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TRENDS IN COLLECTIVE BARGAINING

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on School Law

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Here we review court decisions published from October 2013 to the present that deal with litigation to which the Illinois Educational Labor Relations Board was a party. We focus primarily on Community Unit School District No. 5 v. Illinois Educational Labor Relations Board and American Federation of State, County and Municipal Employees, 2014 IL App (4th) 130294, 12 N.E. 3d 120 (4th Dist. 2014).

I. Community Unit School District No. 5 v. IELRB and AFSCME

Introduction

On June 5, 2014 the Fourth District Appellate Court in a 34 page Opinion reversed the decision of the IELRB, wherein the IELRB found the District committed unfair labor practices when it subcontracted with a private vendor, First Student, for transportation services. The unanimous court found that the IELRB's decision that the District had violated 14(a)(1), 14(a)(3), and 14(a)(5) of the Act was "clearly erroneous". A Petition for Leave to Appeal is pending.

The School District serves approximately 13,500 students in McLean and Woodford Counties in 25 different buildings. The District experienced increasing numbers of serious operational problems with its in-house transportation department, including difficulty in hiring, rampant absenteeism, late buses, missed stops and occasionally drop-off violations. As enrollment increased and new attendance centers were opened, state funding decreased. In October of 2011 the Superintendent received authority to spend $500,000 in emergency busing services to supplement the in-house operation.

Also, in October of 2011 a staff representative of AFSCME, which had just been certified as the exclusive bargaining representative for more the more than 200 bus drivers and bus monitors, sent the Board of Education a demand to bargain a new collective bargaining agreement. After some preliminary bargaining sessions, in December of 2011 counsel for Unit No. 5 informed AFSCME's representative that the School District was considering the possibility of outsourcing the entire transportation department. If implemented, outsourcing would lead to the termination of all 200 plus

members of the bargaining unit. Consequently, the stage was set for contentious bargaining and protracted litigation.

The District meticulously followed the dictates of section 10-22.34c of the School Code which permits school districts to enter into contracts with third parties "for non-instructional services currently performed by any employee or bargaining unit member or lay off those educational support personnel employees upon 90 days written notice to the affected employees". This section of the School Code provides the following safeguards:

(1) No outsource contract can be entered into before the term of an existing collective bargaining agreement has expired.

(2) Vendors must offer employment to qualified bargaining unit members.

(3) Vendors must offer comparable benefits.

(4) The school district must, utilizing detailed information required of bidders, make public a cost comparison.

(5) The school district must hold a public hearing on the question of outsourcing.

From December of 2011 through March of 2012 the parties continued to hold bargaining sessions while the District went through the process of bidding transportation services. After an unsuccessful attempt to solicit bids for a one year contract, on April 2, 2012, Unit 5 received bids from First Student and Durham for a three year contract. A few days later AFSCME presented its first economic proposal. The low bid submitted by First Student was estimated to save the School District $1.5 million over three years and the bargaining proposal submitted by AFSCME was estimated to cost the District approximately $2.5 million more over three years than what the cost would be if all wages and benefits of drivers and monitors remained unchanged.

Although AFSCME made some modifications to its initial economic proposal, in spite of repeated requests from the District, it refused to present its best offer and as of June 4, 2012, the cost difference between AFSCME's offer and outsourcing still approximated $4 million dollars. On June 5th the Board of Education unanimously adopted a resolution approving the outsourcing of transportation services to First Student. On July 11th the Board of Education adopted a resolution honorably dismissing all bus drivers and monitors.

Chronology of Litigation

(1) May 22, 2012, AFSCME filed unfair-labor charges alleging the Unit No. 5 violated the Act by deciding to contract out school bus services in retaliation against the bus drivers and bus monitors for choosing AFSCME as their representative and by failing to bargain in good faith.

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(2) June 15, 2012, the Executive Director of the IELRB issued a complaint against the District.

(3) June 25, 2012, the IELRB filed in the Circuit Court of McLean County to enjoin the District from effectuating its agreement with First Student to outsource transportation services. At trial, however, the IELRB changed its prayer for relief, asking only that the School District be enjoined from discharging its bus drivers and monitors pending the IELRB's decision on the unfair labor practice charges.

(4) July 18, 2012, the Circuit Court granted the preliminary injunction and denied the District's motion for a stay of the order.

(5) November 26, 2012, the Fourth District Court of Appeals affirmed the action of the Circuit Court declaring that the lower court had not abused its discretion and that the IELRB had raised a fair question of an unfair labor practice.

(6) January, 2013, the Administrative Law Judge appointed by the IELRB, having conducted a hearing in August and September of 2112, issued her recommended decision and order asserting that the School District violated sections 14(a)(1) and 14(a)(3) of the Act because it acted with anti-union animus when it subcontracted out transportation services and discharged the bargaining unit members. The ALJ also found that the School District violated sections 14(a)(1) and 14(a)(5) for having failed to bargain in good faith or to impasse regarding its decision to outsource.

