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Labor Law for Public Employers, Large and Small

Stewart H. Diamond
Margaret Kostopulos
Donald W. Anderson

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312.782.7606
Labor & Employment

ANCEL GLINK'S LABOR LAW HANDBOOK FOR LOCAL GOVERNMENTS, LARGE AND SMALL

By: Stewart H. Diamond
Margaret Kostopulos
Donald W. Anderson

INTRODUCTION

In recent years, the organizing targets for Illinois public sector labor unions have included smaller jurisdictions that previously enjoyed exemption from the costs and distractions of union organization drives and collective bargaining. In 2005 the Illinois Public Labor Relation Act was amended by reducing the minimum number of employees that a unit of local government must employ in order to be subject to the Illinois Public Labor Relations Act (IPLRA or "the Act") from 35 to 5. Smaller municipalities, park districts, sanitary districts, and other units of local government have historically been exempt from the state's public sector collective bargaining law.

We originally prepared this booklet to help smaller governmental units whose employees were unionizing for the first time. Although the few years since the change in the law have not witnessed the once expected boom in smaller government organizing, labor unions are still anxious for more public sector members as they watch their private sector ranks continue to diminish. Unions continue to organize employee groups that they historically ignored (the clerical staff in the Mayor's office for instance). Downward economic trends sometimes also result in workers for the first time seeking protection by unions from potential layoffs and compensation freezes or reductions.

This booklet is offered to help those employers who are experiencing unionization for the first time as well as to those officials and administrators in local governmental entities who have had unionized employees but are new themselves to the process. Most of the lessons in this pamphlet apply equally to large and small governmental bodies.

ABOUT THE FIRM

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. is in its 82nd year of representing governmental bodies in the State of Illinois. With offices in Chicago, several of the collar counties and the Bloomington-Normal area, the Firm represents a large number of governmental bodies both as regular attorneys and special counsel. The Firm advises its regular clients on all labor and personnel matters and provides that service to governmental bodies throughout the state. We often work with administrative officials and local attorneys to provide the documents and special advice needed in the dealing with union representation, the negotiation process, ongoing contracts and general personnel issues. We can prepare or review proposed employment contracts with high level administrative officials and those in which the local government wants to be assured that it is contracting with independent contractors rather than assuming increased levels of liability. In many instances we have discovered that providing advice to officials who sit at the bargaining table during a negotiating process offers adequate legal and policy input. The firm has assisted its regular and special clients in difficult or complicated suspension or discharge situations and we are familiar with the hearings often required to take place before boards of fire and police commissioners. We can work with officials of local governments and their attorneys on an occasional basis to deal with unusual questions or desired second opinions. Our attorneys are experienced in contract negotiations for all types of employee groups. The fact that we represent governmental bodies on a regular basis allows us to place personnel and collective bargaining matters into the general scope of local government law and operations. If you have any questions about this pamphlet and the techniques described, please call one of the authors at: Stewart H. Diamond, 312-604-9109,

Margaret Kostopulos, 312-604-9106 or Don Anderson, 847-856-5439. You can also email us at sdiamond@ancelglink.com, mkostopulos@ancelglink.com or danderston@ancelglink.com. You may wish to visit our website at www.ancelglink.com. At that website, there are pamphlets which you can download that deal with a variety of issues dear to the heart of elected and appointed officials.

CHAPTER 1: THE HISTORY OF THE IPLRA

The IPLRA became effective July 1, 1984. It contained a rather unique provision which stated that except for bargaining units in existence on the effective date of the Act and fire protection districts required by the Fire Protection District Act to appoint a Board of Fire Commissioners[1], the Act was not applicable to units of local government employing less than 35 employees. While most states have collective bargaining statutes, only Vermont, with a five-employee threshold, has a provision that is anything like this Section 20(b).

At the time that the statute went into effect, the common perception was that the legislature was concerned about the costs and other effects of collective bargaining on small public employers, and therefore sought to protect those small employers by exempting them from the coverage of the Act. In addition, there is an analogy to be drawn between the employee threshold established by the Illinois Act and the dollar-limit jurisdictional standards used by the National Labor Relations Board to exercise jurisdiction over private employers. In both cases, the operative concept is that it is not practical or appropriate to impose a duty to bargain on employers with limited resources.

As it has evolved, the IPLRA has changed the definition of an employer exempt from mandatory collective bargaining from one employing less than 35 employees to one employing less than 5. How 5 came to be adopted as a threshold number is unknown, although one can speculate that it may have been derived from the Vermont statute. All that is known is that the bill, when it was first filed with the Clerk of the General Assembly in February of 2003, provided for a threshold limit of 2. That number may have been derived from the practice under

[1] Under the Fire Protection District Act, a fire protection district with 12 full-time firefighters or more is required to appoint a board of fire commissioners.

the National Labor Relations Act, where two employees are the minimum number necessary to establish a bargaining unit appropriate for collective bargaining, or it may have been derived from the simple recognition that a single employee by definition cannot engage in "collective" bargaining or "concerted" activities. In any event, in March of 2003, House Amendment 1 changed the number from two to five, and that number remained in House Bill 2577 from that time until the bill was passed by both houses of the Illinois Legislature in November of 2004.

Following the initial passage of the IPLRA, the first questions relating to the language of Section 20(b) revolved around two terms: "employees" and "bargaining units in existence on the effective date of this Act". The latter term was included in the Act primarily to preserve historical bargaining units and relationships in the City of Chicago, but it quickly became the subject of intense scrutiny by the Illinois State Labor Relations Board (the ISLRB) and the courts. After the Act became effective, many employers and employer advocates first thought that references in the statute to historical bargaining units were references to formally-defined units represented by formally-recognized bargaining representatives. The "grandfather" clause would have saved these existing bargaining units from seeking to be formally recognized under the Act. That seemed a sensible result.

Those observers were wrong, as the ISLRB, backed by the courts, ruled in a series of cases that much more informal relationships and configurations, ranging from consultations to meet-and-confer arrangements, were sufficient to confer historical bargaining unit status on groups of employees and historical representation status on their representatives. Accordingly, if a mayor had a practice of meeting with a group of police officers once a year to get the input of

those officers before recommending salary increases to the city council, that was enough for the ISLRB to find that the town's police officers constituted a historical bargaining unit.

The term "employees" also turned out not to be as self-evident as many may have thought it would be. "Employee" or "public employee", as used in the Act, did not mean anyone who works or performs services for a public employer. Rather, it meant those who performed services for the employer except for those classifications of persons excluded from the definition of "employee". Full-time, non-supervisory public works employees, and, later[2], police officers and firefighters, were public employees within the meaning of the statute, of course. Excluded from the definition of "public employee", however, were such persons as elected officials, members of boards and commissions, managers, supervisors, confidential employees, and "short-term" employees.

The determination, in individual cases, of who was and who was not a "public employee" was critical in at least two major respects. First, such excluded classifications did not count in determining whether a particular unit of local government did or did not have 35 employees. Thus, if a jurisdiction were found to have at least 35 employees in total, after deducting those who didn't count in the total, then that jurisdiction was subject to the Act and could be required to bargain with public employee unions representing employees in one or more appropriate bargaining units. If a jurisdiction did not have at least 35 public employees after the deduction, then that jurisdiction was not subject to the Act and could not be required to recognize and bargain with unions representing its employees.

[2] The IPLRA was amended effective January 1, 1986, to cover police officers and firefighters.

Second, with respect to those jurisdictions found to be subject to the Act, persons in the excluded classifications were excluded (except in unusual circumstances[3]) from the composition of appropriate bargaining units, or groupings of employees for collective bargaining purposes. Thus, if a public works foreman were considered to be a supervisor within the meaning of the Act, he normally would be excluded from the bargaining group. But if his duties were such that he would be considered a "leadman" or "working foreman" and not a true supervisor, he would be included in the bargaining unit and subject to any collective bargaining agreement that might be negotiated with respect to that unit.

The determination of whether employees in particular classifications were or were not public employees also proved to be difficult when it came to such classifications as seasonal workers, including pool life guards, recreation program instructors, municipal golf course workers, and summer streets and parks maintenance workers. Also, it was unclear, without precedents, as to how to classify positions such as municipal band members, the police department chaplain, and basketball referees at the municipal recreation center.

With a 35-employee jurisdictional threshold in place, smaller units of local government often contested union organizational attempts by demonstrating, or attempting to demonstrate, that they employed less than 35 public employees. Elected officials, managers, supervisors, short-term employees and non-employees such as recreation activity coordinators and volunteer firefighters, were excluded from the count. If the remainder totaled 35 or more, then the ISLRB had jurisdiction and the union organizing attempt could proceed to the next stage: a determination, by a secret-ballot election or, more recently by a card-check, as to whether a

[3] Those circumstances, discussed infra, are historical or voluntary recognition of units of supervisors or mixed supervisor/non-supervisor units.

petitioning labor union represented a majority of the employees in an appropriate bargaining unit. If the remainder totaled less than 35, then the Act did not apply and the employer was not legally obligated to recognize or deal with the union.

With the reduction in the number of employees required for the exercise of jurisdiction by the ISLRB (now known as the Illinois Labor Relations Board, or ILRB), the municipalities and other units of local government that were marginal when the threshold was 35 are now covered. Under the current rules, the marginal units of local government are those very small governments that engage the services of between three and ten persons, some of whom may be and others of whom may not be "public employees". These governments face legal questions as to coverage by the amended statute, but the bigger question may be the practical one: will the governmental unit have the resources, or the desire or will to expend them, to contest the jurisdiction of the ILRB in the face of a union petition seeking to represent one or more groups of employees?

Many of these governmental units may decide that they do not want or cannot afford to hire law firms with sufficient experience and expertise to represent them before the ILRB, and so decide that they will simply concede the jurisdictional issue, which in most cases amounts to acceding to the unionization of one or more groups of employees. Others may decide that they will represent themselves in ILRB proceedings, or that they will utilize local lawyers who, while they may be competent lawyers generally, are not experienced in public sector labor relations matters. Although this book is by no means an adequate substitute for knowledgeable counsel, our hope is that governmental units, their officials and administrators will find it useful, especially in deciding how to meet a union challenge and how their resources can be best spent.

CHAPTER 2: HOW DO YOU COUNT TO FIVE: WHO IS AND WHO IS NOT AN "EMPLOYEE"?

The law provides that the Illinois Public Labor Relations Act does not apply to units of local government employing less than five (5) "employees". In determining whether your governmental body is exempt from collective bargaining you must do a count of these people who are classified as "employees" by law. "Employee" or "public employee", as defined by the Act, means those who perform services for the jurisdiction with the exception of those classifications of persons excluded from the definition of "employee". The exclusions likely to be relevant in your count are the following:

1. Elected officials;
2. Members of boards and commissions;
3. Managerial employees, including executive heads of departments;
4. Supervisors;
5. Confidential employees;
6. Short-term employees; and
7. Independent contractors.

In order to be covered by the Act, a jurisdiction must have at least five persons who work or perform services for the jurisdiction, excluding the seven classifications listed above. In other words, in counting to five, you do not count anyone who falls within one or more of these classifications.

A. Elected Officials

Elected officials are all persons elected to public office in the jurisdiction, including municipal mayors and aldermen or trustees, city clerks and city treasurers, and trustees,

commissioners or board members of park districts, school districts, sanitary districts, library districts, and special districts. All elected officials are excluded, regardless of whether the position is full-time or part-time and irrespective of the function of the position.

B. Members of Boards and Commissions

Members of boards and commissions are likewise excluded. Such individuals include members of a board of fire and police commissioners, civil service commission, planning and zoning board, zoning board of appeals, liquor commission, or other special function board or commission.

C. Managerial Employees

The statute specifically excludes "executive heads of departments", generally referring to such persons as the police chief, fire chief, or public works director of a village, or the recreation director or director of grounds and maintenance for a park district. But the statute also exempts "managerial employees", a term broader and more inclusive than executive heads of departments. The statute says that a "managerial employee" is "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices".

