Spring 2006

Vol. 23, No. 2

Karl R. Ottosen

Matt Roeschley
Ottosen Britz Kelly Cooper & Gilbert, Ltd.

Illinois Public Employee Relations
>> REPORT
Spring 2006 • Volume 23 Number 2

The Fire Department Promotions Act

by Karl R. Ottosen & Matthew Roeschley

I. Introduction

On August 4, 2003, Governor Rod Blagojevich signed into law the Fire Department Promotion Act.[1] The Act provides detailed, structured guidelines for Boards of Fire and Police Commissioners and Boards of Fire Commissioners to follow in their promotional testing procedures for full-time members.[2] The Act applies to fire protection districts regardless the presence of a collective bargaining unit.[3] However, the Act does not affect municipal fire departments that are not subject to collective bargaining agreements nor fire departments of the State, universities, the City of Chicago, combined departments providing both police and fire fighting services on January 1, 2002, or any other unit of government other than municipalities and fire districts.[4] Because of its numerous new requirements relating to the fire department promotional process, the Act has raised a variety of questions regarding how to best implement its provisions. Moreover, because the Act specifically authorizes collective bargaining in regard to numerous promotional issues, collective bargaining plays a significant role under the Act.

II. History

Prior to the Act, promotional procedures for fire departments were largely governed by provisions contained in Divisions 1 and 2.1 of Article 10 of the Illinois Municipal Code,[5] as well as provisions of the Fire Protection District Act,[6] and several key Illinois Appellate Court decisions.[7] Furthermore, section 4 of the Illinois Public Labor Relations Act (IPLRA) controlled the rights and duties of fire departments, as public employers, in regard to collective bargaining.[8]

Under section 4 of the IPLRA, "matters of inherent managerial policy," such as "functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees" were not mandatory subjects of bargaining for employers.[9] However, under the IPLRA employers were required to engage in collective bargaining "with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives."[10]

A 1994 decision by the Illinois Appellate Court for the First District, *Village of Franklin Park v. Illinois State Labor Relations Board*, considered the bargaining provisions under the IPLRA, and set forth a list of specific matters relating to fire fighter promotions that were determined to be mandatory subjects of bargaining and a list of those that were not mandatory bargaining subjects. In *Franklin Park*, the court found that the Village of Franklin Park, a non-home rule municipality, had violated the IPLRA because it had refused to bargain over certain union proposals regarding promotion to the rank of lieutenant.[11] However, the court also found that the Village of Franklin Park was not obligated to bargain over promotional issues related to ranks outside of the bargaining unit.[12]

At the time of the *Franklin Park* decision, Illinois courts and labor boards used a balancing test to determine the scope of bargaining for issues that related to wages, hours or terms and conditions of employment, and also concerned matters of inherent managerial policy.[13] In *Franklin Park*, both the Illinois Labor Relations Board and the Appellate Court applied this balancing test to determine which issues were mandatory subjects of bargaining.[14] The Labor Board and the First District each found that mandatory subjects of bargaining concerning promotions within the bargaining unit included: (i) criteria for promotions; (ii) the weighting of criteria; (iii) minimum eligibility requirements to participate in examinations; (iv) the order of promotion

INSIDE

from the final eligibility list; and (v) the posting of exam scores.[15] On the other hand, the following matters were found not to be mandatory subjects of bargaining: (i) examination format and design; (ii) the identity of those who conduct the oral and written (or any other) parts of the exam; (iii) the standards and guidelines for exam questions; and (iv) the standards and guidelines for merit and efficiency rating.[16]

Essentially, the distinction between matters that were found to be mandatory bargaining subjects and those that were not was one of substance and procedure. The mechanics and procedures of promotional testing were found to be mandatory bargaining issues, while the substantive issues surrounding how exams are designed, administered, and graded were determined not to be mandatory bargaining issues.

Because the Fire Department Promotion Act specifically addresses collective bargaining issues, the *Franklin Park* decision is no longer reliable authority on the subject of collective bargaining with respect to fire department promotions. The Fire Department Promotion Act supersedes the laws that previously governed fire department promotion to the extent that they conflict with its provisions.[17] However, a case pending before the Illinois Appellate Court involving the Village of Libertyville addresses the issue of whether the Act requires bargaining over promotions to the first rank above the bargaining unit.[18] This same case has produced what organized labor says is clarifying or confirming legislation (SB827) to make it a certainty that the Act not only permits but mandates bargaining over promotions to the rank immediately above the highest rank in a bargaining unit. This legislation was approved by both houses of the General Assembly and at time of finalizing this article is awaiting the Governor's signature. It is believed the appeal of the Labor Boards decision is to be withdrawn in light of the legislative action.

The Act clearly has not been well received by management. However, it is much better than the original bill which provided for a written test only with those who achieved a passing score to be placed on lists by seniority. Certainly, there is disenchantment over the Act's elimination of the "Rule of Three," which allows management to promote one of the three applicants ranked highest on the promotion list, a rule contained in other acts. However, as with most negotiated legislation, it is better than the original draft and no side was fully pleased with the outcome. In the legislative process, labor had significant support for change, and management sought to improve the bill with some success. The remainder of this article addresses the Act's major points of interest and their bargaining implications.

