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Union Dues in the Public Sector: Legislative Changes and Legal Challenges

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ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

Volume 30 Issue 2 – Spring 2013

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RECENT DEVELOPMENTS

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

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UNION DUES IN THE PUBLIC SECTOR: LEGISLATIVE CHANGES AND LEGAL CHALLENGES

By Ann C. Hodges

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I. Introduction

The economic crisis that began in 2008 led many states and localities to look for ways to reduce labor costs, which form a substantial portion of government budgets. Some state legislatures focused on collective bargaining laws, with Wisconsin being the most high profile example. Along with the restrictions on bargaining,^[1] a number of states moved to limit the collection of union dues. The limitations were not across the board, but primarily directed at either political expenditures of unions or at particular unions, most commonly education unions. Not surprisingly, the laws enacted were immediately subjected to legal challenge since

unions, like every other organization, depend on finances to operate. This article will review the newly enacted legislation relating to union dues, the resulting legal challenges, and the law on which they are based. It will also highlight countervailing trends in some states and discuss the Supreme Court's 2012 decision in *Knox v. Service Employees International Union Local 1000*^[2] which portends additional possible restrictions on unions' ability to collect dues. The article will end with an analysis of why the legislative focus on union dues, which have virtually no direct impact on government budgets, and a discussion of the implications of these developments for the future. This is an area of law that is in flux and bears watching, as it will impact the survival of unions and stable labor relations.^[3]

II. The Legal Background

Litigation over union dues is ubiquitous, in part because of the role played by the Right to Work Legal Defense Foundation, which has an express purpose of litigating issues relating to union dues in order to prevent unions from requiring employees to pay them.^[4] A series of Supreme Court cases have set the parameters of the law. The First Amendment free speech provisions and the Fourteenth Amendment Equal Protection clause have formed the basis of most of the challenges.

The First Amendment limits the ability of unions to collect dues from objecting employees. Unions may require payments from employees who are not voluntary members of the union only in states that authorize unions to charge the costs of representation to all employees that they are required to represent. These states either require payment by statute or expressly permit unions and employers to negotiate agreements mandating payment. The purposes for which these fair share or agency fees can be used are limited by the First Amendment to activities related to collective bargaining; they may not be spent on "ideological activities unrelated to collective bargaining."^[5] Objectors can prevent the use of their fees for these nonchargeable expenditures and have the right to challenge the union's determination as to which expenditures are chargeable.^[6] Further, states may constitutionally prevent unions from using agency fees of nonmembers for political purposes without their consent.^[7]

The Supreme Court has also addressed First Amendment and Equal Protection challenges to state law limits on payroll deduction of dues and agency fees. Such dues checkoffs make it much easier for the union to collect dues and fees. In *Ysursa v. Pocatello Education Association*, the Court rejected a First Amendment challenge to Idaho's law barring deduction of employees' dues used for political purposes, stating that the law merely declined to assist in promoting speech and did not actively abridge the employees' freedom of speech.^[8] As a result, the state

need only show a rational basis for its decision, and the desire to avoid entanglement in partisan politics satisfied that standard.^[9] That the law might reduce funds available to the union was of no moment in the absence of a direct abridgement of speech.^[10]

In *City of Charlotte v. Local 660, International Association of Firefighters*, the Supreme Court upheld the city's refusal to deduct union dues despite the fact that it granted deduction requests for other purposes.^[11] The Court held that the city's established standards for determining which dues deduction requests it would grant met the rational basis test.^[12]

The city has determined that it will provide withholding only for programs of general interest in which all city or departmental employees can, without more, participate. Employees can participate in the union checkoff only if they join an outside organization the union. Thus, Local 660 does not fit the category of groups for which the city will withhold. We cannot say that denying withholding to associational or special interest groups that claim only some departmental employees as members and that employees must first join before being eligible to participate in the checkoff marks an arbitrary line so devoid of reason as to violate the Equal Protection Clause. Rather, this division seems a reasonable method for providing the benefit of withholding to employees in their status as employees, while limiting the number of instances of withholding and the financial and administrative burdens attendant thereon.^[13]

Ysursa and *City of Charlotte* indicate that complete bans on dues deduction, whether for political purposes or generally, are likely to survive legal challenge. Yet if the employer distinguishes among organizations in application of its dues policy, it must at least have a rational basis for such distinctions. Additionally, while the government may freely decline to assist or fund citizen speech, it may not do so for reasons based on viewpoint.^[14] Dues deduction bans that apply to some groups of employees and organizations and not others are vulnerable to legal challenge.^[15]

Applying these principles, lower courts have upheld policies that limit payroll deduction to unions that are majority representatives as justified by goals of labor peace and stability.^[16] For similar reasons, courts have upheld numerosity requirements that limit payroll deduction to unions with larger memberships.^[17] In *South Carolina Education Ass'n v. Campbell*, the Fourth Circuit upheld a law which barred dues deductions for all membership organizations except one open to all state employees.^[18] The court recognized several rational bases for the limit, including the administrative and financial burdens of deducting dues for every requesting organization and fostering healthy employment relations with the state's employees through the organization open to all.^[19] Where termination of dues checkoff is in retaliation for the exercise of speech and associational rights, however, it may violate the First Amendment, although the

employer need not provide the checkoff in the first instance.^[20] With this background, the article will next look at the limitations enacted in 2011 and 2012.

III. Dues Limitations of 2011 and 2012

With the revolutionary changes in public sector bargaining laws in recent years came changes in dues laws as well. Both Alabama and Arizona enacted limitations on dues deductions for political purposes.^[21] Wisconsin eliminated fair share and payroll deduction of dues for all except public safety employees.^[22] Michigan and North Carolina eliminated payroll deduction for education employees.^[23] Many other states proposed similar limitations.^[24] In addition, the enactment of right to work legislation will bar negotiation of fair share agreements in Indiana and Michigan.^[25]

The payroll deduction limitations in Alabama, Arizona, Michigan, North Carolina and Wisconsin were all enjoined on constitutional grounds. One of the Wisconsin cases was recently reversed by the Seventh Circuit, and the Sixth Circuit just reversed the Michigan case.^[26] These decisions and the specifics of the laws enjoined will be discussed below.

1. Deductions for Political Purposes

The Alabama law limits public employee payroll deductions for political activity or for membership dues for organizations that use such dues for political activity.^[27] This prohibition appears narrower than a total ban, but in effect may discourage all dues deductions because of criminal sanctions imposed for violation of the law and the inability of individual employees to control the use of their dues. The Alabama law also requires the membership organizations to certify and prove each year that none of the membership dues were spent on political activity. Failure to do so or false submission would terminate the organization's ability to obtain dues deduction.