Village managers and administrators and park district administrators are included in this definition, as are assistant managers and administrators and other individuals who do not necessarily head a department, but nevertheless perform managerial functions. For example, a small entity may have a finance director who does not have any employees reporting to him or her but who is charged with such major management responsibilities as financial accounting, payroll administration, and accounts payable and receivable. A jurisdiction may also have a

human resources director or coordinator who is responsible for advising the manager or administrator of the jurisdiction with respect to all aspects of the performance of the human resources function, including hiring, firing, performance evaluations, and benefit administration. The employees in these examples are most certainly exempt.

Sometimes it is difficult to tell whether an individual is exempt from the definition of "public employee" as a manager or as a supervisor. Sometimes such a person can be both. But as the reader reviews the detailed list of factors considered in determining whether a person is a "supervisor", it is well to remember that even persons who are not supervisors are excluded from the definition of "employee" if their duties and responsibilities are predominantly managerial in nature.

D. <u>Supervisors</u>

Supervisors are excluded from bargaining units because, they are often called upon to function as agents of management. If supervisors were not excluded, it would not be unusual to find departments with no management representatives except the department head. If supervisors were allowed in bargaining units with non-supervisors they would often face conflicts of interest between their roles as management agents and as members and often leaders of the bargaining unit. Such conflicts can manifest themselves in a number of ways, ranging from the supervisor's ability effectively to discipline fellow bargaining unit members, to his ability to effectively adjust their grievances on behalf of management. Because in theory, at least, supervisors are as much a part of the management team as managerial employees, the Act provides that supervisors do not count in determining whether the public employer employs five or more employees.

In the early years after the passage of the Act, and especially after it was amended to cover police and firefighters in 1986, many cases were decided by the Illinois State Labor Relations Board (now the Illinois Labor Relations Board) which help us to determine in any given case, who is and who is not a supervisor. The statute defines "supervisor" as follows:

> "Supervisor is an employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising that authority, State supervisors notwithstanding. In addition, in determining supervisory status in police employment, rank shall not be determinative. The Board shall consider, as evidence of bargaining unit inclusion or exclusion, the common law enforcement policies and relationships between police officer ranks and certification under applicable civil service law, ordinances, personnel codes, or Division 2.1 of Article 10 of the Illinois Municipal Code, but these factors shall not be the sole or predominant factors considered by the Board in determining police supervisory status.
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> Notwithstanding the provisions of the preceding paragraph, in determining supervisory status in firefighter employment, no firefighter shall be excluded as a supervisor who has established representation rights under Section 9 of this Act. Further, in new firefighter units, employees shall consist of firefighters of the rank of company officer and below. If a company officer otherwise qualifies as a supervisor under the preceding paragraph, however, he or she shall not be included in the firefighter unit. If there is no rank between that of chief and the highest company officer, the employer may designate a position on each shift as a Shift Commander, and the persons occupying those positions shall be supervisors. All other ranks above that of company officer shall be supervisors."

One will note from the above definition that there are special rules that apply to the determining of supervisory status in police and fire departments. Police officers and firefighters are members of paramilitary organizations that have ranks, traditions, and nomenclature that differ to some extent from the leadership structures of departments containing other types of public employees. Both police officers and firefighters have rank structures and strongly-

imbedded notions of chain-of-command reporting. In police units, which correspond to military structures more strongly than firefighter units, sergeants historically have fulfilled the role of non-commissioned officers (NCO's) in the military. Accordingly, patrol officers (and, occasionally, corporals) traditionally are considered to be rank-and-file officers, while sergeants and above make up the ranks of supervisors and police management.

In firefighter units, which rely for performance of principal functions on training and teamwork, captains and lieutenants are referred to as "company officers"; however, they tend to be viewed more along the lines of private sector "leadmen" rather than true supervisors. That is why the statute establishes a presumption that fire captains and lieutenants are not supervisors, although it recognizes that the presumption may be overcome by showing, in a particular case, that a fire captain or lieutenant in fact does have supervisory authority. One of the classification difficulties which we will see in many contexts is how to categorize a person who spends only some of his or her time performing managerial or supervisory duties.

1. The Authority Test.

For supervisors generally, the Illinois Public Labor Relations Act establishes three different tests. The first is the authority test. In order to be considered to be a supervisor, the statute says, an individual must have the authority, in the interest of the employer, to:

1. Hire; or
2. Transfer; or
3. Suspend; or
4. Lay off; or
5. Recall; or
6. Promote; or

7. Discharge; or

8. Direct; or

9. Reward; or

10. Discipline employees; or

11. Adjust their grievances; or

12. Effectively to recommend any of the actions (a) through (h)

if the exercise of that authority is not merely routine but requires the consistent use of independent judgment.

In the public sector, state law or governmental practice often restricts or eliminates the ability of a person who otherwise would be considered to be a supervisor or even a manager to exercise some of these indicia of supervisory authority. For example, in jurisdictions that are subject to the Illinois Board of Fire and Police Commissioners Act, police chiefs, fire chiefs, and even village managers do not have the authority to hire or fire police officers and firefighters; that authority rests by law with the Board of Fire and Police Commissioners. And while police chiefs and fire chiefs have the authority to suspend lower ranking officers and firefighters, lower level supervisors in the chain of command typically do not.

Typically, supervisory authority issues tend to revolve around the exercise of three types of powers: the power to direct subordinates in the performance of their duties; the power to engage in lower level discipline of subordinates, including oral and written reprimands and short suspensions (generally not more than sending an officer home for the balance of the shift); and the power effectively to recommend higher levels of discipline. "Direction" refers to the authority to give work orders and directions that involve the use of independent judgment and discretion; merely relaying the instructions of superiors will not qualify. Likewise, as is often

true at a fire scene, it can be argued that if the only directions or instructions that employees receive are the product of training and teamwork, there is no opportunity for the exercise of discretion. Rather, all that employees are doing is carrying out a pre-established protocol.

With respect to the giving of direction, one may ask: does the supervisor give orders, or merely make suggestions? Do the orders relate to matters of substance or importance in the conduct of the employer's business? Does the decision-making process leading to the giving of an order reflect the exercise of judgment and discretion, or is the supervisor simply relaying orders or following an established protocol? Does the supervisor expect compliance? What does he do if there is no compliance? Does the employer regard him as a supervisor? Do the employees think of him as a supervisor? Perhaps most importantly, does he think of himself as a supervisor?[4]

With respect to the issuance of discipline, two issues arise: whether the behavior involved really qualifies as discipline and whether the authority to discipline in fact has been exercised. In some jurisdictions, discipline that can be imposed by police sergeants and/or fire captains is limited to "chewing out" patrol officers or firefighters. In the absence of written documentation, it is questionable whether such an action qualifies as "discipline" within the meaning of the IPLRA. In other jurisdictions, the authority to discipline, including the authority to issue written reprimands and even impose short suspensions[5], is nominally vested in supervision, but that authority is never exercised. In such a case, the failure to exercise the authority can give rise to arguments that the authority itself is non-existent.

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[4] Union representatives have been heard to say, "If the guy thinks he's a boss, then he's a boss, and we don't want him."

[5] The authority to send an employee home for the rest of the shift, without pay, is an example of the type of short suspension that even first-level supervisors may impose.

Recommendations concerning the issuance of discipline must be effective to be considered to be indicia of supervisory status. If the superior officer accepts the recommendations of the lower level supervisor most of the time and without independent inquiry into the facts giving rise to the discipline, then the recommendation is generally considered to be effective. But if the superior officer insists on conducting his own independent investigation of the facts underlying the discipline, then the recommendation will not be considered to be effective and the authority of the lower level supervisor to make such a recommendation will not be considered to be an indicator of supervisory status.

2. The Substantially Different Work Test.

The IPLRA also requires that in order to be considered a supervisor, the individuals in the classification alleged to be supervisory must perform "substantially different work" from the work performed by the non-supervisory subordinates. For the most part, this means that the primary duty of a supervisor must be supervision. The test is qualitative, rather than quantitative, however. Another way of phrasing the test is to ask: what is the individual being paid, or paid extra, to do? If he is being paid to do the same things as his subordinates, then the work is not substantially different, and he is not a supervisor. But if he is paid, or paid extra, to perform work of a non-manual nature consisting primarily of the direction of others, then the substantially different work test is met.

A number of indicia, some primary and some secondary, enter into this determination. Among the questions asked are the following:

Is the alleged supervisor salaried or paid by the hour?

Is there a pay differential between the supervisory classification and the classification(s) of workers subject to supervision? If so, what is the magnitude of that differential?

Are the duties of the supervisor and his subordinates the same or different? If some, but not all, duties are the same, are the primary, or most important, duties of the supervisor substantially different from the primary duties of his subordinates?

Are the supervisor and the subordinate subject to the same kinds of productivity requirements? For example, police patrol officers are subject in some jurisdictions to productivity requirements related to ticket writing and other measures of police productivity. If sergeants are subject to the same requirements, that tends to indicate that the sergeant's performance is being measured by the same criteria that are used to measure patrol officers' performance, and that, therefore, the work of the two classifications is not substantially different.

What is the ratio of supervisors to subordinates? If the ratio approaches one-to-one – that is, nearly one supervisor for every subordinate – then it can be argued that some of the supervisors must not be true supervisors because that much supervision is not necessary.

How many levels of supervision are there, and what do the incumbents of the various levels do? If the are multiple layers of supervision, one can question whether the occupants of the lower levels truly perform supervisory functions.

Do the supervisor and the subordinate wear the same uniforms, or are there readily identifiable differences? Such differences as those involving shirt color (white shirts and blue shirts) and rank insignia send readily identifiable signals concerning rank and authority differences.

In police work, especially, do the supervisor and the subordinate drive the same kinds of cars? If a police sergeant drives a patrol car, rather than one with special markings, it can be argued that his function is viewed by management or the public as being essentially the same as that of a patrol officer.

In the final analysis, it must appear from all of the evidence that the supervisor's work is qualitatively and substantially different from the work of the subordinate. In small jurisdictions, where there are only a few people to do the work, this distinction is a difficult one to make in practice. But, as a general rule, even if a supervisor does some manual labor or clerical work, if he is paid like a boss and is regarded by superiors and subordinates alike as a boss, then he should be found to be a boss, provided that he passes the preponderance test (below).

3. The Preponderance Test.

Except for police employment, the IPLRA requires that a supervisor must devote a preponderance of his working time to supervisory duties. This can be a more difficult test for supervisors in small jurisdictions than the substantially different work test, because it is a quantitative test. Especially in smaller jurisdictions, it is sometimes unavoidable that, in order to get the work done, the boss has to do it. Nevertheless, in order to pass the test, a supervisor must spend more of his typical working day performing supervisory duties than in the performance of manual or clerical work. If, because of personnel limitations, a non-police supervisor is forced to spend most of his day performing non-supervisory functions, then it is likely that he will be found not to be a supervisor and will be counted in determining whether the jurisdiction employs five or more employees. The only situation in which the preponderance test does not apply is

that with police supervisors. To meet the supervisory test with police officers, an employer need only show that the putative supervisor performs any of the enumerated supervisory functions.

E. Confidential Employees

The IPLRA defines "confidential employees" as follows:

> "Confidential employee" means an employee who, 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 in the regular course of his or her duties has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies.

In practice, this is a restrictive definition. Just because an employee has access to confidential information does not make him or her a confidential employee. In order to come within the statutory definition, the employee must have access to confidential information in the capacity of an assistant to a manager or supervisor who formulates, determines, or effectuates management policies with regard to labor relations or collective bargaining. Thus, the secretary to a village administrator or a department head, such as the police chief, probably will qualify as a confidential employee because of that person's access to such documents as collective bargaining proposals and disciplinary recommendations. But others with access to confidential information – for example, payroll clerks and finance department employees with access to financial and budget information – are not considered to be confidential employees under the Act because their access to confidential information does not arise in the context of labor relations or collective bargaining.

