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# ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

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**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 the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.**

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# Labor Relations Collaboration from Start to Finish: A Case Study on a First Contract for Westminster Colorado Firefighters

**By Lisa R. Callaway and Rebecca C. Barnard***

Table of Contents

# RECENT DEVELOPMENTS

**By Student Editorial Board:**

Johnny D. Derogene, Patrick J. Foote, Miranda L. Huber, and Matt Soaper

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 public employee collective bargaining statutes.

# LABOR RELATIONS COLLABORATION FROM START TO FINISH: A CASE STUDY ON A FIRST CONTRACT FOR WESTMINSTER COLORADO FIREFIGHTERS

**By Lisa R. Callaway and Rebecca C. Barnard***

## I. INTRODUCTION AND BACKGROUND

For many labor negotiations practitioners, regardless of whether they are on the labor or management side, the certification of a new bargaining unit is a familiar event, noteworthy only in the fact that previously unrepresented employees now have representation. Where some states' public sector labor relations acts go back decades, the public sector labor boards overseeing the statutes are regularly certifying new bargaining units, some through secret ballot elections and others through card check.[1]

In Westminster, Colorado, a new collective bargaining statute signed into law in 2013 provided public sector employees with substantive bargaining rights. Westminster firefighters organized their workforce and sought bargaining rights with their employer, the City of Westminster. This article focuses on the creative and collaborative manner in which this occurred from start to finish, from drafting a referendum question and City ordinance to bargaining of the first contract using the FMCS Affinity Bargaining model.

The City of Westminster is a home rule municipality, a suburb of Denver located to its northwest. Westminster has a population of approximately 112,000 residents and is located in Adams and Jefferson counties.[2]

The Westminster Fire Department operates from six fire stations. In addition to traditional fire department services, the Department has EMS and ambulance services; performs water rescues and technical rescues; and responds to hazardous material incidents and other emergencies. The Department also responds to large scale disasters through the City's emergency management program.[3] Under the Fire Chief's direction there are two divisions: (1) Administrative; and (2) Operations and Emergency Services. There is a deputy chief heading each of the divisions. On the administrative side, there are battalion chiefs, a training chief, and an EMS chief. The bargaining unit is made up of captains, lieutenants, paramedics,

engineers and firefighters. There are approximately 136 sworn employees in the Fire Department and 121 employees in the bargaining unit.[4]

Besides the firefighters, represented by International Association of Fire Fighters (IAFF), Local 2889, no other Westminster employees are represented by a union.

## II. HISTORY OF PUBLIC SECTOR LABOR RIGHTS IN COLORADO

Colorado's labor history dates back to the 1940s. Following the passage of the National Labor Relations Act in 1935, in 1943, Colorado passed the Labor Peace Act.[5] The law required a vote of 50% plus one for a union to become the exclusive representative of a group of employees. Assuming the first vote passed, the second vote, requiring a seventy-five-vote plurality, determined whether there would be an "all-union" agreement. If the all-union vote passed, the employees would be covered by a union security agreement (i.e., union shop with mandatory dues).[6]

After the National Labor Relations Act (NLRA) repealed the requirement for a separate election for security agreements in 1951, there was confusion regarding whether or not a separate vote for a union security agreement was still required in Colorado. Many unions, believing it was no longer necessary to hold a second vote, chose not to. However, in 1976 the Supreme Court of Colorado held in *Communication Workers of America v. Western Electric Co*. that a separate vote was required for passing a union security agreement, resulting in the invalidation of thousands of union security agreements.[7] Then in 1977, the Colorado legislature passed a law permitting unions that had not ratified their union security agreements separately to ratify the agreements through a written agreement between the employer and union, thus saving many union agreements.[8] Separate ratification would be required for all agreements after June 29, 1977.[9] The procedure continues to exist today.

In 2007, following Democratic Governor Bill Ritter's election, and with a Democratically-controlled state house and senate, unions attempted to repeal the requirement for a separate election for union security agreements through HB 1072. In February 2007, Governor Ritter vetoed the bill, citing political divisiveness and the lack of open dialogue between the stakeholders.[10] But later in that same year, Governor Ritter signed an executive order recognizing labor unions and permitting them to negotiate

with the state government.[11] For the first time, Colorado public sector unions had some bargaining rights, albeit that the right was limited as any agreement reached was non-binding.

Following the signing of the executive order, a right-to-work measure was placed on the 2008 ballot, asking:

> Shall there be an amendment to the Colorado constitution concerning participation in a labor organization as a condition of employment, and, in connection therewith, prohibiting an employer from requiring that a person be a member and pay any moneys to a labor organization or to any other third party in lieu of payment to a labor organization and creating a misdemeanor criminal penalty for any person who violates the provision of the section?[12]

The measure was defeated with 56.1% of voters voting no.[13] In 2009, Governor Ritter vetoed a bill that would have given firefighters a right to collectively bargain.[14] Despite repeated attempts, Colorado remains a non-right-to-work state today, along with twenty-two other states.[15]

In 2013, "The Colorado Firefighter Safety Act" (also known as Senate Bill 13-025 or SB 25), gave Colorado firefighters a path to a potential collective bargaining right.[16] Senator Lois Tochtrop introduced the bill on January 9, 2013.[17] In February of that year, Democratic Governor John Hickenlooper threatened to veto the bill because it did not give municipalities a say in unionization. He stated: "[W]e do not believe it is a matter of state interest to require mandatory bargaining between a locality and its firefighters."[18] SB 25 was passed by the Senate with a 20-14 approval on April 26, 2013, and signed into law by the governor on June 5, 2013 in a form that, according to him, provided municipalities with the voice in collective bargaining he was looking for.[19]

While cloaked under firefighter safety, with the recitals in the final law further emphasizing firefighter safety, SB 25 is a true collective bargaining law. It includes an obligation to "meet and confer" for all municipal employers and their firefighters[20] and codifies a municipality's and union's mutual obligation to engage in collective bargaining, with the traditional good faith bargaining obligation, to discuss "compensation, hours, and terms and conditions of employment" and to execute a written contract memorializing their agreements for a period of between one and three

years.[21] The collective bargaining obligation applies to public employers that employ twenty-four or more firefighters.[22]

The term "compensation" is expressly defined by SB 25. "Compensation" is "base wages or salary; any form of direct monetary payments; employer-paid health, accident, life, and disability insurance programs; employer-paid pension programs, including the amount of pension and contributions to the extent not controlled by law; deferred compensation; retiree health programs; paid time off; uniform and equipment allowances; expense reimbursement; and all eligibility conditions for compensation."[23] Unlike many statutes, and often where the interpretation is left to labor boards and courts, the SB 25 definition appears contained and finite. Similarly, "terms and conditions of employment" is defined as "compensation, hours, and all matters affecting the employment of firefighters, including items related to safety, except the budget and organizational structure of the public employer."[24] SB 25 also includes an obligation by the public employer to deduct union dues and assessments from its employees upon written request to the employer.[25]