(7) April 18, 2013, the IELRB adopted the ALJ's findings and affirmed the recommended decision and order. The IELRB ordered the District to rescind its June 2013 decision to enter into a contract with First Student and upon request from AFSCME to bargain in good faith.

(8) June 5, 2014, the Fourth District Court of Appeals reversed, for the reasons summarized below.

Court's Analysis

It is important to note that in reaching its decision the Court utilized the standard of review set forth in SPEED District 802 v. Warning, 242 Ill.2d 92, 351 Ill.Dec. 241, 950 N.E.2d 1069 (2011). In Speed the state Supreme Court declared that the clearly erroneous standard of review should be employed when reviewing a decision of the IELRB because the decision represents a mixed question of fact and law.

The IELRB found that the District discriminated against bargaining unit members by reason of them engaging in a protected activity. Or, more specifically, that the bus drivers and monitors were discharged because they had chosen AFSCME as their exclusive bargaining representative and AFSCME set out to protect and promote their interests. The Fourth District reasoned that in subscribing an anti-union animus to the School Board the IELRB relied too heavily upon the timing of the District's decision to

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outsource, which came within months of AFSCME's certification. The IELRB in its own decision in Lake Zurich had stated that timing of an action in not sufficient to establish a prima facie case warranting the issuance of an unfair labor practice complaint. Lake Zurich School District No. 95, 1 PERI 1031 (IELRB 1984). Furthermore, the Court declared that even if a prima facie case were established, the District had presented legitimate business reasons for the adverse employment action.

The ALJ and the IELRB maintained that the cost savings was not a legitimate excuse for the District's actions because it was not proffered until it received First Student's bid. The Court pointed out the obvious: the District could not have known the cost savings until it received the bid.

The ALJ and IELRB did find that the School District's operational concerns were a legitimate business reason to outsource. But, the ALJ and IELRB held that, because the School District's actions were "inherently destructive" of collective bargaining rights, the legitimate reason did not overcome the strong presumption that the School District acted improperly

The Court rejected the reliance of the ALJ and IELRB on the doctrine of "inherently destructive of employee rights". See Carmi Education Ass'n. IEA-NEA v. Carmi Community Unit School District 5, 6 PERI 1020 (IELRB 1990). The Court noted that the "inherently destructive" theory has not been adopted by Illinois courts in this type of case and if such a theory were permitted, every decision by an employer to subcontract work would be challenged and there would be no reason for any employer to explore outsourcing.

The Court arrived at "the definite and firm conviction that a mistake was committed by the IELRB" and that the "decision that the District committed an unfair labor practice under section 14(a)(3) of the Act was clearly erroneous."

With respect to the 14(a)(5) charge alleging that the District failed to bargain in good faith, the Court agreed with the ALJ and the IELRB that the decision to subcontract the transportation services was a mandatory subject of bargaining under analysis called for by Central City Education Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board, 149 Ill 496, 599 N.E.2d 892 (1992).

The Court appeared to find it disturbing that the ALJ referenced the Court's own decision in Service Employees International Local Union No. 316 in generally setting forth the law of good faith bargaining, but totally ignored the Court's pronouncement of the standard to be applied in the subcontracting context.

> "In the subcontracting context, the requirements for good-faith bargaining on the decision to subcontract are notice of the consideration of a subcontract, before it is finalized; meeting with the union to provide an opportunity to discuss and explain the decision; providing information to the union; and giving consideration to any counterproposals the union

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makes." Service Employees International Local Union No. 3216, 153 Ill.App 3d at 753, 505 NE.2d at 425.

The record was clear that the District complied with the stated standard.

In summary, the Court underscored that the District was not obligated to compromise, to make proposals that would be more costly than outsourcing. Indeed, the Court recognized that an employer's ability to outsource is part of the bargaining process and if the employer were required to compromise the IELRB would in effect be determining the substance of the bargaining agreement.

II. Board of Education of the City of Chicago v. IELRB, 2014 IL App (1st) 130285, 14 N.E.3d 1092 (1st Dist. 2014)

The Chicago Board of Education and the Chicago Teachers Union had a collective bargaining agreement with a term from 2007 to 2012. In 2010 the Board implemented a policy identifying probationary teachers who had been non-renewed twice or given unsatisfactory performance rating by placing a "do not hire" (DNH) designation in their personnel file. The Union filed grievances and demanded arbitration. The Board refused to arbitrate because it felt the subject matter was excluded from arbitration.