F. Short-term Employees

"Short-term employees" – the statutory term for seasonal employees who are not regularly rehired – are not considered to be "public employees". Many municipalities and park districts hire summer workers – primarily high school and college students who work as life

guards, golf course workers, clubhouse workers, summer recreation program supervisors, and seasonal streets and sanitation workers. Such workers may be, but are not necessarily, short-term employees.

Essentially, short-term employees are those individuals who are employed for less than two consecutive calendar quarters (six months) in a calendar year and who - and this is important - do not have a reasonable expectation of being rehired. A student who is promised a job for the following summer, or who is repeatedly rehired for summer work, will not qualify as a short-term employee. On the other hand, a student who is told at the end of the summer that he or she will have to reapply for work the following summer, with no guarantee of being rehired, may qualify as a short-term employee. Whether or not a summer worker will qualify as a short-term employee – and thus be excluded from the count in determining whether the jurisdiction employs five or more employees – depends on the number of months he works during the year, on the conditions under which the worker was hired, and on the promises made to him or expectations that he may have concerning re-employment the following summer. Many times, municipalities and park districts will give assurances to their better workers regarding the prospect of being rehired the following summer. Such assurances, although understandable and practical from a business perspective, may have the effect of defeating a claim for short-term employee status. Smaller governments must now recognize they are in a "new world" and should evaluate whether they need to change some established policies to conform to the magic words of the Act.

G. Independent Contractors and Volunteers

Managers, supervisors, confidential employees, and short-term employees are excluded from the definition of public employee despite the fact that they have a working relationship with

the public employer. Independent contractors are different in this regard: they are excluded because they are not employees at all, but instead perform services for the jurisdiction on the basis of a contract, fee-for-service. Another group not counted are those who perform services as volunteers. A volunteer is one who performs services for no compensation, for a token fee or for expenses only. Sometimes, persons who are called volunteers - such as volunteer firefighters - are not truly volunteers at all. Rather, they are paid-on-call, receiving compensation on a per-call or per-shift basis.

To determine whether people that perform services other than as an acknowledged employee for a public employer are or are not public employees, the ILRB has developed an "employment nexus" test. This test looks at a number of factors in order to determine employee status. Such considerations as 1) the regularity of employment; 2) the presence of a substantial turnover within a group; 3) the expectation of continued employment; 4) the ability to refuse work without being subject to discipline; 5) the number of hours worked; 6) whether the individual in question was compensated for hours worked; and 7) the form of compensation, were initial factors cited in the application of the employment nexus test. Subsequently, the following additional factors were cited or applied:

- whether a disciplinary policy has been established in fact;
- whether the individual receives fringe benefits in addition to pay;
- whether the individual is paid at the same time and on the same basis as persons conceded to be employees;
- whether the individual is hired in the same manner as persons conceded to be employees;
- whether the employer deducts income and social security taxes from pay;

- whether the individual sets his own work schedule and/or has a minimum number of hours that must be worked in a period;
- whether the individual must work hours for which he signs up to work or find a volunteer replacement for those hours;
- whether the individual performs a traditional public service for the employer;
- whether the employer provides workers' compensation insurance coverage for on-the-job injuries;
- whether the individual is employed full-time elsewhere;
- whether the individual is governed by the employer's personnel rules;
- whether the employer provides training to the individual; and
- whether the individual is held out to the public as being vested with the employer's legal authority.

On the basis of the employment nexus test, the ILRB has found that persons performing services in such capacities as municipal band members, volunteer firefighters, a police department chaplain, and recreation instructors and referees were not public employees. But other part-time or seasonal workers may be considered to be public employees, depending on the facts. Such classifications as auxiliary police officers and paid-on-call firefighters, for example, may be considered to be public employees, even though they do not receive benefits, other than an hourly pay rate, for their services, and even though they may not work enough hours during the year to qualify for pension eligibility. Major indicia of public employee status in the cases of these workers is that they are performing services traditionally viewed as public services, and they typically do not have the right to refuse work – once assigned or accepted – without either finding a replacement or facing the consequences (such as removal from the on-call list) of a failure to report as scheduled.

Five is a small number. Unless a jurisdiction contracts for its principal municipal or district services – such as contracting with a neighboring municipality for police and/or public works services – it may be that the above exclusions will not make the difference in determining whether the jurisdiction is subject to the Illinois Public Labor Relations Act. But for a jurisdiction that is "on the cusp", knowledge of the above exclusions could make the difference between being covered and not being covered by the Act. Because the tests are not easy to apply without an overall view of the precedents, a brief check with an attorney familiar with public sector labor relations law may prevent need for legal help later.

CHAPTER 3: THE ADMINISTRATION OF THE STATUTE

The Illinois Public Labor Relations Act is administered by the Illinois Labor Relations Board (the "ILRB"), consisting of two panels, a State Panel and a Local Panel.[6] The Local Panel handles cases arising out of the City of Chicago and the County of Cook. The State Panel is responsible for the remainder of the State. The Board's chief legal officer is its General Counsel, who, in addition to providing legal advice and counsel to the Board, is empowered to issue declaratory rulings at the request of the parties to a dispute.

A. Representation Cases

There are three principal categories of cases that come before the Board: representation cases, unfair labor practice cases, and fair representation cases. Representation cases involve questions concerning the representation, or attempts at representation, of public employees by labor organizations. Representation proceedings may also be held to clarify or amend descriptions of already existing bargaining units.

Initial organization of the employees in an appropriate bargaining unit may be accomplished by means of a representation petition seeking an election to determine whether the majority of the employees in the unit wish to be represented by the petitioning union. Effective with amendments to the Act that went into effect on August 5, 2003, union organization of a unit without an already existing bargaining representative may be accomplished by means of the new majority interest petition, or "card check" procedure, whereby a union that submits authorization cards, or a petition signed by a majority of the employees in an appropriate unit, may be determined to be the exclusive representative of the employees in that unit without going through

[6] Until it was amended in July of 2000, the IPLRA provided for two separate boards, the Illinois State Labor Relations Board ((ISLRB() and the Illinois Local Labor Relations Board ((ILLRB(). The 2000 amendments to the Act created a single board with two panels.

the election process. This is a dramatic change from prior law, pursuant to which employees could, under pressure, sign "union cards" and then intentd to vote against the union during the secret ballot election. Those days are gone. Representation proceedings may also be held to clarify or amend descriptions of already existing bargaining units.

In order to be declared to be the exclusive representative of the employees in a bargaining unit, the unit must be appropriate. Bargaining unit appropriateness is determined by means of community of interest of the employees involved. The only hard-and-fast rule governing unit appropriateness is that non-sworn personnel cannot be in the same bargaining unit with sworn police officers. Another, generally applicable rule is that a combined white-collar and blue-collar unit is presumptively inappropriate. That does not mean that such units cannot or do not exist; it simply means that if a union seeks to organize a combined unit, and the employer opposes such organization, the ILRB will not certify the union as the exclusive representative of such a unit unless the employer drops its opposition or the union carries the burden of overcoming the presumption against the appropriateness of such a unit.

In local governmental employment, bargaining units typically follow departmental or functional lines. Usually, there is, or can be, a police bargaining unit, a firefighters' unit, a public works unit, and/or a unit of white-collar (administrative) employees of the jurisdiction. Other units that may exist include a dispatchers' unit (consisting of emergency telecommunications personnel) and one or more units consisting of supervisors or supervisors and non-supervisors combined.

A supervisory or mixed supervisor/non-supervisor unit can come into existence in one of two ways: either it is a historical unit, that is, one that existed before the effective date of the

ILPRA, or it is one that exists because the employer did not oppose it and either recognized the union as the exclusive representative of the unit or did not oppose the holding of an election in such a unit. Supervisors, however, have no absolute right to organize and bargain collectively; employer opposition will prevent ILRB certification of a supervisors or mixed supervisors/non-supervisors union in a non-historical unit.

The same basic concept is true with relation to mixed bargaining units of professionals and non-professionals. For instance, the Labor Act will not automatically allow a unit to exist that is comprised of CPA's and payroll clerks. Their employment issues, in some respects, are inherently different. For instance, professionals usually receive compensation on a different pay structure and under different terms. Their duties and obligations are likely to be significantly different as well. The Labor Board may require a vote among these proposed bargaining unit members to determine desire to be combined with one another.

A representation case in which there is a question concerning representation, usually involving the composition or appropriateness of the bargaining unit, may entail a hearing before an administrative law judge appointed by the ILRB. After the hearing and the submission of argument by the parties, usually in the form of post-hearing briefs, the administrative law judge will issue a recommended decision and direction of election in the proposed unit. Such a recommended order may be the subject of exceptions by the parties which are then ruled upon by the ILRB before an election is held or a majority representative is determined pursuant to a card check. The ILRB's decision may be appealed to the Illinois courts.

B. Unfair Labor Practice Cases

Unfair labor practice proceedings are held as a result of charges filed by a union, an employer, or an individual employee urging that the employer or the union has violated the ILPRA by committing one or more unfair labor practices prohibited by that statute.

Employer unfair labor practices are the following:

1. interference with or restraint or coercion of public employees in the exercise of rights guaranteed by the IPLRA, including interference with or coercion of employees because they have engaged in union or other protected, concerted activities;

2. discrimination with respect to hire, tenure, or any term or condition of employment in order to encourage or discourage union organization;

3. discharge of or discrimination against any employee who signs an affidavit or charge, who testifies in any proceeding, or who otherwise provides information pursuant to the provisions of the IPLRA;

4. refusal to bargain collectively in good faith with the exclusive representative of the employees in an appropriate unit;

5. violation of any of the rules and regulations of the ILRB;

6. expenditure or causing the expenditure of public funds to influence the outcome of a representation election or proceeding;[7] or

7. refusing to sign a collective bargaining agreement or reduce it to writing.

Union unfair labor practices are:

1. restraint or coercion of public employees in the exercise of rights guaranteed by the IPLRA, provided that this prohibition does not prevent a labor organization from prescribing its own rules for membership;

[7] This does not prevent the employer from seeking the advice of legal counsel or from communicating with its employees as permitted by the "free speech" provision of the IPLRAAct, Section 10 (c). A further discussion of this is found in Chapter 3. This ban on "persuader activities" is designed to prohibit the expenditure of public funds for non-attorney consultants who are in the business of offering their services to employers for the purpose of attempting to persuade employees to refrain from signing authorization cards or from supporting the union in an election. Such consultants are referred to by unions – fairly or unfairly – as "union busters".

2. restraint or coercion of the public employer in the selection of its representatives for purposes of collective bargaining or the settlement of grievances;

3. causing or attempting to cause the employer to discriminate against an employee in violation of paragraph (2) of the above listing of employer unfair labor practices;

4. refusing to bargain collectively in good faith with the public employer;

5. violation of any of the rules and regulations of the ILRB;

6. discrimination against any employee who signs an affidavit or charge, who testifies in any proceeding, or who otherwise provides information pursuant to the provisions of the IPLRA;

7. representational picketing where another union has been certified to represent the employees in a particular bargaining unit, and representational picketing without filing a representation petition within a reasonable time; or

8. refusing to sign a collective bargaining agreement or reduce it to writing.

Unfair labor practice charges are investigated by an agent of the ILRB. If the charges raise a question of fact as to whether or not certain acts have been committed or a question of law as to whether those acts are unfair labor practices, then a complaint is issued by the General Counsel and the matter is set for hearing before an administrative law judge. After the hearing and argument by the parties, usually in the form of post-hearing briefs, the administrative law judge issues a recommended order and decision. If either party objects to the recommended order and decision, then the matter is decided by the ILRB. As with representation cases, ILRB decisions in unfair labor practice cases may be appealed to the Illinois courts.

C. Fair Representation Cases

Fair representation proceedings are between unions and employees. By being elected or recognized to serve as the exclusive representative of the employees in an appropriate unit, a union assumes the legal duty to represent fairly all employees in the unit, whether or not they are

members of or support the union. Intentional misconduct on the part of the union in breaching its duty of fair representation of an employee is an unfair labor practice, and charges of the breach of the duty of fair representation can become the subject of proceedings before an administrative law judge of the ILRB to determine whether such a breach has occurred. As in the other types of ILRB proceedings, the recommended order and decision of the administrative law judge can be the subject of exceptions to be decided by the ILRB, with an appeal to the Illinois courts.

