courts including the Seventh Circuit Court of Appeals inferred that it remained permissible to consider politics in hiring, transfer and promotion decisions.[13] Those courts analogized to the Supreme Court's affirmative action cases, in which the Court has approved race-conscious programs

for hiring and promotion while overturning similar policies requiring layoffs and discharges.[14] In *Rutan,* however, the Supreme Court rejected such analogies. By a slim five to four margin, the *Rutan* Court concluded that basing hiring decisions on politics also impermissibly burdens First Amendment rights. The majority noted that affirmative action hiring preferences have been sustained only when narrowly tailored to redress prior constitutional violations, a justification lacking in the patronage situation.[15] Accordingly, the Court held that "the rule of *Elrod* and *Branti* extends to promotion, transfer, recall and hiring decisions based on party affiliation and support."[16]

Hence, it is now established that political considerations may play no meaningful role in the hiring, advancement or retention of public employees except with respect to positions which are truly political in character. And, although the Supreme Court's decisions have involved disputes between Republicans and Democrats, their logic is understood to apply to political differences of any kind, including between party factions.[17] Moreover, even a "campaign of petty harassments" may violate the doctrine, though it does not involve a discharge, transfer or demotion, if the campaign surpasses a threshold of triviality.[18]

Practical Implications

By establishing that political hirings and promotions are generally unlawful, the *Rutan* decision reinforces the practical effect of *Elrod* and *Branti.* Any pressure to secure the removal or reassignment of "holdover" employees may be diminished once the resulting vacancies cannot be awarded to political favorites. Otherwise, *Rutan* may have little direct impact on public employee bargaining in Illinois. The Illinois bargaining statutes reserve to management all matters involving the "selection of new employees."[19] Insofar as *Rutan* bans promotions, transfers and harassment based on politics, it may fortify existing collective bargaining agreements by assuring a supplemental remedy for some contract violations. But because that remedy entails complex constitutional litigation, the far less cumbersome contractual remedies will often be preferred.

Because of the context in which the case was decided, *Rutan* offers little help in identifying those positions in which political allegiance may still be demanded. However, the caselaw suggests that most such positions will be among those excluded from collective bargaining. According to *Branti,* the "political" employee must help formulate or implement policy regarding the overall goals and operations of the office.[20] The Seventh Circuit has said that the employee must have "meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation."[21] Such an individual will usually qualify as a "managerial employee" excluded from the public sector bargaining laws in Illinois.[22]

The Seventh Circuit has also held that the powers inherent in a given position, and not the functions actually performed by an incumbent, control the determination of whether the position is political.[23]

> Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance.[24]

However, because each case must focus so closely on the responsibilities of the particular position, at least one court has held that patronage dismissals involving employees in multiple classifications are ill-suited for class litigation.[25]

Although the Supreme Court in *Branti* held that certain assistant public defenders were immune from political discharges, courts have reached contrary conclusions in cases involving other governmental attorneys. The attorneys in *Branti* were engaged to represent private individuals charged with criminal offenses and the Court observed that they did not render confidential advice to other public officials. Where attorneys are employed to advise officials in an attorney-client relationship, courts have deemed them exempt from the constitutional prohibition against political hiring and firing.[26] Notably, applying similar reasoning, the Illinois Appellate Court has upheld a Local Labor Relations Board determination that municipal attorneys in Chicago are also "managerial employees" exempt from collective bargaining.[27]

Conclusion

The Supreme Court's decision in *Rutan* unquestionably alters the legal landscape concerning hiring practices in public employment. This is particularly so in the Seventh Circuit, where the decision reversed prior caselaw. Uncertainty lingers regarding which positions may be exempt from the ruling, but clearly the exceptions are few.

Although public employees and their representatives have applauded the decision, for many public employers it may make little difference. However, the cautious employer concerned with limiting any possible liability should take measures to ensure that, other than for legitimately excepted positions, hiring and screening positions in fact are politics-free. For under some circumstances, an employer may be liable for political discrimination committed by lower echelon supervisors as to which the

employer is completely unaware.[28] However, such prophylactic measures aside, *Rutan* is likely to have little impact on collective bargaining since bargaining is not required over initial hiring criteria particularly with respect to positions of the sort where politics may legitimately play a role. ■

Notes

[1] *Kusper v. Pontikes*, 414 U.S. 51, 63 (1973) (Blackmun, J. dissenting).

[2] 427 U.S. 347. *Elrod* was presaged by the decision of a divided panel of the Seventh Circuit Court of Appeals in *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (1972), *cert. denied*, 410 U.S. 928 (1973).

[3] 496 U.S. _____, 110 S.Ct. 2729 (June 21, 1990), *reh'g denied*, 111 S.Ct. 13 (1990).

[4] *Elrod*, 427 U.S. at 374 (emphasis added) (Justices Stewart and Blackmun concurring).

[5] *Id.* at 380, 388-89 (Justices Powell, Rehinquist and Chief Justice Burger dissenting). Justice Stevens, who authored the Seventh Circuit's opinion in *Lewis, supra* note 2, did not participate in *Elrod*.