III. Coverage

As previously discussed, the Fire Department Promotions Act applies to promotion of full-time members of fire departments of fire protection districts and full-time municipal fire departments that are subject to collective bargaining agreements.[19] "Promotion" is defined as "any appointment or advancement to a rank for which an examination was required before January 1, 2002," or that is included within or the rank immediately above a bargaining unit.[20] However, the following appointments are not considered "promotions:" (i) those for fewer than 180 days; (ii) those of superintendent, chief or other chief executive officer; (iii) exclusively administration or executive ranks for which no exam is required; (iv) ranks exempted by a home rule municipality before January 1, 2002; and (v) an administrative rank immediately below the chief (or

---

Karl Ottosen has practiced local government and labor law since 1984. As one of the initial hearing officers of the Illinois State Labor Relations Board, he was responsible for deciding cases which helped establish the foundation of the state's public sector labor law. He also assisted in developing the labor board's election, investigation, and hearing procedures. After approximately two years with the labor board, Mr. Ottosen entered private practice and currently represents various governmental bodies, private corporations, and individuals in a variety of labor and employment law issues, as well as general school, fire protection, and municipal law matters.

Mr. Ottosen received a B.S. degree with high honors from Western Illinois University in 1981 with a major in secondary education. He received his J.D. degree from the University of Illinois College of Law in May 1984. He has been admitted to the bars of the State of Illinois, the United States District Court for the Northern and Central Districts of Illinois (trial bar member), and the Seventh Circuit Court of Appeals. He is a member of the American, Illinois and DuPage County bar associations, and the Illinois Council of School Attorneys.

Matt Roeschley is a law clerk for Ottosen Britz Kelly Cooper & Gilbert, Ltd. and a third-year law student at Northern Illinois University College of Law. Matt has also interned at the Livingston County State's Attorney's Office and worked as a graduate assistant in the University Writing Center at NIU. During his time at NIU, Matt has been a semi-finalist in the College of Law Moot Court Competition and has served as vice-president of the Public Interest Law Society.

other chief executive officer title) as long as there are no more than two persons in that rank and provided there is at least one promoted rank between the administrative rank and the firefighter rank.[21] Section 10(b) of the Act provides that "all promotions in an affected department to which this Act applies shall be administered in the manner provided for in this Act."[22] Therefore, because of the way the Act defines "promotions," it governs all promotions to ranks either "included within a collective bargaining unit" or to "the next rank immediately above the highest rank included within a bargaining unit," as long as that rank is not the only one "between the Fire Chief and the highest rank included within the bargaining unit."[23] Thus, if the next highest rank outside the unit is the only rank between the chief and the bargaining unit, promotional issues related to that ranks are not subject to bargaining.[24]

Additionally, all positions that were subject to a collective bargaining agreement already in place at the time the Act became effective fall under its coverage.[25] Therefore, if prior to August 4, 2003, a public employer and a union had reached an agreement in regard to promotional criteria and processes for specific positions, those agreed-upon criteria and procedures remain effective to the extent they do not conflict with the Act.

Section 10(d) of the Act states that the Act "is intended to serve as a minimum standard."[26] As such, it leaves ample room for employers and unions to bargain over many issues related to the promotional process. Specifically, section 10(d)(2) states, the Act should be "construed to authorize and not to limit" collective bargaining over issues that relate to "conditions, criteria, or procedures for the promotion of employees who are members of bargaining units."[27] Additionally, section10(d)(3) specifically states that the Act will not limit the negotiation of collective bargaining agreement provisions designed to meet affirmative action goals, assuming, of course, that the negotiated provisions do not violate applicable law.[28] Moreover, the Act allows an appointing authority to supplement the promotional criteria already found in the Act with additional or different components, as long as such additional criteria are "job related and applied uniformly."[29] On the other hand, the Act also states that "[l]ocal authorities and exclusive bargaining agents" are permitted to forge agreements "waiv[ing] one or more of its provisions and bargain on the contents of those provisions," as long as the waiver is treated as a permissive, rather than mandatory, subject of bargaining.[30]

IV. Establishment of Test Components

Another way the Fire Department Promotion Act has changed the promotional process within fire departments is by specifically listing certain factors that a fire department may include in its testing process. Prior to the Act, the Municipal Code and Fire Protection District Act required that promotions be based upon ascertained merit, seniority in service, and examination.[31] Instead, sections 20(b) and 30 of the Act list four components that fire departments may consider as part of the examination process for promotions.[32] Specifically, the Act allows a fire department to include the following: (i) a written examination; (ii) seniority (within the department); (iii) ascertained merit; and (iv) a subjective evaluation.[33] Also important to note is that section 20(b) explicitly excludes the testing of physical criteria of any kind, which was permitted prior to the Act. In particular, section 20(b) prohibits fitness testing, agility testing, and medical evaluations.[34]

The four testing components set forth in sections 20 (b) and 30 of the Act are not mandatory components that must be used by every fire department, but are instead some of the possible factors from which a fire department may choose its testing components.[35] Section 30 allows the weight (if any) attached to each examination component to be determined by the appointing authority or to be determined through collective bargaining.[36] Much of the bargaining has centered on these components, their weights and the specific items to be included within each component.

V. Monitoring

Section 25(a) of the Fire Protection District Act requires that all facets of the promotion process be subject to "monitoring and review."[37] Section 25(b) protects members of bargaining units by giving their exclusive bargaining agents the mandatory right to select two "impartial persons who are not members of the affected department" to serve as monitors over the promotional process. These monitors are to be "selected to act as observers by the exclusive bargaining agent."[38] Section 25(b) also permits appointing authorities to choose two additional observers of their own.[39] All observers appointed to monitor the promotion process are "authorized to be present and observe when any component of the test is administered or scored," except for those components like the "chief's points" which are not amenable to monitoring.[40] Also observers are not allowed to "interfere with the promotion process," unless "otherwise agreed in a collective bargaining agreement."[41] The observers are required to "promptly report" to the department or Commission any witnessed or suspected infractions or

violations of the Act or of a collective bargaining agreement.[42] If any provisions of Section 25 conflict with or contradict the provisions of a collective bargaining agreement, they are not applicable.[43] Therefore, the right to collectively bargain regarding any of the Act's monitoring provisions remains paramount, reflecting the purpose of the Act to serve as a "minimum standard" that generally does not limit collective bargaining.[44]