In order to gain collective bargaining rights, the Colorado Firefighter Safety Act requires a group of firefighters to turn to the voters for approval, via the voter referendum process.[26] The Act defines firefighter as "an employee of a public employer whose primary duties are directly involved with the provision of fire protection or firefighting services." It continues: "'Firefighter' does not include clerical personnel or volunteer firefighters."[27] In order to get a referendum on the ballot, a firefighter employee organization must provide the employer with a notice of intent to circulate a petition amongst voters. The notice of intent must be signed by at least seventy-five percent of the proposed bargaining unit. Following submission of a notice of intent, representatives from the proposed bargaining unit must obtain signatures from five percent of voters *unless a city charter or local ordinance declares otherwise*.[28] Assuming the requisite number of signatures is obtained, the referendum question is: "Should the firefighters employed by the [name of the public employer] be covered by the 'Colorado Firefighter Safety Act'?"[29] A simple majority vote is required for the referendum to pass. In the event the referendum fails, the issue may not be placed on the ballot again for four years.[30]

Colorado Springs is currently following the procedure set forth by the Act. The International Association of Firefighters (IAFF), Local 5 collected 16,000 voter signatures to earn a place on the April 2019 ballot.[31] Firefighter

unions in Denver, Fort Collins, Aurora, and Pueblo, Colorado all have collective bargaining status.[32] Other Colorado communities with collective bargaining agreements with their firefighters include Arvada, Boulder, Thornton, and Commerce City, and there are fire protection district collective bargaining agreements as well.

## III. THE WESTMINSTER FIREFIGHTER BARGAINING RIGHTS PROCESS

### *A. The Ballot Initiative*

In 2014, the Westminster IAFF, Local 2889 (Local 2889), petitioned the Westminster City Council to authorize collective bargaining for the Westminster firefighters. Local 2889 members had begun the process of getting signatures to satisfy the requirements of the Firefighter Safety Act and gain recognition as the exclusive representative for the Westminster firefighters. The City Council's consideration of Local 2889's request continued into early 2015 when new City Manager Don Tripp came to Westminster. City Manager Tripp began meeting with Local 2889 representatives to understand the Local's concerns, and Fire Chief Doug Hall was brought into the discussions. Over several weeks, twenty-one separate meetings were held with more than 150 Westminster Fire Department staff in attendance (some attended more than one meeting). Through these meetings, City Administration and Local 2889 Executive Board representatives worked together to find resolutions to the Local's concerns and began to develop a collaborative relationship and problem-solving model.

On February 18, 2016, Local 2889 delivered to the City a Notice of Intent to circulate a petition pursuant to the Colorado Firefighter Safety Act. City Manager Tripp reached out to Local 2889 with an innovative idea. Since SB 25 permitted the City to adopt a local ordinance with an alternative procedure to the tedious process of obtaining voter signatures, the City Manager proposed that the City would waive the signature requirement if the parties would work together on an agreeable ballot question. The City proposed that it then would put the ballot question regarding representation to the Westminster voters.

The City and Local 2889 worked collaboratively to draft an acceptable ballot question—one that would be supported by the City Council, Local 2889 leadership, and the Local's membership. There were multiple drafts, some not acceptable to Local 2889. At one point in the process, Local 2889

leadership continued to collect voter signatures, resorting to the SB 25 process. In May, Local 2889 President Ron Taylor contacted City Manager Tripp to make one more attempt to try to find mutually acceptable ballot language. The parties were successful and on May 16, 2016, the City Council approved the resolution for the agreeable referendum question.

The City called a special election (Westminster regular elections are only held in odd years) to set the firefighter collective bargaining ballot question for the November 8, 2016, general election. The ballot referendum question, titled "Firefighters' Safety and Collective Bargaining Question," was:

> Shall the City Council of the City of Westminster enact an ordinance by July 1, 2017, which would prohibit Westminster firefighters from striking and create a mutual obligation between the designated representative of Westminster firefighters and the City to bargain collectively in good faith with respect to such terms that include, but might not be limited to, wages, benefits, and items related to personal safety, with such agreements made upon these terms memorialized in a contract enacted by the City Council, with disputes resolved by non-binding arbitration with impasses to be submitted to the electors of the City for final resolution?

The ballot question passed with 57 percent voter approval.

*B. Drafting the Ordinance*

With the referendum approved and the vote certified, the clock began ticking for the drafting of the ordinance. The drafting and approval process had to be completed by July 1, 2017, a relatively short timeline. It was now up to City officials to flush out the details of what was, in effect, a collective bargaining statute. Because there existed no statute to outline collective bargaining duties and obligations, it was up to the City Council to adopt an ordinance providing the type of detail that usually exists in a public sector labor statute.

Items that needed to be addressed in the ordinance included:

a. A general statement of policy to define the purpose and parameters of the ordinance;
b. A list of relevant definitions for terms used throughout the ordinance, including a definition for the terms used in the referendum question;

c. A list of preserved management rights;
d. A prohibition against strikes, work stoppages and similar behaviors, to capture the same in the referendum question;
e. A list of inherent employee rights existing in addition to the collective union rights;
f. A process for certification, decertification, and recognition of an exclusive representative;
g. A statement of the obligation to collectively bargain, the obligation to incorporate agreements into a collective bargaining agreement and the relevant timelines for the process;
h. An impasse resolution procedure, including the use of an advisory fact-finder and non-binding arbitration and the right of either party to submit any issues not agreed upon to the voters.[33]

The Westminster ordinance drafting process began in January 2017. Like the ballot question initiative, drafting the ordinance involved collaborative efforts. Drafting the ordinance took approximately four months and included input from staff, Council members, Local Executive Board members and City and Local 2889 legal counsel. To start the process, the City Council and Local 2889 agreed to core principles that would guide their discussions and the drafting of the ordinance. Those principles included the following:

1. Protect the (City) Charter and home rule authority
2. Maintain competitive market-based wage and benefit package
3. Provide for fire union input
4. Protect management rights
5. Protect the safety of employees and citizens
6. Maintain equity to all employees as individuals
7. Bargain based on interests vs. positional, using an interest-based bargaining model
8. Ensure that the agreed-upon collective bargaining agreement is financially sustainable and fiscally responsible
9. Protect employee rights
10. Create employee engagement and opportunities for positive change
11. Build respectful relationships between labor, management and all stakeholders.

Notably, the principles (7) *bargain based on interests vs. positional* and (11) *build respectful relationships between labor, management and all stakeholders* carried forward the collaborative approach that began with the drafting of the referendum question. While City and Union rights and input were key, principles 6, 9 and 10 addressed maintaining the rights of the individual employee, an important goal for the Council and City staff.

With a draft of the ordinance taking many iterations, the City worked to incorporate as much of the Local's input as was possible, while not conceding important management rights or other rights mandated under the City Charter. The Local wanted, for instance, a broader definition of the subjects for collective bargaining. It also wanted the rank of captain to be included in the bargaining unit, which the City subsequently agreed to during the ordinance discussions. The City also agreed to an ordinance giving some broader bargaining rights. However, the City was not agreeable to including minimum staffing or scheduling as subjects for bargaining.[34]

The ordinance was adopted by the City Council in May 2017, with members of the Local 2889 Executive Board present as a showing of support. The core principles were carried forward and are contained in the *Statement of Policy* at the very beginning of the final ordinance.[35]

The American Arbitration Association (AAA) certified Local 2889 as the "certified employee organization" on December 8, 2017, after a secret ballot election was conducted. The vote was 109-0. On January 10, 2018, the City received a demand to bargain.

