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Winter 2017

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The Illinois Public Employee Relations Report

Institute for Law and the Workplace

Winter 2017

Vol. 34, No. 1

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Recommended Citation

Malin, Martin H., "Vol. 34, No. 1" (2017). *The Illinois Public Employee Relations Report*. 82.
<http://scholarship.kentlaw.iit.edu/iperr/82>

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ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

VOLUME 34

WINTER 2017

ISSUE 1

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Published quarterly by the University of Illinois School of Labor and Employment Relations at Urbana-Champaign and IIT Chicago-Kent College of Law.

(ISSN 1559-9892) 565 West Adams Street, Chicago, Illinois 60661-3691

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RECENT DEVELOPMENTS

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

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THE AFSCME – STATE OF ILLINOIS NEGOTIATIONS: TRAVELING IN UNCHARTED WATERS

By: Martin H. Malin

Martin H. Malin is Professor of Law and Director of the Institute for Law and the Workplace at IIT Chicago-Kent College of Law. He has published more than 75 articles and six books, including Public Sector Employment: Cases and Materials (West 2004, 2011, 2016), the leading law school casebook on public sector labor law. An arbitrator and mediator, he serves as a Vice President of the National Academy of Arbitrators. He also serves, by appointment of President Obama, as a Member of the Federal Service Impasses Panel, which resolves impasses in collective bargaining between federal agencies and unions representing the agencies' employees. From 1984-86, he was a consultant to the Illinois State, Local and Educational Labor Relations Boards and drafted the regulations implementing Illinois's newly enacted public sector labor relations statutes.

I. Introduction

The collective bargaining agreement between AFSCME Council 31 and the State of Illinois expired on June 30, 2015. To describe negotiations for a successor contract as contentious would be an understatement.¹ The conflict has played out at the bargaining table, before the legislature, in the court of public opinion and before the Illinois Labor Relations Board and the courts. Most significantly, on December 13, 2016, the Illinois Labor Relations Board issued its formal decision finding that the parties' negotiations were at impasse.² AFSCME and the State have appealed the ILRB decision and the appeals have been consolidated in the Fourth District Appellate Court. As this issue went to press, the Fourth District Appellate Court stayed the ILRB's decision.³ Meanwhile, the State has spoken of unilaterally implementing its last best offer even though the ILRB expressly disclaimed ruling on whether such unilateral implementation would be lawful,⁴ AFSCME members have authorized their bargaining team to call a strike,⁵ and the State has established a web site to recruit replacements in the event of a strike.⁶

1. The administrative law judge who presided over dueling unfair labor practice charges observed, "[T]hese negotiations reflected a battle mindset on both sides of the bargaining table, with each side willing to do what it takes to achieve its bargaining goals." *State of Ill. Dept. of Central Mgmt. Servs. and AFSCME Council 31*, Nos. S-CB-16-017 & S-CA--16-087, at 242 (ILRB ALJ Sept. 2, 2016) (hereinafter *State of Ill. ALJ Decision*), *aff'd in part, rev'd in part*, Nos. S-CB-16-017 & S-CA--16-087 (ILRB State Panel Dec. 13, 2016).

2. *State of Ill. Dept. of Central Mgmt. Servs. and AFSCME Council 31*, Nos. S-CB-16-017 & S-CA--16-087 (ILRB State Panel Dec. 13, 2016) (hereinafter *State of Ill. ILRB Decision*).

3. *State of Ill v. AFSCME Council 31*, 2017 IL App (4th) 160827 (4th Dist. Mar. 1, 2017).

4. *See id.* at 3 n.2.

5. *See* Kim Geiger, Monique Garcia & Haley BeMiller, *AFSCME Oks Strike, Governor Holds Line*, CHI. TRIB., Feb. 24, 2017, at 1.

6. *See* Kim Geiger, *Rauner Recruits Backup Workers, Administration Uses Web to Find Temps Amid Strike Threat*, CHI. TRIB., Mar. 1, 2017.

The AFSCME-State of Illinois negotiations raise numerous issues for which there is no controlling Illinois legal authority. If they continue in the direction in which they are heading, the uncharted waters will only get deeper. Both sides face substantial legal risks. In normal times, such significant legal risk on both sides of a dispute leads parties to find compromises to resolve the dispute. But are we currently in normal times?

In this article, I examine the unsettled legal issues that the parties are facing. It is not my intent to argue that the ILRB erred in its December 13, 2016, decision. Rather, I raise the numerous issues that a reviewing court will have to confront. Similarly, it is not my intent to suggest how any legal issues should or will be resolved if the State unilaterally implements and if AFSCME strikes. Instead, my purpose is to catalogue the issues and the competing strains of legal analysis to show the high level of legal risk that both sides face.

Part II recaps the litigation before the ILRB and the ILRB's decision. Part III discusses the issues raised by the ILRB's decision. Part IV discusses the legal issues that lie ahead if the State implements its final offer and if AFSCME strikes.

II. The ILRB's Decision Concerning Impasse

The State-AFSCME collective bargaining agreement expired on June 30, 2015.⁷ Negotiations for a successor began on February 9, 2015.⁸ Over the course of negotiations, the parties entered into three "tolling agreements," under which they agreed to negotiate in good faith without a strike or lockout until impasse was reached.⁹ The third such agreement, reached on September 9, 2015, provided, in part:

The parties agree that this agreement will remain in effect until impasse is reached. The parties may mutually agree that impasse exists or, if a dispute exists with respect to the existence of an impasse, the parties agree to submit the matter to the Illinois Labor Relations Board ("ILRB"). If the matter is submitted to the ILRB, this agreement will remain in effect until the ILRB resolves the issue.¹⁰

On January 8, 2016, the State declared impasse in negotiations and presented AFSCME with its last best final offer.¹¹ On January 15, 2016, the State filed an unfair labor practice charge alleging that AFSCME failed to bargain in good faith because it insisted on continuing to bargain after January 8, refused to agree that

7. *State of Ill. ILRB Decision* at 3.

8. *Id.* at 3-4.

9. *Id.* at 4.

10. *State of Ill. ALJ Decision* at 141.