VI. New Scoring Scale

Prior to the Fire Department Promotion Act, the Fire Protection District Act (FPDA) and the Illinois Municipal Code (Code) governed the way in which promotional testing in fire departments was conducted. Although neither the Code nor the FPDA provided a pre-set scoring scale, most commissions utilized a 100-point scale for promotional examinations. The Fire Department Promotion Act sets forth a scoring scale with a structured baseline standard for commissions to follow, while still allowing some flexibility for appointing authorities or collective bargaining to determine the specific weight allocated to each component part.[45] The scale set forth in section 5 of the Act calls for the grading of each component of the testing process on a 100-point scale, with the points for each component subsequently reduced according to the weighting factor assigned to the component.[46] The weights for each component are to be determined at the department's discretion or established by a collectively bargained agreement.[47] Ultimately, the weighted scores of all the components must be added together to total an overall score based on a 100-point scale prior to the awarding of any military preference points.[48]

VII. Seniority Points

Another change brought about by the Fire Department Promotions Act relating to the allocation of promotional points is the manner in which seniority points are to be factored into the promotional process. Prior to the Act, some departments simply tacked on additional points for seniority. The Act, however, clearly makes seniority a testing component to be factored together with the other components to determine a person's position on the preliminary promotion list.[49] Furthermore, the consideration of a promotional candidate's seniority only relates to the candidate's seniority within the particular department in which promotion is sought and is to be calculated as of the date of the written examination.[50] Section 40(a) gives the appointing authority the power to determine the weight and computation of seniority points, but also makes the issue subject to collective bargaining.[51]

VIII. Ascertained Merit

Section 45(a) of the Act itemizes the specific types of credentials and qualifications that may be included under the ascertained merit component of the examination process. Fire departments may award ascertained merit points for: (i) education, (ii) training, and (iii) certification in subjects and skills related to the fire service.[52] Much like section 20(b), which lists testing components that may be utilized in the examination process, section 45(a) sets forth specific credentials and qualifications that may be used to award ascertained merit points. The credentials and qualifications listed in section 45(a) are not mandatory; rather, departments simply may not choose or create qualifications other than those in the statute when establishing guidelines awarding ascertained merit points. Many contracts now contain laundry lists of education, training and certifications for which points are awarded. Due to the various specialties available to members of the fire service, there are many opportunities for employees to participate which now may also assist them in their promotional efforts. Hazmat, technical rescue, and emergency medical service dive teams are some of the specialties for which ascertained merit points are being awarded.

Additionally, section 45(a) requires that fire departments publish their bases for awarding ascertained merit points at least one year in advance of the date upon the points are to be awarded.[53] In other words, a department must make known to its employees the credentials and qualifications for which it will grant ascertained merit points at least one year before the points are to be awarded. This publishing requirement is subject to bargaining under section 45(a), however, so a bargaining unit may choose to waive or alter the provision in a collective bargaining agreement.[54] This requirement has caused difficulties for some fire departments because, unless a department already had a detailed, published policy addressing ascertained merit points at the time the Fire Department Promotion Act was enacted, that department could not include ascertained merit points in any promotional process conducted within the first year after the Act. Some departments have negotiated waivers of the one year notice or have otherwise worked out a timeline for the process.

Furthermore, section 45(a) of the Act requires that all individuals who are eligible to vie for a promotion receive equal opportunity to acquire ascertained merit points.[55] Essentially, a fire department may not unreasonably restrict members to the

extent that they lose opportunities to participate in trainings or certification classes that would qualify for ascertained merit points. However, like the publishing provision, this requirement may be altered through a collective bargaining agreement.[56]

However,while departments must ensure equal opportunity for eligible persons to acquire such points, they are not required to pay for their eligible members to obtain training and educational opportunities, only to provide a fair selection process for such opportunities. An additional requirement under section 45(b) mandates that the total ascertained merit points awarded to each candidate for a particular promotion must be posted prior to the written exam and the compilation of the promotion list.[57]

IX. Written Examinations

The Fire Department Promotion Act also provides detailed and specific guidelines for the written examination component of the testing process. Section 35 of the Act specifically addresses written examinations.[58] All provisions of section 35, however, are inapplicable if and to the extent they conflict with the terms of a collective bargaining agreement.[59]

One condition that arises time and again within the various provisions of the Act is the requirement that all other components of the testing process take place prior to the written component.[60] However, as previously noted, none of the components of the testing process are mandatory, including written examinations.[61] Therefore, the requirement that a written examination must come after all of the other components of the testing process does not imply that a written examination must be offered, only that it must come last if it is one of the testing process' component.

Additionally, section 35(a) prevents fire districts and commissions from making a candidate's eligibility to take a written examination contingent upon the candidate's score on any other facet of the testing process.[62] Hence, all candidates must be permitted to participate in each component regardless of their performance on any other component. Furthermore, written examinations must test candidates on matters that relate to the duties of the position being filled and must be based exclusively on the contents of written materials that have been identified and made available to the members of the department a minimum of ninety days in advance of the written examination.[63]

The Act also requires that departments provide study and reading materials for each upcoming examination at each fire station, and maintain the list of such materials for either the last two written examinations, or for five years, whichever time is shorter.[64] Also, sample examinations may be made available to members of the department for purposes of review in preparation for a written examination. However, no member of the department or commission may examine or even view the actual test questions prior to the issuance of the examination.[65]

