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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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ONE LAWYER'S PERSPECTIVE ON 2020 PUBLIC SECTOR LABOR RELATIONS AND THE IMPACT OF COVID-19 AND RACE RELATIONS

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Shortly after I agreed to write an article about the impact of COVID-19 upon Illinois public sector labor relations, George Floyd was killed by a police officer in Minneapolis. The chilling video of Mr. Floyd's death, and what appeared to be an utter disregard for his well-being by all officers present, resulted in many hours of contemplation of racial inequality and its impacts on society as a whole. Thus, this article will address my personal perspectives on two topics having an impact on Illinois public sector labor and management today. COVID-19 is likely to be wreaking havoc on the economy for several years as it is not just going to disappear one day. Its lingering effects will be short-lived in comparison to the centuries-old racial inequalities in the United States of America and in the "Land of Lincoln."

COVID-19 is an important, complicated world-wide event with devastating health, financial, employment and societal implications. The consequences of minimizing its effects on employment relationships will be severe. Three areas of discussion follow. First, the immediate early impacts; second, where we are six to nine months into the pandemic; and third, a forecast of the future. It is this third area which will garner most of this article's attention.

Being neither a medical doctor specializing in the public health ramifications of an infectious disease, nor an economist, I think it best for these areas to be presented and debated by others. However, there are some issues of public health and COVID-19's financial impact to date which cannot be ignored by labor and management professionals and our constituencies. At this time, we all should be in agreement that: 1) the long-term health impacts of COVID-19 are not yet known or knowable; 2) the vast majority of individuals infected do not require hospitalization; and, 3) for those requiring hospitalization the disease is often a killer.

The fact that many people do not seem to have any serious symptoms upon diagnosis has led to great debate over the appropriate response. It is often argued that annually the "flu" affects millions, and thousands die from it. Early in 2020, this argument was often raised by those opposed to taking major countermeasures to avert a potential public health risk.[1] These advocates believed that maintaining the economy should prevail over taking broad measures using scarce resources to protect against what they viewed as a different strain

of influenza. In the early months of the pandemic, some questioned the increased financial costs related to complying with new federally-mandated paid leaves and the costs of technology and other remote working expenses, as federal, state and local public health guidelines changed often. This was especially true in areas of the state where there were few COVID-19 cases. Those who were of the mindset that the virus was essentially just another type of influenza did not see the need to take extraordinary measures to stop its spread. Federal guidelines initially stated that the wearing of masks or other face coverings was not recommended because there was limited evidence that this was effective in stopping or even slowing cases of COVID-19. Subsequently, the recommendations changed, and today it is believed that wearing a mask is one of the best ways to reduce the chances of becoming infected and in slowing the spread of the virus.

I believe there was a practical basis behind the initial recommendation against wearing masks. There were insufficient supplies for essential workers, let alone for everyone to wear medical grade masks. Many public employers did not have the needed personal protective equipment ("PPE") on hand. Local governments sought assistance from States, and the State of Illinois, along with others, turned to the federal government believing there were adequate supplies in a federal stockpile. However, the federal government did not have on hand sufficient supplies to address the demands of the pandemic. Thus, by the time orders were made, supplies were limited, and local governments had to compete with countries, states, and other local governments to obtain supplies the public health agencies were requiring.

Novel employment issues have blossomed with COVID-19. Some of our clients have asked for guidance in handling employees who did not like wearing the recommended PPE, as well as with employees who were demanding more PPE or greater sanitation efforts and more supplies to be better protected while performing their jobs. These competing demands have created difficult employment issues. Labor and management alike have struggled with how to handle them. Initially some employees did not believe they should be required to take precautionary measures. Their reasons included that the virus was not a serious health threat, there were very few if any reported cases in their locale (especially early on when rural areas of the State were experiencing no known cases and the testing of persons with symptoms resulted in over 90% negative results), and that wearing PPE was uncomfortable. These arguments came not just from front line workers, but others. Employers have followed State and local health department guidelines in addressing the employees' responses. Labor and management advisors have worked together to ensure employees' concerns are attended to appropriately.

Unfortunately, we did not always have good advice to give. How do you meet the needs of those employees who have strong beliefs that they or their family members are at risk and therefore expect their employer to provide a safer workplace, even when the employer is following the recommended course of action? We have had to advise clients to direct employees who feared for their own health to perform their assigned duties. That sounds harsh. Yet I can say that I have not had an employer give such a direction without first

attempting to reduce the employee's fear by listening, and then attempting to find acceptable solutions which would enable the employee to perform his or her work.

Infectious diseases are not new. However, another first in employment-related matters presented itself this year. Health departments have been asked to provide first responders the names and addresses of people who have tested positive for COVID-19. Health departments may lawfully share that information with first responders without violating HIPPA, but are not required to do so.[2] Some county health departments have released the information, while others have not. Correctional officers, nurses, other healthcare providers, and first responders have been recognized as heroically staffing the front line jeopardizing their own health while performing their duties in workplaces which fostered the spread of COVID-19. Yet in the first months of the pandemic there was inconsistent and quickly changing messaging of what the best practices should be to protect workers from this new disease. I believe the initial CDC statement that facial coverings were not likely to be effective in combating the disease greatly contributed to the debate that continues today over the appropriateness of requiring masks to be worn and under what circumstances.