A frequent subject of fair representation proceedings is a decision by a union not to take an employee grievance to arbitration. In most collective bargaining agreements, the union reserves the right to decide whether or not to appeal a grievance to the grievance arbitration process, and there are occasions when a union will decide that a grievance will not be appealed by it to arbitration despite the vigorous insistence of the employee-grievant that his grievance should be appealed. Most of these cases are decided against the employee, because the union, in its role as administrator of the labor contract for the employees of the unit, retains a certain "prosecutorial discretion" as to whether it will expend the time and funds necessary to go through the arbitration process. Only a clear abuse of such discretion[8] will result in the union's being found to have breached its duty of fair representation. At one time, unions would advance the grievance of almost any employee without regard to its validity. As the process has become more expensive, unions are beginning to be more selective in the grievances they will support.

[8] One case in which such an abuse of discretion was found involved a letter written by the president of the union to the employee-grievant, a known supporter of another union, stating that the union would not support employees who were disloyal to it.

CHAPTER 4: UNION ORGANIZING

With the change in the Labor Act allowing unions to represent significantly more local governmental employees than ever before, governmental employers should be aware and ready for one or more unions to wage organizational campaigns in their workplaces. Generally, unions will attempt to organize a workplace for a number of different reasons, but the process by which employees become recognized is limited to four different ways under the ILPRA.

Often times, a union representative, or organizer, is invited by an employee to talk to his other fellow employees because he worked in a unionized setting before and appreciated union representation, or was asked by union representatives from his former workplace for the opportunity to talk to his new co-workers. Other times, a disgruntled employee seeks unionization for him or herself and fellow workers because it represents job security. Similarly, employees experiencing a change in leadership or philosophy in the workplace hope that unionization will somehow ensure their continued employment throughout any changes. Finally, with the dramatic reduction in union jobs in the private sector, the public sector continues to experience union campaigns aimed simply at increasing overall membership within the union itself.

While it is sometimes useful to determine the "cause" of the organizing campaign in the workplace, one thing is certain: a small governmental employer must know what to expect throughout the process and then must quickly decide the position it will take with the union and its employees.

A. The Representation Process

1. Certification Procedures

Under the Act, there are four (4) methods by which a union can become certified as the collective bargaining agent for a group of employees which make up an "appropriate bargaining unit": Voluntary recognition, Majority Interest Petition, Representation Election Petition and Employer Petition.

a. Voluntary Recognition

Upon written request, an employer can voluntarily agree to recognize a labor organization as the exclusive representative, provided that union has been selected or designated by a majority of the employees in the bargaining unit. Voluntary recognition requires the posting of a request for recognition for at least 20 days, during which another interested employee organization can petition the ILRB for an election, claiming that it has been designated by at least 10% of the employees in the bargaining unit. If unionization is inevitable, then agreeing to negotiate with a union to craft a contract through quick negotiations and voluntary recognition is a viable option.

b. Representation Petition for Election.

An employee, group of employees or any labor organization can petition the ILRB for an election, provided that there is a demonstration that the petition represents 30% of the employees in the bargaining unit. The ILRB then conducts a secret ballot election and, if a majority of the votes cast favor the union, the ILRB will certify that employee organization as the exclusive bargaining representative of the employees. The ballot provides a choice of "no representation", and if a majority of those voting choose this option, the union must wait another 12 months before it can file another petition for recognition. Since the amendment of the IPLRA allowing

for the majority interest petition described below, few unions or employee groups seek representation by means of a petition for election**.**

c. Majority Interest Petition

An employee, group of employees or any labor organization is entitled to petition the ILRB for certification based on the presentation of a representation petition which provides independent evidence of a majority support for union representation among the proposed bargaining unit employees. The independent evidence to support this type of petition is generally signature cards from employees expressing their interest in union representation. Once the ILRB receives a Majority Interest Petition, it investigates the validity of the signatures by comparing them to exemplars requested from the employer. Assuming no irregularities concerning the signatures, the ILRB then certifies the proposed bargaining unit based on the evidence of majority interest for representation by the employees and without an election. This type of representation petition still allows the employer to contest the inclusion of specific individuals in the proposed bargaining unit, as well as to contest the appropriateness of the proposed unit, as discussed below. There is, however, no election. Recently, the National Labor Relations Board followed suit by implementing the majority interest petition process for private sector employees covered by that Act.

d. Employer Petition

The public employer itself may petition the ILRB for a secret ballot election if it alleges that one or more labor organizations claim to represent a majority of the employees in a bargaining unit. In such a case, the competing unions appear on the ballot along with the choice of "no representation". If none of the choices on the ballot receives a majority, a run-off election

is conducted between the two choices receiving the largest number of valid votes cast in the election.

B. Appropriate Bargaining Units

Section 3(s) of the IPLRA defines a "unit" as a class of jobs or positions which are held by employees whose collective interests may suitably be represented by a labor organization for collective bargaining. Decisions often focus on the "community of interest" of employees in determining whether a proposed bargaining unit is appropriate. Illinois Labor Relations Board decisions have favored the formation of large bargaining units to prevent the fragmentation of employees into small separate units. We will see over the next few years whether, in the smaller governments now subject to unionization, the ILRB, for efficiency's sake, will find that more diverse groups of employees can constitute a bargaining unit.

The recognition process described in the previous section also includes the ILRB's determination of the appropriate bargaining unit that will be represented by the certified organization. This is based on several factors and is done by a consent agreement or after an ILRB hearing.

A consent agreement as to the appropriate unit is reached in one of two ways. In a consent election, the labor organization and the municipality stipulate to the bargaining unit for the purposes of the representation election. In the alternative, the municipality may grant voluntary recognition to the labor organization, including an agreement upon a specific and detailed description of the proposed bargaining unit. In either case, these stipulations will be enforced by the ILRB as binding upon the parties, unless they were induced by misrepresentations or other fraudulent conduct. Consent elections are the exception rather than

the rule and, typically, the ILRB will hold a hearing in which the parties present evidence to support their proposed unit. It is important to have someone with experience assist the governmental body in the voluntary recognition process since mistakes made at this stage are very hard to correct or overcome.

The ILRB's Rules and Regulations provides the guidelines for the determination of a unit. Hearings on the appropriateness of proposed bargaining units constitute a major portion of the ILRB's activities. The following is a list of the factors which may be weighed in a unit determination hearing: (1) Do the employees have strong community of interest?; (2) Will the proposed unit result in efficient operations?; and (3) What, if any, is the history of employee representation in the municipality? Ultimately, the ILRB will decide which employees will be included in the unit and which will be excluded.

Determination of the appropriate bargaining unit is an essential element in an employer's overall strategy for dealing with a union. The selection of the appropriate unit will help establish the framework for future collective bargaining and may affect the results of a representation election. Not only will the size and composition of the unit affect negotiations, it will continue to shape the administration of a contract during its term.

C. <u>To Resist or Not To Resist:</u>

Employers usually learn of a union's organizational campaign in the workplace when a friendly worker shows a supervisor union campaign literature, or when a "helpful" union organizer wants to meet with the department head or head administrator to let them know that they shortly will be representing the employees. It is at this point that the employer must decide whether or not it wants to resist the union's attempts at organizing its workers. To reach that

decision, the employer should analyze who the union is attempting to represent and whether a benefit exists to resist those attempts.

1. Do the Employees Know What They Are Getting Into?

Many employers and employees alike still think that union representation requires a secret election. Many employees believe that if they sign cards that they are interested in union representation, they will still have the chance to make a final decision by casting their ballots. Notwithstanding the availability and increasing use of the majority interest petition procedure, which allows for certification of a bargaining unit upon the union's showing by means of a card check that a majority of the proposed bargaining unit is interested in representation, many employees are unaware that the showing of interest card or petition is, in effect, the ballot for representation. In situations where the union is actively campaigning to organize employees, but no petition for representation is on file, an employer may wish, at the very least, to inform its workers of the effect of signing a showing of interest card or petition.

Similarly, unions often make sweeping promises to workers during organizational campaigns to excite the interest of employees. Job security, automatic wage increases and seniority based job decisions are just some of the traditional promises heard from unions. More recently, unions focus their campaign on promises of maintaining free or low cost health insurance, and often lure workers with the promise of a union-based health insurance plan that will cost little for employees, even after retirement. Often, upon analysis, the existing plan offered by the employer grants significantly better benefits. The decision as to whether or how much an employer wants to counter this campaign with its own "propaganda" is an individual decision with no right or wrong answer.

Sometimes an employer wants its employees to know that by selecting union representation it invites a third party into the work relationship that inhibits some flexibility of the employer. After all, when a union is enforcing the terms of a contract with the employer, that employer can not afford to stray from those terms for fear that it will violate the contract or create a past practice that diminishes a contractual right of the employer. In a union environment, an employer can no longer "negotiate" with any individual employee. By bringing in a union the employees have chosen a representative to speak for and negotiate on their behalf. Similarly, sometimes an employer may want to let employees know that when they unionize and come to the bargaining table, everything is up for negotiation and the work benefits that they enjoy now are subject to negotiation, just like new work terms and benefits that they may desire to negotiate. In other words, nothing is a "given".

The problem is simply that the employer must decide, first, whether it is likely to change the outcome of a union organizing campaign if it attempts to resist it, and second, whether in doing so it will alienate its workers, and maybe others, by seeming to refuse to acknowledge the employees' rights and desires to unionize. While many agree that a non-union workplace is easier to manage, elected officials may wish to test the climate of the community. A balancing of these factors determines whether a particular governmental employer should choose whether or not to resist a union campaign.

2. Should An Employer Contest Inclusion of Certain Individuals But Not the Entire Petition

If an employer chooses not to resist the attempt to unionize its workers, it should still ensure that the union is seeking to represent only those workers that are eligible for representation. While unions generally seek to represent rank-and-file employees, they

sometimes try to organize groups of employees - such as police sergeants - who are considered by the employer to be supervisors. Similarly, a union may attempt to organize a group of workers comprised primarily of employees who only work four months in the year. In situations such as these, it is important for the employer to determine whether these employees are actually eligible for union representation. These types of unionization challenges are simply the employer's assertion of its rights under the IPLRA.

After applying the tests for employee exemption explained in Chapter 2, if any question exists as to whether a group or any individual in a group of employees is not eligible for representation, then the employer must decide whether to challenge the representation petition or to challenge the inclusion of certain employees it believes are ineligible for representation because of their exempt status under the IPLRA. Sometimes, an effective challenge of individuals within a proposed bargaining unit can reduce the number of interested employees below a majority, thus defeating the petition in its entirety.

3. Waging an Effective CounterCampaign

As explained in Chapter 5, the employer is significantly constrained in what it can and cannot say to employees and what it can and cannot do during an organizational campaign.

4. Employer Responses to Union Organizing Campaigns

Municipalities may not expend public funds, except for attorneys' fees and association dues, to hire outside consultants to engage in "persuader activities", that is, to provide information to them or to employees on why employees might not want to unionize. The following, however, are several of the positive steps that the employer may take.

The employer has the right to explain the collective bargaining law to its employees and to explain that if a union or employee group obtains an evidence of interest in union representation from a majority of the employees in the proposed bargaining unit, the union can obtain certification without an election among employees. Further, employers may explain to their employees at any time, and especially if there is evidence of union activity, that they are free to join or not join the union and that their decision will not prejudice their employment status. The employer also may explain that although employees cannot be forced to join a union, they may still be required - under a typical "fair share" collective bargaining agreement provision - to pay a proportionate share of the cost of the collective bargaining process to the union. Employers may explain that employees are free not to sign a union authorization card or petition, but that if they do sign an authorization card, they may not have another opportunity to change their mind or withdraw their cards. Employers can emphasize to their employees how their wages, benefits and working conditions compare with those of other governmental bodies and private sector employees performing similar services, whether they are unionized or not.