X. Minimum Eligiblity Requirements

Prior to the Act, it was not uncommon for departments to utilize predetermined "eligibility requirements" that were set forth either in their job descriptions or commission rules, to determine which candidates could take part in the promotional process. However, under the statutory sections that previously governed eligibility for promotion, the appropriateness of specific eligibility requirements was suspect. The applicable statutes provided "[A]ll examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to examination."[66] Certainly, the language did not clearly or specifically grant authority to commissions to prequalify candidates for promotion based on set criteria. However, the Labor Board court in the *Franklin Park* case identified prerequisites as a mandatory topic of bargaining.[67] Section 15(b) of the Fire Department Promotion Act, which now governs this issue, clearly grants the authority to use preset eligibility requirements and specifically sets forth the criteria that may be considered, including a candidate's: (i) length of employment; (ii) education; (iii) training; and (iv) certification in subjects and skills related to fire fighting.[68] Just as with the basis for awarding points for ascertained merit, pre-established eligibility requirements must be published at least one year before the promotional process begins.[69] In addition, like the requirements for ascertained merit, equal opportunity to meet the published eligibility requirements must be provided for all members of the department.[70]

XI. Post Seniority List Prior to the Written Examination

As previously discussed, the Act clarified the way seniority points are to be factored into the promotional process. Section 40 of the Act addresses seniority points and, as previously mentioned, requires that such points only be awarded based on a candidate's service with the department as of the date of the written examination in which the promotion is sought.[71] Therefore, in order for the seniority list to be compiled, the date of the written exam must be set and known by the individual compiling the seniority list. Under section 40(a), the weight of the seniority points component is to be determined by the commission or

through a collective bargaining agreement.[72] Furthermore, under section 40(b), the seniority list must be posted prior to the written examination and before the creation of a preliminary promotion list.[73] Specifically, section 40(b) requires that the seniority list include each candidate's initial hire or seniority date, any breaks in service, the total number of eligible years, and the number of seniority points.[74]

XII. The End of the "Rule of Three"

Another important change under the Fire Department Promotion Act is the end of the "rule of three" found in the Municipal Code and Fire Protection District Act, which called for promotions to be made from the group of three candidates having the highest ratings at the end of the promotional process.[75] Clearly this provision in many instances permitted commissions to appoint the most qualified candidate at the time of the vacancy. However, any time a commission promoted anyone other than the top ranked person, the decision was subject to scrutiny and raised suspicion of inappropriate action. Labor unions convinced the legislature that this rule of three could easily be abused and result in unfairness, as departments were vested with the power to arbitrarily pass over the top-rated candidate for reasons left undefined. The Fire Department Promotion Act does away with the "rule of three." Section 20(d) of the Act calls for the highest-ranked individual on the final promotion list to be appointed to the vacant position.[76] However, the new rule provides an exception where "the highest ranking person has demonstrated substantial shortcomings in work performance or has engaged in misconduct affecting the person's ability to perform the duties of the promoted rank."[77] It is important to note the top-ranked person may be passed over only if the substantial shortcomings or misconduct occur after the posting of the promotion list and may only be passed over for promotion once, unless the reasons for being passed over are "not remedial."[78] Finally, section 20(d) requires that the reasons for passing over a top-ranked candidate be documented by the appointing authority.[79]

XIII. Promotional List Expiration Date

The Fire Department Promotion Act also provides a degree of flexibility for departments in regard the expiration of promotional lists. Previously the lists were valid for three years.[80] The new Act, on the other hand, allows a promotional list to expire after a minimum of two years, or to remain unchanged and in effect for up to three years.[81] The Act does not require that a promotional list exist at all times, but calls for the preparation and distribution of a new list within 180 days after a vacancy if one does not exist at the time the vacancy occurs.[82] This ends the arguments over whether lists for all ranks must be in place at all times, but it remains an area of contention in negotiations.

Employees prefer to have examinations held regularly as a list is about to expire. When lists expire without new promotional exams scheduled, there are often questions raised as to whether the Department is waiting for some favored employee to meet the prerequisites. Of course, employees who are close to the required seniority, educational, or other prerequisites are displeased by their department's going forward with an examination which freezes them out of the process for at least two more years. While the timing of the process will always have these competing interests, a department's decision not to hold an exam is often based on a determination that vacancies are not likely to occur in the near future. Thus, the expense of a promotional exam can be put off until a future budget year. Employees should understand there is generally a sound business justification for the timing of an exam. It is too easy to impute some sinister motivation behind the action, but all are urged to inquire and listen to the explanation before challenging the employer's action as discriminatory or otherwise unjust.

XIV. Aggregate Minimum Scoring

Section 30 of the Act requires that if a minimum passing score is established, it must be a sum total of all component parts of the testing process and must be announced in advance of the beginning of the promotion process.[83] Therefore, section 30 does not call for a baseline score to be established for each individual component part. Instead, it requires that all candidates be allowed to participate in each individual component regardless their performance on any one piece of the testing process.[84] However, as with other provisions relating to testing components and scoring, to the extent that any of the provisions of section 30 conflict with the provisions of a collective bargaining agreement, they do not apply.[85]

XV. Future Considerations

The Act's detail is ripe for procedural errors. Commissions must ensure that the various notice requirements are met and then be particular in the examination process to ensure that neither the Act nor any supplemental or conflicting collectively bargained provision is violated. The fact that the Act is applicable to only those

municipal departments with a unionized workforce definitely has created, and will create even more bargaining units. As we bargain these issues, commissioners should not be ignored. Before agreeing to examination changes, the commissions should be consulted or even directly involved in the process. Many departments with good trusting relationships between the commissions and employees have been able to negotiate rule changes to implement the Act without amending their collective bargaining agreements. Others, of course, have spent numerous hours negotiating these matters. Regardless, the issues will continue to be a main negotiating topic for the foreseeable future.