11. *Id.* at 1.

the parties were at impasse, and refused to join the State in seeking ILRB determination of whether an impasse existed. The State sought as a remedy a declaration from the ILRB that it was free to unilaterally implement its last best and final offer except with respect to those employees in the bargaining units who lacked the right to strike and were covered by the interest arbitration procedures of Section 14 of the Illinois Public Employees Relations Act (IPLRA).¹² On February 22, 2016, AFSCME filed unfair labor practice charges against the State alleging, among other things, that the State breached its duty to bargain in good faith by refusing to negotiate after January 8, 2016.¹³ On March 22, 2016 the ILRB Executive Director issued complaints on both sets of charges and consolidated them.¹⁴ On September 2, 2016, an ILRB Administrative Law Judge analyzed the charges in exhaustive detail in a Recommended Decision and Order which totaled 250 pages plus appendices. She recommended dismissal of the State's charge against AFSCME, sustaining some of the allegations in AFSCME's charges against the State and dismissal of others. On December 13, 2016, the State Panel affirmed the ALJ in part and reversed her decision in part.

AFSCME argued that the ILRB did not have jurisdiction over the State's unfair labor practice charge because the charge amounted to a claim that AFSCME breached the tolling agreement and the ILRB lacked jurisdiction to enforce a collective bargaining agreement. The ALJ rejected this argument, reasoning that the ILRB has "jurisdiction to adjudicate those breaches of contract involving conduct so sufficiently lacking in good faith that they amount to a repudiation of the collective bargaining process."¹⁵ She found "that the parties bargained over how they would conduct themselves during the course of the negotiations and the process by which they would continue to bargain. Refusal to abide by the bargained-for process would be a repudiation of the collective bargaining process."¹⁶

The ALJ determined that AFSCME did not repudiate the agreed-on collective bargaining process. Rather, she found that by filing its unfair labor practice charge, AFSCME placed the issue of whether the parties were at impasse squarely before the ILRB.¹⁷ The ILRB State Panel affirmed the ALJ in this regard.¹⁸

12. *Id.* at 1.

13. *Id.* at 1-2.

14. *Id.* at 1, 2.

15. *Id.* at 141.

16. *Id.* at 142.

17. *Id.* at 144-45.

18. *State of Ill. ILRB Decision* at 6-7.

The ALJ observed that the parties had grouped issues into packages. She analyzed the status of the negotiations package by package.¹⁹ With respect to wages and step increases, the ALJ found that the parties appeared to be deadlocked because AFSCME never wavered from its demand for across-the-board wage increases and the State never moved from its position opposed to such uniform increases.²⁰ However, the ALJ found that impasse was not legitimate because the State had insisted on waiver of employees' right to pension calculations based on their "whole compensation" and because the State breached its duty to provide AFSCME with requested information.²¹ The ALJ found that the State's insistence that bonuses paid under its merit pay and gainsharing proposals not be pensionable demanded a waiver of the employees' right under Illinois Pension Code's provisions governing the State Employees Retirement System to have their pensions based on all remuneration defined as wages under the Social Security Enabling Act.²² The ALJ found that the State failed to provide AFSCME with examples of how its proposed merit pay plan would identify high performers,²³ and had failed to provide AFSCME with information on its experience developing criteria implementing its merit pay plan under its collective bargaining agreement with the Teamsters.²⁴

With respect to health insurance, the ALJ made a similar ruling. She found the parties appeared to be deadlocked but found the deadlock was not a legitimate impasse because the State had insisted on waiver of employees' statutory right to subsidized health care during retirement and because the State had breached its duty to provide AFSCME with requested information concerning target savings generated by various cost-savings initiatives and increases in out-of-pocket costs.²⁵ She made a similar finding with respect to a package labeled, "Non-Discrimination, Upward Mobility Program (UMP) and Filling of Vacancies," finding that the parties' deadlock was not a legitimate impasse because the State had not given AFSCME an opportunity to respond after it provided new information the day before declaring impasse.²⁶

With respect to subcontracting, the ALJ found considerable movement by both parties.²⁷ The State had moved from its opening position of an unfettered and

19. *State of Ill. ALJ Decision* at 221.

20. *Id.* at 223.

21. *Id.*

22. *Id.* at 214-16.

23. *State of Ill. ALJ Decision* at 183.

24. *Id.* at 184-85.

25. *Id.* at 223-25.

26. *Id.* at 231-32.

27. *Id.* at 225-26.

unreviewable management right to subcontract toward a proposal for managed competition, whereby AFSCME would have the opportunity to bid on work that was to be subcontracted and management would review the union's proposal to determine whether it more effectively met the State's needs than the outside bids.²⁸ AFSCME had moved from its position of maintaining the status quo to a proposal for a committee to discuss alternatives to subcontracting but maintained its desire to retain existing language that limited the State's ability to select an outside bidder based on "efficiency, economy, or related factors."²⁹ Based on the parties' differing standards, the ALJ concluded that they were at impasse on subcontracting:

While I believe that the parties could get closer to agreement on managed competition provision, I find that the State was warranted in assuming that further bargaining would be futile. The State had consistently indicated its unwillingness to agree to language limiting its subcontracting decisions based on "efficiency, economy or related factors." The Union had continued to assert its unwillingness to remove that language and on the last day, the parties met, doubled down on that language by including it in the provision related to the assessment of the Union's managed competition proposal.³⁰

With respect to layoffs and a package labeled "Outstanding Economics," the ALJ found that the parties were not at impasse.³¹ She made a similar finding with respect to Health and Safety issues,³² and Semi-Automatic/Classification In-Series Advancement.³³ She found that the parties were at impasse on Vacation, Holiday Scheduling and Leaves of Absence;³⁴ Department of Corrections and Department of Juvenile Justice issues;³⁵ Mandatory Overtime;³⁶ and Management Rights and Check-off/Fair Share.³⁷

The ALJ addressed the question of what remedy to recommend in light of her findings. She rejected AFSCME's position that the unremedied unfair labor practices required the ILRB to order the parties to resume bargaining as if it were January 9, 2016. She reasoned:

The Board would certainly be justified if it followed the approach set out by the Union. However, the standard remedy of an affirmative bargaining order on the entire

28. *Id.* at 225.