The Alabama law was enjoined based on a First Amendment challenge in *Alabama Education Association v. Bentley*,^[28] which found the statute overbroad and vague. The Eleventh Circuit narrowed the injunction, however, allowing the law to take effect so long as it applied only to dues deductions for electioneering activities, certifying to the Alabama Supreme Court questions about the scope of the statute.^[29] Subsequently, the district court dismissed the plaintiffs' equal protection and viewpoint discrimination claims but declined to dismiss the claims of retaliation for constitutionally protected speech, which are currently in the discovery process.^[30]

The Arizona law requires organizations accepting dues through payroll deduction to certify that none of the dues are used for political purposes or to specify the percentage used for political purposes, with a substantial fine if the predicted percentage is exceeded.^[31] It also requires a special written authorization from employees, renewed annually, to have deducted dues used for political purposes. The law exempts charitable organizations, employee benefits organizations, and organizations of public safety officers from its provisions. The Arizona law was preliminarily, and then permanently, enjoined on First Amendment grounds because it was not uniformly applied to unions and other organizations that could use funds for political purposes and therefore, was not viewpoint neutral.^[32]

2. Deductions of Full Dues for Certain Unions

Legislatures in Michigan, North Carolina and Wisconsin banned deduction of all dues for identified unions, with Wisconsin also eliminating fair share agreements. In Michigan and North Carolina, the ban applied only to education unions, while in Wisconsin, it applied to general employee unions, but not public safety employee unions, which were defined in the statute.^[33] The District Court for the Eastern District of Michigan enjoined the legislation from taking effect, concluding that the union plaintiffs were likely to succeed on the merits of both their Equal Protection and First Amendment claims.^[34] The court found no rational basis for the legislation, suggesting that it appeared to be directed at limiting the power and speech of a politically unpopular group based on viewpoint. The Sixth Circuit Court of Appeals denied the defendants' motion for a stay of the district court's injunction but subsequently reversed the district court's decision, finding no viewpoint discrimination.^[35] The North Carolina Superior Court issued a temporary restraining order, and later preliminary and permanent injunctions, preventing the legislation from taking effect on both procedural and substantive constitutional grounds, the latter retaliatory viewpoint discrimination.^[36]

The legal path of the Wisconsin statute is more complex. Lawsuits were filed in both state and federal court. The Wisconsin Supreme Court rejected a procedural challenge to the statute based on the state constitution,^[37] while the federal district court and a state trial court both found the dues deduction provisions of the statute unconstitutional based on the unjustifiable distinction between general and public safety unions.^[38] The federal district court upheld the limitation of fair share provisions to public safety employees while the state trial court found the entire law unconstitutional in one case. The decision of the federal district court was recently reversed by the Seventh Circuit Court of Appeals, which upheld the statute in its entirety.^[39]

3. Legislative Patterns

There is an unmistakable pattern in these legislative actions which led to initial court victories for unions challenging their constitutionality. Most of the laws apply to some but not all unions, burdening the speech of the disfavored organizations. Most of the laws were enacted using surreptitious and unusual, and sometimes improper, legislative tactics. Additionally, most targeted particular unions that had recently engaged in political activities in opposition to proponents of the legislation. And finally, in most cases, leaders of the legislative body made public statements suggesting political reasons for the legislation. These common elements, which will be discussed in more detail below, supported the argument that the motivation for the dues deduction bans was either suppression of certain political views or retaliation for political activity or both.

Except for the Alabama statute, the laws target some, but not all unions. The Arizona and Wisconsin bills except public safety unions from the ban, while Michigan and North Carolina barred deductions only for education unions. In North Carolina, only the North Carolina Association of Educators was affected, because the authorizing legislation permitted deductions only for unions with a specified level of membership. This distinction between unions alone led the Arizona court to enjoin enforcement of the statute.^[40]

A brief description of the enactment of the legislation in the other four states will demonstrate the remainder of the legislative pattern. In Alabama, the court allowed the claim of retaliatory viewpoint discrimination to proceed, noting that the plaintiff, Alabama Education Association, had repeatedly clashed with the Governor on political issues and then subsequently supported an opponent to his chosen successor in the Republican primary.^[41] The Governor announced that the organization should stay out of the primary and two days later the state comptroller decided to stop the longstanding practice of making payroll deductions for political action committees, a decision for which the Governor took credit. After the election, which resulted in a Republican sweep of the legislature and governorship, the legislation at issue, which codified the practice instituted by the comptroller, was enacted.

In Michigan, the legislation had lain dormant for months.^[42] It was resurrected and passed using a suspension of rules in both chambers within hours of the union's announcement of a political campaign to obtain a constitutional amendment protecting collective bargaining.^[43] According to the complaint, the decision to seek the constitutional amendment followed a series of legislative enactments curbing collective bargaining rights and reducing the benefits of school

employees, which triggered a political response by the union, including a recall effort directed at the primary sponsor of the legislation.^[44] The complaint also quotes the Speaker of the House stating that the union has “declared war” by promoting recalls and the Senate Majority Leader as saying “[t]he teachers union specifically the Michigan Education Association have lost their (sic) way and public school employees should no longer be forced to join them.”^[45]

The court enjoined the legislation, finding the action was likely to succeed on the merits because the legislation had no rational basis; instead it appeared to be motivated by a desire to limit the political power of an unpopular group by limiting their ability to speak. The court rejected the asserted cost rationale for the law, noting that the legislature had found the cost was negligible.^[46] In these days of computer payroll systems, the cost of adding deductions is far less than in earlier times and, as the Michigan court recognized, may no longer be sufficient to justify limitations. The court of appeals reversed, over a strong dissent, finding no likelihood of success on the merits. The court found no viewpoint discrimination since the legislation was directed at school employers not unions, and the deduction process was neither speech nor a nonpublic forum.^[47]

The North Carolina legislation followed a path similar to that of Michigan. Despite numerous legislative sessions and a Senate override vote, the House of Representatives failed for months to consider overriding the Governor’s veto of the legislation, which was scheduled to take effect July 1, 2011.^[48] Then in January 2012, after a late night veto session called for the sole purpose of considering another vetoed bill, the House adjourned and reconvened to override the Governor’s veto on the dues deduction bill at 12:45 a.m.^[49] The Speaker of the House was quoted as stating that the legislation was prompted by the Association’s mailings targeting Democrats who had voted with Republicans on the state budget, and he subsequently acknowledged that the organization’s politics were a factor in the legislation.^[50] As in the case of Michigan, these statements reflect the strategic timing of the legislation, in direct response to political activity by the Association. The permanent injunction was based on “retaliatory viewpoint discrimination.”^[51]