First responders and medical personnel can attest that, particularly in the first two-to-three months of the pandemic, they received changes in the recommended practices to follow weekly and sometimes daily. Whether from state, local or federal agencies, these changing guidelines made it difficult to maintain consistency among the workforces to reduce the potential spread of the disease. Numerous updates were provided, and employees and management alike should be proud of the way they did their best under trying circumstances. Initially isolated cases of employees being exposed to the disease were difficult to handle until there was a better understanding of how the disease was contracted and how long the incubation period was. As more became known about the disease's properties, the timelines became more universal, making employment-related decisions easier.

As with many emergency plans, the nation's pandemic response plans have received great interest, expert analysis, and continued development before being put on a shelf for future use. When the real disaster occurs, however, these plans are not always at everyone's fingertips because those responsible for establishing them and ensuring that dissemination and training have occurred on an appropriate broad scale are often no longer involved. Emergency plans, unfortunately, are created, and then as time passes fewer people know the plan, or even that such a plan exists, when it is most needed. Recall the emergency weather plans from your youth? What were you to do in the event of a fire, tornado, or flood? What were you to do to avoid a contagious disease? I recollect the fire and severe weather warnings and being told it was important to cover coughs, wash hands with soap and hot water, and to keep hands away from my face.

Emergency responders and medical professionals receive training in much greater detail on how to prevent the spread of contagious diseases. Our local governments have established many emergency plans and regularly review and train for emergencies. However, too few are involved in planning and training regularly in part due to insufficient time when the daily responsibilities of local government consume employees'

and officials' time. Around the State and the country there were different responses to the declaration of a pandemic and national emergency in part due to the rarity of pandemics. Since the last major pandemic, the amount of international travel and trade have greatly increased the speed and extent of spread and reduced the time for nations to effectively review, update, and implement emergency response plans.

The delay caused in getting up to speed in a public health emergency like this pandemic allowed the contagion to spread around the globe. In this country, states were burdened with the responsibility to implement their public health emergency response plans with guidance from the federal government, which changed as medical professionals learned more about COVID-19. In addition, PPE and sanitation supplies became scarce for a period of time until the supply side was able to increase production. During the first few months of the pandemic, procedures were implemented and refined to adjust to increases in cases and reduced supplies.

Illinois has county and local public health departments responsible for protecting their populations. These layers can create confusion if the messaging is inconsistent. As of November 2020, there remain many conflicting approaches to addressing the pandemic within the State of Illinois. Despite increasing cases, a large number of individuals are still opposed to wearing masks. How much of this resistance to wearing masks comes from the initial statements from national health agencies that masks are ineffective against COVID-19? I have attended meetings in different parts of the State and have found the lack of consistent procedures to be troubling. Clearly, many people simply do not believe that COVID-19 required the shutting down of the economy to the degree the governor ordered. Since the lessening of the restrictions in late June, there is even greater resistance to imposing more restrictions, even as cases increase. How can the private businesses upon which local governments rely for a significant portion of governmental revenues survive? The State is relying upon local law enforcement to enforce the governor's orders yet there are many elected officials in the State who are reluctant to do so due to both economic and legal concerns. State's attorneys and local government attorneys are concerned about the potential legal liability that may arise from enforcing as well as from choosing not to enforce the governor's executive orders.

The uncertainty and lack of uniformity has of course raised numerous questions for government employers and employees. What safety procedures should be required? Which are effective? Why are we taking extraordinary measures which have tremendous negative impacts on the economy for a disease which is not life threatening to most of the population? Why can 50 people gather in a setting but only 6 may eat together in a restaurant? What is going to happen to my family if I get COVID-19 while required to perform my job? What is the public employer going to do to ensure the health of its employees and their families, especially for those who are more vulnerable to the serious complications of the disease? We may disagree whether the questions raised are rational or appropriate; we should not ignore the questions.

Personally, I find the mixed perspectives regarding the "best" response to the disease compelling. In March 2020, as a 60-year-old who had heart surgery October 1, 2019, my perspective was significantly different than it would have been one year earlier. Hearing

that cardiac rehab services were going to be reduced and the employees reassigned in order to address the needs of COVID-19 patients was startling. Whether from a management or labor point of view, we must acknowledge that there are conflicting and competing perspectives on almost all issues we address. This pandemic, however, brings new challenges to all. To the health-impaired employee who is called upon to engage with the public on a large scale daily, it matters that her employer understands she has legitimate concerns. Rather than wasting time and energy debating the correctness of one's perspective (something we do to the point of exhaustion on so many ridiculous issues) we are better served by listening to the different perspectives and making sure all are heard.

Employees and their representatives early on were called upon to address the provision of essential services and how to handle directives requiring all others to stay home. Not all non-essential jobs can be done remotely. Some services simply were not provided. Not all employees have the ability to work from home due to lack of appropriate workspace, electronic equipment, or internet connectivity. Having remote working and learning in the same household, frequently with multiple workers or learners (not to mention preschoolers, grandparents, cats and dogs in the household added to the new workplace) makes for interesting labor issues.

Some employees were more efficient and productive working from home; others could not be productive at all. What leave time was to be used under these circumstances? Many employees cancelled vacations, and now, late in the year, are competing with other employees to take the time off before year's end. Many need the break from the increased stress of life during the pandemic. Employees and their supervisors have had to address many issues of first impression. How to effectively manage a scattered workplace is not something learned in the classroom nor on-the-job for the vast majority of our supervisory personnel. Most employees and supervisors have done remarkably well in continuing to provide the public services in new ways while meeting the challenges of changing state and federal guidance and laws.