29. *Id.* at 225-26.

30. *Id.* at 226.

31. *Id.* at 226-28.

32. *Id.* at 229-30.

33. *Id.* at 233-34.

34. *Id.* at 228.

35. *Id.* at 228-29.

36. *Id.* at 230.

37. *Id.* at 232.

CBA would likely do little to assist the parties in reaching agreement, which would only further deteriorate what labor harmony exists between these parties.³⁸

The State argued that it should be allowed to implement its last best and final offer because the parties were at impasse over a single critical issue. The ALJ found that the parties had reached a legitimate impasse over the single critical issue of subcontracting but recommended that the ILRB not adopt the single critical issue approach to impasse that had been developed under the National Labor Relations Act (NLRA) in the private sector. She reasoned:

Though the Board could find that there was an impasse on one of the three critical issues, and that under NLRB precedent, this would presumably allow the State to implement its entire last, best, and final offer, I find this remedy is, like the standard remedy urged by the Union, extreme when applied to this case. The parties were at impasse on a large number of packages, but they were not at impasse on several others. If the State were able to implement its entire last, best, and final offer, the implications and impact would be enormous that, when applied to this case, it would be destructive of the collective bargaining process and not serve the statutory mission of the Board. Therefore, I recommend that the Board not adopt the single-issue impasse standard, or at least refuse to apply it to this case.³⁹

Instead, the ALJ recommended that the ILRB allow the State to implement its final offer with respect to those packages on which the parties had reached a legitimate impasse but resume bargaining on the others.⁴⁰ She concluded, “[T]his proposed remedy most comprehensively protects the rights of both parties preserved by the Act, promotes labor harmony by assisting in the efficient resolution of the remaining issues, and is an appropriate use of the Board’s broad discretion in crafting remedies.”⁴¹

Both parties filed exceptions to the ALJ’s recommendations. The State Panel affirmed the ALJ’s findings that the State had breached its duty to provide information.⁴² It addressed the issue of impasse in connection with AFSCME’s charge that the State had refused to bargain in good faith after January 8, 2016, the day the State declared impasse. The State Panel did not engage with the ALJ’s rationale for recommending that the State be allowed to implement its final offer with respect to packages on which the parties had reached a legitimate impasse but be required to resume bargaining on the others. Instead, the State Panel rejected it in conclusory language and adopted the private sector single critical issue

38. *Id.* at 238.

39. *Id.* at 242.

40. *Id.* at 244.

41. *Id.*

42. *State of Ill. ILRB Decision* at 8-9, 15.

approach to impasse.⁴³ Consequently, the State Panel held that the State's unlawful refusals to provide information and its insistence on permissive subjects of bargaining were irrelevant to the issue of impasse because the information and permissive subjects did not concern the issue of subcontracting.⁴⁴ The State Panel declared that the parties had reached a complete impasse.⁴⁵

III. Issues Raised by the ILRB's Decision

Typically, an issue of impasse is presented to a labor relations board when an employer unilaterally implements its final offer and the union charges that the conduct breached the employer's duty to bargain in good faith. The employer defends claiming that the parties' negotiations had reached impasse. If the labor board disagrees, it usually orders the employer to restore the status quo ante, resume negotiations and make adversely affected employees whole. If the union struck in response to the unilateral implementation, a finding that the parties were not at impasse likely means that the strike was caused by employer unfair labor practices, depriving the employer of the ability to permanently replace striking employees. In other words, having calculated that negotiations have reached impasse, an employer typically acts at its peril in the event it miscalculated.

In the AFSCME-State negotiations, the State sought an advance ruling from the ILRB that the parties were at impasse and that the state could lawfully unilaterally implement its final offer. In essence, the State sought a declaratory ruling from the ILRB. Although the IPLRA confers on the ILRB the authority to adjudicate unfair labor practice charges, nowhere does it confer on the agency the authority to issue declaratory rulings. Interestingly, the Florida Public Employment Relations Act confers on the Florida Public Employment Relations Commission the authority to issue declaratory rulings in situations akin to the situation that the State faced.⁴⁶ The IPLRA, however, contains no comparable provision.

The State maintained that the ILRB had jurisdiction because under the tolling agreement, AFSCME had agreed to join the State in asking the ILRB to resolve the question of impasse if the parties were unable to agree. However, where an administrative agency lacks authority to undertake particular action, such as a declaratory ruling, parties may not by agreement confer such authority on the

43. "[W]e adopt the NLRB's approach to single critical issue impasse and find that the parties reached single issue impasse on the critical issue of subcontracting. In light of this analysis, we decline to adopt the ALJ's package-by-package approach to determining the existence of an impasse and her proposed remedy of partial implementation to which both parties strenuously objected." *Id.* at 16.

44. *Id.* at 20-21.

45. *Id.* at 16.

46. Fla. Stat. Ann. § 427.207(7); see *Dist. 2A Transp., Tech., Warehouse & Service Employees Union v. Canaveral Port Auth.*, 24 Fla. Pub. Emp. Rpr. ¶ 29,288 (Fla. P.E.R.C. 1998).

agency. Only the legislature by statute may confer authority on an administrative agency.⁴⁷

The ALJ held that the ILRB had jurisdiction because AFSCME would have breached its duty to bargain in good faith if it had repudiated the tolling agreement. She further found that AFSCME did not repudiate the tolling agreement because AFSCME itself raised the issue of impasse by filing its own unfair labor practice charge contending that the State breached its duty to bargain by cutting off negotiations on January 8, 2016. In the ALJ's view, this placed the issue of impasse before the ILRB. The State Panel affirmed the ALJ on this point, but neither addressed the agency's lack of authority to issue declaratory rulings and the inability of parties to confer on an agency authority to do something that the legislature has not empowered the agency to do. Because the IPLRA does not give the ILRB authority to issue declaratory rulings, had AFSCME not filed its unfair labor practice charge, it is doubtful that the ILRB would have had jurisdiction over the State's charge.