Finally, the highly publicized Wisconsin legislation reveals a similar pattern. It was peculiarly structured using unprecedented classifications that targeted unions which did not support the governor’s election, while preserving dues deduction for unions that supported the Governor.^[52] Statements by State Senate Majority Leader Scott Fitzgerald were even clearer than those in Michigan and North Carolina regarding the intent to suppress political views. Fitzgerald stated,

If we win this battle [over the passage of the Act], and the money is not there under the auspices of the unions, certainly what you're going to find is President Obama is going to have a . . . much more difficult time getting elected and winning the state of Wisconsin.^[53]

As in Michigan and North Carolina, quick votes and limited opportunities for public input at hearings characterized the legislative process. Initial efforts to pass the legislation surfaced quickly and surprised advocates, resulting in the escape of the Democratic legislators to Illinois to avoid passage.^[54] The actual passage involved parliamentary maneuvers that were challenged as violative of the Open Meetings Law and state constitutional provisions requiring open hearings.^[55]

There were several legal challenges to the law. The federal district court, analyzing the equal protection claim, found that there was no rational basis for the differential treatment of general unions and public safety unions with respect to dues deduction, rejecting as unpersuasive the rationale of preventing strikes by public safety employees.^[56] The court noted that the law allowed public safety unions to collect fair share fees from objecting employees, while barring general unions from using payroll deduction to collect fees from voluntary members, suggesting that this result seemed particularly unlikely to further the goal of deterring strikes among public safety employees.^[57] Further, the court found that the only apparent rationale for the distinction among unions was to suppress the speech of the general unions; consequently, the law violated the First Amendment.^[58] The court did not find that the limitations on collective bargaining, which included a bar to negotiating fair share agreements, violated the constitution.^[59] The court found fear of public safety strikes a more persuasive justification for this part of the law.^[60] By way of contrast, the Dane County Circuit Court found the entire statute unconstitutional on both First Amendment and Equal Protection grounds because the distinctions between unions burdened the speech and association rights of some employees, but not others, without adequate justification.^[61]

The Seventh Circuit panel rejected the analysis of the lower court on the dues issue, upholding the entire law.^[62] The majority opinion found that dues deduction is a subsidy of speech and, thus, differential treatment of speakers is permissible unless the classification on the basis of speaker identity is inherently based on viewpoint.^[63] The court concluded there was no reason to assume that different unions have different viewpoints.^[64] Neither the disproportionate impact on groups with a particular view (Governor Walker's opponents), nor the expressed political purpose of one member of the legislature established a motive of viewpoint discrimination. Having found no viewpoint discrimination, the court then applied a rational basis test to the entire statute and concluded that the interest in labor peace among essential

employees was rational even if the classifications may have been imperfectly suited to that purpose.^[65] It refused to probe the motivations of the legislature and, indeed, suggested that politically motivated legislation was a reality of the democratic system.^[66]

Judge Hamilton dissented as to the finding regarding the dues deduction, while agreeing that the “flimsy” rationale of the state was sufficient for the “deferential rational basis” review of the remainder of the statute.^[67] Judge Hamilton concluded that once the state offered dues deduction it was not just a subsidy of speech but, instead, the dues deduction system became a nonpublic forum, which had to be viewpoint neutral.^[68] Judge Hamilton, like the district court but unlike the majority, was willing to look behind the facial viewpoint neutrality.^[69] Three factors convinced Judge Hamilton that the law was not viewpoint neutral. First, Judge Hamilton found a lack of fit between the purpose of labor peace and the classification, resulting in the protection of dues deduction for unions that endorsed Walker and denial to those that did not.^[70] For example, corrections officers, Capitol Police and the University of Wisconsin Police, who have important public safety responsibilities, were considered general employees, while the Motor Vehicle Inspectors, whose association endorsed Governor Walker, were considered public safety employees whose strike would endanger the public.^[71] Relatedly, and for the same reason, Judge Hamilton found the state’s justifications for the classification weak, since a strike by corrections officers would be far more damaging than a strike by Motor Vehicle Inspectors.^[72] Finally, the Fitzgerald statement revealing a political purpose was the third factor that persuaded Judge Hamilton that the ostensible neutrality masked a motive of viewpoint suppression.^[73]

The Seventh Circuit’s disposition is not the final word on the Wisconsin legislation as litigation in the state courts^[74] and before the Wisconsin Employment Relations Commission is ongoing. If the rationale of the panel majority is accepted in other jurisdictions, however, many, if not all, recent dues limitations could be upheld as constitutional.^[75] Before turning to the future, however, a brief review of other legislation relating to dues is helpful.

IV. Right to Work Laws

Legislation regarding dues is not limited to bans or partial bans on dues deduction or elimination of fair share legislation. Both Indiana and Michigan adopted right to work laws in the last year, which prohibit public and private employee unions from negotiating fair share or agency shop agreements.^[76] Like the dues deduction and fair share legislation discussed above, these laws restrict the ability of unions to fund their activities because unions are still required by law to represent all employees in their bargaining units where collective bargaining legislation

exists. A constitutional challenge to the Indiana law was recently rejected,^[77] while a challenge to the Michigan law is pending.^[78]

V. State Actions Favoring Union Dues Collection

Not all recent state actions regarding union dues have imposed restrictions on unions, however. California voters rejected a 2012 ballot referendum to ban payroll deduction of political contributions.^[79] While applying to both corporations and unions, it was widely agreed that unions would suffer far more if the referendum passed because they rely far more heavily on payroll deduction for political funding than businesses.^[80] In 2011, Maryland state employees began paying fair share fees for the first time under a law enacted in 2009.^[81] New Hampshire has twice rejected proposals to enact a right to work law.^[82] In addition, other state legislatures have entertained proposals to require fair share or payroll deduction of dues.^[83]

This review of the recent legislation and the cases challenging these new laws provides clues as to the reasons for their passage. We turn to this in the next section.