Employers are free to tell employees about information contained in the union constitution or by-laws that would directly affect those employees, specific examples being the union's right to impose fines upon its members for crossing picket lines and dues requirements. Employers can explain to their employees that the municipality's policy will not allow pay for time when the union calls them out on strike. Additionally, the employer should emphasize that employees may not get unemployment compensation benefits while they are engaged in a strike and that a strike is an economic weapon that unions employ.

The employer should take steps to explain what the requirement of bargaining in good faith means, so that the employees understand that the employer does not have to agree to any specific proposal or make a specific concession and that when collective bargaining begins on the first contract, everything is negotiable and employees can get more, less or the same as before. Municipalities should use extra effort to explain any false or misleading campaign propaganda that is distributed by the union organizers. To avoid a possible unfair labor practice, the authors recommend that any speeches or literature to be disseminated to employees during the organization/election process be reviewed by your attorney prior to distribution.

5. What to Do In the Meantime

The temptation to implement changes in the workplace during an union campaign, either in response to newly discovered employee complaints, or in an attempt to diminish the union's efforts, must be resisted. One of the most frequent mistakes that employers make during an organizational campaign is to try to "fix" the problems that it perceives resulted in interest in union membership, or to "show" that it will treat employees well, even without a union. Unfortunately, once a union begins its organizational campaign in the workplace, it is too late, and too dangerous, to make those changes.

During the organization campaign, which is measured either from the time that the union can show that the employer knew of its attempts to represent its members, and certainly any time after a petition for representation is filed with the Labor Board, the employer must retain "laboratory conditions" in the workplace. This means that it can make no changes to the wages, hours and terms and conditions of employment of those in the job titles who are the subject of

the unionization campaign. The employer, in fact, must maintain status quo on all issues which impact an employees conditions of employment, such as:

- wages
- hours of work
- insurance benefits
- leave benefits
- promotions to job titles subject to the union petition

Additionally, an employer must be sure that, if disciplinary action is appropriate against an employee who is seen or known as an "organizer", such action is consistent with the employee's past disciplinary record, as well as disciplinary action issued in the workplace to others with the same or similar infractions or misconduct. A favorite unfair labor practice charge by unions during an organizational period is to claim that the employer engaged in retaliatory conduct against an employee for his or her protected union activity. Needless to say, thorough documentation of the misconduct and the rationale for the disciplinary action is especially necessary during this time.

The only exception to the rule that employers must make no changes is when a change was already scheduled to occur prior to the organizational campaign or comes about as a result of some external change of condition. For instance, an increase in health insurance premium contribution by employees, approved prior to a union campaign, can still be implemented because the decision to make the change occurred prior to the union campaign. Similarly, an automatic step increase on a salary schedule that occurs on an employee's anniversary date, should not be stopped. If the organizational process continues for a long time, the employer can

also make changes dictated by changed conditions having nothing to do with the union or changes which would periodically be made in any case. Great care must be taken in this process so as to lessen the chances of a union unfair labor practice charge.

CHAPTER 5: EMPLOYEE AND EMPLOYER RIGHTS AND RESPONSIBILITIES

As indicated by the list of unfair labor practices in the earlier chapter, public employees have the right to organize and bargain collectively with their employers. They also have the right to refrain from such activities, and the law prohibits both employers and unions from coercing or restraining public employees in the exercise of their rights either to engage in organizing and collective bargaining activities or to refrain from such activities.

A. Protected Concerted Activities

It should be noted, however, that the right of employees to engage in what is called "protected, concerted activities" is not limited to union activities. Employees are also protected in their right to engage in concerted activities (that is, activities engaged in by or on behalf of a group) that may or may not be related to union activity. For example, employees are protected against retaliation or discrimination for banding together to protest what they consider to be unacceptable working conditions or unjust policies of the employer. So if, for example, a group of employees were to petition a park district board to change some particular practice or policy of the district, the park district administrator would violate the law if he discharged or suspended them for submitting the petition. And that would be true whether or not the employees worked with and through an existing union to present such a petition.

Similarly, unions cannot discriminate against employees for engaging in such activities, even if those activities are contrary to an official union position on the subject. And while a union has the right to prescribe rules governing its membership, and thus would have the right to expel from the union an employee who engaged in activities forbidden by the union's constitution or by-laws (including active support for a rival union), it does not have the right to

refuse to represent that employee as a member of the bargaining unit, and it does not have the right to pressure the employer to fire or otherwise discriminate against the employee.

B. Free Speech

Under Section 10(c) of the statute, the so-called "free speech" provision, an employer has the right (although not by use of a paid non-attorney consultant, or) to express and disseminate its views and opinions to employees, provided that the expression does not contain a promise of a benefit or a threat of reprisal. For example, an employer can tell employees that, in its opinion, employees are better off without a union, and it may make factual statements about conditions in other unionized environments. But it is prohibited from promising employees a raise if they vote out a union or from threatening the withdrawal of a benefit or a privilege if they vote the union in.

C. Conduct Affecting Elections

During an election campaign, the employer's speech is constrained even more than it would be in the absence of such a campaign. Coercion or threats of reprisal may constitute unfair labor practices in any circumstance, but even milder forms of such behavior are prohibited during election campaigns. During the "critical period" of an election campaign – the time between the filing of the petition and the election – an employer's speech or behavior can constitute conduct interfering with the results of the election, even if that conduct does not rise to the level of an unfair labor practice. There is an acronym that describes generally the kinds of employer activities that are prohibited, either as unfair labor practices or conduct interfering with the results of the election, or both. That acronym is TIPS. Thus, an employer may not:

- Threaten,

- Interrogate,
- Promise, or
- Engage in Surveillance

The prohibitions against threatening and promising are reasonably self-explanatory. Interrogation means questioning an employee about his union or anti-union activities. Thus, while an employer may express an opinion about the merits of unionization or a particular union, he may not ask the employee to reveal his opinions or activities. Surveillance means spying, and it can be inferred when managers or supervisors are present even in the vicinity of a union meeting, for example. An employer wishing to avoid unfair labor practices and meritorious charges of conduct interfering with an election - which can result in remedies ranging from voiding the results of an election and rescheduling it to certifying the union notwithstanding an employee vote against the union - would be wise to take the position that the decision of employees as to whether or not to have a union is theirs to make. And while the employer can express its opinion, it must be careful to avoid the infringements on employee rights summarized by the acronym TIPS.

D. Duty to Bargain

Once a union has achieved recognition or certification as exclusive bargaining representative of employees in an appropriate unit, there is no guarantee that it will be able to negotiate a contract. But both the employer and the union have a duty to bargain in good faith over wages, hours, and terms and conditions of employment. The duty to bargain in good faith means negotiating with the sincere desire to reach agreement. Violation of the duty to bargain is an unfair labor practice.

Failure to bargain in good faith involves much more than simply refusing to meet, although that is prohibited, as well. Some examples of violations of the duty to bargain are the following:

1. Unilateral change. The employer cannot make changes in wages and conditions of employment during the pendency of collective bargaining negotiations without bargaining those changes with the union. For example, the employer cannot unilaterally raise wages, change normal working hours, or institute other changes in working conditions that deviate from the conditions that were in effect when the union was certified. Rather, the employer must maintain the status quo during collective bargaining.

2. Regressive bargaining. Neither the union nor the employer can "backtrack" in negotiations if the purpose of doing so is to thwart the goal of reaching agreement. That does not mean that the employer may never put a lower offer on the table; indeed, the tactic of placing a higher offer on the table with conditions (such as a time within which the offer must be accepted), then replacing it with a lower offer if the conditions are not met is a well known method of placing pressure on the other side to settle on terms acceptable to the offering party. Similarly, as a reflection of challenging economic times, many employers have found it necessary to withdraw an original wage offer or benefit package because its financial circumstances have changed since commencement of bargaining. This is not regressive bargaining. But it does mean that the progression in bargaining generally must be toward the other party's position, rather than away from it, and it also means that any regression in the party's position must be capable of surviving scrutiny lest it be deemed to be an attempt to frustrate, rather than advance, the bargaining process.

3. Bypassing the bargaining representative. The duty to bargain is with the representative of the party. Both employers and unions in the public sector have a tendency to forget that. The employer may not bypass the union and try to deal directly with the employees, or groups of them. Similarly, it is, or should be, an unfair labor practice for the union to bypass the representatives of management at the table in order to present their demands directly to the governing body of the jurisdiction.[9]

[9] For some reason, the rather rampant practice engaged in by some unions of approaching the city council or its members directly during the pendency of negotiations has not been the subject of much negative attention on the part of the ILRB, or similar boards in other states, for that matter. This may be due in part to the fact that union members are also city residents and constituents, so part of the approach may be chalked off in particular circumstances to the exercise of free speech. But that explanation does not address the problem created when it is not employees who approach the council or its members but the non-resident business representatives of the union. Perhaps a better explanation for the failure of the ILRB to address this situation is that it often works a *fait accompli*

4. "Boulwarism". This is a bargaining technique attributed to Leon Boulware, a labor relations executive with General Electric Company in the 1940's and '50's. In bargaining with company unions, Boulware devised the strategy of doing thorough research prior to bargaining, then making one fair, firm offer to the union. The union could accept the offer or reject it, but the company would not deviate from its offer unless the union could convince the company of some flaw or mistake in the offer. Then, if the union declined the offer, the company would engage in a massive publicity campaign among the employees, designed to convince them of the fairness of the offer. The union filed charges, the National Labor Relations Board upheld them, and the United States Supreme Court ultimately agreed with the union that the tactic was an unfair labor practice.

While neither party to the bargaining process is obligated to agree to any particular proposal or to make a concession, the overall tenor of bargaining must appear to be conducive to reaching agreement on a labor contract. If the conduct of either party, taken as a whole, is antithetical to that objective, it will be found to violate the law. Boulwarism, combining elements of unilateralism and bypassing the bargaining representative, is an extreme example of a failure to bargain in good faith.

E. Mandatory, Permissive, and Illegal Subjects of Bargaining

The employer's and union's duty to bargain is restricted to so-called "mandatory" subjects of bargaining. These are the subjects of bargaining that are generally encompassed by the phrase "wages, hours, and terms and conditions of employment". Such bargaining issues as wages and wage structures, health insurance benefits, sick leave, vacations, holidays, hours of work and overtime, leaves of absence, transfers, promotions to positions within the unit, discharge and discipline, employee residency requirements, and drug and alcohol testing policies are mandatory subjects of bargaining, in the sense that a party to the bargaining process must

– that is, the council is persuaded, and either directly implements the union's request or directs the city's management to do so. The result is that there is no one to complain, and therefore no basis or reason for the ILRB to act. It must be stressed, however, that elected officials are free to refuse to talk to the union or its employees other than through the jurisdiction's representative at the bargaining table.

bargain about any of these subjects and other mandatory subjects if requested to do so by the other party.

A second category of subjects of bargaining encompasses "permissive" subjects of bargaining. These are subjects over which the parties may, but are not required to, bargain. Included in this category are the subjects covered in Section 4 of the Act, the statutory Management Rights clause, which provides, in part, that:

> Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees.