Having decided that AFSCME's unfair labor practice charge placed the issue of impasse before the ILRB, the ALJ proceeded to declare the matters on which the State was privileged to implement unilaterally. The State Panel wisely chose not to go down that road. Rather, the State Panel considered the State's claim of impasse as, in effect, a defense to AFSCME's charge that by ceasing negotiations on January 9, 2016, the State breached its duty to bargain. The State Panel sustained the defense but then simply dismissed AFSCME's charge in this regard. The State Panel did not declare whether the State could lawfully unilaterally implement all or any part of its final offer.

The State Panel's decision is now before the Illinois Appellate Court, which has stayed the ILRB's decision.⁴⁸ The court will have to decide whether the State Panel appropriately opted to reject the ALJ's recommendation and instead to apply the NLRA doctrine of impasse driven by a single critical issue. As observed above, the State Panel did not engage with the ALJ's reasoning. It simply relied on and applied NLRA case authority.

The Appellate Court will have to consider strong arguments that the State Panel erred in applying the private sector single critical issue doctrine. Although NLRA precedent in some circumstances may provide appropriate persuasive authority for interpreting the IPLRA, there are strong reasons as to why this was not one of

47. See *Lesner v. Police Board of the City of Chicago*, 2016 IL App. (1st) 150545 at ¶ 22, 55 N.E.3d 1206, 1213 (1st Dist. 2016) (“Administrative agencies . . . exercise purely statutory powers and possess no inherent or common-law powers.”).

48. *State of Ill. v. AFSCME Council 31*, 2017 IL App (4th) 160827 (4th Dist. Mar. 1, 2017).

those circumstances. The purposes behind the NLRA and the IPLRA are not identical. As the Nebraska Supreme Court observed in declining to follow NLRA precedent in determining the scope of protected concerted activity under the Nebraska public sector labor relations law observed:

The Act has a somewhat different focus than the NLRA. Although couched in broad Commerce Clause language, the NLRA attempts to rectify the “inequality of bargaining power between employees ... and employers” by providing certain rights to employees. The Act, on the other hand, focuses almost exclusively on protecting the public.⁴⁹

Similarly, the legislative findings justifying enactment of the IPLRA do not mention a need to equalize bargaining power. However, they do include:

It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all.⁵⁰

In many respects, the IPLRA was modeled on the comparable Pennsylvania statute rather than the NLRA.⁵¹ In *Philadelphia Housing Authority v. Pennsylvania Labor Relations Board*,⁵² the Commonwealth Court of Pennsylvania, the intermediate appellate court in that state, upheld a Pennsylvania Labor Relations Board (PLRB) decision that a public employer in that state may not unilaterally implement its final offer even when the parties have reached an impasse in negotiations. Rather, unilateral implementation may occur only in response to a work stoppage by the union. The court quoted favorably the PLRB’s analysis:

[I]t would not serve the legislature’s declared goal of promoting orderly and constructive relationships between public employers and their employees through good faith collective bargaining to allow a public employer to implement its final offer when the employees in the unit have not disrupted the continuation of public services by striking. Unilateral action by an employer during a period of no contract while employees continue to work serves to polarize the process and would encourage strikes by employees who otherwise may wish to continue working under the terms of the expired agreement while negotiations continue.⁵³

The holding of the court in *Philadelphia Housing Authority* came before the Pennsylvania Supreme Court in 2013 when, four years after its collective bargaining agreement with AFSCME District Council 33 expired, the City of

49. *Omaha Police Union Local 101 IUPA v. City of Omaha*, 736 N.W.2d 375, 384 (Neb. 2007).

50. 5 ILCS 315/2.

51. *See Central City Educ. Ass’n v. IELRB*, 149 Ill. 2d 512, 599 N.E.2s 892, 900 (1992) (“Notably, the legislature used the Pennsylvania experience as a model in creating the Act, and the Pennsylvania courts’ interpretation of the statute is relevant to any analysis of the Act.”)

52. 620 A.2d 594 (Pa. Cmwlth. 1993).

53. *Id.* at 600.

Philadelphia applied to the Pennsylvania Supreme Court for extraordinary relief alleging that because the union had not struck, the city was precluded by the decision in *Philadelphia Housing Authority* from implementing its final offer. With the Chief Justice dissenting, the court denied the application.⁵⁴ The dissent maintained, among other things, that *Philadelphia Housing Authority* was not a binding precedent because, of the seven justices who decided the case, two concurred in the result only and two dissented.⁵⁵ The court majority, however, apparently did not see it that way.

The rationale behind the Pennsylvania approach of not allowing unilateral implementation even after reaching impasse is recognition of the high likelihood that unilateral implementation will provoke a strike. Allowing such provocation, according to the Pennsylvania authorities, is inconsistent with the legislative policies underlying the Pennsylvania public sector collective bargaining statute. Those legislative policies, which emphasize protection of the public through peaceful and orderly procedures, are comparable to the legislative policies declared in the IPLRA.

The Pennsylvania approach prohibiting unilateral implementation even after bargaining to impasse is controversial. The dissent in the Pennsylvania Commonwealth Court and the dissent in the Pennsylvania Supreme Court feared that prohibiting an employer from implementing unilaterally after impasse empowers a union to forestall forever concessions necessary in times of fiscal strain by not striking.⁵⁶ But the Illinois Appellate Court need not go as far as prohibiting unilateral implementation following impasse to reverse the ILRB State Panel. The court can reject the State Panel's adoption of the single critical issue doctrine from private sector labor law as inconsistent with the IPLRA's policies but leave open the possibility of unilateral implementation based on impasse in the negotiations as a whole. As long as the possibility of progress being made on other issues exists, the court could hold, it is contrary to the statutory policy to allow the employer to implement unilaterally merely because there does not appear to be progress on one key issue. Indeed, in my experience mediating public employee collective bargaining negotiations,⁵⁷ I have found when the parties' positions on one particular issue seem to have hardened it can be useful to move to other issues

54. *City of Philadelphia v. AFSCME District 33*, 68 A.3d 323 (Pa. 2013).

55. *Id.* at 324-25 (Castille, C.J. dissenting).

56. *Id.* at 325-26 (Castille, C.J. dissenting); *Philadelphia Housing Auth.*, 620 A.2d at 601-02 (Collins, J. dissenting).