[6] *Id.* at 367.

[7] *Id.*

[8] 445 U.S. 507 (1980). *Branti* arose in the State of New York.

[9] *Id.* at 518.

[10] *Id.* at 519.

[11] *Id.* at 520-21 (citations omitted). In fact, it was only Justice Stewart's concurring opinion in *Elrod* which had intimated that "confidential" employees were subject to patronage replacement in the first place. The plurality opinion in Elrod spoke only of "policymaking" positions.

[12] *Branti*, 445 U.S. at 513 n.7.

[13] *See Rice v. Ohio Department of Transportation*, 887 F.2d 716 (6th Cir. 1989), *vacated and remanded*, 110 S.Ct. 3232 (1990); *Rutan v. Republican Party of Illinois*, 868 F.2d 943 (7th Cir. 1989).

[14] *Compare Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987) with *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[15] *Rutan*, 110 S.Ct. at 2736 n.6, 2739.

[16] *Id.* at 2739 (The majority opinion was authored by Justice Brennan shortly before his departure from the Court).

[17] *See Williams v. City of River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990); *Bauer v. Bosley*, 802 F.2d 1058, 1062 n.2 (8th Cir. 1986). Indeed, public employees are protected for merely expressing opinions on nonpartisan "political" issues. *See Rankin v. McPherson*, 483 U.S. 378 (1987).

[18] *Pieczynski v. Duffy*, 875 F.2d 1331, 1336 (7th Cir. 1989). *See also Morfin v. Albuquerque Public Schools*, 906 F.2d 1434, 1437 n.3 (10th Cir. 1990); *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989). "Harassment of a public employee for his political beliefs violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs." *Pieczynski*, 875 F.2d at 1333.

[19] *See* Ill. Rev. Stat. ch. 48, ¶¶ 1604, 1704.

[20] *Branti*, 445 U.S. at 511.

[21] *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985).

[22] *See Ill.* Rev. Stat. ch. 48, ¶¶ 1603(n), 1702(o); *Board of Regents v. Educational Labor Relations Board*, 166 Ill. App. 3d 730, 742 (1988).

[23] *Meeks v. Grimes*, 779 F.2d 417, 419 n.1 (7th Cir. 1985); *Tomczak v. City of Chicago, supra*, note 21.

[24] *Tomczak, supra*, note 21, 765 F.2d at 641. This doctrine is designed to save the employer and the courts the burden of repeatedly re-examining a position every time the incumbent or his work routine changes. *Id.; Dickson v. Quarberg*, 844 F.2d 1435, 1441-42 (10th Cir. 1988).

[25] *Stott v. Haworth*, 916 F.2d 134, 139 (4th Cir. 1990). Courts have split over whether the appropriateness of political considerations to a particular position is a question of fact to be decided by a jury or a question of law within the province of the judge. *See Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986).

[26] *See Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Bauer v. Bosley, supra* note 17; *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983).

[27] *Salaried Employees of North America v. Local Labor Relations Board*, 202 Ill. App. 3d 1013 (1990).

[28] *See Wzorek v. City of Chicago*, 906 F.2d 1180 (7th Cir. 1990).

Unfair Labor Practice Complaints Under the IELRA

Robert Perkovich

One of the most important substantive tasks that the Executive Director of the Illinois Educational Labor Relations Board must face is to investigate charges and initially determine whether to issue complaints in unfair labor practice cases. This is an important task because unfair labor practice cases represent the vehicle by which statutory rights are enforced and statutory obligations fulfilled. Moreover, unfair labor practice charges often represent the first, and sometimes only, interaction between the Agency and educational employers and employees and labor organizations. Unfair labor practice charges often arise in bargaining and or strike cases. Therefore, it is essential that the investigation and review of the evidence be thorough and expeditious, and lead in all possible cases to a timely and mutual

---

Robert Perkovich is an arbitrator and mediator serving on the labor arbitration panels of the Federal Mediation and Conciliation Service and the American Arbitration Association as well as the permanent panels of the United States Postal Service (North Suburban) and the Chicago Transit Authority. Prior to becoming an arbitrator, Mr. Perkovich served as the first executive director of the Illinois Educational Labor Relations Board (1984-90) and as a field examiner and trial attorney of the National Labor Relations Board (1977-84). He also serves on the adjunct faculties of the Chicago-Kent College of Law and the University of Illinois-Chicago as an instructor of public sector labor relations.

resolution of the dispute. Finally, because the issuance of a complaint in an unfair labor practice case may lead to further litigation before a Hearing Officer, the Board, and/or the courts, one must seriously consider questions of protecting the rights of those who file charges and those against whom charges are filed, as well as the conservation of resources of the Board and the parties.

In light of the foregoing, it is worthwhile to review the history of the issuance of complaints under the Illinois Educational Labor Relations Act, the decisional law in this area, and to what extent, if at all, the process could be improved to achieve the statutory goals of the Act, both as a matter of law and as a matter of dispute resolution and procedure.