Once an agreement is reached, the commission must be updated on any new requirements and it is imperative that all aspects of the promotional processes be conducted in strict compliance with the Act and the related contract provisions. Departments should review their new contracts with all employees as part of the regular training. Supervisors must know the agreement and then should conduct the training session with subordinate members in order for the entire department to be fully informed of the changes in the terms and conditions of employment. ♦

Notes

1. P.A. 93-411 (eff. Aug. 4, 2003) (codified at 50 ILCS 742/1 *et. seq.*).
2. 50 ILCS 742/1.
3. *Id.*
4. *Id.*
5. 65 ILCS 5/10-1 *et. seq.*; 65 ILCS 5/10-2.1 *et. seq.*
6. 70 ILCS 705/16.01 *et. seq.*
7. *Village of Franklin Park v. ISLRB*, 265 Ill. App .3d 997, 638 N.E.2d 1144 (1st Dist. 1994); *Markham v. State and Municipal Teamsters, Chauffeurs and Helpers, Local 726*, 299 Ill.App.3d 615, 701 N.E.2d 153 (1st Dist. 1998).
8. Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives. 5 ILCS 315/4.
9. *Id.*
10. *Id.*
11. *Franklin Park*, 265 Ill. App. 3d at 1002-04, 638 N.E.2d at 1147-48.
12. *Id.* at 1005, 638 N.E.2d at 1149.
13. *See Central City Educ. Ass,n v. IELRB*, 149 Ill.2d 496, 599 N.E.2d 892 (1992); *AFSCME v. ILRB*, 190 Ill.App.3d 259, 546 N.E.2d 687 (1st 1989).
14. *Franklin Park*, 265 Ill.App.3d at 1002-07, 638 N.E.2d at 1147-50.
15. *Id.* at 1003-04, 638 N.E.2d at 1148.
16. *Id.* at 1004, 638 N.E.2d at 1048.
17. 50 ILCS 742/10(b) provides:
> Notwithstanding any statute, ordinance, rule or other laws to the contrary, all promotions in an affected department to which this Act applies shall be administered in the manner provided for in this Act. Provisions of the Illinois Municipal Code, the Fire Protection District Act, municipal ordinances, or rules adopted pursuant to such authority and other laws relating to promotions in the affected departments shall continue to apply to the extent they are compatible with this Act, but in the event of conflict between this Act and any other law, this Act shall control.

18. *See Libertyville Professional Firefighters Ass'n IAFF Local 3892 and Village of Libertyville*, No. S-CA-05-045 (ILRB State Panel Nov. 28, 2005), *appeal pending* (holding that Fire Department Promotions Act made promotion to the first rank above the bargaining unit a mandatory subject of bargaining).
19. 50 ILCS 742/5 provides:
> Affected department' or 'department' means a full-time municipal fire department that is subject to a collective bargaining agreement or the fire department operated by a full-time fire protection district. The terms do not include fire departments operated by the State, a university, or a municipality with a population over 1,000,000 or any unit of local government other than a municipality or fire protection district. The terms also do not include a combined department that was providing both police and firefighting services on January 1, 2002.

20. *Id.*
21. *Id.*
22. 50 ILCS 742/10(b).
23. 50 ILCS 742/5 provides:
> "Promotion" means any appointment or advancement to a rank within the affected department (1) for which an examination was required before January 1, 2002; (2) that is included within a bargaining unit; or (3) that is the next rank immediately above the highest rank included within a bargaining unit, provided such rank is not the only rank between the Fire Chief and the highest rank included within the bargaining unit, or is a rank otherwise excepted under item (i), (ii), (iii), (iv), or (v) of this definition.

24. *Id.*
25. 50 ILCS 742/10(a).
26. 50 ILCS 742/10(d).
27. 50 ILCS 742/10(d)(2).
28. 50 ILCS 742/10(d)(3).
29. 50 ILCS 742/10(d)(1).
30. 50 ILCS 742/10(e).
31. 65 ILCS 5/10-2.1-15 and 70 ILCS 705/16.11 provide: "The board, by its rules, shall provide for promotion in the fire department on the basis of ascertained merit and seniority in service and examination, and shall provide in all cases, where it is practicable, that vacancies shall be filled by promotion."
32. 50 ILCS 742/20(b); 50 ILCS 742/30.
33. 50 ILCS 742/30 ("Promotion examinations that include components consisting of written examinations, seniority points, ascertained merit, or subjective evaluations shall be administered as provided in Sections 35, 40, 45, and 50.").
34. 50 ILCS 742/20(b) ("The use of physical criteria, including but not limited to fitness testing, agility testing, and medical evaluations, is specifically barred from the promotion process.").
35. *See id*, providing the criteria which a fire department may use in promotional testing:
> A person's position on the preliminary promotion list shall be determined by a combination of factors which *may* include any of the following: (i) the person's score on the written examination for that rank, determined in accordance with Section 35; (ii) the person's seniority within the department, determined in accordance with Section 40; (iii) the person's ascertained merit, determined in accordance with Section 45; and (iv) the person's score on the subjective evaluation, determined in accordance with Section 50.

36. 50 ILCS 742/30 provides:
> The weight, if any, that is given to any component included in a test may be set at the discretion of the appointing authority provided that such weight shall be subject to modification by the terms of any collective bargaining agreement in effect on the effective date of this Act or thereafter by negotiations between the employer and an exclusive bargaining agreement."

37. 50 ILCS 742/25(a) provides:
> All aspects of the promotion process, including without limitation the administration, scoring and posting of scores for the written examination and

subjective evaluation and the determination and posting of seniority and ascertained merit scores, shall be subject to monitoring and review in accordance with this Section and Sections 30 and 50."