## IV. THE INTEREST-BASED BARGAINING MODEL

The City and Local 2889 were committed to negotiating their first contract using an interest-based bargaining (IBB) process. They believed that if the relationship started based on IBB principals, it would be a solid foundation for their relationship moving forward. The parties sought out the assistance of the Federal Mediation and Conciliation Service (FMCS) to facilitate the process.

### *A. The FMCS Interest-Based Bargaining Model*

FMCS describes interest-based bargaining as "a collaborative approach to resolving labor and management disputes. Through the process, parties proactively identify durable solutions to outcomes at the bargaining table. Agreements are based on mutual and individual interests rather than

positions. This approach emphasizes problem solving and enables mutual gain outcomes."[36] Javier Ramirez, FMCS Director, Agency Initiatives, explains that the parties are not spending their time strategizing when to make a move, but rather are focused on solving the problem.[37] Essentially the parties are transforming negotiations from a win-lose strategy into a puzzle to be solved by the group as a whole.

In Roger Fisher and William Ury's classic book *Getting to Yes*, the authors explain that a negotiation method "should produce a wise agreement…, should be efficient…, [and] should improve or at least not damage the relationship between the parties."[38] Fisher and Ury developed a theory of negotiation called "principled negotiation," later named interest-based bargaining ("IBB") by FMCS.[39] The IBB method "produces wise agreements amicably and efficiently."[40]

Fisher and Ury describe four key ideas that form principled negotiation: "1) people: separate the people from the problem; 2) focus on interests, not positions; 3) options: generate a variety of possibilities before deciding what to do; and 4) insist that the result be based on an objective standard."[41]

The FMCS interest-based bargaining model directly embodies these four elements.[42] The FMCS model is a group problem-solving process that focuses on the common interests of the parties to create effective solutions which can be supported by the entire group. It is intended to strengthen the labor-management relationship. All conversations and interactions occur at the joint table between the designated team members. Any caucuses, which are discouraged, are an exception and must be limited. A simplified explanation of the process is as follows:

**1. Framing the Issues**

Each party must frame its individual issues to identify the topics of negotiation, as opposed to presenting proposals in traditional negotiations. The issue-framing procedure is known as the "what," or "what is the problem we're trying to solve?" There is a process to framing issues, however, so they don't look like positional, adversarial, and win-lose propositions. The steps in the issue-framing process include: 1) express the topic as a question; 2) frame the question as a joint problem; 3) ask the question objectively; 4) do not suggest the answer by the manner in which the question is phrased; and 5) leave the problem open to multiple solutions. For example, a concern might

be stated in traditional negotiations as "Employees are claiming that overtime is being improperly assigned based on favoritism and are demanding that this practice be stopped immediately and that supervisors be instructed on proper procedures." Using the FMCS issue framing process, the same issue might be restated as: "What can we do to improve procedures in the assignment of overtime?"[43]

**2. Identifying Interests**

As part of the parties' transition from sharing the issues to identifying their interests, an individual or group shares the story of the issue. For instance, "this is why we want to talk about this situation." It is best to be specific and provide examples so others can truly gain an understanding of the reason(s) for raising the issue.

**3. Generate Options**

The process of getting to options, or the "how" of the process, is the next step. Like the previous steps, there is great value to the group's hearing options and building additional solutions from what is stated. There are invariably multiple options to resolve an issue so this step is best accomplished by permitting the free-flow of potential options with the philosophy that "no idea is a bad idea." Sometimes options are only partial options to solve the issue, which is acceptable. A partial option might raise another partial option to work in tandem. An option is not a proposal and does not have to solve the entire issue to be included. In any event, the options will be discussed and evaluated by the entire group to determine each one's viability.

**4. Review Standards for Evaluation**

Under the FMCS model, there is a standardized process for reviewing and determining the efficacy of all options. This standards evaluation process is referred to as the F, B, and A process.

> First, a specific option must be <u>feasible</u>. It must be capable of being done. Factors to use in determining feasibility include the legality of the option; whether it's affordable; whether it's workable and practical; and whether it's understandable.[44]
>
> The second standard is whether the option is <u>beneficial</u>. This standard requires the parties to evaluate each option

based on whether it improves the condition that caused the issue to be raised. If it doesn't satisfy a party's interest, or causes harm, then this standard has not been met.[45]

The third standard is whether the option is acceptable. The option has to be favorably received by both parties to pass this standard. It's critical that when evaluating the acceptability standard, the evaluation is simply whether the option is acceptable and not whether this is the most acceptable option. Because a participant likes another option better is not a reason to fail to support an acceptable option at this stage of the process.[46]

**5. Evaluate the Options**

One by one, the parties will review each option for each issue statement individually to determine the F, B, and A status. If an option doesn't make it past any of the standards, it is immediately discarded. For example, an option must be feasible to get to the beneficial standard analysis. If it is not feasible, it is discarded without any further analysis.

Additionally, all options are evaluated by consensus. If an individual does not like an option and others do, that individual has to explain why the option is not acceptable to the individual. It also bears repeating that the analysis is not whether a particular option is the best option, but whether it is an acceptable option having applied all three factors.

*B. Keys to Success in the Process*

This interest-based bargaining process supports the two parties' working together and discourages any behaviors that get in the way. When a participant puts an option up for consideration, the option is the group's idea, not a union participant's idea or an employer participant's idea.[47] This part of the process allows the group to focus on interests and options, not on what side came up with the idea, thus allowing everyone to view the idea objectively. There is also an important "circle-back" step, a last step in the process, where the participants review their work to ensure their agreements are in alignment with their predetermined objective criteria.

Another important step is agreement on and collection of data. All participants must agree on what information they need to resolve all contract

issues. This should occur prior to the start of the issues/interests/options process so the parties are not distracted, and so that time is not wasted chasing down information when the parties are in the middle of the process, thus slowing momentum. This is particularly important with respect to financial data (also see Affinity model below.) There is typically extensive discussion surrounding the financial data needed and then secondly, how to read and interpret that data. For instance, in traditional negotiations, there is often a dispute regarding how to calculate wage increases—do you include roll up costs or are they excluded? Is longevity included in wage increase percentage calculations or is it calculated separately? As a result, when determining what a .25% wage increase costs, the parties often reach different conclusions. With interest-based bargaining, these calculations are discussed and agreed to as a group. So when the parties get to economic discussions, all participants are in agreement as to the value of a .25% increase and how it is calculated.

Another key to success in this process is using a third-party facilitator. The importance of a facilitator who is not connected to a party and who has nothing to be gained by process outcomes is imperative. Such an independent facilitator can offer unbiased opinions and nudge the parties from time to time without motivation or the impropriety of such. Additionally, the independent facilitator can move into a mediation role if this is determined necessary.

### *C. The Affinity Model*

When getting to economic issues, the FMCS interest-based bargaining model was found by FMCS to have limitations. It works with great success and positive outcomes when addressing the non-economic issues—any issues that do not have a direct and substantial economic impact. However, when applied to economic issues, FMCS found that the process often broke down. When union participants are looking for a wage increase, applying the issue/interest/options analysis was a strain. It was difficult to maintain objectivity and reach consensus. Participants tended to gravitate to traditional bargaining behaviors.