The Families First Coronavirus Response Act (FFCRA),[3] while well-intended and in many cases very much needed from an individual perspective, added new leave rights and many legal issues. These benefits are scheduled to end December 31, 2020. COVID-19, however, is not likely to go away with the expiration of this federally mandated leave. Labor organizations will continue to seek leave protection for employees. There have been many attempts to expand the FFCRA emergency sick and emergency leave. One area that is very difficult to address is the employee who is afraid to return to work and wants to continue to work remotely. Is there a medical reason for the request and does it qualify as a reasonable accommodation under the Americans with Disabilities Act (ADA), or Illinois Human Rights Act? Employers must carefully take each request on an individual basis.[4] General concerns about becoming infected are not sufficient, but an individual's mental health may result in their being an individual with a disability in need of an accommodation.[5] If the work can be done remotely then that may be the reasonable accommodation. If the work cannot be done remotely, is there some other work the employee may perform, or workplace safety measures which may be added that could be considered a reasonable accommodation? If the employee still refuses to work under the

altered conditions, must the employer take additional steps? The answer is, "it depends," and we must then look at each case on its own merits to reach a legal conclusion. There simply is no clear answer.

The new laws and the governor's executive orders gained much of our attention. Old ones, like the ADA, needed to be kept in mind as did the language of existing collective bargaining agreements. Absent management rights clauses giving employers the ability to modify non-wage provisions during declared emergencies or disasters, the employers must follow the contract. There remained an obligation to negotiate changes in terms and conditions of employment. Further, wage and hour laws must be followed even if employees are working from home. How to document work hours for remote workers has been challenging. Pursuant to the Fair Labor Standards Act (FLSA), [6] most employees are due overtime after 40-hours in a work week. Yet employers had no effective way to monitor their employees' work hours. Most simply had employees self-report their hours of work. What should the employer do when employees record only their regular hours, but the employer has reason to believe one or more employees in fact did not work their typical schedule?

Perhaps the employee worked what amounted to her regular hours but not during the typical workday. For many reasons, employees performed their work duties at non-traditional hours. As long as the number of hours worked did not exceed 40-hours in a week, then FLSA would not require overtime payment. Yet, some employees regularly worked at times which raised questions of whether they were exceeding their normal hours; others were likely not putting in their full work schedule on a consistent basis. If an employer knows a non-exempt employee is working more than 40 hours in a work week then overtime must be paid.[7] Employees can be directed not to work overtime, but if they are allowed to do so, payment is required.[8]

Some employers were not inclined to negotiate changes brought on by the pandemic. New laws, executive orders, and public health directives were to be implemented with little advance notice. Thus, the ability to engage in negotiations over their implementation or the impact of these new requirements was not always considered. Those employers who actively engaged with employees and their representatives generally received cooperation in developing solutions. Those who sought to unilaterally impose the changes were more likely to be challenged. Yes, I am generalizing here and not trying to place blame. We all can point to non-cooperative employers and unions. During this extraordinary year, many have worked together in a manner we should seek to emulate going forward.

Teachers quickly adapted to remote learning, with school district administrators and teachers cooperatively seeking to meet the challenges faced. Employees all over have had to accept that change is normal. All too often I have been confronted with resistance to change no matter how insignificant that proposed change may appear to me. Some employers sought to reduce the number of employees physically present at any given time in order to reduce the chance of exposure. Splitting shifts was seen as an effective solution, yet grievances and allegations of unfair labor practices ensued. Could better communication have prevented the disputes? Perhaps, but some employees and their representatives simply will balk at any change and even in a pandemic fight over process

rather than seek resolution of the substantive issues. Some employer representatives can be faulted for not taking into consideration the benefit of incorporating employees and their representatives in the decision-making process. Understanding each other's perspectives and interests assists in fostering good relations, which will serve both sides well in times of crises. Where both management and labor have engaged in discussion of the changes due to COVID-19, I can say that it has generally been refreshing.

Unfortunately, I believe a much more difficult time is to come for state and local governments. A resurgence in the number of cases is already occurring. The health issues will continue to be a major concern for employees, employers, and labor organizations. The economic impacts will have severe consequences on the public sector. Congress is struggling to work through another stimulus or relief effort. Can the country afford another huge relief package? Can it afford not to do so?

It will do little good to recite the negative economic realities related to unemployment, lost income, decreased gross domestic product, and reduction in expected revenues to date.[9] Forecasts are even bleaker for the next fiscal year.[10] How many years it will take for governmental entities to overcome the reduction in revenue due to COVID-19 is of course unknown. We can readily find those which have not fully recovered since the 2008-2009 recession. Many governmental units never attained pre-recession employee staffing levels nor fully restored services.[11] Once again, public employers are being asked to provide more services with less funding. There have been few federal funds for states and local governments. Local governments in Illinois can expect little, if any, assistance from the State. All employees, their representatives, members of the governing bodies of local governments, and management personnel need to be aware of the economic crisis ahead. Very few local governments will not be adversely affected financially. Yes, the operational issues are being dealt with daily. But I fear there is an inadequate understanding of what the impact is on the employers' ability to pay for the same or even enhanced services. Many are already engaged in concessionary negotiations in order to preclude layoffs or reduce their number.