VI. Why Union Dues?

One might ask why union dues have drawn such attention in recent years. While critics have branded collection of union dues as a self-interested grab for power and money,^[84] the simple truth is that unions, like any other organization, cannot accomplish their purpose without resources. The sophistication of employers, the complexity of benefit programs such as pension and health insurance plans, the size and intricacy of governmental budgets, and the powerful anti-tax and anti-government lobbies, among other things, require a sophisticated and powerful union to accomplish the goals and protect the interests of public employees.^[85] Labor unions have limited ability to raise funds from sources other than their members, or where fair share applies, from all employees they represent. Accordingly, dues are necessary to permit the organization to continue to operate.

Payroll deduction is important because it provides an effective mechanism for dues collection that requires only a single authorization from the employee. Once an employee authorizes payroll deduction, an employer deducts dues each pay period and remits them to the union. In the absence of payroll deduction, unions must establish independent mechanisms for dues collection, and no other method is as effective as payroll deduction. Data demonstrates that even where membership is already voluntary, elimination of payroll deduction can result in substantial losses in dues payment and membership.^[86] The union must then expend resources on organization

and dues collection that might otherwise be spent on activities that directly benefit the bargaining unit.

Thus, union dues are important to fund both the union's representational and political activities. While opponents often object to the political activity of unions, in the public sector union political activity can directly impact the terms and conditions of employment of the employees the union represents.^[87] For example, increased government funding makes more money available for government employees' wages and benefits or additional staffing to reduce their workload. Additionally, political action can directly impact the working conditions of employees. Longer school days and larger classes affect teacher workloads, as does the number of police officers assigned to a shift or the number of firefighters to a truck. Yet it is precisely the power to influence such decisions that leads to opposition to public sector unions.

Opponents of unions in general and of public sector bargaining in particular see the funding limitations created by the economic crisis as an opportunity to limit the power of public sector unions. The Right to Work Committee and the National Right to Work Legal Defense Foundation have long been active in this role in both the public and private sectors, but in recent years they have been joined by conservative groups arguing that the power of public sector unions is detrimental to the public interest. When the economic storm hit, devastating state and local government budgets, these conservative groups seized the opportunity to push for legislation limiting bargaining and dues collection. Model legislation developed by the American Legislative Exchange Council (ALEC) and the policy papers and proposals of other conservative think tank organizations reveal the goal of the elimination of mandatory collective bargaining, fair share, and payroll deduction of union dues.^[88] Additionally, political rhetoric and research from conservative organizations and politicians have focused heavily on teachers and their unions as impediments to education reform.^[89] These conservative groups frequently cite the size, power, and political spending of the National Education Association, the largest union in the country,^[90] as an obstacle to educational change.^[91] Finally, there is the pure political reality that unions lean heavily Democratic and any impairment of their ability to collect funds benefits Republican and conservative causes.^[92] Given these facts, along with Republican successes in state level elections in 2010, the emergence of strikingly similar legislative campaigns directed at union dues, particularly of the teachers' unions, is not surprising.^[93] Having reviewed the current status of the law, and the reasons for the importance of the issue to both unions and their opponents, we look next to what the future holds.

VII. The Future

The legal battles over existing legislation are likely to continue. It seems unlikely, however, that the union plaintiffs will petition for U.S. Supreme Court review of any losing decision, although the defendants well might. Unions have been largely unsuccessful in the Supreme Court in recent dues cases and the rhetoric from some justices suggests an inclination to restrict dues collection even further.^[94] Last term, in *Knox v. Service Employees International Union, Local 1000*, the Court rejected the union's argument that it did not need to send an additional notice to members regarding a mid-year special assessment, providing them the opportunity to object to any political spending included.^[95] The Court also reached out to decide an issue neither briefed nor argued by the parties.^[96] The Court determined that the union could not charge objectors the percentage of the assessment that represented chargeable expenses from the previous year, even though this prevented the union from collecting the full cost of representation.^[97] Even more striking, the Court ruled that nonmembers could not be charged the assessment at all unless they opted in, instead of applying the opt out rule used in all prior cases.^[98] This was a position that was not even advocated by the petitioners.^[99] The majority opinion extensively discussed and critiqued longstanding precedent, under which unions were allowed to charge nonmembers the cost of representation unless the employees opted out of the charges.^[100] The Court did not overrule these decisions, however.^[101] While the *Knox* decision has been criticized as at odds with other First Amendment cases such as *Citizens United*,^[102] the Court's disposition in *Knox* may foreshadow a future Court decision that limits the ability of a union to charge nonmembers the cost of representation absent the nonmember's consent.

Depending on the political winds, additional legislation may impair or assist unions in their ability to collect dues from their members and other employees that they represent. Although the recent legislation discussed above may be vulnerable to legal attack because of the structure and circumstances surrounding passage, it is clear from earlier cases that bans on payroll deduction and fair share can be structured to meet constitutional requirements, particularly if legislators are willing to ban deductions for all unions. Unions might be well-served to invest in alternative methods of dues collection such as automatic credit card charges or bank drafts, which are relatively efficient and require a reduced expenditure of union resources. Employees can terminate these deductions more easily than employer-based deductions, however, requiring the union to engage in continual marketing to convince employees of the value of their union membership. While this too requires investment of funds, such campaigning is essential to union survival and effective employee representation in the current political climate, where affluent

union opponents spend massive sums of money to convince employees that unions are not acting in their best interests.

The future of unions and collective bargaining is closely tied to the ability of unions to maintain their funding. Collective bargaining has predominated historically in the United States as a vehicle for employee voice and as an instrument of limiting income inequality.^[103] In addition, in the public sector, union lobbying can persuade legislators to fund important government initiatives, such as those relating to education and law enforcement. Collective bargaining also has a role to play in times of crisis and may lead to creative solutions to governmental challenges. Without a reliable source of funding, the role of unions in collective bargaining and in the political process will be diminished. Severe reductions in the ability of unions to facilitate employee participation in the workplace and the political process will bring about fundamental changes in the American democracy. Given the power and resources of union opponents and the current slide in union membership, accelerated by state legislation, such change is not beyond the realm of possibility. A robust debate about the role of unions in public employment is a worthy endeavor for there are strongly held conflicting views. However, without a viable labor movement such a debate will be both one-sided and meaningless.

[1] See Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149, 154-60 (2012).

[2] 132 S. Ct. 2277 (2012).

[3] See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[4] National Right to Work Legal Defense Foundation, *About*, <http://www.nrtw.org/en/about> (last visited Feb. 1, 2013).

[5] *Abood*, 431 U.S. at 235-36.

[6] See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986).

[7] *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

[8] 555 U.S. 353, 360-61 (2009).