Other permissive subjects are such items as health insurance for present retirees,[10] and transfers of employees to positions outside the bargaining unit, other than management-level promotional positions covered by the Fire Department Promotion Act. While these items are clearly permissive, there are other subjects which are not so readily classified as being either mandatory or permissive. One of those subjects relates to manning issues in fire departments. It is clear that the employer has the right to determine the number of employees it needs to perform a particular function; therefore, there is little doubt that the issues of total department manning and shift manning (the number of firefighters to be assigned per shift) are permissive in nature. But firefighters' unions have argued strenuously that rig manning – the number of firefighters assigned to a piece of fire apparatus – is a mandatory subject because of the safety considerations allegedly involved in determining minimum manning for a hook-and-ladder truck or an engine. Because of historical bargaining practices or union arguments, some firefighter contracts contain rig manning, or even shift manning, provisions. But the prevailing view is that, except for

[10] Health insurance for those who are already retired is to be distinguished from the subject of health insurance for present employees when they retire. The former is permissive; the latter is mandatory.

unusual circumstances in which the safety issue is clearly implicated, manning – whether departmental, shift, or rig – is a permissive subject, and many, if not most, departments have avoided the inclusion of manning provisions in their firefighter contracts. The police unions continue to lobby heavily for a legislative change to their rule while firefighters argue that the equipment requirements amount to minimum staffing requirements. The Labor Board is clearly leaning towards declaring that staffing levels are an absolute mandatory subject of bargaining for firefighters. Employers of firefighters and police should pay careful attention to this evolving issue. Where there is an overlap between the subject matter covered by the phrase "wages, hours, and terms and conditions of employment" and the subject matter covered by the inherent rights of management set forth in the statutory Management Rights clause, the ILRB has devised what it calls a "balancing test" to determine whether the adverse impact on the employer's operations from bargaining over a subject outweighs the beneficial impact to the employees and the bargaining process of determining the subject to be mandatorily bargainable. In most cases decided to date, the balance has been struck in favor of mandatory bargaining; but that does not mean that an employer should assume that, if a subject arguably falls both within the scope of mandatory bargaining and within the scope of inherent management rights, it is necessarily going to be found to be mandatorily bargainable. Rather, each situation has to be reviewed on its own merits, based upon the operative facts, to determine whether it involves a subject over which the employer is free to decline to bargain.

The final category of bargaining subjects is the illegal subjects. Those are the subjects that are removed by operation of law from the bargaining process. Not long after the statute was passed, the question of whether another statute removes a subject from the bargaining process by

operation of law came up in the context of a civil service system established pursuant to Illinois statute. When the union in that case demanded to bargain over its proposal that disciplinary actions be appealable to grievance arbitration rather than to the civil service board, the city refused to bargain. The Illinois Supreme Court found that the union's proposal was mandatorily bargainable, in part because the civil service law did not bind the city to follow the procedures set forth therein.

Whether the same result would be reached with respect to pensions is an open question. While many collective bargaining agreements contain supplemental retirement provisions, none has attempted to supersede the Illinois Pension Code in determining such things as eligibility for and level of benefits and required contributions. The argument against the bargainability of pension proposals conflicting with the Pension Code is that the pension laws for public employees constitute a legislative effort to establish a uniform pension scheme for public employees in the State of Illinois and that, therefore, the parties to a collective bargaining agreement are not free to opt out of the required provisions of the applicable pension law. But the Illinois courts have not been presented with a case challenging that argument, and so have not ruled on it.

In summary, the employer must bargain over mandatory subjects, may bargain over permissive subjects, and may not bargain over illegal subjects. But deciding whether a particular proposal falls within the scope of mandatory, or even permissive, bargaining can be a tricky process, requiring the exercise of experienced legal judgment.

F. Tough Choices For the Small Employer

A small employer without extensive bargaining experience may come to believe that it is at a serious disadvantage in entering the bargaining process. Any union with state or national affiliation generally sends in not only professional organizers, but also will provide a newly certified bargaining unit with a business agent and/or an attorney to bargain the contract. These individuals are not only experts in the field and practice of labor relations, but spend virtually all of their time bargaining contracts and litigating labor issues. It raises the question: as between the union and the small employer, who is David and who is Goliath?

The tough choice for a small employer, especially a small local governmental entity employer, is that it must work within its budget and available funds for professional services related to bargaining a labor contract. It is important to strike the right balance between the goal of obtaining competent representation at the bargaining table and the goal of not breaking the bank in paying for it. Compounding this dilemma is that many local governmental attorneys themselves are not expert in the field of labor law, requiring the small governmental employer to retain special counsel for the task.

Some small employers opt to attempt to bargain the collective bargaining agreement with little or no legal advice. While this saves the cost of attorney's fees at the bargaining table, it may be a classic case of "penny wise, pound foolish." Without a bargaining representative who has labor expertise, either at the table or in close contact with the bargaining team, the parties are not well matched and the risk of unwittingly entering into an unfavorable contract are significantly higher. See Chapter 7 for examples of traps in which unrepresented employers sometimes find themselves.

G. The Bargaining Team

Besides a labor expert, the bargaining team should be composed of management representatives who bring other expertise to the table. For instance, a member with intimate knowledge of the operations of the department whose employees form the bargaining unit is essential. Without such a person a contract which looks good on its face may be a nightmare when applied in the real world of the workplace. Additionally, some employers prefer to appoint their finance officer or human resource officer to the team for financial and benefit expertise.

Local governmental employers often struggle with the question of whether it is appropriate to have an elected official as part of the bargaining team. On the one hand, if an elected official has a special interest in labor negotiations, it is somewhat difficult to dissuade him or her from participating. On the other hand, such participation can be a very bad idea. The presence of an elected official at the table is the equivalent of having the "principal" present. It allows the union to pressure the governing board directly through that elected official and prevents the employer representative from creating a cooling off period in bargaining by adjourning to obtain direction from the elected officials.

Finally, the employer should identify a spokesperson for negotiations. It is best for the employer, as well as the union, to speak through one person to avoid confusion and chaos at the table. This selection, again, should be given some thought since the emotional aspect of bargaining cannot be ignored. Sometimes managers and officials find it hard to deal at arm's length with employees who until recently were "one happy family." It is human nature to find it difficult to separate your feelings about individuals from the issues in an adversarial situation, such as collective bargaining (and collective bargaining is adversarial!). Remember, also, that at

the bargaining table, all legitimate issues are negotiable. Neither party should assume that what was once status quo will remain so. Therefore, when you need to revisit employee insurance premium contributions in light of wage demands, for example, be prepared for an angry response.

It is often also true that future relations can be improved if the individual making the strong pro-employer arguments is a person who will not be involved in the day to day operations of the workplace. Especially for initial contracts, smaller government employers may wish to retain an attorney for this process. Even without an attorney at the negotiating sessions, it is wise to consult with a labor expert when formulating positions and responses, and especially when the parties are prepared to make final offers. This can sometimes be done by involving the attorney in one, any or all of three separate stages of negotiation. First, the experienced legal professional will help to analyze the union proposal and to craft a counter proposal. Second, the attorney, when not asked to sit in on all negotiating sessions, can be reached by phone or e-mail as negotiations progress and can be called in as a physical presence at "crunch time". Third, the attorney, now familiar with this specific negotiating history, can be used if occasional questions arise as the contract is implemented.

CHAPTER 6: BASIC CONTRACT PROVISIONS

A. Management Rights and No-Strike Clauses

It has been said that, from the employer's perspective, the ideal contract would consist of a management rights clause, a no-strike clause, and a zipper (complete agreement) clause. The objective of a management rights clause is to obtain a contractual agreement with the union as to those rights that are retained by the employer during the term of a contract. The objective of a no strike clause is to get the union's agreement that it will not strike during the term of the agreement. Such an agreement is valuable even for employee groups whose members – such as police and firefighters – are prohibited by law from striking, because some unions have taken the position that, whether or not they agree with the law, they are bound by their word. Sample management rights and no-strike clauses are included in an Appendix to this pamphlet.

B. The Zipper Clause

Zipper clauses used to have more value than they do now. A zipper clause recites that, in reaching the collective bargaining agreement, the union has had a full opportunity to bargain over all issues within the scope of mandatory bargaining and that, in consideration for the agreements entered into in the contract, it waives its right to bargain over any matter that was raised in bargaining and covered by the collective bargaining agreement and any matter that could have been raised in bargaining but is not covered by the collective bargaining agreement. The purpose of such a clause is to put an end to bargaining as of the date of execution of the agreement and to require that all disputes from that date until contract expiration be handled by means of contract administration, primarily by means of the grievance procedure.

Now, however, the ILRB has ruled that a waiver must be clear and explicit, and that such a general waiver cannot be relied upon to waive the employer's continuing duty to bargain

during the term of the agreement. Accordingly, the value of such clauses clearly has diminished. Many employers believe, however, that zipper clauses still have some value and continue to seek to attain or retain them in collective bargaining. A sample "entire agreement" clause is included in an Appendix to this pamphlet.

C. Grievance and Arbitration Procedures

By law, an Illinois public sector collective bargaining agreement must contain a grievance procedure, whereby the union and/or individual employees who believe that the employer has violated the collective bargaining agreement can file grievances and process them to progressively higher levels in the employer's management structure. Most grievance procedures culminate in binding arbitration, whereby the union can appeal the employer's denial of a grievance at the last step of the grievance procedure to a third-party neutral arbitrator selected by the parties to hear and decide the merits of the grievance. The statutes require that the process end in binding arbitration unless both parties agree otherwise; but in the event that the employer and the union agree to a procedure that does not end in binding arbitration, a law suit over the interpretation of a contract is still an alternative.

Grievance arbitration normally consists of a relatively formal hearing before the arbitrator, often transcribed by a court reporter, in which the parties present witnesses, introduce documentary evidence, and argue the merits of their cases. Closing arguments may be in the form of an oral argument at the close of the hearing or, if requested by one or both parties and directed by the arbitrator, a post-hearing brief filed with the arbitrator at a designated time following the presentation of evidence. Arbitration awards normally are in writing and are issued following the hearing or the submission of post-hearing briefs, whichever is later.

Labor arbitrators often are, but are not required to be, lawyers. Some are full-time arbitrators, while others perform arbitration and mediation services in addition to holding full-time or part-time positions, for example as college or university professors. An arbitrator's function is to serve as a neutral, third-party contract dispute resolution specialist and, in that capacity, to interpret the collective bargaining agreement and apply "the law of the shop"[11] to the resolution by arbitration decision of collective bargaining disputes between employers and unions and/or employees. A sample grievance and arbitration procedure is included in an Appendix to this book.

D. Other Collective Bargaining Agreement Provisions

Aside from a management rights clause, a no-strike clause, an entire agreement provision, and a grievance and arbitration procedure, most public sector collective bargaining agreements also contain at least the following provisions:[12]

- A preamble;
- A recognition clause;

[11] The "law of the shop" is a form of industrial relations common law that supplies a number of rules or understandings that are not specifically included in a written collective bargaining agreement. For example, it is part of the law of the shop that an employee is not free, except where the work is unreasonably dangerous, to refuse a work order but must (work now, grieve later). Another example of the operation of the law of the shop is the rule that, in discipline cases, it is the employer(s burden to prove that an employee was discharged or disciplined for (just cause(and, therefore, that the employer has the burden of going forward with the evidence. In non-discipline cases, called (contract interpretation) cases, the law of the shop says that the union has the burden of going forward and must present its case first.

[12] This listing is illustrative, and is by no means exhaustive. Agreements also contain such provisions as a fair representation provision (acknowledging the union(s) duty of fair representation to non-members in the bargaining unit and often including an objection procedure for handling challenges by employees to the obligation to pay union dues); provisions dealing with various kinds of compensation other than hourly pay or weekly, monthly, or yearly salary, including special assignment or certification pay provisions, education pay, out-of-rank or acting pay, shift differential, reporting pay, call-out pay, court pay (for police officers), and hazardous duty pay; provisions dealing with various kinds of fringe benefits other than health insurance, vacations, and holidays, such as supplemental retirement provisions, pay for unused sick leave, and tuition reimbursement; a shift selection provision; a military leave provision; a union rights or maintenance of benefits provision; a drug and alcohol testing provision; and a labor-management conferences provision.

- A dues checkoff provision;
- An hours of work and overtime provision;
- A wages provision;
- A seniority, layoff and recall provision;
- A health insurance provision;
- A vacations article;
- A holidays article;
- A jury duty provision;
- A sick leave provision;
- A leaves of absence provision;
- A job posting provision; and
- A termination provision.

The important thing to remember about all collective bargaining agreement provisions is that they contain terms of art and conventions that are very familiar to experienced labor negotiators and administrators of collective bargaining agreements, but that may not be understood or appreciated by inexperienced individuals perhaps getting their first taste of collective bargaining. Because all things are not as they appear to be, it is important for those representatives of small public employers who may be bargaining for the first time under the amended law to seek help in becoming acquainted with and participating in the process. This is especially true in first contract negotiations, where a mistake can haunt the employer for decades.