38. 50 ILCS 742/25(b) provides, "Two impartial persons who are not members of the affected department shall be selected to act as observers by the exclusive bargaining agent. The appointing authorities may also select two additional impartial observers."
39. *Id*.
40. 50 ILCS 742/50(c).
41. *Id*.
42. *Id*.
43. 50 ILCS 742/25(d).
44. 50 ILCS 742/10(d).
45. 50 ILCS 742/5; 50 ILCS 742/30.
46. 50 ILCS 742/5 ("Each component of the promotional test shall be scored on a scale of 100 points. The component scores shall then be reduced by the weighting factor assigned to the component on the test and the scores of all components shall be added to produce a total score based on a scale of 100 points.").
47. 50 ILCS 742/30 ("The weight, if any, that is given to any component included in a test may be set at the discretion of the appointing authority provided that such weight shall be subject to modification by the terms of any collective bargaining agreement in effect on the effective date of this Act or thereafter by negotiations between the employer and an exclusive bargaining representative.").
48. 50 ILCS 742/5.
49. 50 ILCS 742/20(b), provides the factors that determine a candidate's position on a preliminary promotion list:

> A person's position on the preliminary promotion list shall be determined by a combination of factors which may include any of the following: (i) the person's score on the written examination for that rank, determined in accordance with Section 35; (ii) the person's seniority within the department, determined in accordance with Section 40; (iii) the person's ascertained merit, determined in accordance with Section 45; and (iv) the person's score on the subjective evaluation, determined in accordance with Section 50.

50. 50 ILCS 742/40(a) ("Seniority points shall be based only upon service with the affected department and shall be calculated as of the date of the written examination.").
51. *Id*. ("The weight of this component and its computation shall be determined by the appointing authority of through a collective bargaining agreement.").
52. 50 ILCS 742/45(a) ("The promotion test may include points for ascertained merit. Ascertained merit points may be awarded for education, training, and certification in subjects and skills related to the fire service.").
53. *See id*, further providing:

> The basis for granting ascertained merit points, after the effective date of this Act, shall be published at least one year prior to the date ascertained merit points are awarded and all persons eligible to compete for promotion shall be given an equal opportunity to obtain ascertained merit points unless otherwise agreed to in a collective bargaining agreement.

54. *Id*.
55. *Id*.
56. *Id*.
57. 50 ILCS 742/45(b) ("Total points awarded for ascertained merit shall be posted before the written examination is administered and before the promotion list is compiled.").
58. 50 ILCS 742/35.
59. *See* 50 ILCS 742/35 (e) ("The provisions of this Section do not apply to the extent that they are in conflict with provisions otherwise agreed to in a collective bargaining agreement.").
60. 50 ILCS 742/35(a) ("The written examination shall be administered after the determination and posting of the seniority list, ascertained merit points, and subjective evaluation scores."). *See supra* note 49; s*ee also* 50 ILCS 742/40 ; 50 ILCS 742/50(e).
61. 50 ILCS 742/20(b).
62. 50 ILCS 742/35(a) ("The appointing authority may not condition eligibility to take the written examination on the candidate's score on any of the previous components of the examination.").
63. *See id*, further stating that written examinations for promotion must test matters related to the duty of the rank in question:

> The written examination for a particular rank shall consist of matters relating to the duties regularly performed by persons holding that rank within the department. The examination shall be based only on the contents of written materials that the appointing authority has identified and made readily available to potential examinees at least 90 days before the examination is administered.

64. 50 ILL. COMP. STAT. ANN. 742/35(d) (West 2005):

> "Each department shall maintain reading and study materials for its current written examination and the reading list for the last 2 written examinations or for a period of 5 years, whichever is less, for each rank and shall make these materials available and accessible at each duty station."

65. 50 ILL. COMP. STAT. ANN. 742/35(c) (West 2005):

> "Sample written examinations may be examined by the appointing authority and members of the department, but no person in the department or the appointing authority (including the Chief, Civil Service Commissioners, Board of Fire and Police Commissioners, Board of Fire Commissioners, or Fire Protection District Board of Trustees and other appointed or elected officials) may see or examine the specific questions on the actual written examination before the examination is administered. If a sample examination is used, actual test questions shall not be included. It is violation of this Act for any member of the department or the appointing authority to obtain or divulge fore knowledge of the contents of the written examination before it is administered."

66. 70 ILL. COMP. STAT. ANN. 705/16.11 (West 2005).
67. *See supra* notes 11-16 and accompanying text.
68. 50 ILCS 742/15(b) ("Eligibility requirements to participate in the promotional process may include a minimum requirement as to the length of employment, education, training, and certification in subject and skills related to fire fighting.").
69. *See id*, which further provides, "[A]ny such eligibility requirements shall be published at least one year prior to the date of the beginning of the promotional process and all members of the affected department shall be given an equal opportunity to meet those eligibility requirements."
70. *See id*.
71. 50 ILCS 742/40(a) ("Seniority points shall be based only upon service with the affected department and shall be calculated as of the date of the written examination.").
72. *See id*, further stating, "The weight of this component and its computation shall be determined by the appointing authority or through a collective bargaining system."
73. 50 ILCS 742/40(b) ("A seniority list shall be posted before the written examination is given and before the preliminary promotion list is compiled. The seniority list shall include the seniority date, any breaks in service, the total number of eligible years, and the number of seniority points.").
74. *Id*.
75. 70 ILCS 705/16.11 further provides for the promotion of one of the three highest-rated candidates:

> "All promotions shall be made from the 3 having the highest rating and where there are less than 3 names on the promotional eligible register, as originally posted, or remaining thereon after appointments have been made therefrom, appoints to fill existing vacancies shall be made from those names or name remaining on the promotional register."