The Illinois Educational Labor Relations Act in Section 15 requires that a complaint issue on an unfair labor practice charge which "... states an issue of law or fact." The question is, of course, what constitutes a question of law or fact? The Board's Rules and Regulations in Section 1120.30(b)(4) provide scant additional enlightenment on this issue. The Rules provide that after investigation the Executive Director shall issue a complaint if he or she concludes that there is "... an issue of law or fact sufficient to warrant a hearing..." The Rules further provide that in so determining the Director shall consider whether the charge states a cause of action upon which relief can be granted and whether the facts provided during the investigation state a *prima facie* case.

The very first decision of the Illinois Educational Labor Relations Board turned on this issue. In *Lake Zurich*[1] the Executive Director dismissed an unfair labor practice charge alleging that employees in a bargaining unit had been laid off and replaced by employees of a sub-contractor in retaliation for the filing of a representation petition. In dismissing the charge the Executive Director reviewed the facts and arguments presented by the employer and the union, including the propriety or validity of the employer's economic defense as to why it subcontracted the work in question. On review, the Board was not concerned with this level of scrutiny by the Executive Director. Indeed, the Board employed the same analysis and affirmed the Executive Director's dismissal of the charge.

Subsequently however, the Board began to reverse the Director in a number of charges with a brief recitation that did not explain why the charge raised a question of law or fact. Two notable examples were *Chicago Board of Education,* 84-CA-0001-C and *Chicago Board of Education,* 84-CA-0002-C[2] in which the Executive Director, in dismissing the unfair labor practice charges, ruled that the employees in question were either supervisors or managers under the Act. He, therefore, held that there was no obligation on the part of the employer to bargain with the union as the representative of those individuals.

In a series of cases over the years, the Board attempted to more specifically explicate not only what constitutes an issue of law or fact, but also what procedure the Director may employ in determining whether there is a question of law or fact. In *Brown County*[3] the Board concluded that in so determing whether to issue a complaint, the Executive Director could weigh the competing positions and evidence provided by the parties, but that he could not make a credibility assessment in determining which witnesses were more believable. In *Putnam County*[4] the Board began to distinguish between issues of law and issues of fact. In *Putnam* the Board held that although the charging party may, in its unfair labor practice charge, put forth a legitimate and reasonable legal theory, if it failed to support that legal theory with adequate facts, the Executive Director could dismiss the charge. Accordingly, the Board seemed to say that although there might be a question of law, the charge could be dismissed if no facts supported the question of law. The converse of this situation was presented in *West Chicago.*[5] There, the Board held that although the charging party may present facts to support its legal theory, if the legal theory was not a "facially plausible theory or argument, reasonably based on our statute" the charge could be dismissed.

As a result of these cases, all that is clear is that the Charging Party must set forth a legitimate legal theory and support that legal theory with the necessary facts to justify a hearing. The ultimate questions, however, as to what is a legitimate legal theory and what constitutes sufficient facts to support that theory remain unresolved. To illustrate the problem, consider an unfair labor practice charge which questions whether a matter is a mandatory subject of bargaining.

It is now well settled, at least before the Board, what method the Board will employ to determine whether a subject of bargaining is a mandatory subject of bargaining. This of course is widely known as the *Decatur* balancing test.[6] Moreover, the majority of such cases do not involve disputed facts. For example, in a case involving a unilateral change in curriculum, it is ordinarily obvious that there was in fact a change and that the employer did not bargain over the change. Similarly, the reasons behind the change and the interests relied upon by both sides to justify the obligation to bargain or the failure to bargain are also usually well known and not disputed.[7] All

that remains is the application of the *Decatur* balancing test. However, how do *Brown County, Putnam County,* and *West Chicago* fit into this scenario?

Certainly the allegation that curriculum is a mandatory subject of bargaining is a "facially plausible theory" based on a reasonable reading of the statute. Moreover, the facts necessary to support that theory, *i.e.,* that the employer did in fact change curriculum and did so without bargaining, are simple to establish and beyond dispute. Therefore, the question becomes whether a complaint must issue *in order* to determine how the *Decatur* balancing test should be struck.[8] To follow *Brown County, Putnam County,* and *West Chicago* literally would require the issuance of a complaint in the above hypothetical. However, such an approach cannot be reconciled with the Board's own handling of the charge in *Lake Zurich* where the undisputed facts and competing positions of the parties were examined and relied upon in determining whether there was merit to the charge.[9]

To properly weigh whether to issue a complaint in the hypothetical, as well as in all cases, one must identify what is at stake. There are two competing goals at stake. On the one hand there is the statutory obligation of the Board to interpret and enforce the statute and the statutory obligations of the parties to comply with the statute. On the other hand, there is a general public interest in the screening of non-meritorious (as distinguished from frivolous) unfair labor practice cases and the effective and quick resolution of disputes without the anxiety, delay and expense of protracted litigation. To issue a complaint in the hypothetical would resolve only one of the goals described above, that of statutory interpretation and enforcement. However, a higher threshold in determining whether there is a question of law or fact will achieve both goals.[10]