Units of government that are reliant on income, sales, motor fuel, food and beverage, hotel, and amusement taxes have seen huge drops from many sectors of the economy. Most Illinois governmental entities are dependent upon property taxes. School districts, park districts, library districts, fire districts, and police and fire pension funds are among the units most heavily reliant on property taxes.[12] This year, property tax payment due dates were extended, permitting late payments without penalties or interest. More units of government engaged in short-term borrowing to bridge the time until property taxes were paid. If the economy continues to decline, there is a real probability that property values will decrease in the near future. A consequence of the great recession was a 10 percent reduction in property values, resulting in reduced tax revenues for governmental entities.[13] Especially hard hit were public employers in tax-capped counties. These same conditions may be upon us in the next few years. Already, we are seeing an increase in property owners simply not paying property taxes when due or not paying at all.

The number of businesses that will close permanently cannot be estimated with accuracy, and predictions of reduced tax revenue do not seem to come with an expiration date. The

economic forecasts are couched in terms of "at least through 2021 . . ." While property tax dependent entities will likely see reduced revenue, it is the municipal, county, and the State that I expect will be hardest hit. Many of their revenue streams have slowed to a trickle or dried up completely while expenses due to COVID-19 and protests have risen significantly. The public safety overtime budgets are in shambles and employees are exhausted. Tired employees lead to slower reflexes, slower mental processing, and increased mistakes. Employees feeling the pressures of having to work more hours in stressful times understandably turn to their union representatives for assistance. Demands for increased staffing, hazard pay, and greater medical protections to assure a safe workplace are certainly understandable and not unexpected. Employers without funds to meet these bargaining demands must find alternative ways to demonstrate their appreciation of their employees. Employees and their representatives must be able to accept the economic realities and be willing to accept alternative forms of appreciation besides increased wages and benefits.

For those who have heard me and similarly-minded management representatives strenuously object to increased time off, this next part will surely shock you. Time off always costs employers money. Perhaps, just for 2020–2021, granting a "COVID-19 free day" as an additional personal day is worth consideration to off-set lower than desired wages. Take the time to reward employees, in other low-cost ways, to recognize their continued efforts. Be genuine and ask if there is anything they need. Inquire about your employees' well-being and of their families' health. Do more employee recognition and thank-you events. Send a report to the governing body which highlights the employees or have employee recognitions at each board or council meeting. As I see it, we have tough years ahead in Illinois public sector labor relations. The impacts of COVID-19 have been too numerous to mention specifically here. Regardless of the position held, every one of us has been impacted by this pandemic.

Those who have jobs should be thankful and do their part to ensure that as many of their co-employees as possible remain employed in the years to come. Management must be vigilant and cautious with their employees' health. On a personal note, I am disgusted by those who have shown self-centered greediness with little to no concern for their fellow "man" in the broadest sense of the word. Everyone should have a sense of rightness with their family, workplace, community, state, country, and Mother Earth. Many are exhausted by the toll of the pandemic. As 2020 ends, we must all take seriously health professionals' guidelines and do our best to avoid the possible spread of COVID-19 by our own actions. This is not the duty of others; it is the individual responsibility of each of us to care for each other better than we have to date. Over 250,000 deaths in eight months is shameful as well as soberingly frightful. Regardless of partisan political issues, COVID-19 does not care whether you are a member of any particular political party. Washing my hands frequently, maintaining social distance, and wearing a mask when in public is no political statement on my part. It is following public health and infection disease experts' best practices.

When we deal with each other, representing management and labor, let us do so with greater emphasis on the "and" than either "labor" or "management." Upon agreeing to write this article, my thoughts were on detailing the economic impacts, the frontline

mission, and how governments and employees had to adopt new ways of working, along with the labor relations approaches taken to date. It was a good concept plan and perhaps one I should have followed. However, for more time than I care to share here, the words simply would not flow from pen to paper, I believe in large part because of my personal frustrations over the utter loss of respect for our fellow human beings. I am not referring to the insatiable greed of some public sector labor organizations, which is something I shall never conquer. That is nothing compared to how little value a human life has for many people. Taking steps to help reduce the spread of COVID-19 should be a public duty; treating each person as an equal is a moral and legal responsibility.

As a white male, I have benefitted from societal norms and traditions without any effort on my part. I do not come from a wealthy family, as my parents had little money. Raised to work hard and respect all people regardless of economic status, religion, race, color or other non-meritorious factors, I have failed to always do what was expected of me by my parents. While I strive to be the person I should be, I cannot relate to women who are seen as lesser valued members of society and fit only for male conquests. Nor can I relate to those who have been stopped or detained by a police officer and feared for their lives due to their skin color. For good or bad, I have always felt I was judged by my own actions and words. Unfortunately, many people are not. Non-white males have had to work harder and be better even to be noticed. I have known this type of prejudice exists, and hopefully have done my part to ensure I do not perpetuate or condone it through a failure to act.

This May, the video of George Floyd's last minutes of life jolted me to the core. "Black Lives Matter" was a statement to which I had reacted in two ways before seeing the video: 1. Thinking, "Of course they do. There is no reason for believing otherwise."; and 2. Thinking, "All lives matter. Is this suggesting that Black lives matter more?" After George Floyd's senseless death, many questions came forward, including: How can so many sworn officers nonchalantly take part in this man's death? He was not resisting. There was an overpowering police presence to easily place him under arrest, handcuff him, and put him into a car. How can they not see him as a man worthy of life and their protection once restrained? How do so many officers continue this pattern around the country? Would they have treated me as a white male the same? Without answers to the other questions, I knew the answer to the last. No, I would never have had to endure that treatment.