The collective bargaining agreement contained the following pertinent language:

i. Grievance was defined as "[a] complaint involving a work situation; a complaint that there has been a deviation from, misrepresentation of or misapplication of practice or policy; or a complaint that there has been a violation, misinterpretation or misapplication of any provisions of this Agreement."

ii. "No derogatory statement about a teacher or other bargaining unit member originating outside of the Chicago public school system shall be placed in the teacher's or other bargaining unit member's personnel file."

iii. "The Board 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 Board, standards of service, its overall budget, the organizational structure and selection of new employees and direction of employees…"

The court found there was no contractual agreement to arbitrate because the collective bargaining agreement expressly excluded matters of "inherent managerial policy," including the selection of new employees, from the bargaining process. The grievances were not a matter subject to mandatory bargaining because they involved a matter of managerial policy, not wages, hours or terms of employment. The collective bargaining agreement also provided that probationary teachers were only required to receive 30 days written notice of renewal, which was provided in this case. Forcing the Board to hire probationary teachers who it determined were not qualified to teach would

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also conflict with section 10-22.4 of the School Code, which authorizes a district to dismiss teachers it determines are not qualified to teach.

III. Board of Education of the City of Chicago v. IELRB, 2013 IL App (1st) 122447, 3 N.E.d 343 (1st Dist. 2013) (appeal denied)

A security officer was terminated on the grounds that he initiated a physical altercation with two students. The Union requested the disciplinary files of two students on the basis that the files were relevant to the arbitration, suggesting that the students had been disciplined for lying and had a history of violence. The Union stated that it was willing to accept redacted disciplinary files without the last names of the students and to take reasonable steps to assure confidentiality. The Board refused to turn over the records even after the arbitrator issued a subpoena. The Court reversed the IELRB's ruling that the School Board violated Sections 14(a)(5) and 14(a)(1) by refusing to produce the students' disciplinary records.

The Court found that by redacting the student's surnames or reference by initials of two specific students for the purpose of discovering individual disciplinary history does not render the records "masked". A masked record is one where identifying information has been deleted and is released for the purpose of research, statistical reporting or planning. The Court also noted that the Student Records Act does not create a blanket prohibition of the release of student records, rather such records may only be released under certain circumstances. Furthermore, the Union had the option of seeking an enforcement of an arbitral subpoena from the circuit court.

IV. Niles Township Support Staff, Local 1274, IFT/AFT, AFL-CIO v. Niles Township High School District No.219, 2014 IL App (1st) 131044-U, 2014 WL 2730703 (Ill.App.1st Dist) (1st Dist. June 13, 2014) (RULE 23 OPINION)

After the Union referred an employee's discharge to grievance arbitration, the employee filed a claim with the EEOC. The District moved to dismiss the grievance based upon language in the collective bargaining agreement that provided for a waiver of recourse to the grievance procedure if an employee files a lawsuit with a federal or state agency for discrimination. The arbitrator granted the motion. The IELRB determined that an employer's action to prevent a grievance from being arbitrated on the merits may violate Section 14(a)(1) of the Act and that it had the authority to determine the issue. While substantive arbitrability is a matter for the arbitrator to decide, the IELRB observed it is charged with interpreting the Act. The IELRB determined that the contractual provision at issue was permissible under the Act and that the arbitrator's award drew its essence from the collective bargaining agreement.

The Court held that in matters of arbitration the arbitrator is bound by the language of the collective bargaining agreement. In this case the collective bargaining agreement expressly created a condition precedent to arbitration in that the grievant cannot pursue two different remedies. By failing to withdraw her EEOC claim, the grievant elected not to participate in arbitration.

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V. Board of Education of Peoria School District No.150 v. Peoria Federation of Support Staff, Security/Policeman's Benevolent and Protective Association Unit No. 114, 998 N.E. 2d 36 (2013)

The Court declared Public Act 96-1257 to be unconstitutional as special legislation. In doing so the Court determined that the School District had the right to bring a declaratory judgment action, without exhausting administrative remedies, regarding questions of constitutionality and jurisdiction of an administrative agency. The legislation would have had the effect of removing the relationship between the School District and the bargaining unit from the province of the IELRA to that of the IPLRA. Consequently, the Union would upon reaching impasse during negotiations have had recourse to interest arbitration.

VI. International Union of Operating Engineers, Local 399 v. IELRB, 2013 WL 587456 (1st Dist. October 30, 2013)

In October of 2010 Western Illinois University reclassified six maintenance workers who had been members of a bargaining unit and subject to the collective bargaining agreement between the University and the Operating Engineers. Upon reclassification the employees were removed from the bargaining unit and the University applied to them the same terms of employment that applied to other unrepresented prevailing rate employees. In December of 2010 the IELRB issued an order of certification adding the employees to the bargaining unit. In February the Union asked the University to apply the terms of the existing collective bargaining agreement to the newly classified employees. The University denied the request, taking the position that it must maintain the status quo pending bargaining over the terms and conditions of employment for the reclassified employees. The Union filed a charge under Sections 14(a)(1) and 14(a)(5) of the Act.

The IELRB dismissed the complaint. The Court affirmed the decision of the IELRB, holding that the University was required to maintain the status quo regarding wages, hours and other mandatory terms of employment until the parties could negotiate the terms for the reclassified employees.

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