As noted above, many of the cases that come before the Board, such as the hypothetical described above, raise legal, and not factual, issues. The question then becomes why must a hearing be held? The purpose of a hearing is to determine what the facts are when they are in dispute. When the facts are not in dispute, a hearing is not necessary. Indeed, the experience of the Board shows that a fair number of cases that fall into this category are "heard" by a Hearing Officer, but on a stipulated record. This record could be as easily compiled during the investigation of the unfair labor practice charge as well. Similarly, under those circumstances there is no reason why a brief to the Hearing Officer could not be replaced by a brief to the Executive Director during the investigatory process. Accordingly, if a higher threshold (for example, a determination that there is merit to the case rather than a "clearly dismissable" standard) is employed to justify the issuance of a complaint on such a record, the Executive Director can decide whether, in the hypothetical described above, the subject is not a mandatory subject of bargaining, requiring dismissal of the charge. Therefore, the statutory goal of interpreting and enforcing the statute is still met. Moreover, the second statutory goal, that of the expeditious and effective resolution of disputes, is also met. If the Executive Director concludes that the charge lacks merit under the higher threshold, the charge is terminated. The issue is resolved, and although there may be an appeal to the Board of the Executive Director's dismissal, the steps of the issuance of a complaint, answer, hearing, briefs to the Hearing Officer and Hearing Officer's Recommended Decision and Order have been eliminated. Accordingly, the process is faster and more cost effective for all involved.

There remains then the consideration whether the benefits of a higher threshold to justify the issuance of a complaint are borne out by experience. There is some objective data upon which to conclude that the higher threshold will in fact achieve both goals as described above.

For example, between 1984 and through 1989 the Board has reversed the dismissal of an unfair labor practice charge by the Executive Director in nine cases that ultimately proceeded to hearing, Board Decision and/or court decision.[11] In those nine cases, seven of the decisions rendered by the Board and/or the courts, in terms of the holding, were identical or nearly identical to that of the Executive Director in the first instance.[12] Certainly, of course, the decisions of the Board and the court were more thoughtful and complete, but there is no denying that the ultimate results were the same. There is also no denying that these decisions issued months, and in some cases years, after the dismissal of the charge by the Executive Director. Accordingly, a higher threshold for the issuance of complaints, which may have justified affirming the Executive Director's dismissal, would have achieved both of the statutory goals described above. There would have been an interpretation and enforcement of the Act and such interpretation and enforcement would have taken place faster and in a less costly manner.

The clearest example of this case is the Board's and Court's decision in *Chicago Board of Education,* 84-CA-0002-C. As shown by the docket number, the charge was the second unfair labor practice charge before the Agency in 1984. In that case the Executive Director dismissed the charge finding that the principals were supervisory and

managerial. Therefore no obligation existed on the part of the employer to bargain with the union as the representative of those individuals. The Board reversed, cryptically stating that the charge involved a question of law or fact. A complaint issued, hearing ensued, and the Hearing Officer's Recommended Decision and Order was appealed to the Board and ultimately to the Court. Almost four years after the reversal of the Executive Director, the Fourth District Appellate Court affirmed the Board's finding that the Chicago principals were managerial employees and that there was no obligation on the part of the employer to bargain with the union over the terms and conditions of employment of those individuals.[13]

Finally, there can be no question that for the Agency to effectively implement the statute, the hundreds and hundreds of cases that flow through the Agency each year and that do not become decisional law of the Board or the courts, must be disposed of in an expeditious and definitive fashion short of protracted litigation. For example, in the fiscal year ending June 30, 1990, of 143 unfair labor practice charges not involving fair share cases that were filed before the Board, 100 were closed pursuant to withdrawal, settlement or both. This high rate of alternative dispute resolution is essential to the success of the collective bargaining process and to insuring that those cases that do demand the issuance of an complaint, the development of a hearing record, and decisional law are given their due consideration. The higher threshold to justify the issuance of a complaint can only support this philosophical approach on the part of the Agency which, in my opinion, is necessary for the Agency and the Act to be effective. ■

Notes

[1] *Lake Zurich School District No. 98,* 1 PERI 1031 (IELRB 1984).

[2] Because of the fact that these reversals were simple "orders," as opposed to full opinions, the Board's decisions in these cases are not published.

[3] *Brown County Community Unit School District No. 1,* 2 PERI 1096 (IELRB 1986).

[4] Putnam City Community Unit School District No. 535, 2 PERI 1148 (IELRB 1986).

[5] *West Chicago School District No. 33,* 3 PERI 1088 (IELRB 1987).

[6] *See Decatur Board of Education, District No. 61 v. IELRB,* 180 Ill. App. 3d 770, 536 N.E.2d 743 (1989).

[7] Of course, the parties dispute the legal conclusion to be drawn, but that is *not* a question of fact.

[8] If, after investigation, the Director concludes that curriculum is or may be a mandatory subject of bargaining a complaint must issue, for a finding that a violation has occurred can only be made after a hearing.