76. 50 ILCS 742/20(d) calls for the promotion of the highest ranking candidate, with two exceptions:

> Whenever a promotional rank is created or becomes vacant due to resignation, discharge, promotion, death, or the granting of a disability or retirement pension, or any other cause, the appointing authority shall appoint

to that position the person with the highest ranking on the final promotion list for that rank, except that the appointing authority shall have the right to pass over that person and appoint the next highest ranked person on the list if the appointing authority has reason to conclude that the highest ranking person has demonstrated substantial shortcomings in work performance or has engaged in misconduct affecting the person's ability to perform the duties of the promoted rank since the posting of the promotion list.

77. *See id*.
78. *See id*., further providing that "[u]nless the reasons for passing over the highest ranking person are not remedial, no person who is the highest ranking person on the list at the time of the vacancy shall be passed over more than once."
79. *See id*, also providing that "[I]f the highest ranking person is passed over, the appointing authority shall document its reasons for its decision to select the next highest ranking person on the list."
80. *See supra* note 11, further providing that "[t]he board shall strike off the names of candidates for promotional appointment after they have remained thereon for more than 3 years, provided there is no vacancy existing which can be filled from the promotional register."
81. 50 ILCS 742/20(e) ("A final adjusted promotion list shall remain valid and unaltered for a period of not less than 2 nor more than 3 years after the date of the initial posting.").
82. *Id*. further providing that "[i]f a promotion list is not in effect, a successor list shall be prepared and distributed within 180 days after a vacancy, as defined in subsection (d) of this Section."
83. 50 ILCS 742/30, which states in pertinent part: "If the appointing authority establishes a minimum passing score, such score shall be announced prior to the date of the promotion process and it must be an aggregate of all components of the testing process."
84. *Id*. further providing that "[a]ll candidates shall be allowed to participate in all components of the testing process irrespective of their score on any one component."
85. *Id*.

♦

Recent Developments

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

IELRA Developments

Confidential Employees

In *Glenview Professional Association, IEA-NEA v. Glenview Community Consolidated Sch. Dist. No. 34l2*, 27 PERI 37 (IELRB 2006), the IELRB granted the petition to include the administrative assistant to the director of technology, in a bargaining unit of non-certificated employees at the Glenview Community Consolidated School District No. 34. The IELRB held that the administrative assistant was not a confidential employee.

After the 2003-2004 school year, the district created the position. The position's purpose was "to provide administrative and secretarial support to ensure the smooth operation of school related and business functions of the central administration" of the District. The position mostly consisted of administrative duties, but included day-to-day technical support for the district administrative office and to facilitators and associates. According to the IELRB, there was no evidence that an employee in this position would need to read any of the documents she would be troubleshooting during technical support. Although an employee in this position would have access to documents regarding labor negotiations through the network server, three other administrative assistants also had access to this information and were part of the bargaining unit. There was no evidence that the person in this position had ever seen any collective bargaining documents or information as a result of her duties.

The IELRB applied ILRA section 2(n)(ii)'s, 115 ILCS 5/2(n)(ii)'s "access" test. Under the "access" test, the Board inquires as to whether the employee in question has unfettered access ahead of time to information pertinent to the review or effectuation of pending collective-bargaining policies. In addition, the information must be confidential, and the employee's access to the information must be authorized. In *Board of Control of the Lake County Area Vocational System*, 20 PERI 5 (IELRB 2004), the IELRB held that it would consider the following factors in determining whether an employee responsible for operating and maintaining an employer's computer system was confidential: (1) evidence of actual access to confidential information in the regular course of the employee's duties, (2) the employee's job description, and (3) the employee's day-to-day activities. Applying these criteria, the IELRB concluded that the administrative assistant position was not confidential. First, the facts did not establish that the employee in the position would have actual access to confidential collective bargaining information in the regular course of her duties. Her access to confidential information was incident to her primary duty, similar to that of a custodian emptying a superintendent's wastebasket. Second, the job description did not indicate that she would have access to confidential labor relations information. Third, an analysis of the employee's day-to-day activities did not demonstrate that she is a confidential employee.

Duty to Bargain

In *Board of Educ., Granite City Community Unit Sch. Dist. No. 9 v. IELRB*, 179 L.R.R.M. 2243 (Ill. App., 1st Dist. 2006), the Appellate Court for the First District affirmed an IELRB finding that the Granite City Community School District violated sections 14(a)(5) and 14(a)(1) of the IELRA by engaging in regressive bargaining and reneging on a tentative agreement. The unfair labor practice charges arose out of a strike which began on September 17, 2001, after negotiations for a new collective bargaining agreement broke down. By September 28, 2001, the parties had agreed on all terms except the number of dock days resulting from the strike.

On October 5, 2001, the parties met in a mediator's office. A member of the district's negotiating team informed the mediator that he wanted to propose that there would be no dock days in exchange for the union agreeing that teachers would incur additional time during which they would supervise students outside of their regular classrooms (duty time). After midnight, the mediator brought together a subcommittee of two members of each bargaining team to discuss dock days. They agreed to a trade-off of no dock days for increased duty time. The parties agreed that the union would draft the new duty language and the district would draft the remainder of the tentative agreement and that they would reconvene at 7 p.m.

The union announced to its membership that an oral tentative agreement had been reached and scheduled a ratification vote. A district employee drafted a tentative agreement which contained all provisions except for the duty language. However, when the parties reconvened, it was revealed that the tentative agreement did not receive support from the minimum number of school board members needed to ratify it and the district submitted a new proposal changing several provisions of the tentative agreement. The strike eventually ended on October 11, 2001, with the parties agreeing to submit the issue of dock days to an arbitrator. The arbitrator ruled on December 20, 2001.

The court affirmed the IELRB's finding that the parties had reached a tentative agreement during the early morning of October 6. The court observed that both parties acted as if they had reached agreement, with the district drafting the tentative agreement and the union announcing a ratification vote to its members. The court also affirmed the IELRB's finding that the district's negotiators had authority to enter into the tentative agreement. It noted that the parties' ground rules provided that all negotiators had authority to bind their principals.