With the goal of maintaining an interest-based approach from start to finish, FMCS mediators were determined to find a way for the parties not to slide back to traditional bargaining. The Hinsdale, Illinois office of FMCS developed an alternate process which the agency titled the Affinity Economic Bargaining (AEB or Affinity) model as an effective problem-solving way to

approach the economic issues in bargaining.[48] FMCS soon saw success in the AEB model for resolving economic issues in an efficient way. The Affinity model is now used nationwide.

The AEB model modified the Affinity diagraming tool, essentially reversing the process. Affinity diagraming is a facilitation tool that can be used to sort large amounts of data or ideas.[49] It was originally developed by Kawakita Jiro in the 1960s and is also known as the KJ Method. Jiro describes his idea for the process, saying, "[w]ith masses of data spread around on my desk, I had been racking my brains to find some way to integrate them when I suddenly realized that depending on the spatial arrangement of the cards, you can see new meaning in them and find ways to synthesize the data."[50] While originally developed to sort academic data, it has become an integral part of the Affinity model. Some facilitators continue to facilitate Affinity with an old-fashioned flip-chart and others have incorporated the use of various software programs at different stages of the process, such as mind mapping and collaboration software, to improve efficiencies.

The Affinity process includes five steps: 1) Preparation; 2) Set Up; 3) Brainwriting; 4) Working the Puzzle; and 5) Final Consensus and Approval.[51] It borrows on the concepts and rules used in the regular IBB, Affinity Diagramming, Human Behavior (neuroscience principles) considerations, and a newly-created step to build a zone of possible agreement (explained below). FMCS also insists that the parties do not caucus during the Affinity economic bargaining steps 3, 4, and 5.

**1. Preparation**

This is the official beginning of the Affinity process. It further breaks down into four parts with terminology and process similar to the IBB process discussed above. The steps are "1) issue identification, and, if necessary, grouping; 2) interest identification; 3) information identification, gathering, and review; and 4) development of a common economic language."[52] Issue identification is determining the real economic issues that are concerns for each of the parties. The process is different than identifying issues in traditional negotiations, where each party includes non-critical "bargaining chip" issues. In Affinity bargaining, each party is required to explain and defend its issues, so it is critical the parties only include issues they are truly concerned with and not throw-away issues.[53] There is frequently

similarity in issues, and those issues can be grouped. For instance, if the union seeks more time off and the employer wants to clarify procedures for when certain time off can be taken, these issues may be grouped as they are similar concerns.

After identifying the issues, each party must discuss the interests related to each of its issues, so the other party can understand why the issue is important to the party who raised it. This is similar to the "telling the story" concept discussed above. Only through the sharing of interests can a party fully explain why the issue is important and can the other party begin to understand.

After identifying all the interests related to each issue, the parties must discuss what kind of information is needed in order to completely vet the issues and interests.[54] Such information may include scattergrams, insurance census information, comparable employer data, and other necessary financial information. Gathering information is the obligation of both the employer and the union. There is usually a period of time between discussing what information needs to be gathered and the beginning of the actual negotiations as information gathering may take some time. It is critical that all participants understand the data gathered and its significance. Only by working off shared information and agreement as to what the financial information means can the parties have a common economic language. This is critical to making the process a success.

**2. Set up**

This is about the room and physical surroundings where bargaining is going to take place.[55] While in the early days of the process, lots of wall space was required to utilize flipchart paper, as discussed, most IBB is now done using mind mapping software that permits all ideas to be diagrammed. Often, a combination of the two will be used. As for the room set-up for collaborative bargaining, a round or rectangular table shape is best. Unlike traditional bargaining, the participants are then interspersed amongst each other so, preferably, a management participant would find himself flanked on both sides by union participants and vice-versa. In any event, during the Affinity process, participants can expect to be standing during most of the process.

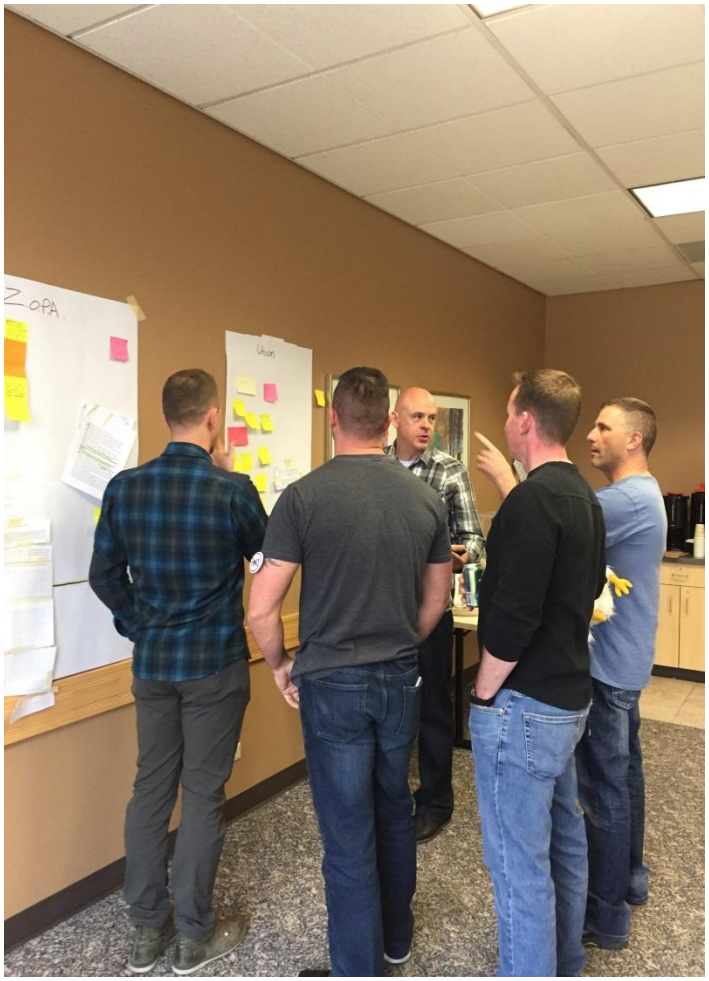
For each of the economic issues, there is a flip-chart sheet or mind map page identifying the topic/workspace.[56] For instance, wages, health insurance, pensions, and leaves of absence are common individual Affinity topics.

**3. Brainwriting**

This is the option generation part of the process and it naturally follows the discussions on issues and interests.[57] For stand-alone issues and in the IBB process, individuals call out ideas and they are added to the mind map then discussed and processed down to a solution. If using the flip-chart method, the ideas are written on a post-it note and placed in the appropriate category. For example, if one of the Affinity topics is insurance, the employer may write "increase employee premium contributions by 5%." The union might write "status quo on premium contributions." This process is happening live, and there are typically many ideas/post-it notes in each category.[58]

FMCS describes that during brainwriting, "once a post-it is placed in the workspace it becomes community property. There is no team ownership of ideas or options."[59] Different from traditional bargaining, participants are simply generating options and vetting ideas. The facilitator will only direct the

participants to move on to step four when there do not appear to be any more solutions for any of the identified areas.[60]




**4. Working the Puzzle**

This is the next step in the process. In addition to the workspaces for each of the economic issues, there is one flip-chart sheet titled "union" and one titled "employer." We will refer to these as the employer and the union staging areas. Between the staging areas is a sheet titled what FMCS calls the Zone of Possible Agreement ("ZOPA").[61] This is what will become the parties' tentative agreement. As individuals review the options posted for each of the economic issues, if a party finds an acceptable solution, the party can move that solution to their staging area. For instance, if under "health insurance" the union finds it acceptable for the employer to have the latitude to change carriers, union participants will move a post-it note stating such to the union

staging area. Similarly, if the employer is agreeable to an additional paid sick day and a new provision that employees forfeit sick days not taken, the employer can put those two solutions/post-it notes together and move them to the employer silo. Ideally, there will be solutions for all outstanding economic issues on either the employer's or the union's staging areas or both. Additionally, because the parties know they have to find agreeable final solutions to all economic issues, the employer does not move solutions to its staging area that the employer knows will not be agreeable to the union and vice-versa.[62]

Each party assesses the other party's posted solutions and ideas. As the union participants now know what is acceptable to the employer participants, the available solutions have been narrowed. Sometimes ideas are grouped together, and solutions are further clarified. It is at this point that all participants are gathered around the three sheets—the union staging area, the employer staging area, and the ZOPA.