[9] This interpretation is also inconsistent with *all* of the Board's decisional law in the area of a union's duty of fair representation. In all of these cases decided by the Board, it has reviewed and affirmed dismissals of the Executive Director where he reviewed undisputed facts and drew conclusions of law whether a union's conduct violated § 14(b)(1) of the Act.

[10] One may argue that the lower threshold for issuing complaints is justified because the Board, unlike the National Labor Relations Board, does not prosecute the case. However, important questions of statutory interpretation and effective dispute resolution should not turn a "box score" or "won-loss" record.

[11] *Chicago Board of Education,* 3 PERI 1074 (1987); *Chicago Board of Education* 4 PERI 1074 (1987); 543 N.E.2d 166 (1989). ***Author's Note***: There is no published decision reversing the Executive Director's decisions. *Lombard School District,* 3 PERI 1989 (1987); 5 PERI 1038 (1989); *Southern Illinois University,* 3 PERI 1045 (1987), 4 PERI 1100 (1988); 5 PERI 1077 (1989); *Hinsdale School District No. 86,* 5 PERI 1130 (1989); 6 PERI 1110 (1990); University of Illinois, 3 PERI 1022 (1987); 5 PERI 1035 (1989); *University of Illinois,* 6 PERI 1023 (1990); 6 PERI 1128 (1990); *West Harvey School District No. 147,* 5 PERI 1161 (1989); 6 PERI 1010 (1989); *Charleston School District,* 4 PERI 1054 (1988); 561 N.E.2d 331 (1990).

Of course, there were other reversals of dismissals, but those charges were settled or disposed of in some other fashion.

[12] The two exceptions are *Lombard School District, 3 PERI 1989 (1987); 5 PERI 1038 (1989) and University of Illinois,* 6 PERI 1023 (1990); 6 PERI 1128 (1990).

[13] *Chicago Principals Association v. IELRB,* 187 Ill. App. 3d 64, 543 N.E.2d 166 (1989).

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

Arbitration

In *Alton Community Unit School District No. 11 v. Alton Education Association,* No. 89-CB-0007-S (IELRB 1990), the IELRB explicitly overruled its decision in *Brookfield-LaGrange Park School District No. 95,* 3 PERI 1117 (1987) that an exclusive representative commits a per se violation of § 14(b)(3) of the Act by demanding arbitration of an inarbitrable grievance. The case involved a decision by the District to subcontract a portion of its food service program and a grievance filed by the union that the District violated recognition and agency shop provisions of the collective bargaining agreement by failing to apply the agency shop provision to newly-hired food service personnel employed after an outside agency had taken over the management of the food service program. The Union sought arbitration of the grievance. The District then filed a § 14(b)(3) unfair labor practice charge under *Brookfield* alleging that the union's grievance was inarbitrable under the terms of the District's agreements with the union and the outside agency made at the time of subcontracting.

The Board stated that the importance of the grievance-arbitration process and its experiences since the *Brookfield* decision forced its reassessment of its policy. The IELRB stated that the *Brookfield* decision (that a union demand for arbitration of an inarbitrable grievance violated § 14(b)(3)) was originally made to provide the employer with protections against an exclusive representative's abuse of the grievance process, and that this was unnecessary since the employer had other methods of protection against such abuse (such as refusing to arbitrate the grievance or refusing to comply with an arbitration award and raising inarbitrability as a defense). Moreover, the Board noted that its experience since the *Brookfield* decision was that the use of § 14(b)(3) as a device for determining arbitrability served to significantly delay the arbitration. Thus, the IELRB stated that the use of § 14(b)(3) to determine arbitrability, originally designed to remedy potential abuses by labor organizations, served to create greater abuses by employers in impeding or delaying the preferred method of dispute resolution, grievance arbitration, and was therefore to be abandoned, and that the exhaustion of the grievance arbitration process is to be required.

In *West Harvey Federation of Teachers v. Board of Education, West Harvey-Dixmoor Public School District No. 147*, No. 90-CA-0017-C (IELRB 1990), the IELRB held that the duty to provide information applies to requests for information after an arbitration award issues. The Board suggested that the policy favoring the finality of arbitration awards may require that post-award requests for information concern only an employer's compliance with the award rather than with the merits of the underlying grievance. The Board found, however, that the District did meet its burden of providing information by giving the requested information via phone conversations and a letter.

Collective Bargaining

In *Decatur Federation of Teaching Assistants (DFTA) v. Board of Education, Decatur School District No. 61*, No. 91-CA-0001-S (IELRB 1990), the Board applied its policy of holding that the decision to subcontract work is a mandatory subject of bargaining where it results in a "significant impairment . . . of reasonably anticipated work opportunities for those in the bargaining unit" to the assignment of work to a different unit of employees working for the same employer. The case involved a conflict between the DFTA, a union of teaching assistants, and the Decatur Education Association (DEA), a union of teachers, over the decision by the Decatur Board of Education to hire all teaching assistants for the 1990 summer session from the DEA teacher unit, despite an alleged past practice of hiring employees from both units for these positions. The DFTA's charge raised a question of fact as to whether there was such a past practice and whether DFTA employees had a reasonable expectation of at least some portion of the summer positions available. If DFTA employees had such a reasonable expectation, the employer would have unilaterally changed a term and condition of employment. Therefore, the IELRB reversed the Executive Director's dismissal of the charge.