57. I have mediated public employee negotiations in Illinois, most recently the 2015-16 negotiations between the Chicago Board of Education and the Chicago Teachers Union as well as federal sector collective negotiations while serving by appointment of President Obama as a member of the Federal Service Impasses Panel.

and if significant progress is made on other issues, the momentum can spill over to soften positions on the most difficult issue.

The court may also decide that even if the single critical issue doctrine is compatible with the IPLRA's policies, it should not be applied to the State's negotiations with AFSCME. The court can reach this conclusion in at least two different ways. First, the court can look to the key NLRB decision on which the State Panel relied, *CalMat Co.*,⁵⁸ and find it inapplicable to the State-AFSCME negotiations. In *CalMat*, among the issues in dispute was an employer proposal to eliminate the fixed hourly pension plan contribution rate. The union opposed this proposal and the union's chief negotiator told the employer that "unless [the employer] took its proposal to eliminate the fixed contribution rate off the table, there would be no movement on any other issue."⁵⁹ The NLRB found that the parties were at impasse on pension contributions, which was a single critical issue that justified the employer implementing its final offer. The Board defined the burden on the party asserting impasse based on a single critical issue to demonstrate:

first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.⁶⁰

In finding that the parties were at impasse over the single critical issue of pensions, the NLRB pointed to statements by the union's chief negotiator that he would not put forth any further proposals until the employer moved off its pension proposal and his concurrence with the employer's chief negotiator's assessment that the parties were hung up on the pension issue.⁶¹ Thus, it was clear from the parties' statements and actions that the impasse on pensions precluded progress on any aspect of the negotiations until the impasse was resolved. Similarly, in *Richmond Electrical Services, Inc.*,⁶² two members of the NLRB, over a dissent by then-Board Member (later Chairman) Wilma Liebman, held that the parties were at impasse because of the single critical issue of wages. Although there is no mention in the Board's opinion of a statement by union negotiators that they would refuse to negotiate further until the employer dropped its wage proposal, the Board effectively inferred such because of the presence of a most favored nations clause

58. 331 N.L.R.B. 1084 (2000).

59. *Id.* at 1092.

60. *Id.* at 1097.

61. *Id.* at 1099.

62. 348 N.L.R.B. 1001 (2006).

in the union's other contracts, including its multi-employer contract with the National Electrical Contractors Association. The Board majority observed:

In this case, the Union conceded that the most-favored-nation clauses in the Union's other collective-bargaining agreements effectively precluded it from agreeing with the Respondent on a wage that was lower than the one in the NECA agreement[.] If the Union agreed to grant the Respondent a lower wage than the NECA wage, the Union would have had to offer the lower wage to 64 other electrical contractors with whom it had contractual relations. Thus, a lower contractual wage for the Respondent's small number of bargaining unit employees would have lowered the wages that hundreds of union members would earn at other local electrical contractors.⁶³

In contrast, in *Atlantic Queens Bus Corp.*,⁶⁴ the employer insisted on a most favored nations clause and stated it would never agree to a contract without one and the union stated it would never agree to a contract containing one.⁶⁵ Finding that even if the parties were at impasse with respect to the most favored nations clause, they continued to make progress with respect to wages, the Board concluded that they were not at impasse under the single critical issue doctrine because “the record does not permit a finding that as of the afternoon of March 19, the parties were unable to make further ‘progress on any aspect of the negotiations.’”⁶⁶

For the Illinois Appellate Court to affirm the State Panel, it must do what the State Panel failed to do – engage with the ALJ's findings that apart from their positions with respect to subcontracting, the parties were still making progress on several other issues. The Appellate Court will also have to engage with the ALJ's reasoning behind her recommendation that the single critical issue doctrine not be applied to the State-AFSCME negotiations. The Appellate Court could hold that the State Panel erred in finding that the single critical issue doctrine's requirements were met in this case and reverse the State Panel on that basis. In granting a stay of the ILRB's decision, the Appellate Court seemed to favor this approach.⁶⁷

Second, the Appellate Court will also have to evaluate the impact of the State's unfair labor practices of failing to provide AFSCME with relevant information and insisting on permissive subjects of bargaining. The State Panel found that those unfair labor practices were irrelevant to the question of impasse because the information did not pertain to the single critical issue of subcontracting.⁶⁸ Those

63. *Id.* at 1002.

64. 362 N.L.R.B. No. 65 (2015).

65. *Id.* at 2.

66. *Id.* at 3 (quoting *CalMat Co.*, 331 N.L.R.B. at 1097).

67. *State of Ill. v. AFSCME Council 31*, 2017 IL App (4th) 160827, slip op. at 5, (Mar. 1, 2017).

68. *State of Ill. ILRB Decision* at 21-22.

unfair labor practices related to the critical issues of wages and health insurance. The Appellate Court will have to determine whether, in light of unremedied unfair labor practices with respect to two core issues, it can be said that the impasse over the single critical issue of subcontracting meant that the parties were unable to make further progress on any aspect of the negotiations.⁶⁹ The Appellate Court will also have to decide whether finding impasse based on a single critical issue when there are unremedied unfair labor practices with respect to other core issues is consistent with the IPLRA's policy "to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all."⁷⁰ It could conclude that, even accepting the NLRB's single critical issue doctrine, the doctrine should not be applied where the employer has committed unfair labor practices that potentially impeded negotiations on other critical issues.

The Illinois Appellate Court could also decide to defer to the ILRB State Panel's administrative expertise and judgment balancing the competing interests at stake in the case. Should it do so, it likely will affirm the State Panel. Although the Appellate Court's analysis in its opinion granting the stay makes this doubtful, my point is that the State Panel's decision has not alleviated the substantial legal risks both parties face. It has merely moved them to another level. It is also very likely that whichever party does not prevail in the Appellate Court will seek review in the Illinois Supreme Court.

IV. Moving Deeper into Uncharted Waters

As previously discussed, the State Panel reached the issue of impasse in the context of resolving AFSCME's charge that the State violated the IPLRA by refusing to negotiate after January 9, 2016. In effect, the State Panel found that the State had sustained its affirmative defense that it was not required to continue negotiations because the parties were at impasse. The State Panel expressly disclaimed determining whether the State was legally allowed to implement all or part of its final offer.