Now a key rule comes into play. The employer participants may only move options from the union staging area to the ZOPA. The union participants may only move options from the employer staging area to the ZOPA.[63] As such, the parties are forced to find acceptable solutions within the other party's staging area. This process works because the parties are each working under the understanding that they are to only move options to their staging areas that the other side will find agreeable. The parties together then discuss the options in the staging areas and through "explanation, creation, linking, elimination or modification of options," gradually build up the ZOPA, and the formation of a potential tentative agreement emerges."[64] This stage has been described as "organized chaos" because of the organic nature in which multiple discussions form at any time. Anyone is welcomed and encouraged to join in on any discussion that is taking place in room. Because of the "no caucus" rule there is understanding and expectation that anyone can join in on a conversation in the spirit of transparency, understanding, and problem-solving.[65]

**5. Final Consensus and Approval**

This occurs when the participants believe they have reached consensus on all outstanding issues.[66] Ideally, the acceptable solutions have all been moved from the parties' staging areas to the ZOPA. Consensus does not mean that both parties achieved all their objectives, but rather the agreement is one both parties can live with and support. Consensus seeks unity between all participants. Consensus forces discussion. It is important that members do not simply agree to avoid conflict, but rather ask questions, provide feedback, and consider alternatives.

The last step is the drafting of the actual contract language. As the parties have defined what they are seeking, the drafting of the language should ideally not be difficult.[67]

With any IBB process, an important step is that participants from both teams attend a training, ideally two days in length and facilitated by a mediator. The training is centered around team building, explanation of the process, and discussions on participation expectations in order to get the most successful outcome in the bargaining process. Like the process itself, it is crucial that the training be provided by an experienced non-party facilitator. An unsuccessful training will likely result in an unsuccessful interest-based bargaining process. FMCS can assist parties in selecting the collaborative bargaining model that will increase the odds of success for the parties based on either the pre-training assessment, the dynamics witnessed in the training, or a combination of the two. On rare occasions FMCS has even recommended that parties use a traditional bargaining approach if the parties are unable to fully commit to the collaborative principles needed for success.

## V. THE WESTMINSTER NEGOTIATIONS

*A. Pre-Negotiations*

The process began on January 17 with the two-day IBB training. The training was facilitated by Javier Ramirez and attended by twenty-two individuals, not all of whom were going to be present for the negotiations. As the IBB process is markedly different than the traditional negotiations some had experienced (and in this case, only a few of the participants had been in any

labor negotiations at all), there was great interest. As support for the process and those who would be at the table, City staff thought it important to have large participation in the training.

Through two back-to-back days, the participants became more comfortable with each other. Team members from both sides were interspersed around a U-shaped table, IAFF member next to City representative. Each team contributed food and all meals were shared together. For two days, the participants spent their time together in one room, building a bond engaged in exercises and shared experiences. As Deputy Fire Chief Derik Minard stated, "the collaborative approach took away potential barriers and brought the teams together to work as one. It was a positive, team-building training. This set the stage for a positive working relationship."[68]

At the end of the training, the participants agreed on ground rules for the negotiations and had collaborated to create a mission statement for the process. The mission statement was: "To build a mutually beneficial collective bargaining agreement though respect, trust, transparency and collaboration."

The selection of the bargaining team from the City side was thoughtful and strategic, with representatives from human resources and Fire Department administration. Fire Chief Doug Hall sat through the IBB training session and was interested in participating but recognized that Deputy Chief Minard and EMS Chief Erik Birk were better suited to the negotiations process.

Local 2889 was also careful in the selection of its participants, seeking to select participants with the greatest outcome for success. While Local IAFF counsel was not present, a firefighter/IAFF representative from the Denver Fire Department participated in the IBB training and some of the negotiations as support to the Westminster Local. When bargaining began shortly thereafter, the participants felt they had trust in the process and the other team for a strong foundation to begin bargaining.

The Ordinance requires that negotiations be completed within thirty days from the start date, with a collective bargaining agreement (CBA) ratified by Local 2889 membership and approved by the City Council by no later than April 30, 2018.[69] The timeline includes having a fully-ratified/approved CBA with a January, 2019 effective date – a short timeline for a first contract.

Adopting the Affinity process for both the initial, non-economic process and the economic issues happened organically. Upon observing the dynamics of

the training process and realizing that the parties had a high level of collaboration and trust, Director Ramirez suggested that the parties attempt Affinity for all issues. Director Ramirez had not previously used the Affinity process for a negotiation from start to finish. When asked why he made his recommendation in Westminster, he stated that he thought the participants could truly honor the necessary elements" that would make Affinity work: "You all had the authority and drive to want to get a deal."[70]

*B. The Negotiations*

The first day of bargaining was February 8, 2018, and there was an energy in the room from the beginning. The participants had been exchanging information and discussing the process since the training and all participants were anxious to begin. Colored post-it notes were available and individuals and groups of participants began immediately contemplating what to write. On the walls on flip-chart paper were the following broad headings of issues for discussion: wages, provisional pay, grievance handling, discipline representation, discipline process, union issues, promotion process, expeditious job offers, paramedic recruitment and retention, and no-strike clause/penalty.

The participants began moving around the room, discussing and writing options on the post-it notes. The participants tended to gravitate toward other team members (employer to employer and union to union) in determining what to write on a post-it note. Human nature dictates that a union team member wouldn't put something on a post-it note that he/she has not discussed with the team, and vice-versa. But all such discussions were forced to happen in the large room as a huddle, not a caucus. A huddle is a more fluid process. In a huddle, members of the other team are permitted, and encouraged, to enter the conversation. It is the mediator's job to make the conversation broader. Deputy Chief Minard recalled, "at times, two people would turn into a larger group to sort through the issue. At times, Director Ramirez would make it a focal point and the collective group would resolve it. When there were contentious issues, other team members would recognize a conversation was not going well and intervene to bring it back on track. This was a group effort."[71] At the end of the first day, a small economic subcommittee was formed to gather baseline financial data and agree on a common spreadsheet to be used for wages. Fortunately, there was a representative from each team that was skilled at working the spreadsheets.

Between meetings, contract language was drafted so it could be reviewed and finalized at the next session. Sometimes the language had to be drafted after a long day of bargaining because the parties were bargaining the very next day. It was important that language be finalized as soon as there was agreement so the participants could review the language while it was still fresh and then put it aside to further narrow the issues. Some of the standard clauses were drafted ahead of time so another subcommittee could review the language, make any necessary edits and finalize it so this process didn't have to be completed at the end.