IPLRA Developments

Collective Bargaining

In *Teamsters Local 714 v. County of Cook and Sheriff of Cook County*, 6 PERI ¶ 3019 (ILLRB 1990), the Local Board held that *Loudermill* hearing procedures are a mandatory subject of bargaining, because they "impact upon employee discipline." Relying on *City of Decatur v. ISLRB*, 122 Ill. 2d 353, 522 N.E.2d 1219 (1988), the Board held that the existence of a constitutional requirement for the hearings "does not necessarily exempt that subject from the duty to bargain."

Coverage

In *AFSCME, Council 31 v. Chief Judge of the Circuit Court of Cook County*, No. S-RC-90-73, (ISLRB 1990), the State Board held that attorneys in the Office the Public Guardian of Cook County are not managerial employees under the Act. The employer relied on the recent decision by the Illinois Appellate Court that attorneys in the City of Chicago Law Department are managerial for purposes of the Act. *City of Chicago Law Department*, 4 PERI ¶ 3028 (ISLRB 1990) (Chairman Brogan, dissenting), *affirmed, Salaried Employees of North America v. Illinois Local Labor Relations Board*, 202 Ill. App. 3d 1013 (1990). The Board, however, distinguished *Chicago Law Department* from the present case on several points.

First, the attorneys in *Chicago Law Department* represented the City itself by providing legal advice and litigation services. This relationship prohibited them "from being placed in a position requiring them to divide their loyalty to the City." In contrast, the attorneys in the Public Guardian's Office or Guardians Ad Litem I & II (GALs) represent the individual wards of the Court, not the employer.

Second, the GALs in the Public Guardian's Office play no role in establishing daily operating policies for their employer. In *Chicago Law Department*, the attorneys in question routinely drafted operating policies, operating rules and regulations, and city ordinances for the City.

Finally, the organization of the Office of the Public Guardian differed from that of *Chicago Law Department*. In *Chicago*, attorneys

worked in both the personnel and labor relations areas, thus "making a division between management and labor unpracticable." In contrast, the Board found that the GALs worked in neither labor relations nor personnel and held that that office "could withstand a division between management and labor without sacrificing or threatening the collegial work environment or the efficiency of operations."

The Board also held that the GAL II positions were not supervisory. Although GAL IIs instruct less-experienced GAL Is, issue reprimands and recommend promotions, their primary responsibility is "to serve as advocates on behalf of juveniles in Cook County." The Board also found the GAL IIs non-supervisory because they were not exclusively responsible for the GAL Is, who are also under the supervision of the Public Guardian and his Deputies. Relying on *City of Freeport v. ISLRB,* 135 Ill.2d 499, 554 N.E.2d 155 (Ill. 1990), the Board found no "impermissible conflict."

The Board, overruling the Hearing Officer, held that the GALs could be included in a unit with non-attorneys. The "functionally-related" groups share many common benefits, fall under the county classification system, and generally share a strong "community of interest."

Discrimination

The Illinois Appellate Court issued its second opinion in *County of Menard v. ISLRB,* No. 4.90.0024 (Ill. App. 1990). The union in *County of Menard alleged* §§ 10(a)(1) and (2) violations in connection with the discharge of a union member. The Appellate Court in its 1988 opinion, *County of Menard v. ISLRB,* 177 Ill. App. 3d 139, 531 N.E.2d 1080, remanded the case to the State Board with instructions to apply the NLRB's *Wright Line* test, rather than the test set forth in *State of Illinois,* 1 PERI ¶ 2020 (ISLRB 1985).

The 1990 Appellate Court opinion held that the "plain meaning" of the Court's previous opinion did not require the admission of additional evidence and upheld the State Board's exclusion of evidence offered at a supplemental hearing held on remand. "The *Wright Line* test," the Court ruled, "is such that there was no need for additional evidence."

On the merits, the Appellate Court upheld the Board's decision that the employer failed to meet its *Wright Line* burden of proving that the employee would have been discharged regardless of protected activity, and thus violated §§ 10(a)(1) and (2) in this "dual motive" discharge case.

Duty to Furnish Information

In *General Service Employees Union, Local 73, v. County of Cook,* No. L-CA-89-043 (ILLRB 1990), the Local Board affirmed the Hearing Officer's decision that the employer violated §§ 10(a)(1) and (4) of the Act when it failed to furnish the union with information regarding the employer's policy on dual employment among County employees. The union sought the information after four members were discharged from Cook County Hospital for allegedly violating the dual employment policy, which limits the hours in which County employees may engage in outside work. The union requested information on dual employment for all hospital employees and a random 20 percent of other County workers. The employer refused, asserting that the information was irrelevant and to provide it would violate the Personnel Records Act.