Upon reflection, the phrase "Black Lives Matter," to me, is a cry for persons of color to be seen, truly seen, as human beings; as individuals whose lives have just as much worth as any other. It is far from the statement that their lives are more important, or dismissive of the value of a Caucasian's life. Too many do not see value in a Black person's life. This devaluation has been in existence longer than our nation.

How can we in the public sector do our part to bring racial equality to the forefront of our mindset? What societal inequalities can we impact in a mindful, positive way? I can readily point to some obvious impediments to equality in public employment opportunities, and I no doubt have very poor vision given my life experiences. As wonderful as our country is, it has always been a white male–privileged society. Any

woman or non-white individual can easily identify more examples of hurdles confronting them in the workplace and life in general.

Law enforcement has earned the right to be challenged more than others for the unequal treatment it has, repeatedly, openly demonstrated. My children were advised to always treat police officers with respect. This advice was not given out of fear that they might be shot during a routine traffic stop due to their skin color. Yet children of minorities are often given advice on how to interact with police officers out of their parents' legitimate fear for their safety. The outrage over George Floyd's killing and the peaceful protests by all types of people were a great sight and must be encouraged and joined by all of us. Few people condoned unlawful forms of protests. Violence against police officers protecting the right of citizens to peacefully assemble, and looting, must be condemned by all.

Every member of the law enforcement community should accept the criticism and reject the past unequal treatment of members of our society. Police labor organizations need to stop encouraging the "code of silence" among their members. Management, labor, and arbitrators should take up this call to action and insist upon real reforms. Stop standing behind those that should not be in uniform. The vast majority of officers perform their duties with due regard for all people. This majority needs to be the leaders in developing reforms to weed out the undeserving members. Management must reform police training and supervision. Misconduct must be dealt with fairly and appropriately documented. Disciplinary records should never be destroyed, but they should be deemed unable to support progressive discipline after an appropriate period of time. We need to eliminate the requirement that any complaint against an officer must be a sworn statement. That is more about protecting guilty police officers rather than making sure complainants are careful in their allegations. We need to investigate complaints and where misconduct is proven take appropriate disciplinary action to ensure the misconduct is not repeated.

The just cause standard for employee termination in the public sector, especially public safety, needs to be reconsidered. The current standard has resulted in employers not seeking termination where appropriate, fearing an arbitrator will return the employee to work and the employee will be impossible to remove later. Lesser discipline is imposed with the expectation the employee will engage in further misconduct for which the termination may be upheld. This latter misconduct would not occur if proper discipline were to be applied and upheld. Management must do a better job of documenting misconduct, but when frontline supervisors are often in the same bargaining units or at least represented by the same labor organization as their subordinates, a significant amount of misconduct goes unreported.

In my opinion, supervisors should not be in bargaining units with subordinates. In 1986, as a hearing officer for the Illinois State Labor Relations Board, I recommended that the lieutenants of the Wheeling Fire Department not be in the same unit as their subordinates due to the inherent conflict of interest. The union objected to the recommendation and the Labor Board's decision to allow the lieutenants to be in the firefighters' unit was upheld by the Illinois Supreme Court.[14] While I admit, given the definition of "supervisor" for Illinois public sector employees, that my recommendation was not well founded in law —Section 3(r) of the Illinois Public Labor Relations Act requires that an individual spend

a preponderance of working time performing supervisor duties to be excluded as a supervisor[15]—my over 30 years of practice since tells me I was absolutely right from a practical point of view. Unfortunately for me and the employer community, law beats out practical. Hence a change in law is needed.

Police units have fewer combined units of sergeants and patrol officers because Section 3(r) of the IPLRA does not require police supervisors to devote a preponderance of their time exercising supervisory authority. In Chicago, sergeants and lieutenants are in their own units and are represented by PBPA whereas patrol officers are represented by FOP. To achieve some meaningful reform in police and fire disciplinary cases, the General Assembly should prohibit front line supervisors from being in the same bargaining unit as their subordinates. In addition, management must do a better job at training supervisors in documenting misconduct and handling discipline in a fair and consistent manner.

I do not suggest that we eliminate the just cause requirement, rather that we hold public employees to higher standards. Whether a teacher, custodian, doctor, lawyer, police officer, laborer or firefighter, all public employees should be held to a tougher standard of performance because the public is paying their wages and benefits. I believe this will help change systemic unfairness which has contributed to racial inequality in public employment.

Another reform that I have been seeking is in the fire service. The Associated Firefighters of Illinois (AFFI) achieved legislative changes in hiring standards for firefighters but has ignored and supported the continuation of one of the greatest obstacles to racial equality in employment opportunities. While professing that the new hiring standards were meant to encourage more minority and female firefighters, the AFFI has, to my knowledge, taken no action to eliminate the requirement that anyone seeking to obtain certification as a firefighter from the Office of the State Fire Marshal (OSFM) be affiliated with a fire department.[16] The Basic Operations Firefighter certification is a common prerequisite for application for the firefighter examination and hiring process that AFFI pursued legislatively with a vengeance, even preempting home rule authority. The new hiring legislation did nothing to promote a more diverse workforce. To this date, women and minorities must obtain, from a fire department's chief, a statement that they are already either a trainee or firefighter of the fire department before being eligible to participate in an academy and then take the exam for OSFM's Basic Operations Firefighter certification. Only upon being certified by the OSFM may an individual qualify to apply for the majority of full-time positions in the Illinois fire service. Until anyone can apply for an academy and then take the OSFM's basic firefighter certification exam without having to be affiliated with a fire department, the firefighters in this State will remain predominately white males. Any group that continues a similar tradition of requiring what is essentially membership in the club before being eligible to be a member is encouraging the continuation of systemic racial and gender inequality when the club's make up is mostly white males.