Once the participants had completed the process of moving solutions to their respective staging areas and then into the ZOPA, which led to tentative agreement on most of the issues, some unresolved issues were put into a parking lot. Language was drafted for all agreed-upon issues, which was reviewed, tweaked and finalized. The economic subcommittee worked to finalize agreement on spreadsheets and work different scenarios to be presented to the larger group. The parties then moved to a smaller room to review and finalize language, work through and resolve issues in the parking lot, and review the financial data and spreadsheets to discuss and reach agreement on the core economic issues.

Working through the core economic issues was more challenging. Using and tweaking the spreadsheets that provided information on wages, provisional pay, pensions, and other related costs, the parties worked toward an agreement. Representatives from both teams came up with a tool that would enable the calculation of a split-year increase, which was the creative idea that paved the way to settlement. At one point on the last day, when the parties were quite certain they had a deal on wages, the teams agreed to permit the City's budget director to participate for a final number-crunching and confirmation session.

While the parties had scheduled a total of eight full days for negotiations, the contract was finalized with tentative agreements on all outstanding items by the sixth scheduled day.

*C. Final Agreement, Ratification and Approval*

The final agreement looks much like other collective bargaining agreements with some notable language. In the preamble, it was important to capture the parties' view for the future, which was done with the following language: "[t]he parties commit to maintaining a healthy, inclusive culture where all employees are respected as contributing members of the City workforce with the same vision and values serving our community."

With a commitment to future joint problem-solving, the parties agreed to a labor-management committee and joint safety committee, and other committees as the parties deemed necessary. There is also an agreement to work together on a promotional process, which was an issue important to Local 2889. In February 2019, post-negotiations, the parties worked together to complete an extensive performance improvement program, which is in the implementation phase currently.

Because fair share fees were in jeopardy with *Janus v. AFSCME, Council 31* having been heard by the Supreme Court but no decision having been issued at the time of the negotiations, the parties decided to include a side letter on

fair share in the event such fees were deemed unconstitutional, which they subsequently were. [72] This was done to avoid having to renegotiate this provision.

Because this was an important moment for the City and the Union, Local 2889 President Ron Taylor proposed to include the names of all City employees involved in the process as part of the agreement, specifically mentioning the fact that the agreement was reached using a "collaborative Interest-Based Bargaining process."

Local 2889 membership ratified the agreement unanimously on March 19, 2018, and the City Council approved the agreement on April 2, 2018, well ahead of the ordinance's April 30 deadline. The agreement's effective date was January 7, 2019 and is set to expire January 3, 2021.[73] At the Council meeting to approve the agreement, the Local 2889 Executive Board was present to show their support for the agreement to the City Council. At that meeting, Deputy Chief Minard stated, "the beautiful thing is we have such a strong relationship, from our lowest fire fighter to the chief, that relationship translated into the negotiation process. It really was not all that different from the way we were doing business from the beginning."[74]

## VI. CONCLUSION

The Westminster experience is a solid example of what can be accomplished when all stakeholders are committed to a spirit of collaboration. While this experience was unique due to the fact the parties were able to work together on a referendum question and then the drafting of an ordinance, the collaboration that continued into the bargaining process and beyond was certainly something that can be replicated. For Westminster, the participants and stakeholders have built a model not only for future negotiations, but for future issues of any kind.

*The authors wish to express their gratitude to Javier Ramirez, FMCS Director, Agency Initiatives, and Rosa Tiscareno, FMCS Commissioner, for their assistance and contributions to this article. Additional appreciation to the City of Westminster Administration for their input.*

[1] Wisconsin *adopted* the first law, in 1959, giving municipal employees the right to organize and join labor organizations. *See* Paul Onsager, *State and Local Government Labor Relations Law (Under 2011 Acts 10 and 32)* at 2 (Wisconsin Legislative Fiscal Bureau Informational Paper 96, Jan. 2015), available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2015/0096_state_and_local_government_employment_relations_law_informational_paper_96.pdf.

[2] *QuickFacts Westminster City, Colo.*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/westminstercitycolorado/PST045217#PST045217 (last visited Apr. 24, 2019).

[3] *Fire Dep't*, WESTMINSTER COLO., https://www.cityofwestminster.us/fire, (last visited Apr. 24, 2019).

[4] *Org. Chart*, FIRE DEP'T, WESTMINSTER COLO., https://www.cityofwestminster.us/Portals/1/Documents/Public%20Safety%20-%20Documents/Fire%20Department/2019%20FD%20Org%20Chart_1.pdf?ver=2019-04-03-144226-367 (last visited Apr. 24, 2019).

[5] *See generally* Alvin Weinberger, *An Analysis of the Colorado Labor Peace Act*, 19 ROCKY MOUNTAIN L. REV. 359 (1947); *see also* Roberto L. Corrada, An Academic's Perspective on Current Labor Law Issues § III.A.2, (ABA Section of Labor & Employment Law 2nd Annual CLE Conference (Sept. 12, 2008), available at https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/152.pdf.

[6] *Id.* Weinberger, *supra* note 5, at 362-64.

[7] *Communication Workers of Am. v. W. Elec. Co.*, 561 P.2de 1065 (Colo. 1976); *See* Corrada, *supra* note 5.

[8] COLO. REV. STAT. ANN. § 8-3-108(C)(II) (West 2019).

[9] *Id.*

[10] Bill Ritter, *Gov. Bill Ritter's Veto Statement on HB 1072*, THE DENVER POST (Feb. 9, 2007), https://www.denverpost.com/2007/02/09/gov-bill-ritters-veto-statement-on-hb-1072/.

[11] Colo. Exec. Order No. D 028 07 (Nov. 2, 2007), http://www2.cde.state.co.us/artemis/goserials/go4113internet/2007/go41132007028internet.pdf.

[12] LEGIS. COUNCIL OF THE COLO. GEN. ASSEMB., 2008 STATE BALLOT INFORMATION BOOKLET (2008), https://www.colorado.gov/pacific/sites/default/files/2008EnglishVersionforInternet_3.pdf.

[13] St. of Colo., OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST FOR THE 2008 PRIMARY 2008 GENERAL, https://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2008AbstractBook.pdf.

[14] *Gov. Ritter Statement on Senate Bill 180 Veto*, COLORADO MUNICIPAL LEAGUE (Jun. 4, 2009), http://www.cml.org/uploadedFiles/CML_Site_Map/_Global/pdf_files/Ritter_020513.pdf.

[15] Nat'l Conference of State Legislatures, *Right-To-Work Resources*, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last visited March 15, 2019).

[16] S.B. 25, 2013 Leg. Sess. (Colo. 2013).

[17] Collective Bargaining Firefighters – SB 13-025, THE DENVER POST - BILL TRACKER, http://extras.denverpost.com/app/bill-tracker/bills/2013a/sb_13-025/ (last visited April 24, 2019).

[18] Tim Hoover, *Colorado Gov. Hickenlooper Threatens Veto of Firefighter Unions Bill in Present Form*, THE DENVER POST (Jan. 10, 2013), https://www.denverpost.com/2013/02/19/colorado-gov-hickenlooper-threatens-veto-of-firefighter-unions-bill-in-present-form/.