The court rejected a district argument that giving district negotiators authority to enter into a tentative agreement conflicted with School Code provisions requiring that official business of a school board be transacted only at regular or special meetings and that votes on expenditure of school funds be recorded. 105 ILCS 5/10-6, 19-7. The court relied on IELRA section 17's, 115 ILCS 5/17's provision that the IELRA controls over other conflicting laws.

The court also rejected the district's argument that the arbitrator's award resolved the matter. The court reasoned that the arbitrator resolved the issue of dock days pursuant to the agreement reached on October 11, 2001. In contrast, the unfair labor practice charge concerned the district's behavior with respect to the agreement reached on October 6, 2001.

IPLRA Developments

Unit Clarification Petitions

In *Illinois Department of Central Management Services v. ILRB*, Nos. 4-05-0276, 4-05-0277 (Ill. App. 4th Dist. Apr. 12, 2006), the Fourth District Appellate Court held that the ILRB must consider a unit clarification petition seeking to sever a confidential employee from a bargaining unit regardless of when the petition is filed. The court reversed the State Panel's dismissal of two unit clarification petitions and remanded them to the ILRB to consider them on their merits.

Under the ILRB's regulations, unit clarification petitions may be filed where substantial changes occur in a position's duties and functions, where a position was inadvertently excluded at the time the bargaining unit was established, and where a significant change occurs in statutory or case law. In *AFSCME v. ISLRB*, 333 Ill. App. 3d 177, 775 N.E.2d 1029 (5th Dist. 2002), the court held that a unit clarification petition must also be available where a newly created positions has functions similar to those of positions already contained in the bargaining unit.

In the instant case, the union and employer jointly petitioned to remove employees from two bargaining units on the ground that the employees were confidential employees. The employees objected and the State Panel held that the unit clarification petitions were inappropriate. The court agreed that the petitions did not fall within the four circumstances established in the ILRB's rules and case law but held that the ILRB was obligated to consider them anyway. The court reasoned that the statutory exclusion of confidential employees is intended to protect employer's interests in maintaining confidentiality in labor relations matters and to protect the

employees. The court concluded that the importance of those interests mandates that the Board consider a unit clarification petition seeking to remove confidential employees from the bargaining unit whenever it is presented. ♦

Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

MATTON, RICHARD H. STATE AND LOCAL GOVERNMENT PUBLIC PENSION FORUM: A CONFERENCE SUMMARY. *CHICAGO FED LETTER*. Issue 226A. May 2006. pp. 1-4.

This article summarizes presentations and discussions that took place at the Federal Reserve Bank of Chicago on February 28, 2006. Speakers at this conference discussed state and local governments' public pension issues from perspectives of a pension consultants, an economics scholar, a labor union leader for public employees, CEO of the Federal Reserve Bank of Chicago, and pension fund managers. While generally agreeing that pension liabilities would become a serious fiscal challenge for state and local governments, solutions for problems differed depending on regions and current fiscal situations. The participants presented their views on the realities of current and future pension challenges and also offered remedies that might help address such issues.

MCCARTIN, JOSEPH A. BRINGING THE STATE'S WORKERS IN: TIME TO RECTIFY AN IMBALANCED US LABOR HISTORIOGRAPHY. *LABOR HISTORY*. Vol. 47, no. 1. February 2006. pp. 73-94.

The author argues in this article that there exists an obvious and serious imbalance between the coverage of the history of public sector and private sector unions and employees. While 36 percent of all government employees belong to unions, only 7.9 percent of private sector employees are union members. However, labor history textbooks and scholarly journals mainly cover private sector unions and employees and neglect the development and current state of public sector labor unions and employees. The author lists some possible explanations: 1) public sector unionism is too recent a phenomenon for historians, 2) labor historians are more interested in the heroic icon of the industry worker and the imagery of the insurgent CIO, and 3) a close examination of public unions and employees challenges, complicates, and revises many preconceptions about recent US labor history. The author agrees with the third explanation and then provides reasons that more investigation into public labor history is needed.

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

The Report Subscription Form (Volume 23, Numbers 1-4)

The publication of *The Illinois Public Employee Relations Report* reflects a continuing effort by Chicago-Kent College of Law and the Institute of Labor and Industrial Relations to provide education services to labor relations professionals in Illinois. *The Report* is available by subscription through Chicago-Kent College of Law at a rate of $40.00 per calendar year for four issues. To subscribe to *IPER Report*, please complete this form and return it with a check or billing instructions to:

Institute for Law and the Workplace
Chicago-Kent College of Law
Illinois Institute of Technology
565 W. Adams Street
Chicago, IL 60661-3691

☐ Please start my subscription to *IPER Report*.
☐ Please bill me.
☐ Enclosed is my check payable to Chicago-Kent College of Law.
☐ We also accept MasterCard, VISA and Discover Card;
Please complete the following information:

☐ MasterCard ☐ VISA ☐ Discover Card

No. _____

Exp. Date _____

_____
(Cardholder Signature Required)

Name: _____

Title: _____

Organization: _____

_____

Address (**Please give address where the *IPER Report* should be mailed**.)

_____

_____

Tel.: _____ Date: _____

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 the 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 opportunities institutions.

Illinois Public Employee Relations Report

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

Faculty Editors:
Peter Feuille and Martin Malin
Production Editor:
Sharon Wyatt-Jordan

Student Editors:
Judith Archer, Jeremy Edelson, Meagan C. LeGear and Evan M. Lison

Chicago-Kent College of Law
ILLINOIS INSTITUTE OF TECHNOLOGY

458