This is but one example of barriers to equal opportunity in public employment. We all need to review our hiring and promotional processes to root out bias and discriminatory

practices, so all truly possess equal public employment opportunities. The Civil Rights movement of the 1960s came a century after the Civil Rights Act of the 1860s. As a society we have made improvements, but it is necessary that we engage in personal and societal reflection. Just as we owe one another the respectful taking of precautions to reduce the spread of COVID-19, we have a duty to take action to eliminate barriers to equal opportunities for all. Regardless of our color, race, ethnic background, religion, gender, union affiliation or non-affiliation, promotion of equality and justice for all people is imperative in public sector employment as well as all other aspects of life. For those who believe in perpetuating discriminatory practices and covering up or defending misconduct of fellow employees, I wish them the ability to walk in the shoes of those they perceive as beneath them, and pray that that experience provides them a clearer vision of the value of their fellow human being. There should be no tolerance for such blindness. If you see injustice do your part to correct it. Speaking out against injustice and discrimination of any form is a good start in showing that you value one another equally. Let's not have 2020 be remembered for COVID-19 when we have the opportunity to remember it for the start of real change in our race relations

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[1] *See* Jeremy Samuel Faust, *Comparing COVID-19 Deaths to Flu Deaths Is Like Comparing Apples to Oranges*, SCI. AM. (Nov. 10, 2020, 5:29 PM), https://blogs.scientificamerican.com/observations/comparing-covid-19-deaths-to-flu-deaths-is-like-comparing-apples-to-oranges/

[2] *See* U.S. Dept. of Health and Human Servs., *COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities*, (Nov. 10, 2020, 9:23 PM), https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf; Ill. Dept. of Health, *LHD Guidance to Local Health Departments on Disclosure of Information regarding Persons with Positive Tests for COVID-19 to Law Enforcement*, https://dph.illinois.gov/covid19/community-guidance/LHD-disclosure (updated June 30, 2020); Illinois State Attorney General (Illinois State Attorney General, *Guidance re: Disclosing Addresses for Confirmed COVID-19 Cases to First Responders* (April 3, 2020)).

[3] Pub. L. No. 116–127, 134 Stat. 177–220; 29 U.S.C. §2601.

[4] *See* JOB ACCOMMODATION NETWORK, EMPLOYER'S PRACTICAL GUIDE TO REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT (ADA), (Nov. 16, 2020, 10:32 PM), https://askjan.org/publications/employers/employers-guide.cfm

[5] Americans with Disabilities Act, 42 U.S.C. § 12112; *see also* JOB ACCOMMODATION NETWORK, MENTAL HEALTH IMPAIRMENTS, (Nov. 10, 2020, 10:07 PM), https://askjan.org/disabilities/Mental-Health-Impairments.cfm?csSearch=2885559_1.

[6] 29 U.S.C. § 203.

[7] 29 U.S.C. § 207(a)(1).

[8] *Id.*; *see also* Department of Labor, *Overtime Pay, Wage and Hour Division* (Nov. 16, 2020, 10:11 PM), http://dol.gov/agencies/whd/overtime; *see also* Department of Labor, *Overtime Pay, Wage and Hour Division* (Nov. 16, 2020, 10:11 PM), http://dol.gov/agencies/whd/overtime.

[9] *See* U.S. Securities and Exchange Commission, Division of Economic and Risk Analysis, *DERA Economic and Risk Outlook* (April 23,2020), https://www.sec.gov/files/DERA_Economic-and-Risk-Outlook-Report_Apr2020.pdf; *see also* Council of Economic Advisers (U.S.) [Washington, D.C.]: Executive Office of the President, Council of Economic Advisers. (Aug.2020), https://www.whitehouse.gov/wp-content/uploads/2020/08/Evaluating-the-Effects-of-the-Economic-Response-to-COVID-19.pdf. The State of Illinois has published forecasts of declining revenue. As reported by many sources including The Civic Federation, the City of Chicago forecasted an $800,000,000 budget deficit this year and over $1,200,000,000 next year. *See* Civic Federation, City of Chicago Releases Projection of Fiscal Year 2020 Revenue Shortfall Due to COvid-19, https://www.civicfed.org/civic-federation/blog/city-chicago-releases-projection-fy2020-revenue-shortfall-due-covid-19 (Sept. 10, 2020); Illinois Municipal League, Illinois Municipal League Survey Finds 87% of Responding Municipalities Face Revenue Shortfalls Due to COVID-19, (Aug. 25, 2020).