[19] Collective Bargaining Firefighters, *supra* note 17.

[20] COLO. REV. STAT. § 29-5-205 (Lexis/Nexis 2019).

[21] *Id.* § 29-5-209.

[22] *Id.* § 29-5-206(6).

[23] *Id.* § 29-5-203(6).

[24] *Id.* § 29-5-203(16)

[25] *Id.* § 29-5-207(3)

[26] *Id.* § 29-5-206.

[27] *Id.*

[28] *Id.* § 29-5-206. The italicized language is the process the City and Local 2889 eventually settled on.

[29] *Id.* § 29-5-206(1).

[30] *Id.*

[31] Conrad Swanson, *Colorado Springs Firefighters Union Overcomes Mayor's Opposition for Spot on Ballot*, COLORADO SPRINGS GAZETTE, (Jan. 3, 2019), https://gazette.com/news/colorado-springs-firefighters-union-overcomes-mayor-s-opposition-for-spot/article_9605510c-0f76-11e9-b7e2-e7b04be0c401.html.

[32] Kaitlin Durvin & Conrad Swanson, *Colorado Springs Firefighters Union Petitioning for Collective Bargaining Over Pay,* COLORADO SPRINGS GAZETTE, (June 28, 2017), https://gazette.com/news/colorado-springs-firefighters-union-petitioning-for-collective-bargaining-over-pay/article_9f11230f-a011-5654-8dd7-d1d30b81d769.html.

[33] City of Westminster, Colo. Collective Bargaining for Firefighters, Tit. 1, ch. 34 (2017).

[34] Notably, the City notified Local 2889 during the ordinance drafting process that it was agreeable to a change in scheduling that the Local wanted.

[35] CITY OF WESTMINSTER, COLO. *supra* note 34, at §1.

[36] FED. MEDIATION & CONCILIATION SERV., JOINT PROBLEM-SOLVING FOR MUTUAL GAIN https://www.fmcs.gov/wp-content/uploads/2016/02/Interest_Based_Bargaining.pdf.

[37] Telephone Interview with Javier Ramirez, Dir., Agency Initiatives, Fed. Mediation & Conciliation Serv. (Jan. 16, 2019).

[38] Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 4 (1981).

[39] Jean-François Tremblay, *From Principled Negotiation to Interest-based Bargaining*, 4 UNIVERSAL J. OF INDUS. AND BUS. MGMT., 71, 72 (2016).

[40] FISHER & URY, *supra* note 39, at 86.

[41] *Id*. at 11.

[42] Javier Ramirez & Edward Bantle, The Origins and Application of the Federal Mediation and Conciliation Service Pioneered Affinity Bargaining Model (FMCS Oct. 18, 2016).

[43] *Id*.

[44] Lisa R. Callaway, Amy Moor Gaylord & Rosa M. Tiscareno, Commissioner, Fed. Mediation & Conciliation Serv., Don't Worry, Be Happy: Collaborative Bargaining, paper presented at the Illinois Public Employers Labor Relations Ass'n 2016 Annual Conference (Oct. 23, 2016).

[45] *Id*.

[46] *Id*.

[47] Ramirez & Bantle, *supra* note 44, at 4.

[48] *Id*. at 2-3.

[49] *Id*. at 3.

[50] Raymond Scupin, *The KJ Method: A Technique for Analyzing Data Derived from Japanese Ethnology*, 56 HUMAN ORG. 233, 234 (1997). (Quoting Kawakita Jiro, THE ORIGINAL KJ METHOD, rev. ed. (Meguro, Tokyo: Kawakita Research Institute, 1991), 25.)

[51] Ramirez & Bantle, *supra* note 44, at 3-6.

[52] *Id*. at 4.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] We're using the flipchart explanation for this purpose as it is easier to visualize.

[57] Brainstorming usually involves participants verbally contributing ideas and are recorded one at a time by the facilitator or recorder. Brainwriting allows participants time for reflection and the ability to contribute at their own pace while still benefiting from seeing ideas generated from other participants. Ramirez & Bantle, *supra* note 44, at 5.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 5.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 5-6.

[65] *Id.* at 6.

[66] *Id.*

[67] *Id.*

[68] Interview with Derik Menard, Deputy Fire Chief, City of Westminster (Jan. 30, 2019).

[69] City of Westminster, Colo. *supra* note 34.

[70] Ramirez interview, *supra* note at 38.

[71] Interview with Derik Minard, Deputy Fire Chief, City of Westminster (Jan. 30, 2019).

[72] 138 S. Ct. 2448 (2018).

[73] The uneven dates are due to the City's fiscal year start and end.

[74] Scott Taylor, *City, Fire Union Settle New Contract Quickly*, THE WESTMINSTER WINDOW (Apr. 10, 2018), https://westminsterwindow.com/stories/city-fire-union-settle-new-contract-quickly,260508?

# RECENT DEVELOPMENTS

**By Student Editorial Board:**

Johnny D. Derogene, Patrick J. Foote, Miranda L. Huber, and Matt Soaper

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 public employee collective bargaining statutes.

## I. IELRA DEVELOPMENTS

### *A. Arbitration*

In *University Professionals of Illinois and Western Illinois University*, 35 PERI ¶ 133 (IELRB 2019), the IELRB held that an arbitrator, when issuing an award sustaining a grievance, has the authority to retain jurisdiction over implementation of the awarded remedy. After Western Illinois University ("WIU") implemented a series of layoffs in January 2016, the University Professionals of Illinois, Local 4100 grieved them. The grievances on behalf of laid-off faculty moved to arbitration in April 2017, and the arbitrator subsequently issued an award for some of the grievants. The award included backpay for at least one professor, as well as a requirement that WIU affirmatively look for placements within its system for those who had been laid off from their original positions. The union had requested that the arbitrator retain jurisdiction over the award to supervise its implementation and respond to any problems that might arise. The arbitrator agreed, saying that he would retain jurisdiction for at least 90 days while the award was implemented. The university did not object to the arbitrator's retention at hearing, nor did it discuss that issue in its post-hearing brief.

Subsequently, counsel for the union sent an email to the university invoking the retained jurisdiction over the remedy. The union alleged that the university had not complied with the award with regard to five grievants. The university responded with letters that were issued to those grievants; it also stated that there was no need for further proceedings on the matter. The union replied by continuing to request relief. Once the hearing was scheduled, the union stated that it was now challenging WIU's implementation of the arbitration award for only four grievants. At this supplemental hearing, the university stated that this dispute could only be

decided by the IELRB; the union continued to argue that the issue was within the arbitrator's jurisdiction.

The arbitrator's supplemental award concluded that the university had not made a good faith effort to alter its decision to lay off one grievant; as to the other grievants, the arbitrator noted that the university was not required to displace another employee to find work for a grievant but also could not take unusual measures to avoid giving the grievants work. That reasoning led the arbitrator to find that WIU had failed to implement the original award as to one other grievant. The arbitrator also directed that the grievant be made whole for the semester she had missed and be given the opportunity to teach the following school year. Afterward, the union requested a second supplemental award; when the arbitrator requested WIU's response, the university noted that the matter was pending before the IELRB and that an IELRB decision would moot the union's request. The arbitrator determined that he would let the IELRB rule on the charge; if the IELRB found he had jurisdiction, he would then rule on the merits.