CHAPTER 7: BARGAINING TRAPS FOR THE UNWARY

Collective bargaining at its best, in game theory terms, is a non-zero sum game. That is, in the ideal bargaining situation, each side to the process concentrates on its own goals and objectives and does not make it a goal to prevent the other side from accomplishing its objectives. In fact, in an ideal circumstance, if the other side can accomplish its objectives while you are accomplishing yours, that only enhances the result. In that case one can reasonably expect each party to begin the post-negotiations contract administration period on a more harmonious note than otherwise would be the case. Sadly, this is an ideal not often achieved.

Focusing only on one's goals in collective bargaining is difficult. It is easy to become side-tracked by the temptation of trying to keep the other side from getting what it wants in some area. Of course, there will be times when the bargaining goals of the two sides are mutually exclusive. When that occurs, one must resist the other sides proposals and demands, although not because they represent gains to the other side, but because agreeing to them would frustrate one's own bargaining goals.

When goals conflict over a particular bargaining subject, it is well to remember that there may be many paths to success. Compromises are invited, and novel approaches rewarded. But, as with all proposals, you must be aware not only of how you envision the compromise or creative proposal working in practice, but how the other side envisions it. And before you set sail on uncharted waters, it is wise to be sure that you are not a modern-day Columbus, who by some accounts did not know where he was going when he left and did not know where he was when he got there.

One important pre-condition to successful collective bargaining is the right mind-set. One must embrace, or at least accept, the fact that the relationship between management and labor in the work place is going to be shaped to a large extent by the collective bargaining agreement between the parties. If one accepts the principles and practices of collective bargaining, without rancor or resentment, in the first place, it is much easier to participate successfully in the bargaining process. Active or even passive resistance to the process will only slow it down, and perhaps lead to such unpleasant side-effects as strikes or unfair labor practice charges.

But approaching the bargaining table with the proper mind-set is only the first step in the process. There are many traps for the enlightened, but unwary, employer. Remember, the union is approaching the bargaining process with objectives of making as many gains as possible for the union as an institution and for the employees as workers. It is not the union's role - and the employer should not expect it to be – to propose contract provisions that make it easier for the employer to operate or that keep costs down. Rather, those are among the bargaining objectives of a reasonable employer. By the same token, it is not the employer's role to advance union objectives, despite the fact that union objectives sometimes can also be employer objectives, albeit phrased or manifested differently by each side.[13] But a smart and experienced union representative can sometimes advance arguments at the bargaining table that cause the employer unwittingly to advance union objectives by allowing its attention to be drawn away from the employer's bargaining goals.

[13] For example, the union may seek wage increases in order to put more money into the pockets of the workers. The employer also may seek wage increases (although perhaps not of the same magnitude or distributed in the same way) in order to make it easier to attract and retain competent employees.

For the most part, such arguments are deceptively simple. They are couched in notions of fairness, equity, economy, or "what's sauce for the goose is sauce for the gander." But in listening to union arguments, it is well to remember that fairness is in the eye of the beholder; and if your negotiator is induced to accept union premises the result will be a pro-union contract. That is one reason why it is almost always important to present a written management counter proposal. It is essential, as a practical matter of human nature, to have proposals to drop, in return for the union withdrawing some demands which are less important to achieving goals..

Let's look at a few of the arguments often made during the negotiating process which may prove traps for the uninitiated or unwary:

1. "You don't need a management rights clause in the contract; the statute has one."

What's wrong here? Remember, the statutory management rights clause was never intended as a tool of contract management. It helps to define the metes and bounds of the duty to bargain. But you are not looking at duty to bargain issues here. Rather, you are attempting to lay out for contract administration purposes those items or areas that are within the exclusive province of management. Perhaps the worst mistake that a novice negotiator can make is to agree, by commission or omission, on some kind of co-management scheme. Such an agreement, active or tacit, violates the fundamental tenet of the collective bargaining agreement: *management acts and the union reacts*. You must, by the management rights clause and other provisions that deal with the management of the public enterprise, preserve management's right to manage.

2. "Let's put the job classification descriptions in the contract."

Remember "management acts, and the union reacts"? Putting job descriptions in the contract violates that precept, for you are negotiating and putting in the agreement a description of what the employees are to do. Assignment and direction of work is a management right. Although the bargaining unit will be described with reference to the job classifications that it covers, the content of the work performed by those classifications should be determined in the first instance by management. There may be areas of description or assignment to which the union can legitimately object – such as a job description that seems to invade the province of the work normally performed by the employees in another unit – but the union's recourse is to react to the descriptions issued by management, through the grievance procedure or, if necessary, by means of proceedings before the ILRB. Not only does the placing of job descriptions in the collective bargaining agreement constitute negotiating something that should be determined by management in the first instance, but the employer who agrees to such a proposal sooner or later finds himself in another dilemma – the descriptions can't be changed without the union's agreement, irrespective of changes in technology or the nature and scope of the work performed.

3. "Put the disciplinary rules and regulations in the contract."

This sounds fair. After all, if the employees are subject to discipline, they should know the actions and reasons for which they could be disciplined. But the most basic of management rights clauses says that the employer has the right to publish reasonable rules and regulations. So devise the rules and regulations, describe the conduct that could lead to discipline, and let the employees know. The collective bargaining agreement is not, and should not be, the only source of information about what is required of employees in the workplace. As noted with respect to

number 2, above, if you negotiate something that you have the independent right to do, then you not only are negotiating part of your rights away, but you are putting something in the contract that can't be changed without the union's consent. One thing we have learned about disciplinary rules and regulations: the mind of man (and woman) is capable of infinite variety. Invariably, something will occur in the workplace that no one thought of before as being a disciplinary offense; you need to be able to adjust to that by having a set of disciplinary rules that can be amended as needed.

4. "The city has a management rights clause; we should have a union rights clause."

That sounds fair, too, doesn't it? But the argument loses sight of one basic fact: the collective bargaining agreement as a whole is a union rights clause. We start with the premise that, before the advent of the union, the unfettered right to control operations, assign work, and direct the employees in the performance of the work belonged to management. A collective bargaining agreement, by definition, represents an erosion of management's rights, consisting of one or more steps in the progression from unilateralism to bilateralism. A management rights clause is a residual rights provision – everything that is not bargained away belongs to management. The same kind of clause describing alleged union rights necessarily leads to confusion and uncertainty in the administration of the agreement: does the residual issue in question fall into the province of management or the union? Accordingly, all derogations from management's rights should be specific, and the parties should avoid giving residual or non-specific rights to the union.

5. "We want to be sure that you don't change anything unilaterally, so let's put a past practices or maintenance of benefits clause in the contract."

Past practices clauses and maintenance of benefits clauses are variants of the non-specific union rights provisions discussed in number 4, above. A past practices clause purports to retain all past practices not specifically changed or eliminated by the collective bargaining agreement. But what are those practices? Can the union list them? If they can be listed, they can be dealt with specifically. If they can't be listed, then there is uncertainty in the future administration of the agreement, because management will not know until some future time what rights or privileges are being preserved as past practices.[14]

6. "If we don't meet the time deadline for filing or advancing a grievance, the grievance is considered settled on the basis of the City's last position; if you don't meet the time deadline for responding to a grievance at any step, the grievance is considered granted."

That sounds fair, as well, doesn't it? Most grievance procedures provide that the right to process a grievance to a higher step is lost if the employee or union fails to process it in a timely manner. So the union may propose what it will portray as an equal procedural rule. But equal it is not. In a grievance procedure, the union is the moving party, alleging a violation of the contract. It is up to the union to move the grievance in a timely fashion through the procedure; if it fails to do so, it loses its right to further contest its claim. The employer, on the other hand, is merely responding to the union's allegations; a failure to respond doesn't make those allegations true. Moreover, what does granting the grievance mean? Suppose a supervisor calls out an

[14] Many past practices are the product of what some might call lenient or considerate management and others might call lax administration. For example, a collective bargaining agreement may not provide for "wash-up time" before the usual quitting time. Yet, public works management may allow employees, when the work permits, to come to the public works garage before the normal quitting time to give them time to wash up before going home. A past practices or maintenance of benefits clause may convert such a privilege into an inalienable right that cannot be changed without negotiation with the union.

employee for overtime out of seniority order. Does granting the grievance mean that the employee who was passed over should get paid for the overtime missed even though he did not work it? Or should he simply be guaranteed the next overtime opportunity? The resulting dispute could create a grievance out of a grievance.

These are only a few of the traps for the unwary that may arise during the bargaining process. Experienced labor relations professionals know them and avoid them. Inexperienced negotiators fall into them, with the result that the jurisdiction's ability to administer the contract in the best interests of the citizens is compromised.

CHAPTER 8: CONTRACT ADMINISTRATION

A. Impasse Proceedings

Sometimes, despite best efforts, employers and unions find themselves at an impasse in negotiations.

B. Bargaining Impasses

It is not uncommon for negotiations to become "stalled" over difficult issues. As in the private sector, a union may have the right to strike when bargaining reaches a standstill, and neither party is able to make any movement toward agreement. However, because of the potential for great disruption that strikes can have on public services and safety, the IPLRA provides a number of mechanisms designed to avoid work stoppages

1. Voluntary Mediation/Fact Finding

Both mediation and fact finding are provided for in the IPLRA. Mediators are available from a Public Employees Mediation Roster provided by the ILRB to arbitrate disputes over the interpretation or application of the terms of a collective bargaining agreement. A fact finder is available from the same roster if, after a reasonable period of negotiation over the terms of the agreement, or upon expiration of an existing collective bargaining agreement, the parties have not been able to mutually resolve their dispute. While the parties generally must equally share the costs of mediation and fact finding, neither the results of mediation nor the recommendations or findings of the fact finder are binding on the municipality. If an exclusive representative of a bargaining unit requests a mediator for the purpose of the mediation or conciliation of a dispute between the municipality and the exclusive representative, as is required prior to a strike, either party may request the use of mediation services from the Federal Mediation and Conciliation

Service. If such a request is made, the other party must either join in the request or bear any additional cost of mediation services provided by another source.

2. Strikes

While one of the most significant aspects of the Act is that municipal employees have the right to strike, that right is limited. Full-time police officers, firefighters, paramedics and security officers are prohibited from striking. All other employees are permitted to strike only if: (1) the agreement, if any, between the parties has expired; (2) the employees are represented by an exclusive bargaining representative; (3) the parties have not mutually agreed to final and binding arbitration of disputed issues; (4) the union has requested mediation pursuant to Section 12 of the IPLRA; and (5) at least 5 days have elapsed after the union has given the employer a notice of intent to strike.

For employees permitted to strike, there is a process to prevent a strike which is about to occur or to end one in progress. That process is cumbersome and the likelihood of success is not encouraging. The employer must first determine that the strike "may" constitute clear and present danger to the health and safety of the public. If such danger exists, the employer may petition the ILRB to make an investigation and conduct a hearing. The ILRB must then find within 72 hours that there is a clear and present danger to the health and safety of the public. Once the ILRB so finds, the employer can petition the circuit court for an order to stop the strike or to set conditions and requirements for the union to avoid or remove any such clear and present danger. The court designates which employees are essential and whose services are necessary to avoid or remove the clear and present danger. Only these essential employees may be ordered to return to work under the conditions set by the court. Their return may be for a limited duration

and only extend to the protection of the public health and safety from the established clear and present danger. The Act provides for interest arbitration for employees who are ordered back to work from a strike by the court. This procedure is complicated and could be costly to the municipality.