[10] *See* City of Chicago. *2021 Budget Forecast*. Chicago (2020). https://www.chicago.gov/content/dam/city/depts/obm/supp_info/2021Budget/2021BudgetForecastFinal.pdf*See also* Commission on Government Forecasting and Accountability. *Fiscal Year 2021*. (July 31, 2020). https://cgfa.ilga.gov/Upload/FY2021BudgetSummary.pdf.
[11] *See* U.S. Census Bureau. *Effects of Economic Downturn on Private and Public Employment* (2019). https://www.census.gov/library/stories/2019/10/effects-of-economic-downturn-private-and-public-employment.html *See also* Mike Maciag, *A Downsized Public Workforce May Be a Permanent Consequence of the Recession*. (Dec. 2017), https://www.governing.com/topics/mgmt/gov-suppressed-staffing-levels-government-recession.html. *See generally* Center on Budget and Policy Priorities. *Chart Book: Tracking the Post-Great Recession Economy*. (Nov. 10, 2020) https://www.cbpp.org/research/economy/chart-book-tracking-the-post-great-recession-economy.
[12] *See* Illinois Department of Revenue. *The Illinois Property Tax System*. https://www2.illinois.gov/rev/research/publications/Documents/localgovernment/ptax-1004. (last visited Nov. 13, 2020) *See* also Illinois Department of Revenue. *An overview of Property Tax*. https://www2.illinois.gov/rev/research/publications/Documents/pios/pio-16.pdf (last visited Nov. 13, 2020) *See generally* Annum Haider, *Property Taxes Explaining who imposes property taxes, what property tax dollars fund, and more*. (Mar. 21, 2018) https://www.bettergov.org/backstory/property-taxes/.
[13] *See* Orphe Divounguy, Bryce Hil &, Joe Tabor. *When Illinois home values fall, but property taxes don't*, ILL. POL'Y, https://www.illinoispolicy.org/reports/when-illinois-home-values-fall-but-property-taxes-dont/.
[14] *City of Freeport v. Ill. St. Lab. Rel. Bd.*, 135 Ill. 2d 499, 554 N.E.2d 155 (1990).
[15] 5 ILCS 315/3(r).
[16] Pursuant to 50 ILCS 740/11, the Office of the State Fire Marshal (the Office) has the authority make, amend, and rescind its own rules and regulations regarding training participation and certifications. The act specifically covers employees of the Office and states that "employees shall not be prohibited from receiving training certification from the Office on the grounds that they are not employed or otherwise engaged by an organized Illinois fire department if they otherwise meet the minimum certification standards set by Office and the certifications are directly related to their job-related duties, as determined by the Office." 50 ILCS 740/9. Anyone other than an employee of the Office, must be engaged as an Illinois fire protection personnel, as attested to by the employing Fire Chief of the individual seeking certification. 41 Ill. Admin. Code §§ 141.15, 141.200 (d), (e), 141.301(a)(5).

RECENT DEVELOPMENTS

By Student Editorial Board:

Enrique Espinoza, Marykate Hresil, Nicholas Lira Lisle, Erin Monforti

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employee relations community.

I. IELRA DEVELOPMENTS

A. Duty to Bargain

In *Maine Teachers' Ass'n, IEA-NEA and Maine Township High School District 207*, 37 PERI ¶ 19 (IELRB 2020), the IELRB held that the District violated Sections 14(a)(1) and (5) when it unilaterally eliminated the bargaining unit position of Career Counselor and assigned the work to the newly-created position of Career and College Admissions Specialist.

In October 2017, bargaining unit members were notified that the Career Counselor position was being eliminated and that all Career Counselors would be moved into Generalist Counselor positions. Career Counselors were required to have special licensing and certificates, and their focus was on students' post-graduation plans of continuing their education or moving into the workforce. Career Counselors did not typically have a caseload; rather, students came to them as necessary. However, during the 2016–2017 academic year, one Career Counselor was given a Generalist workload. The District and the Union began negotiating a Memorandum of Understanding related to Career Counselors who took on Generalist work. During these negotiations, District Superintendent Dr. Ken Wallace made mention of an intention to eliminate the Career Counselor position and spread responsibilities among Generalist Counselors. He notified the Union representatives that the new position would be administrative or managerial in nature and he would keep them informed on any changes.

During the 2017–2018 school year, the Union demanded to bargain over the eliminated Career Counselor position, but the District refused. In December 2017, the District posted a job listing for a Career & College Admissions Specialist which did not require the licensing required of Career Counselors but shared many responsibilities of the previous position of Career Counselor. Two applicants hired for the Specialist position had substantially similar licensing as the former Career Counselors. Wallace and the District did not notify the Union about the positions before posting.

In March 2018, the Union demanded to bargain over the Specialist position, claiming that the new position was taking work already assigned to unit members and that the new position belonged in the bargaining unit. The District refused to bargain and said it would only bargain over the new position being added to the unit if the Union filed a petition with the IELRB, but that it might still continue to refuse bargaining because the demand

was untimely. The Union filed an unfair labor practice charge and a unit clarification petition.

The ALJ found that the charge was timely because the Union had not learned that the new Specialist position would be taking bargaining unit work until the posting of the job, and not, as the District contended, when the Union learned that the Career Counselor position was being eliminated. The ALJ also found the District violated Section 14(a)(5) for refusing to bargain and unilaterally changing the status quo without bargaining to impasse. The ALJ determined that the removal of the Career Counselor and subsequent creation of a new position that largely reflected the work of the bargaining unit had deprived the unit of reasonably anticipated work opportunities. The ALJ also approved the Union's unit clarification petition to add the Specialist position and recommended a rescinding of the unilateral changes. The District filed exceptions with the Board.