The State has indicated its intent to implement its final offer unilaterally. Doing so will be fraught with legal risk. Illinois legal authority concerning employer unilateral implementation of a final offer is sparse and non-determinative.

69. *See id.*, at 13.

70. 5 ILCS 315/2.

Under the NLRA, an employer may implement its final offer unilaterally following an impasse in negotiations.⁷¹ The ALJ cited *AFSCME Local 3464 and City of Peoria*,⁷² as applying this private sector rule under the IPLRA. *City of Peoria* arose out of negotiations between the union and the city over the accretion to an existing bargaining unit of three job titles held by four employees. The city declared impasse and implemented its final offer and the union filed unfair labor practice charges. The ALJ recommended dismissing the charges because the union failed to prove that the city had effected any material change in the employees' wages, benefits or working conditions. As an alternative, in the event that the Board disagreed with this conclusion, the ALJ recommended that the Board dismiss the charge because the parties had bargained to impasse thereby allowing the city to implement its final offer. The Illinois State Labor Relations Board (ISLRB), the predecessor agency to the ILRB State Panel, simply accepted the ALJ's recommendation and adopted it as a decision of the Board. Thus, the ALJ's alternate recommendation that the city could lawfully implement its final offer because the parties were at impasse is dicta and dicta from an ALJ is hardly binding precedent on which parties should rely.

The ALJ in *City of Peoria* cited *County of Jackson*,⁷³ and *Illinois Departments of Central Management Services and Corrections*,⁷⁴ for the proposition that an employer may unilaterally implement following a good faith impasse. Neither case so holds. In *County of Jackson*, a group of employers bargaining together declared impasse and unilaterally implemented. The ISLRB hearing officer found that they were not at impasse and violated the IPLRA when they implemented. On exceptions to the ISLRB, the employers argued that several of them were necessary parties and were not joined in the unfair labor practice charge. The ISLRB rejected that position and adopted the hearing officer's recommended order. Thus, the ISLRB never ruled expressly on whether an employer may implement following impasse. The hearing officer in *County of Jackson* relied on *Corrections* for the proposition that an employer may implement following a good faith impasse in negotiations. However, in *Corrections*, the ISLRB held that the employer could unilaterally impose drug testing on corrections officers because the decision to do so was not a mandatory subject of bargaining, but that the employer committed an unfair labor practice by unilaterally implementing its position with respect to the disciplinary consequences of a positive drug test because the parties were not at impasse in their effects bargaining.

71. See *NLRB v. Katz*, 369 U.S. 736 (1962).

72. 11 PERI ¶ 2007 (ISLRB 1994).

73. 9 PERI ¶ 2040 (ISLRB 1993).

74. 5 PERI ¶ 2001 (ISLRB 1988), *aff'd*, 190 Ill. App. 3d 259, 546 N.E.2d 687 (1989).

In *Corrections*, the ISLRB cited the Illinois Educational Labor Relations Board's (IELRB's) decision in *Kewanee Education Association and Kewanee Community Unit School District No. 229*,⁷⁵ for the proposition that an employer may unilaterally implement following impasse. However, in *Kewanee* the IELRB found that the employer violated the Illinois Educational Labor Relations Act by implementing its final offer before the parties had reached impasse in negotiations. In other words, there simply is no Illinois authority upholding an employer's unilateral implementation with respect to a mandatory subject of bargaining based on a bargaining impasse. On the other hand, the labor board and the courts in Pennsylvania have held that an employer violates that state's statute, a statute which served as a model for the IPLRA, if an employer unilaterally implements following impasse unless the union has gone on strike.

If the State unilaterally implements its final offer, the parties will be traveling in uncharted legal waters. The ILRB and the courts will have to choose from among the Pennsylvania approach of not allowing unilateral implementation unless there is a work stoppage, the NLRA approach of allowing unilateral implementation following a good faith impasse, or the ALJ's approach of allowing partial implementation. The stakes for both parties will be high. For example, the State's final offer includes major changes to health insurance, which impose significant additional costs on bargaining unit members. If the unilateral implementation is held unlawful, the State will be liable to make those employees whole for their losses. If the implementation is held lawful, the bargaining unit members will have to bear the additional costs.

The legal risks that both parties face go beyond the question of whether, and if so under what circumstances, an Illinois public employer may unilaterally implement following an impasse in negotiations. Impasse is not a static state. A party may take action that breaks an impasse and revives the other party's duty to negotiate. On January 9, 2017, AFSCME presented a new proposal to the State which included a freeze on base wages for the life of the contract, immediate 2.5% increase in employee contributions to health insurance followed by 3% increases in the next two fiscal years, increases in copays and deductibles, bonuses paid to all employees in amounts equal to the pool of bonus money proposed by the State to be awarded based on merit, and step increases in the last two years of the contract.⁷⁶ If the State declines to resume negotiations or unilaterally implements its final offer, we can expect AFSCME to file new unfair labor practice charges claiming that its new offer broke the impasse. A final resolution of such charges is

75. 4 PERI ¶ 1136 (IELRB 1988).

76. Letter from AFSCME Executive Director Roberta Lynch to Illinois Governor Bruce Rauner (Jan. 9, 2017), available at <http://www.afscme31.org/pdfs/FairFramework.pdf>.

likely to be years away as they would have to first be litigated before an ILRB ALJ, then before the State Panel and then before the Illinois Appellate Court with a likely petition for review to the Illinois Supreme Court.