3. Interest Arbitration

Section 14 of the Labor Act specifically prohibits police and firefighters from striking. However, the IPLRA does provide an alternative mechanism for the resolution of collective bargaining impasses involving these employees (as well as other types of employees who are ordered back to work from a strike). Effective January 1, 2010, the IPLRA is amended to expand interest arbitration rights to those bargaining units, regardless of the type of represented employee, which become certified after that date by the Labor Board, have 35 or fewer members of the bargaining unit and have been unable to reach an agreement on an initial contract after 90 days of bargaining. Interestingly, eligible bargaining units under this amendment, if not composed of police or firefighters, retain the right to strike in addition to the right to interest arbitration.

The right for these smaller groups to utilize the interest arbitration process after bargaining impasse represents a significant departure from the underlying philosophy of public sector labor relations that interest arbitration is the quid pro quo for the loss of the right to strike for those employees who provide public safety services for governmental entities. Unions have persuaded the state legislature that public sector employers maintain significant leverage in contract negotiations by "starving out" the union with delay tactics that extend negotiation of initial contracts for two to three years with the hopes that the employees will decertify during

that period of time. Additionally, this new Illinois legislation mirrors, in part, that which was proposed to federal legislators as part of the Employee Free Choice Act.

Certainly, public sector employers might acknowledge that more time is spent in the negotiation of initial contracts, if for no other reason than all contract provisions are new, as opposed to successor agreements where the parties traditionally bargain over only those additional provisions that they seek to add or language that calls for clarification or amendment. Rarely, though, is an initial contract bargained in 90 days or fewer. The new interest arbitration amendments to the Act may result in employers feeling greater pressure to concede on contract language to avoid lengthy and costly arbitration proceedings.

The IPLRA provides that the parties will submit issues in dispute to final and binding interest arbitration. The phrase "interest arbitration" is to be contrasted with "grievance arbitration" which relates to interpretations of existing contract language. "Interest arbitration" is used to fill what are essentially blank spaces in a contract where the parties are not able to come to any agreement on a term such as salary.

Under the IPLRA, there are fundamental differences between interest arbitration and grievance arbitration. Interest arbitration is the procedure for the final resolution of bargaining impasses and is mandated for those public employees who are not allowed to strike. In contrast, final and binding grievance arbitration is required by the IPLRA, unless the parties mutually agree otherwise, and is designed for the resolution of contract disputes. Interest arbitration is really the legislative substitute for the right to strike. Final and binding grievance arbitration is the required trade-off given by a jurisdiction when a labor organization agrees to include a no-strike clause in the contract.

"Interest arbitrators" become involved in the collective bargaining process when the parties reach an impasse in contract negotiations. A "grievance arbitrator" enters the picture only after the parties have failed to settle an employee's grievance over items such as a disciplinary action or complaint regarding a supervisor's interpretation of a contract provision, such as seniority rights. These are two very different forms of arbitration accompanied by distinct rules and procedures which require thorough preparation and planning by a public employer.

The procedures for the arbitration process are complex; if a municipality becomes involved in an interest arbitration proceeding, it should seek qualified legal counsel. It should be noted that the expenses of the interest arbitration proceeding will be borne equally by both the employer and the union. In the case of police officers and firefighters, the interest arbitration proceeding will be limited to a decision on issues of wages, hours, and conditions of employment. Specifically excluded will be such items as the type of equipment used, manning issues and the total number of employees employed by a department. But the Legislature has recently amended the IPLRA to remove residency requirements from the list of issues excluded from interest arbitration.

During the interest arbitration hearing, the municipality presents evidence to support its final offers to provide a basis for the arbitrator's award. The municipality will present data on factors such as comparability with similar work, ability to pay, the bargaining history between the parties, and the rate of inflation. There are few formal rules for conducting interest arbitration proceedings, and the IPLRA states that the technical rules of evidence do not apply. The IPLRA notes that the proceedings are to be informal; however, a verbatim record of the

proceedings is required to be made, with the arbitrator securing the necessary recording service. Additionally, the arbitration proceeding includes the administering of oaths, and the arbitration panel has the authority to subpoena the attendance of witnesses and the production of books, contracts and other documents that may be material in making a just decision. Any time before the arbitrator renders an award, the parties may interrupt the arbitration proceedings and continue negotiations.

The arbitration panel shall determine which issues are in dispute and whether they are economic or not. As to the economic issues, the arbitration panel must adopt the last offer of settlement of one of the parties, while non-economic issues may be decided without regard to the final position of the parties. The arbitration panel will render a written opinion, which shall be mailed and delivered to all parties and their representatives and to the ILRB. During the pendency of these proceedings, the parties may not change existing wages, hours or other conditions of employment without consent by both parties. The IPLRA also provides for the parties to use alternative forms of impasse resolution other than interest arbitration. However, it does not spell out what those alternative forms might be.

If, by a three-fifths majority of the duly elected and qualified members of the governing body of the municipality, the arbitrator's decision is rejected, the Act provides for supplemental proceedings, requiring that the parties return to arbitration and seek a supplemental decision or interpretation of the arbitrator's original decision. As a practical matter, this is an illusory right, because a rejected arbitration award results in the resubmission of the case for further proceedings to the same arbitrator who issued the original award. It is extremely unlikely that an arbitrator ever would reverse himself and decide anything differently just because his original

award is rejected. And, in fact, in the history of the statute, this has never happened, even though a number of awards have been rejected. In practice, the arbitrator always reinstates his original award. Moreover, the statute provides that the employer must pay all of the costs of the supplemental proceedings, including the union's attorney' fees. The rejection process is worse than futile, therefore; it is also costly.

APPENDIX

SAMPLE CONTRACT LANGUAGE

Management Rights

The Employer shall retain the sole right and authority to operate and direct the affairs of the Employer in all its various aspects, including but not limited to all rights and authority exercised by the Employer prior to the execution of this Agreement, except as modified in this Agreement. Such rights include, but are not limited to, the following: to plan, direct, control and determine all the operations and services of the Employer; to supervise and direct the working forces; to establish the qualifications for employment and to employ employees; to schedule and assign work; to establish work and productivity standards, and from time to time, to change those standards; to assign overtime; to determine the methods, means, organization and number of personnel by which operations are conducted; to determine whether goods or services are made or purchased; to make, alter and enforce reasonable rules, regulations, orders and policies; to evaluate employees; to discipline, suspend and discharge non-probationary employees for cause (probationary employees without cause); to change or eliminate existing methods, equipment or facilities; and to carry out the mission of the Employer; provided, however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.

Grievance Procedure

Section 1. Definition. A "grievance" is defined as a dispute or difference of opinion raised by an employee against the Employer involving an alleged violation of an express provision of this Agreement, except that any dispute or difference of opinion concerning a matter or issue which is subject to the jurisdiction of the Board of Fire and Police Commissioners shall not be considered a grievance under this Agreement.

Section 2. Procedure. The parties acknowledge that it is usually most desirable for an employee and his immediate supervisor to resolve problems through free and informal communications. If, however, the informal process does not resolve the matter, the grievance will be processed as follows:

STEP 1: Any employee who has a grievance shall submit the grievance in writing to the Department Head or his designee, specifically indicating that the matter is a grievance under this Agreement. The grievance shall contain a complete statement of the facts, the provision or provisions of this Agreement which are alleged to have been violated, and the relief requested. All grievances must be presented no later than five (5) business days from the date of the first occurrence of the matter giving rise to the grievance of within five (5) business days after the employee, though the

use of reasonable diligence, could have obtained knowledge of first occurrence of the event giving rise to the grievance. The Department Head or his designee shall render a written response to the grievant within five (5) business days after the grievance is presented.

STEP 2: If the grievance is not settled at Step 1 and the employee wishes to appeal the grievance to Step 2 of the grievance procedure, it shall be submitted in writing to the Mayor/Manager/Administrator or his designee(s) within five (5) business days after receipt of the Employer's answer at Step 1. The grievance shall specifically state the basis upon which the grievant believes the grievance was improperly denied at the previous step in the grievance procedure. The Mayor/Manager/Administrator or his designee(s) shall investigate the grievance and, in the course of such investigation, shall offer to discuss the grievance within five (5) business days with the grievant and an authorized representative of the Union at a time mutually agreeable to the parties. If a settlement is reached at this meeting, it shall be reduced to writing and signed by the Employer, the grievant and, if present, a Union representative. If no settlement of the grievance is reached, the Mayor/Manager/Administrator or his designee(s) shall provide a written answer to the grievant and the Union within five (5) business days following their meeting.

Section 3. Arbitration. If the grievance is not settled in Step 2 and the Union wishes to appeal the grievance from Step 2 of the grievance procedure, the Union may refer the grievance to arbitration, as described below, within fifteen (15) business days of receipt of the Employer's written answer as provided to the Union at Step 2:

(a) The parties shall attempt to agree upon an arbitrator within seven (7) business days after receipt of the notice of referral. In the event the parties are unable to agree upon the arbitrator within said seven (7) day period, the parties shall jointly request the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA) to submit a panel of five (5) arbitrators. Each party retains the right to reject one (1) panel in its entirety and request that a new panel be submitted. Each party also retains the right to request that any panel be composed only of members of the National Academy of Arbitrators. Both the Employer and the Union shall have the right to strike names from the panel alternatively, with the party first requesting arbitration having the obligation to strike the first name. The person remaining after each party has struck two names from the panel shall be the arbitrator.

(b) The arbitrator shall be notified of his/her selection and shall be requested to set a time and place for the hearing, subject to the availability of Employer and Union representatives.

(c) The Employer and the Union shall have the right to request the arbitrator to require the presence of witnesses or documents. The Employer and the Union retain the right to employ legal counsel.

(d) The arbitrator shall submit his/her decision in writing within thirty (30) calendar days following the close of the hearing or the submission of briefs by the parties, whichever is later.

(e) More than one grievance may be submitted to the same arbitrator by mutual agreement of the parties in writing.

(f) The fees and expenses of the arbitrator and the cost of a written transcript, if any, shall be divided equally between the Employer and the Union; provided, however, that each party shall be responsible for compensating its own representatives and witnesses.

Section 4. Limitations on Authority of Arbitrator. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of the Agreement. The arbitrator shall consider and decide only the question of fact as to whether there has been a violation, misinterpretation or misapplication of the specific provisions of the Agreement. The arbitrator shall be empowered to determine the issue raised by the grievance as submitted in writing at the Second Step. The arbitrator shall have no authority to make a decision on any issue not so submitted or raised. The arbitrator shall be without power to make any decision or award which is contrary to or inconsistent with, in any way, applicable laws, or of rules and regulations of administrative bodies that have the force and effect of law. The arbitrator shall not in any way limit or interfere with the powers, duties and responsibilities of the Village under law and applicable court decisions. Any decision or award of the arbitrator rendered within the limitations of this Section 4 shall be final and binding upon the Village, the Union and the employees covered by this Agreement.

Section 5. Time Limits. No grievance shall be entertained or processed unless it is submitted at Step 1 within five (5) business days after the first occurrence of the event giving rise to the grievance or within five (5) business days after the employee, through the use of reasonable diligence, could have obtained knowledge of the first occurrence of the event giving rise to the grievance. A "business day" is defined as a calendar day exclusive of Saturdays, Sundays or holidays.

If a grievance is not presented by the employee within the time limits set forth above, it shall be considered "waived" and may not be pursued further. If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Village's last answer. If the Village does not answer a grievance or an appeal thereof within the specified time limits, the aggrieved employee may elect to treat the grievance as denied at the step and immediately appeal the grievance to the

next step. The parties may, by mutual agreement, in writing, extend any of the time limits set forth in this Article.

Section 6. Miscellaneous. No member of the bargaining unit who is serving in an acting capacity shall have any authority to respond to a grievance being processed in accordance with the grievance procedure set forth in this Article. Moreover, no action, statement, agreement, settlement, or representation made by any member of the bargaining unit shall impose any obligation or duty or be considered to be authorized by or binding upon the Employer unless and until the Employer has agreed thereto in writing.

Zipper Clause

This Agreement, upon ratification, supersedes all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire agreement between the parties, and concludes collective bargaining for the term of the Agreement. The Employer and the Union, each voluntarily and unqualifiedly waives its right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered by this Agreement. In so agreeing, the parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.