The District argued that the ALJ erred in finding that the creation of the new position was a mandatory subject of bargaining because it had resulted deprived the bargaining unit of reasonably anticipated work opportunities. The District maintained that, to be a mandatory subject, the new position must have resulted in a significant impairment of work opportunities. The IELRB found, that because the new Specialist position took over most responsibilities of the Career Counselor, it constituted a significant impairment of the unit's reasonably anticipated work opportunities, therefore upholding the ALJ's decision.

The District also argued that the ALJ had erroneously found a shared community of interest between the Specialist position and the bargaining unit. The Board found, however, that while the District had violated the Act, the ALJ's remedy posed a conflict. The ALJ recommended to add the Specialist position to the bargaining unit as well as a rescind the unilateral changes. The Board ultimately modified the ALJ decision such that the remedy no longer included a rescinding of the unilateral changes and affirmed the addition of the specialist to the bargaining unit. The Board also upheld the Union had filed the charge in a timely manner.

B. Procedure

The IELRB adopted an emergency amendment, effective September 9, 2020, for a period of up to 150 days after the effective date, allowing parties to serve documents via email. These documents include: complaints, petitions, hearing notices, final opinions, and subpoenas. This excludes any documents containing confidential, protected, or personally identifying information or documents showing interest in a representation petition.

II. IPLRA Developments

A. Duty to Bargain

In *AFSCME, Council 31, and County of Rock Island (Hope Creek Center)*, 37 PERI ¶ 46 (ILRB State Panel 2020), the State Panel reversed a decision of the Executive Director

that had dismissed unfair labor practice charges alleging that Rock Island County failed to bargain in connection with the sale of Hope Creek Center. The Executive Director relied on National Labor Relations Act case law in determining that the Employer was not required to engage in impact bargaining prior to completion of the sale as long as it bargained prior to ceasing operations. The State Panel, however, observed that unlike the National Labor Relations Act, the IPLRA, in Section 4, expressly requires employers to bargain the impact of decisions concerning inherent managerial policy on wages, hours and working conditions. The ILRB held that, in light of this language, the alleged refusal to bargain raised issues of law or fact, warranting issuance of a complaint.

The Executive Director had dismissed the charge relating to restrictions in the sale agreement, likening it to good faith hard bargaining rather than a bad faith refusal to bargain. The State Panel reversed, holding that evaluation of the analogy raised issues of law or fact, warranting issuance of a complaint. The Executive Director dismissed the charge relating to restrictions on disclosure of information in the sales agreement but the State Panel reversed, observing that authority establishes that a party that does not have relevant information or documents is obligated to request them from the third party controlling them. The ILRB remanded the matter for the issuance of a complaint and the holding of a hearing.

In *Mattoon Firefighters Association, Local 691, and City of Mattoon*, 37 PERI ¶ 30 (ILRB State Panel 2020), the State Panel held that the City violated provisions the IPLRA by failing to engage in impact bargaining over its elimination of employer-operated ambulance services.

In July 2017, the City adopted a resolution eliminating city-operated ambulance services as of May 1, 2018. Prior to this resolution, the City provided ambulance services on a rotating basis with two private ambulance companies. City ambulance services were performed by members of the fire department bargaining unit. The Union filed a grievance disputing Employer's resolution. An arbitrator determined that the Employer was permitted to eliminate ambulance services under the terms of the parties' bargaining agreement. Subsequently, the Union filed the charge with the ILRB.

The Board applied Section 10-2.1-4 of the Illinois Municipal Code (Substitutes Act), which prohibits a municipal fire department with full-time, unionized firefighters from substituting classified members of its fire department with individuals who are not qualified for regular appointment as firefighters, unless the union agrees to such substitutions. Here, the Board found that before utilizing substitutes, the City was obligated, by the Substitutes Act, to seek an agreement from the Union to use unqualified individuals as substitutes for full-time firefighters who had previously performed that work.

The Board held that the City violated Sections 10(a)(4) and 10(a)(1) of the IPLRA by failing to bargain over the transfer of firefighters' work of responding to requests for emergency medical services. It reasoned that the Substitutes Act required the Employer to obtain the Union's consent when using substitutes for full-time firefighters and that the transfer of bargaining unit work constituted a mandatory subject of bargaining.

B. Grievance Processing

In *Sallis and SEIU, Local 73*, 37 PERI ¶ 14 (ILRB Local Panel 2020), the Local Panel held that an employee has no statutory right to be represented by private counsel in a grievance hearing. Sallis filed an unfair labor practice charge, alleging that her union violated of Sections 10(b)(1) and 10(b)(3) of the IPLRA by obstructing her Party from having private representation during a grievance meeting. The Board's Executive Director dismissed the charge for a lack of merit and the Board affirmed.

In July 2019, the Employer notified Sallis that it was placing her on a leave of absence because her personnel file was missing a copy of her high school diploma or educational equivalent (GED). The Union filed a grievance. The Employer's hearing officer informed Sallis that a personal attorney would not be allowed to represent her at the grievance hearing.

Upon considering both federal and Illinois case law, the Board upheld the Executive Director's conclusion that Section 6(b) of the Act does not confer a right upon employees to be represented by private counsel in a grievance meeting. The Board also noted that, if parties have not contractually permitted private representation in the grievance process, the use of such representation by individual employees would bypass the union and undermine the policy of exclusive representation.

The Board concluded that the Section 10(b)(1) and 10(b)(3) allegations were meritless, absent a showing that Sallis suffered an adverse representation action or that the Union acted with an unlawful motive; and that Section 6(b) of the Act confers no right to private representation.