The IELRB held that the arbitrator could retain jurisdiction over the award. The IELRB noted that arbitrators' retention of jurisdiction over implementation of a remedy was commonly upheld in Illinois. In Pennsylvania – the state whose labor relations law served as a model for the IELRA – the courts have also upheld arbitrators' retention of jurisdiction. WIU contended before that the issue of compliance with the award was within the IELRB's exclusive primary jurisdiction and that that issue was beyond the arbitrator's authority under the collective bargaining agreement. The IELRB acknowledged that it, instead of the courts, has exclusive primary jurisdiction over initially determining compliance issues. However, the Labor Board noted that its exclusive primary jurisdiction did not preclude an arbitrator from also retaining jurisdiction over the award that he or she issued.

The IELRB also held that the arbitrator had not exceeded his contractual authority in issuing the supplemental award. WIU argued that the arbitrator's supplemental award violated a provision in the collective bargaining agreement which stated that "arbitration shall be confined solely to … the precise issue(s) submitted to arbitration" and that "[t]he arbitrator shall have no authority to determine any other issues." The IELRB was unpersuaded by WIU's argument. It noted that the supplemental award concerning the remedy in the original award did not create a new issue. To the contrary, it was part of the issues the parties had already agreed to

arbitrate: what the remedy should be. The IELRB finally noted that the arbitrator's retention of his jurisdiction allowed him to determine an appropriate remedy: the precise outcome for which the parties had already bargained.

As a result, the IELRB found that the supplemental award was binding and upheld the arbitrator's finding that WIU had not complied with the original award. Therefore, it held, WIU violated the IELRA by failing to comply with the arbitration awards.

*B. Duty to Bargain*

In *Rock Valley College Support Staff, Local 6569, IFT-AFT and Rock Valley College*, 35 PERI ¶ 150 (IELRB 2019), the IELRB reversed the Administrative Law Judge's recommended decision that the college violated Section 14(a)(5) of the IELRA by implementing its last, best and final offer, finding that the parties had reached an impasse in their negotiations. The IELRB affirmed the ALJ's decision that the college violated Section 14(a)(5) by changing the holiday schedule, but it did not violate Section 14(a)(5) when it unilaterally ended merit pay and pay increases for increased workloads.

During the 2016-2017 school year, the newly-certified union and the college were in negotiations for their first collective bargaining agreement. During this time, Rock Valley College was in severe financial trouble. In February of 2017, the college submitted its best and final offer to the union and due to the impasse, implemented its unilateral changes. The union contended that these changes were illegal because they had not reached an impasse.

The union also alleged that the college committed an unfair labor practices by unilaterally changing two policies. Prior to negotiations, Rock Valley's employee handbook stated that the college's board had discretion to decide whether the college would stay open between Christmas and New Year's. From 2008 to 2015, the college closed and granted employees paid holidays. The board decided that, for 2017, the employees would be required to work on December 26-28, 2017. The union contended that this constituted a unilateral change in a mandatory subject of bargaining, while the college stated the decision was a matter of managerial right. A second college policy that pre-dated negotiations concerned employee pay increases. This policy stated that employees would receive annual salary reviews and pay increases would be based on performance, promotions, or changes to the salary ranges of each position. The past practice by the college board was mixed on this issue. It had in some years given performance-based increases and in other

years given flat increases. The union argued that the practice was to give increases each year and the college was required to follow that practice while negotiations continued.

The IELRB held that the change to the holiday schedule was a mandatory subject of bargaining. The IELRB explained that converting paid time off to working time was a change regarding the employees' wages. Further, the IELRB reasoned, it did not impede managerial rights clause because, although management had the authority to decide whether the college would be open, the changing of pay statuses was a mandatory subject to bargain.

With regard to the pay increase policy, the IELRB held that the employees were not owed increases because there was no consistent past practice on which employees could justifiably rely. Finally, the IELRB decided that college did not violate section 14(a)(5) when it implemented its final offer in negotiations because the parties did reach an impasse. The IELRB examined the parties' offers and counter-offers and found that the union had not made any material movement over three months. The IELRB explained that because the union had not budged on its proposals despite multiple meetings and appeared to not fully grasp the college's financial troubles nor address them in its offers, the college had no other choice but to declare an impasse.

## II. IPLRA DEVELOPMENTS

### *A. Supervisors*

In *AFSCME Council 31 and City of Chicago*, 35 PERI ¶ 129 (ILRB Local Panel 2019), the ILRB Local Panel upheld the ALJ's findings dismissing a majority interest petition that the union filed in which it sought to represent a group of City of Chicago employees in the job title Supervising Disease Control Investigator (SDCI) at the City's Department of Public Health, and to include the employees in one of the union's existing bargaining units. The Local Panel agreed with the Union that its majority interest petition was not barred by a 10-year-old Board-issued certification of representation that expressly excluded the employees at issue from the bargaining unit. Second, the Local Panel found in favor of the city that the SDCI employees were supervisors within the meaning of Section 3(r) of the IPLRA; therefore, the union could not include them in the bargaining unit, since they were outside of the IPLRA's protection.

This case began in 2016 when AFSCME filed a majority interest petition seeking to represent a group of SDCI's employees and the city responded

with two objections. First, the city argued that the union was barred from seeking to represent the SDCI employees because the ILRB issued a certification of representative in 2008 that expressly excluded them from the bargaining unit in which the union was seeking to include them. The Local Panel agreed with the ALJ that the exclusionary clause in the 2008 certification was insufficient to preclude the union from seeking to represent the SDCI employees because the clause failed to identify the reason for excluding them from the bargaining unit. In so holding, the ILRB relied on its long-standing rule that an exclusionary clause that does not identify the reason for excluding certain employees from a bargaining unit is insufficient to preclude a union form seeking to organize the excluded employees, unless the union waived its right to organize the employees by specifically agreeing with the employer that it would refrain from doing so. The Board agreed with the ALJ that the city presented no evidence of a "quid pro quo agreement" between it and the union concerning exclusion of the employees from the bargaining unit as a result of the 2008 certification, nor any reason for the exclusion.

Second, the city argued that the SDCI employees were supervisors within the meaning of the IPLRA, and therefore, Section 3(r) precluded their inclusion in the bargaining unit. The ILRB agreed with the ALJ that the SDCI employees were supervisors. Applying the four-part supervisory test, the ALJ found that there was sufficient evidence to establish that (1) the SDCI employees' principal work substantially differed from their subordinates' work; (2) they exercised supervisory authority; (3) with independent judgment; and (4) devoted a preponderance of their time exercising their supervisory authority.

The ILRB upheld the ALJ's conclusion that the SDCI employees possessed the supervisory authority to discipline and direct and they did so with the requisite independent judgment. The ILRB agreed that the SDCI employees directed their subordinates by assigning, overseeing, reviewing, and evaluating subordinates' work, and approving time-off requests. These actions gave the SDCI employees discretionary authority to affect the terms and conditions of their subordinates' employment. The Local Panel further agreed that the SDCI employees devoted a preponderance of their time exercising supervisory authority over their subordinates. Accordingly, the ILRB dismissed the union's certification petition on the ground that the SDCI employees were supervisors within the meaning of Section 3(r) of the IPLRA.