The Local Board affirmed the hearing officer's determination that the information was relevant to the union's processing of the four grievances. Citing *Chicago Transit Authority,* 4 PERI ¶ 3013 (ILLRB 1988), the Board noted that in refusal to furnish information cases, a "liberal discovery-type standard" is used. Information pertaining to other County employees was material to determine whether the dual employment policy had been applied "fairly and consistently" to the four union members.

The employer argued that the union must produce evidence to show that the policy was being implemented unfairly before the information should be released, citing *Water Pipe Extension v. City of Chicago,* 195 Ill. App. 3d 50, 551 N.E.2d 1324 (1990). The Local Board upheld the hearing officer's decision that the union met the *Water Pipe* standard by showing a "reasonable basis" for further investigation. The union had previously questioned stewards about other instances of discipline stemming from the dual employment policy.

The County argued that to produce the information sought by the union would violate the Personnel Records Act, Ill. Rev. Stat. ch. 48, para. 2001 *et seq.* (1989). The Board, however, affirmed the hearing officer's determination that the Personnel Records Act gives employees the right to inspect the contents of their personnel files. The Board held that special exclusions in this Act from notice requirements for labor unions and arbitration proceedings "facilitate, not hinder the inspection of personnel records in the labor context." Employers may not use this Act as a "defensive weapon" to deny information to a union.

The Board also held that the employer failed to prove that County employees had a reasonable expectation of the dual employment information remaining confidential. The Board held that the information was not "confidential" as defined in *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979) and *Johns-Manville Sales Corp.,* 252 NLRB 368 (1980).

Finally, the employer argued that

the cost of supplying the information to the union would be an undue financial burden. The Board held that "time and money considerations are not a basis for refusing to supply requested information," but could be considered at the compliance stage.

Interest Arbitration

In *Arlington Heights Firefighters Association, IAFF Local 3105 v. Village of Arlington Heights,* No. S-CA-91-7 (ISLRB 1990), the State Board held that a party cannot unilaterally present issues to an interest arbitrator that have been previously settled at the bargaining table.

During negotiations, the union and the Village had tentatively reached agreement on the employee deductibles and contributions for health care insurance, but the issue of an employer contribution cap went unsettled. When the parties presented the remaining issues to an interest arbitrator, the Village included a proposal on the employer cap on contributions. The Village also proposed that in the event the arbitrator ruled in favor of the contribution cap, the union could opt for a package that called for an increase in the employer's cap in exchange for modifications of the tentative agreement on employee contributions. The union charged that this proposal breached the duty to bargain in good faith under the Act.

The Executive Director dismissed the complaint. He held that in cases involving protective services units, the main issue is whether the parties are willing to participate in the interest arbitration process. In addition, he ruled that the employer contribution proposal submitted to the arbitrator did not negate the tentative agreement; the alternative proposal would only come into play if the union chose the option.

The State Board affirmed the Executive Director's dismissal, but declined to adopt his findings in whole. The Board held that an employer may not "consistent with its duty to bargain, unilaterally place before the arbitrator issues previously settled at the bargaining table." Adopting the position of the New York Public Employment Relations Board in *Peekskill School District,* 16 PERB ¶ 3075 (NY PERB 1983), the Board that ruled an employer may not make such proposals unless the parties engage in "package" bargaining. However, since this case was one of first impression, and there was no evidence of bad faith on the part of the employer, the Board upheld the dismissal of charges. ■

Further References

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

ALCOHOL AND DRUG ABUSE PROVISIONS IN MAJOR COLLECTIVE BARGAINING AGREEMENTS IN SELECTED INDUSTRIES. Washington: U.S. Bureau of Labor Statistics, October 1990. Bulletin no. 2369. 32 pp.

This bulletin reports the results of an analysis of collective agreements covering 1000 workers or more in petroleum refining, primary metals manufacturing, transportation equipment manufacturing, trucking, and interurban and local transit (mass transit). Patterns of provisions regarding identification of substance abuse, testing, discipline, rehabilitation programs, and reinstatement are presented, along with illustrative clauses in full text.

Bemmels, Brian. GENDER EFFECTS IN GRIEVANCE ARBITRATION. Industrial Relations, vol. 29, no. 3, Fall 1990, pp. 513—525.

Are arbitrators more lenient with female grievants than male grievants? This author's examination of 557 suspension arbitration cases decided between 1976 and 1986 found that, other things being equal, arbitrators were 74% more likely to sustain grievances from females than from males.

Bodah, Matthew M. TWENTY-FIVE YEARS OF COLLECTIVE BARGAINING UNDER THE URBAN MASS TRANSIT ACT OF 1964. Labor Studies Journal, vol. 15, no. 3, Fall 1990, pp. 32-50.

By including a provision protecting the bargaining rights of mass transit employees, the Act is significant as the farthest the federal government has reached in developing a national policy on bargaining by nonfederal public employees. This article recounts the bargaining history and litigation under the Act, with particular emphasis on management's reactions and on the unions' political and bargaining strategies.

Hill, Marvin F., Jr. and Anthony V. Sinicropi. REMEDIES IN ARBITRATION. 2d ed. Washington: Bureau of National Affairs, 1991. 575 pp.