[9] *Id.* at 359.

[10] *Id.*

[11] 426 U.S. 283, 289 (1976).

[12] *Id.* at 288.

[13] *Id.*

[14] See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (stating “even in the provision of subsidies, the Government may not ‘ai[m] at the suppression of dangerous ideas,’” quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983)); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that denial of student activities funds on the basis of a newspaper’s Christian viewpoint violated the First Amendment, despite resource limitations).

[15] See, e.g., *Int’l Ass’n of Firefighters Local 3858 v. City of Germantown*, 98 F. Supp. 2d 939, 948 (W.D. Tenn. 2000) (invalidating statute requiring dues deductions for firefighters in some counties and not others, finding no rational basis for distinguishing between them that was relevant to dues deduction); *Truck Drivers & Helpers Local Union No. 728 v. City of Atlanta*, 468 F. Supp. 620, 623 (N.D. Ga. 1979) (reaching similar conclusion regarding dues deduction distinctions between police and firefighters, finding any distinction in their functions was unrelated to dues deduction).

[16] See, e.g., *Memphis Am. Fed’n of Teachers, Local 2032 v. Bd. of Educ. of Memphis City Sch.*, 534 F.2d 699, 702-03 (6th Cir. 1976).

[17] See, e.g., *Brown v. Alexander*, 718 F.2d 1417, 1424 (6th Cir. 1983). The *Brown* court also approved requirements that the union be domestic and have an objective of delivering efficient government service, reasoning as to the latter that it was a requirement of employees so could also be imposed on the union. *Id.* at 1424-25.

[18] 883 F.2d 1251, 1262-64 (4th Cir. 1989).

[19] *Id.* at 1263-64. The court also found no First Amendment violation. *Id.* at 1256-57.

[20] See *Ga. Ass’n of Educators v. Gwinnett Cnty. Sch. Dist.*, 856 F.2d 142, 144-46 (11th Cir. 1988). The district court in *Arkansas State Highway Employees v. Kell* apparently held to the contrary, but the Court of Appeals affirmed the decision on other grounds. 628 F.2d 1099, 1102, 1103-04 (8th Cir. 1980).

[21] See ALA. CODE § 17-17-5 (2010); ARIZ. REV. STAT. ANN. § 23-361.02 (2011). Alabama, consistent with its alphabetical position, beat other states to the punch by passing its law in 2010 but it is included in the analysis as sufficiently recent. The Ohio legislation, which was overturned by referendum, also contained some limitations on payroll deduction of dues for political purposes. See S. 5 § 4117.09(C), 129th Gen. Assembly (Ohio 2011), available at, <http://www.legislature.state.oh.us/BillText129/129_SB_5_EN_N.pdf>.

[22] 2011 WIS. ACT 10, §§ 198, 200, 213, 217, 219, 220, 223, 252, 267, 273, 299.

[23] 2012 MICH. PUB. ACTS 53; 2012 N. C. SESS. LAWS 1, S.B. 727, 2011 Gen. Assemb. (N.C. 2012).

[24] A search of the collective bargaining and labor union legislation database of the National Conference of State Legislatures reveals numerous bills introduced into state legislatures in 2011-13 relating to union dues and fair share, many proposing to restrict payroll deduction and

fair share in various ways but some proposing to institute fair share or payroll deduction of union dues. National Conference of State Legislatures, *Collective Bargaining and Labor Union Legislation Database*, <http://www.ncsl.org/issues-research/labor/collective-bargaining-legislation-database.aspx> (last visited Feb. 14, 2013).

[25] 2012 MICH. PUB. ACTS 349; IND. PUB. L. 2-2012.

[26] The Michigan case was reversed just before publication, *Bailey v. Callaghan*, No. 12-1803, 2013 WL 1908391 (6th Cir. May 9, 2013). Because of the timing, that decision will be discussed only briefly.

[27] 2010 ALABAMA ACTS NO. 761 (amending ALA. CODE § 17-17-5).

[28] 788 F. Supp. 2d 1283, 1327-28 (N.D. Ala. 2011).

[29] *Ala. Educ. Ass'n v. State Sup't of Educ.*, 665 F.3d 1234, 1238, 1239 (11th Cir. 2011).

[30] *See Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306 (N.D. Ala. Jan. 3, 2013).

[31] 2011 ARIZ. SESS. LAWS ch. 251 (codified at ARIZ. REV. STAT. ANN. § 23-361.02).

[32] *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1124-25 (D. Ariz. 2011); *United Food & Commercial Workers Local 99 v. Bennett*, 2013 WL 1289781 (D. Ariz. Mar. 29, 2013).

[33] 2011 WIS. ACT 10, §§ 214, 216.

[34] *Bailey v. Callaghan*, 873 F. Supp. 2d 879 (E.D. Mich. 2012), rev'd, No. 12-1803, 2013 WL 1908391 (6th Cir. May 9, 2013).

[35] Order, *Bailey v. Callaghan*, No.12-1803, 2013 WL 1908391 (6th Cir. Dec. 27, 2012).

[36] *See* Temporary Restraining Order, *N.C. Ass'n of Educators v. North Carolina*, No. 12 CVS 404 (N.C. Superior Ct. Jan. 9, 2012); Order Granting Plaintiffs' Motion for Preliminary Injunction and Denying Defendants' Motion to Dismiss, *N.C. Ass'n of Educators v. North Carolina*, No. 12 CVS 404 (N.C. Superior Ct. May 16, 2012); Order Granting Plaintiff's Motion for Judgment on the Pleadings, *N.C. Ass'n of Educators v. North Carolina*, No. 12 CVS 404 (N.C. Superior Ct. Dec. 17, 2012).

[37] *See State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436 (Wis. 2011).

[38] *See Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 859-60 & n.2, 868, 871, 875-76 (W.D. Wis. 2012) (finding viewpoint discrimination not justified by the rationales offered by the state), *aff'd in part, rev'd in relevant part*, 705 F.3d 640 (7th Cir. 2013); *Madison Teachers, Inc. v. Walker*, Case No. 11CV3774, 194 L.R.R.M. (BNA) 2113 (Dane Cty. Cir. Ct. Sept. 14, 2012), available at, http://laborandemploymentlaw.bna.com/lerc/2442/split_display.adp?Fedfid=28293458&vname=lectcases&wsn=1036488000&searchid=20362267&doctypeid=1&type=court&mode=doc&split=0&scm=2442&pg=0 (finding the law violative of the free speech and equal protection provisions of both the U.S. and Wisconsin constitutions). The state court case was appealed and the Wisconsin Court of Appeals certified the case to the Wisconsin Supreme

Court. *Madison Teachers Inc. v. Walker*, No. 2012AP2067 (Wis. Ct. App. Apr. 25, 2013), available at, http://laborandemploymentlaw.bna.com/lerc/2442/split_display.adp?fedfid=30809141&vname=lectcases&wsn=1036302000&searchid=20294390&doctypeid=1&type=court&mode=doc&split=0&scm=2442&pg=0. Another state court case, involving state employees, is still pending in the trial court. Additionally, there is a pending unfair labor practice case dealing with the question of the applicability of the *Madison Teachers* case to employers who were not parties to the case.