Meanwhile, AFSCME members have authorized the bargaining team to call a strike. If a strike ensues, it will elevate the legal risks on both sides. If AFSCME ultimately prevails in its unfair labor practice charges, the strike would likely be deemed an unfair labor practice strike. Under private sector precedent, the State would be precluded from permanently replacing the strikers. On the other hand, if the State ultimately prevails on the legal issues, under private sector precedent the State would be allowed to permanently replace the strikers. But since Illinois has never had a case of a public employer permanently replacing strikers, we can only speculate as to whether the ILRB and the Illinois courts would adopt private sector law concerning replacement. Indeed, even temporary replacement of strikers in the Illinois public sector has been rare. It was attempted in 1987 during the strike by teachers in the Homer School District in Champaign County and failed miserably.⁷⁷

A strike in the private sector is designed to exert economic pressure on the employer by curtailing production and, thereby, reducing employer revenues. In the public sector, by contrast, a strike does not relieve members of the public from paying taxes. Thus, the primary pressure exerted by a strike is political, rather than economic. A strike by AFSCME against the state would be unprecedented. Both parties would vie for public support and each would try to exert political pressure on the other in an environment less than two years before the next gubernatorial and legislative elections. We can also expect the State to try to break the solidarity of AFSCME-represented bargaining unit members and lure them to cross the picket lines to return to work and we can expect AFSCME to work hard to maintain worker solidarity.

Unilateral implementation by the State and a strike by AFSCME would occur in an environment marked by extremely high levels of legal and political risk. Only time will tell whether the pressure generated by such risks will provide the incentive needed for both parties to reach a deal, or whether the parties will continue with what the ALJ characterized as a “battle mindset . . . with each side willing to do what it takes to achieve its bargaining goals.”⁷⁸

77. See Martin H. Malin, *Two Models of the Right to Strike*, ILL. PUB. EMP. REL. REP. Winter 1990 at 1.

78. *State of Ill. ALJ Decision* at 242.

RECENT DEVELOPMENTS

By: Student Editorial Board

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

I. IERLA Developments

A. Confidential, Managerial and Supervisory Employees

In *University Professionals of Illinois, Local 4100 and University of Illinois, 33 PERI ¶ 73* (IELRB 2016), the IELRB held that university department chairs are not confidential, supervisory or managerial employees. The University Professionals of Illinois, Local 4100, IFT-AFT, sought to add department chairs to an existing bargaining unit of full-time tenured and tenure-track faculty members at the University of Illinois at Springfield. The university argued that department chairs are not educational employees as defined by the IELRA because of their status as confidential employees, supervisors, and managerial employees.

Section 2(n) of the IELRA defines a confidential employee as “an employee, who (i) in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations or who (ii) in the regular course of his or her duties has access to information relating to the effectuation or review of the employer's collective bargaining policies. The university argued that department chairs are confidential employees because the collective bargaining agreement provides that department chairs are the first step in the grievance procedure, giving them access to information sufficient to make them confidential employees. However, the IELRB noted that the information must be strictly related to the bargaining process between labor and management. The IELRB held that department chairs would not have access to the type of information that falls within the scope of confidential status, thus concluding that the department chairs are not confidential employees.

The IELRA has a three-prong test for supervisory status. Pursuant to Section 2(g): 1) the individual must have authority to perform supervisory functions or recommend such action; 2) the functions must involve the exercise of independent judgment rather than be clerical or routine; and 3) the individual must spend “a preponderance of his or her time exercising these functions.” The university

argued that department chairs perform supervisory functions by directing work upon the scheduling of classes. The IELRB rejected this argument and concluded that the chairs do not have supervisory status because the chairs do not exercise independent judgment when scheduling classes. Instead, they work together with the faculty to create schedules. In addition, the department chairs do not order faculty to teach certain classes—chairs and faculty reach decisions together.

Finally, a managerial employee is defined under Section 2(o) of the Act as “an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices.” The IELRB concluded that the department chairs are not managerial employees. It reasoned that the chairs act as liaisons between deans and their respective department faculty. The chairs do not exercise independent authority to determine how the university’s goals will be met.

Therefore, because the department chairs at the University of Illinois at Springfield are not confidential employees, supervisors, or managerial employees, they were included in the bargaining unit as educational employees.

II. IPLRA Developments

A. Arbitration

In *Village of Bartonville v. Lopez*, 2017 IL 120643 (Jan. 20, 2017), the Illinois Supreme Court held that a police officer who participated in a hearing before the Board of Fire and Police Commissioners was barred from “re-litigating” his termination through the grievance and arbitration process in his collective bargaining agreement. The court reasoned that Lopez, the terminated police officer, could not pursue a grievance over his termination because (1) he waived his right to the grievance process through certain behaviors prior to and during the Board hearing and (2) the grievance was barred by *res judicata*.

The Municipal Code provides that police officers will be offered due process, in the form of a hearing before the Board of Fire and Police Commissioners, for all disciplinary actions. A union and a municipality may agree in collective bargaining on an alternative form of due process, but it must be based on impartial arbitration and clearly articulated in the collective bargaining agreement. Lopez’s contract was silent on whether discipline was arbitrable. The court held that normally, the question of arbitrability of his discipline would fall under the jurisdiction of an arbitrator. However, when Lopez filed for declaratory judgment that the Board

should not have jurisdiction over his disciplinary proceeding, he failed to raise the argument that jurisdiction properly lay with an arbitrator. Further, he participated in the hearing (over the jurisdictional argument which was ultimately decided against him) and did not file his grievance until *after* the hearing. All of these factors led the Court to decide that Lopez had waived his right to the grievance procedure.

The court also held that Lopez's grievance arbitration was barred by the doctrine of *res judicata*. Three requirements must be satisfied for *res judicata* to apply: (1) there must be a final judgment on the merits, (2) there must be identity of cause of action, and (3) there must be identity of parties. Neither party disputed the third requirement, that the parties to both the Board hearing and the grievance arbitration would be the same. The court held that the first requirement was satisfied because, since Lopez failed to request judicial review of the Board's decision, it was a final decision on the merits. As for the second requirement, Lopez argued that the grievance was a separate cause of action because only an arbitrator could decide the issue of just cause for termination. However, the court found that the identity of cause of action was sufficiently established since both the Board hearing and the arbitration would rely on the same set of facts and accomplish the same objective (to decide if termination was proper). The court also observed that if it were to allow grievance arbitrations to go forward in these situations, it risked the slippery slope of eventually allowing an arbitrator's decision to override that of the Illinois courts. Lopez was barred by *res judicata* from filing a grievance over his termination.