A new edition of a widely-used text, this volume expands and updates their previous work by referring extensively to unpublished arbitrators' decisions. Chapters are organized under the headings: sources of remedial authority, remedies in discharge and disciplinary cases, and remedies in nondisciplinary cases. A final chapter analyzes remedial patterns.

Levine, Marvin J. PRIVATIZATION OF GOVERNMENT: THE DELIVERY OF PUBLIC GOODS AND SERVICES BY PRIVATE MEANS. Alexandria VA: International Personnel Management Association, 1990. (Public Employee Relations Library no. 72) 87 pp.

The author reviews the entire privatization issue, including the types of privatization and the activities contracted out, the advantages and disadvantages, the effect on employment and wages, union responses, legal issues, and case studies on the federal and the state and local levels. A final chapter assesses the future of privatization.

———

Normand, Jacques, Stephen D. Salyards and John J. Mahoney. AN EVALUATION OF PREEMPLOYMENT DRUG TESTING. Journal of Applied Psychology, vol. 75, no. 6, December 1990, pp. 629—639.

This study examines the relationship between the results of preemployment drug tests and subsequent job performance to see if those applicants testing positive for illicit drugs were more likely to have higher rates of absenteeism, turnover, work injuries, and accidents. The population studied was applicants for permanent jobs with the U.S. Postal Service. Applicants with positive drug tests were found to have higher rates of absenteeism and turnover, but no significant relationship was established with work injuries and accident rates.

———

Pindur, Wolfgang and Loretta Cornelius. A MANAGER'S GUIDE TO INFORMAL COMPLAINT HANDLING. Alexandria VA: International Personnel Management Association, 1990. (Public Employee Relations Library no. 73) 120 pp.

This is intended as a practical manual for managers on resolving complaints before they become formal grievances. Chapters cover causes of complaints, steps to effective complaint handling, and recommended complaint handling procedures.

———

PUBLIC SECTOR COLLECTIVE BARGAINING AGREEMENTS IN MAJOR METROPOLITAN AREAS AS OF JANUARY 1, 1990. Cleveland OH: Cleveland State University, Industrial Relations Center, July 1990. (Report 9002-1). 147 pp.

Data are reported by occupation and region on the frequency with which various collective agreement provisions are included in public employee contracts nationally. Both wage and non-wage provisions are presented as well as dispute resolution language.

———

Purcell, Edward R. BINDING ARBITRATION AND PEER REVIEW IN HIGHER EDUCATION. Arbitration Journal, vol. 45, no. 4, December 1990, pp. 10-15.

The academic tradition of peer review and faculty participation in decision making has been used as an argument against the appropriateness of collective bargaining for faculty. In this article, the author reviews the experience at the California State University campuses with binding arbitration, suggesting that arbitration can be acceptable to both parties and supportive of traditional academic practices.

———

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

The Report Subscription Form (vol. 8:1-4)

The publication of *The Illinois Public Employee Relations Report* reflects a continuing effort by IIT Chicago-Kent College of Law and the Institute of Labor and Industrial Relation to provide education services to labor relations professionals in Illinois.

The Report is available by subscription through IIT Chicago-Kent College of Law at a rate of $30.00 per calendar year for four issues. To subscribe to The *Report*, please complete this form and return it with a check or billing instructions to:

Director of Administration & Finance
IIT Chicago-Kent College of Law
77 South Wacker Drive
Chicago, IL 60606

____ Please start my subscription to *The Report*.

____ Please bill me.

____ Enclosed is my check payable to IIT Chicago-Kent College of Law.

Name _____

Title _____

Organizaiton _____

Address (please give address where *The Report* should be mailed)

_____

_____ Tel. _____

Date _____

IIT CHICAGO KENT COLLEGE OF LAW

IIT Chicago-Kent College of Law
77 South Wacker Drive
Chicago, IL 60606

Letter to the Editors

The Report welcomes letters with comments about the articles or comments on other matters of interest to the public sector labor relations community. We reserve the right to edit to meet space limitations.

Congratulations on your fine efforts in resuming the Illinois Public Employee Relations Report. I personally have found this to be a very useful tool and I am sure that most practitioners and students in the labor relations field agree.

The purpose for my letter is to inform you that an article appearing in a recent volume of *The Report* by Lamont Stallworth regarding the interrelationship of labor arbitration in public education and the Illinois Educational Labor Relations Act was an example of the value of your publication. In that case, Lamont's article proved to be the stimulus for discussions by our staff and the Board itself as to procedural devices that the Agency could utilize to expedite the processing of unfair labor practice cases involving grievance arbitration in public schools. Moreover, many of the points raised by Lamont in his article also provoked continuing discussion by the Board with respect to cases pending decision by the Board.

Robert Perkovich
Executive Director, IELRB

The Illinois Public Employee Relations Report
Published quarterly by The Institute of Labor and Industrial Relations
University of Illinois at Urbana-Champaign
and
IIT Chicago-Kent College of Law
77 South Wacker Drive
Chicago, Illinois 60606

The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and University of Illinois at Urbana-Champaign are affirmative action/equal opportunity institutions.