[39] See *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013).

[40] *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 111 (D. Ariz. 2011); *United Food & Commercial Workers Local 99 v. Bennett*, 2013 WL 1289781 (D. Ariz. Mar. 29, 2013).

[41] This description of the facts is taken from the court's opinion. See *Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306 (N.D. Ala. Jan. 3, 2013).

[42] Complaint at ¶ 35, *Bailey v. Callaghan*, 873 F.Supp.2d 879 (E.D. Mich. Apr. 4, 2012) (No. 2:12-cv-11504), 2012 WL 1136414.

[43] *Id.* at ¶¶ 35-36.

[44] *Id.* at ¶¶ 30-33.

[45] *Id.* ¶ 33.

[46] *Bailey v. Callaghan*, 873 F. Supp. 2d 879, 883-84 (E.D. Mich. 2012).

[47] 2013 WL 1908391. The court also found a rational basis for any distinction between employers, as the legislature might have concluded that cost savings was more important for educational employers. The dissent criticized the majority for failing in its duty to look behind facial neutrality to find the hidden viewpoint discrimination, a critique quite similar to that of Judge Hamilton in the Wisconsin case. See *infra* notes 67-73 and accompanying text.

[48] Verified Complaint at ¶¶ 12-15, *N.C. Ass'n. of Educators, Inc., v. State of N.C.*, No. 12 CVS 404 (N.C. Superior Ct. Jan. 9, 2012), available at, [http://op.bna.com/dlrcases.nsf/id/scrm-8qdtl8/\\$File/NCAE%20Complaint.pdf](http://op.bna.com/dlrcases.nsf/id/scrm-8qdtl8/$File/NCAE%20Complaint.pdf).

[49] *Id.* ¶¶ 14-29.

[50] See Verified Complaint at ¶ 50, *N.C. Ass'n. of Educators, Inc.*; Laura Leslie, *State Seeks Dismissal of NCAE Lawsuit*, WRAL.COM (March 30, 2012), <http://www.wral.com/news/state/nccapitol/blogpost/10928368/#commentform>; John Rottet, *N.C. Teachers Group Says it was in GOP's Sights*, NEWSOBSERVER.COM (Jan. 6, 2012), <http://www.newsobserver.com/2012/01/06/1756668/teachers-group-says-it-was-in.html>.

[51] Order Granting Plaintiff's Motion for Judgment on the Pleadings, *N.C. Ass'n of Educators, Inc., v. State of N.C.*, No. 09 CVS 404 (N.C. Superior Ct. Dec. 17, 2012), available at, http://www.southernstudies.org/sites/default/files/gessner_ncae_dues_order.pdf.

[52] *Wis. Educ. Ass'n Council*, 824 F. Supp. 2d at 859, 863-65.

[53] *Id.* at 876 n.17.

[54] See Bill Glauber, Jason Stein & Patrick Marley, *Democrats Flee State to Avoid Vote on Budget Bill*, MILWAUKEE JOURNAL SENTINEL (Feb. 17, 2011), <http://www.jsonline.com/news/statepolitics/116381289.html>.

[55] See *Wis. Educ. Ass'n. Council*, 824 F. Supp. 2d at 862. Of course, one might argue that at least some of the proponents' actions were necessitated by the actions of opponents.

[56] *Wis. Educ. Ass'n. Council*, 824 F. Supp. 2d at 869-70

[57] *Id.* at 869-70.

[58] *Id.* at 876 n.17.

[59] *Id.* at 859-61.

[60] *Id.* at 866-69.

[61] See *Madison Teachers, Inc. v. Walker*, *supra* note 38.

[62] *Wis. Educ. Ass'n. Council v. Walker*, 705 F.3d 640, 2013 WL 203532 (7th Cir. Jan. 18, 2013).

[63] *Id.* at 652-54.

[64] *Id.* at 648-49.

[65] *Id.* at 653-54.

[66] *Id.* at 654.

[67] *Id.* at 659-60 (Hamilton, J., concurring in part and dissenting in part).

[68] *Wis. Educ. Ass'n. Council*, 705 F.3d at 660-61.

[69] *Id.* at 662-63.

[70] *Id.* at 664-65.

[71] *Id.* at 665-66.

[72] *Id.* at 666.

[73] *Wis. Educ. Ass'n. Council*, 705 F.3d at 667.

[74] See *Madison Teachers, Inc.*, *supra* note 38.

[75] The district court in Arizona distinguished the case there from *Walker* because the Arizona law required some speakers (particular unions) to predict accurately in advance their political expenditures or pay substantial fines. See *UFCW Local 99 v. Bennett*, 2013 WL 1289781. The Sixth Circuit, in *Bailey v. Callaghan*, agreed with the decision, however. 2013 WL 1908391.

[76] See House Enrolled Act No. 1001, 117th Gen. Assembly (Ind. 2012)(codified at IND. CODE ANN. § 22-6-6 (West 2013)); 2012 MICH. PUB. ACTS 348, *amending* MICH. COMP. LAWS ANN. § 423.14 (West 2013); 2012 MICH. PUB. ACTS 349, *amending* MICH. COMP. LAWS. ANN. § 423.210.

[77] See *Sweeney v. Daniels*, 2:12CV81-PPS/PRC, 2013 WL 209047 (N.D. Ind. Jan. 17, 2013).

[78] Nora Macaluso, *Union Groups Sue Over Constitutionality Of Michigan's New Right-to-Work Measure*, 29 DAILY LAB. REP. (BNA) A-10 (Feb. 12, 2013).

[79] See Steve Harmon & Matt O'Brien, *Proposition 32: Measure that Would Restrict Union Donations is Defeated*, MERCURYNEWS.COM, Nov. 6, 2012, http://www.mercurynews.com/elections/ci_21943924/proposition-32-losing-early-returns.