B. Duty to Bargain

In *Skokie Firefighters Union, Local 3033 v. ILRB*, 2016 IL App (1st) 152478 (Dec. 5, 2016), the First District Appellate Court held that the Village of Skokie committed an unfair labor practice by submitting a permissive subject of bargaining to interest arbitration over the union's objection. At issue was the process for promotion to lieutenant, which is normally governed by the Fire Department Promotion Act, 50 ILCS § 742/1 *et seq.* (Act). The Act expressly provides that firefighters are free to waive the provisions in the Act in favor of other provisions collectively bargained with the employer. It also expressly provides that in the event a union waives such rights, any bargaining over the promotion process will be considered a permissive subject. The Union had waived its rights and negotiated its own promotion process with the Village in the 2009-2010 collective bargaining agreement. When bargaining for the successor 2010-2014 agreement, the union proposed to follow the process in the Act. The village ignored this proposal, and instead submitted a proposal of status quo to the interest

arbitrator. The arbitrator, reasoning that the current system did not appear to be broken, found for the Village and maintained the status quo.

Neither party disputed that the promotion process was a permissive subject of bargaining. The union maintained that by insisting to impasse on a permissive subject that required the union to waive its statutory rights, the village committed an unfair labor practice. The village insisted that, as has been held in *Wheaton Firefighters Union, Local 3706*, 31 PERI ¶ 131 (ILRB State Panel 2015), and *Village of Bensenville*, 14 PERI ¶ 2042 (ISLRB 1998), it did not commit an unfair labor practice merely by submitting a permissive subject to interest arbitration. The ILRB State Panel sided with the village, but the court reversed and remanded. *Wheaton* and *Bensenville* held that the mere submission of a permissive subject to the arbitrator is not an unfair labor practice because the other party can object, causing the arbitrator not to consider the issue. In those scenarios, the objecting party is not unfairly prejudiced. Distinguishing the case before it, the court held that the union was prejudiced by the arbitrator's award of the status quo. The arbitrator effectively ordered the union to waive its statutory right to use the Act's promotion process.

The key to the Court's holding is the understanding that the union is required to renew its waiver under the Act with each negotiation for a successor agreement. Though

the Village had no obligation to negotiate with the Union over this permissive subject, . . . the Union is entitled to insist upon the baseline default rights granted to its members in the Promotion Act. The Village cannot force a waiver of those rights; it can only negotiate with the Union for a waiver as it had done in the past.

Because the village pressed its status quo proposal to the arbitrator when the Union clearly refused to relinquish its statutory right to use the process in the Act, the village insisted to impasse on a permissive subject, an unfair labor practice. The court's holding does not disturb the reasoning of *Wheaton* and *Bensenville*, but does narrow the circumstances in which an arbitrator can rule on permissive subjects. The court reiterated that just because parties have a permissive subject in their agreement, they do not have the right to insist to impasse on that subject when negotiating for a successor contract. If one party wishes for an arbitrator to rule on a permissive subject, the other party must clearly agree. Otherwise, the court held, it will be an unfair labor practice.

C. Scope of Bargaining

In *Painters District Council No. 14 v. Chicago Transit Authority*, Case No. L-CA-14-035 (ILRB Local Panel 2016), the ILRB Local Panel affirmed the Administrative Law Judge's decision that the Chicago Transit Authority violated Sections 10(a)(4) and (1) of the IPLRA when it used video surveillance to support disciplinary action against employees.

In September 2013, the CTA fired three employees for violating General Rules regarding personal conduct, reporting to duty, and obedience to the rules. The CTA determined that the employees "stole company time" and accepted pay for time not worked. This determination was based in part on video footage recorded from the CTA's rail platform cameras (Rail Videos).

The ALJ held that the CTA violated Sections 10(a)(4) and (1) of the Act when it used video footage from the Rail Videos as evidence to discharge its three employees. Specifically, the ALJ found that the CTA's reliance on the Rail Videos unilaterally changed the employees' terms and conditions of employment.

To determine whether a matter is a mandatory subject of bargaining, the ALJ looked to the three-part test established by Illinois Supreme Court precedent. *See City of Belvidere v. Ill. State Labor Rel. Bd.*, 181 Ill. 2d 191, 692 N.E.2d 295 (1998); *Central City Educ. Assoc. v. Ill. Ed. Labor Rel. Bd.*, 149 Ill. 2d 496, 599 N.E.2d 892 (1992). The first part of the test considers whether a topic concerns wages, hours, and terms and conditions of employment of employees in the bargaining unit. The second prong of the test asks whether the topic is also a matter of inherent managerial authority. The last step of the test requires weighing the benefits that bargaining will have on the decision making process against the burdens that bargaining imposes on the employer's authority.

First, the CTA's use of the Rail Videos varied the method by which it investigated employee misconduct. The ALJ found that the CTA changed the character of proof on which it relied because the CTA had never used Rail Video to support employee discipline. Secondly, the use of Rail Video to support the imposition of discipline was a matter of inherent managerial authority because it served to further the integrity of the CTA as a governmental entity. Third, the ALJ found that the benefits of bargaining over the Respondent's disciplinary use of rail platform footage outweighed the burdens of bargaining on the Respondent's inherent managerial authority. For example, bargaining would benefit the bargaining process because it would put employees on notice that they were subject to monitoring while off of CTA platforms.

The ALJ held that the CTA did not give the Union notice and an opportunity to bargain over its decision to use Rail Video in support of disciplinary decisions. It only informed the Union of its disciplinary use of rail platform footage during an employee's disciplinary meeting where the footage was first presented as evidence. Prior to 2014, including the period of time when the three employees were terminated based on the Rail Video, the Union and the CTA never bargained or discussed the installation or the use of the surveillance cameras. It was not until the beginning of 2014 that the CTA and the Union engaged in bargaining over the CTA's camera policy.

As a remedy, the ALJ ordered reinstatement of the three employees. The ILRB modified the ALJ's remedy. The ALJ ordered reinstatement of the three employees based on a premise that two of the employees retired to avoid impending termination. Essentially, the ALJ determined that the CTA constructively discharged the two employees. The ILRB held that the two employees were not constructively discharged and were only entitled to backpay with statutory interest for the suspension they served.