[80] *Id.*

[81] Laura D. Francis, *Maryland State Employees Begin Paying Nonmember Fair Share Fees to Unions*, 49 GOV'T EMP. REL. REP.(BNA) 905 (July 19, 2011).

[82] See Dan Tuohy, *House Kills Right to Work Law in NH*, MERRIMACK PATCH, Feb. 13, 2013, <http://merrimack.patch.com/articles/house-kills-right-to-work-bill-in-nh>.

[83] See *supra* note 24.

[84] *Why We Fight*, NAT'L RT. TO WORK COMM., < <http://nrtwc.org/about-2/why-we-fight/>> (last visited Nov. 26, 2012).

[85] See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977); Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 269, 272, 279 (1987).

[86] See Ann C. Hodges, *Maintaining Union Resources in an Era of Collective Bargaining Retrenchment*, 16 EMP. RTS. & EMP'T POL'Y J. 599, 605-06 n. 35 (2013).

[87] *Id.* at 606 n.41.

[88] See, e.g., Paul Kersey, *Michigan's Public Employee Relations Act: Public-Sector Labor Law and Its Consequences*, MACKINAC CENTER POL'Y BRIEF (Mackinac Ctr. for Pub. Policy, Midland, Mich.), 2009, <http://www.mackinac.org/archives/2009/S2009-07.pdf>; Joseph Slater & Daniel DiSalvo, *Are Dues Check-Off and Agency Shop in the Public Interest?*, *Online Debate*, PUB. SECTOR INC., (Apr. 2012), http://www.publicsectorinc.com/online_debates/2012/04/are-dues-check-off-and-agency-shop-in-the-public-interest.html (last visited Nov. 27, 2012) (comments of Daniel DiSalvo, Senior Fellow at the Manhattan Institute's Center for State and Local Leadership); John O. McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions: A Powerful Force for Unaffordable Benefits*, 162 POL'Y REV. (Hoover Inst., Stanford Univ., Stanford, Cal.), Aug. 1, 2010, available at, <http://www.hoover.org/publications/policy-review/article/43266>; James Sherk, *Right to Work Increases Jobs and Choices*, WEB MEMO 3411 (Heritage Found., Wash. D.C.), Nov. 9, 2011, http://thf_media.s3.amazonaws.com/2011/pdf/wm3411.pdf; *Public Employer Payroll Deduction Policy Act*, ALEC EXPOSED (Ctr. for Media & Democracy, Madison, Wis.), http://alecexposed.org/w/images/c/c9/1R9-Public_Employer_Payroll_Deduction_Policy_Act_Exposed.pdf (last visited Nov. 27, 2012) (prohibits payroll deduction of union dues by public employers); *Paycheck Protection Act*, ALEC EXPOSED, (Ctr. for Media & Democracy, Madison, Wis.), http://alecexposed.org/w/images/b/b8/Paycheck_Protection_Act_Exposed.pdf (last visited Nov. 27, 2012) (prohibits unions from using dues for political activities and prohibits payroll deduction of funds for political activities without compliance with specific

limitations and mandatory disclosures and provides for criminal penalties for violations); *Public Employee Freedom Act*, ALEC EXPOSED (Ctr. for Media & Democracy, Madison, Wis.), http://alecexposed.org/w/images/1/15/1R8-Public_Employee_Freedom_Act_Exposed.pdf (last visited Feb. 15, 2013) (prohibits mandatory collective bargaining and agreements covering employees who are not union members). For information about the connections between the Mackinac Center, ALEC and other similar organizations, see *Brendan Fischer, Koch-Funded Mackinac Center Brings Wisconsin Act 10 Provisions to ALEC*, P.R. WATCH (Ctr. for Media & Democracy, Madison, Wis.), May 1, 2012, <http://www.prwatch.org/news/2012/05/11490/koch-funded-mackinac-center-brings-wisconsin-act-10-provisions-alec>.

[89] See, e.g., *Bills Affecting Americans' Rights to a Public Education*, ALEC EXPOSED, http://alecexposed.org/wiki/Bills_Affecting_Americans%27_Rights_to_a_Public_Education (last modified Jan. 30, 2012, 5:23 PM); Lindsey Burke, *Creating a Crisis: Unions Stifle Education Reform*, WEB MEMO 2967 (Heritage Found., Wash., D.C.), July 20, 2010, <http://www.heritage.org/research/reports/2010/07/creating-a-crisis-unions-stifle-education-reform>; Jessica Calefati, *Gov. Christie: NJEA Leaders Are 'Bullies' That Use a '\$130 Million Slushfund'*, NJ.COM May 4, 2012, 5:57 AM, http://www.nj.com/news/index.ssf/2012/05/gov_christie_njea_leaders_are.html; *Impact of Teachers Unions on Education and Schools*, HERITAGE FOUND. (Sept. 7, 2011), <http://www.heritage.org/multimedia/video/2011/09/impact-of-teachers-unions-on-education-and-schools>; *Teachers Unions Oppose Education Reform*, TEACHERS UNION EXPOSED (Ctr. for Union Facts), <http://teachersunionexposed.com/blocking.cfm> (last visited Nov. 27, 2012); see also *Ala. Educ. Ass'n v. Bentley*, 788 F. Supp. 2d 1283, 1296-98 (describing political conflicts between the Alabama Education Association and the governor and a state senator and gubernatorial candidate who attacked the Association as “the single greatest impediment to quality education in this state.”).

[90] *About NEA*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/2580.htm> (last visited Nov. 27, 2012) (describing NEA as the largest professional employee organization in the U.S. with three million members and affiliates in every state); See National Education Association Form LM-2 (Sept. 2011- Aug. 2012), available at <http://kcerds.dol-esa.gov/query/getOrgOry.do> (in “Union Name by Abbreviation” drop down menu select “NEA-National Education ASN IND”; then select “LM-2” in “Report Type” drop down menu; then select the “submit” button at the bottom of the page; then scroll to file number 000-342 on the results page, and click on “2011 Report” hyperlink in the second column) (showing total membership of 3,068,237 and total receipts of \$387,136,801).

[91] See Burke, *supra* note 89; According to the National Institute on Money in State Politics, the NEA and its affiliates were the top political donors in 2007-2008, contributing over \$56 million. *Top National Donors 2007-2008*, FOLLOW THE MONEY (Nat'l Inst. on Money in State

Politics, Helena, Mont.), <http://www.followthemoney.org/database/top10000.phtml> (last visited Nov. 27, 2012).

[92] Paul F. Clark, *Using Members' Dues for Political Purposes: The "Paycheck Protection" Movement*, 20 J. LAB RES. 329, 340 (1999); Richard Michael Fischl, "Running the Government Like a Business": Wisconsin and the Assault on Workplace Democracy, 121 YALE L.J. ONLINE 39, 39-40, 60-63 (2011), <http://www.yalelawjournal.org/images/pdfs/996.pdf>; Beau Hodai, *Publicopoly Exposed: How ALEC, the Koch Brothers and Their Corporate Allies Plan to Privatize Government*, IN THESE TIMES, July 11, 2011, <http://inthesetimes.com/article/11603/>. Unions are not all Democratic supporters, however, as evidenced by the support of some public safety unions for Gov. Walker. See *supra* note 52 and accompanying text.

[93] See, e.g., Kersey, *supra* note 88, at 17-19.

[94] See *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2290 (2012) ("Once it is recognized ... that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? ... An opt-out system creates a risk that the dues paid by nonmembers will be used to further political and ideological ends with which they do not agree.").

[95] *Id.* at 2291-93.

[96] *Id.* at 2292-96, 2297-99 (Sotomayor, J., concurring), 2306 (Breyer, J., dissenting).

[97] *Id.* at 2293-96.

[98] *Id.* at 2294, 2296.

[99] *Id.* at 2297 (Sotomayor, J., concurring) ("Petitioners did not question the validity of our precedents, which consistently have recognized that an opt-out system of fee collection comports with the Constitution.").

[100] *Id.* at 2290 ("[A]cceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.").

[101] See *id.* at 2288-91.

[102] See Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU Local 1000*, 98 CORNELL L. REV. No. 5 (forthcoming 2013), available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185415. For pre-*Knox* criticism of the difference in treatment between unions and corporations with respect to use of dissenters' funds for political purposes, see Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, 112 COLUM. L. REV. (2012).

[103] For a discussion of the roles of public sector collective bargaining see David Lewin, *et al.*, *Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining*, EMP. POL'Y RES. NETWORK, March 16, 2011, <http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/EPRN%20PS%20draft%203%2016%2011%20PM%20FINALtk-ml4%20edits.pdf>.

ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

Volume 30 Issue 2 – Spring 2013

I. IELRA Developments

A. Bargaining Units

In *Danville Community Consolidated School District 118 and Danville Education Association, IEA-NEA*, Case No. 2013-RS-0002-S (IELRB 2013), the IELRB certified the proposed merger of two bargaining units, one consisting of teachers and teacher aides and another consisting of secretarial and clerical employees even though it had previously determined that the teachers did not share a sufficient community of interest with the clerical employees to justify the inclusion of both groups in a single bargaining unit.

In 1987, the Danville Education Association filed a petition with the IELRB seeking to add non-unionized teacher aides and clerical employees to an existing bargaining unit of teachers. In its 1989 Opinion and Order, the IELRB decided that such a bargaining unit would be inappropriate, finding that the teachers and clerical employees did not share a sufficient community of interest to justify including them in the same bargaining unit. The IELRB noted that the Association only sought to add a portion of the District's unrepresented employees to the unit and suggested that if the Association had sought to create a "wall-to-wall" bargaining unit of all of the District's unrepresented employees, such a bargaining unit might be appropriate because it would increase bargaining efficiency.

Pursuant to its 1989 Opinion and Order, the IELRB certified the Association as the exclusive representative of two distinct bargaining units, one consisting of teachers and teacher aides and another of secretarial and clerical employees. In the interim, the remaining portions of the

District's workforce were organized. On August 1, 2012 the Association filed a new representation petition seeking to merge the teacher/teacher aide bargaining unit and the clerical bargaining unit into one.

The IELRB framed the issue as "whether the situation has changed since our previous decision in 1989 so that the unit proposed in this case is now appropriate." Both parties stipulated that the duties of the teachers, teacher aides, and clerical employees had not materially changed since the 1989 decision.

In determining that the merger was appropriate, the IELRB first discussed the fact that the District's remaining employees were now unionized. In its 1989 decision, the IELRB declared that "[k]ey to our determination is the fact that the requested unit seeks some, but not all, of the District's remaining employees." In that case, the IELRB declared that in a "residual or wall-to-wall unit" the preference for a community of interest within the bargaining unit can be overridden "in order to achieve efficiency and to ensure an opportunity for representation for everyone." In this case, the IELRB held that the lack of a community of interest between the teachers and clerical staff was less dispositive now that the entirety of the District's staff was unionized, stating, "The unit that is proposed in this case is similar to a residual unit in terms of efficiency in bargaining, because it reduces the number of units with which the District must bargain. Therefore, a lesser community of interest can be acceptable. "

The Board next analyzed the parties' bargaining history, observing that a history of coordinated bargaining is a factor leaning in favor of merging two units. The record showed that since 1989, the Association and the District had negotiated successor collective bargaining agreements for the teacher/teacher aide bargaining unit and the clerical bargaining unit "on the same days and at the same time." THE IELRB Found that there existed a history of coordinated bargaining.

The IELRB relied on *Black Hawk College Professional Technical Unit v. IELRB*, where the Illinois Appellate Court held that when evaluating the proposed merger of two bargaining units, the Board is to focus on the similarities of the two units instead of the differences. 275 Ill.App.3d 189, 655 N.E.2d 1054 (1st Dist. 1995). Further, the Board cited the Appellate Court for the proposition that that IELRA does not require that a bargaining unit be the most appropriate unit possible under the statute, but only "that the unit be appropriate." See *Sandburg Faculty Ass'n, IEA-NEA v. IELRB*, 248 Ill.App.3d 1028, 1036, 618 N.E.2d 989, 995 (1993).

Finally, the IELRB recognized that its decision finding the proposed unit appropriate did not end the matter. The Board stated that: "[w]hether the proposed bargaining unit is ultimately approved

will depend on the desires of the employees, [who] [] will have the opportunity to express [their opinions] in the election to be conducted subsequently.” The IELRB directed that a unit-preference vote be conducted among the employees.

B. Anti-Union Discrimination

In *Illinois Eastern Community Colleges Association v. Board of Trustees of Illinois Eastern Community Colleges*, Case No. 2011-CA-0008-S (IELRB 2013), the IELRB affirmed the Recommended Decision of the ALJ that the complaint be dismissed because the Complainants failed to establish a prima facie case of discrimination to discourage union activity.

The events giving rise to this complaint began in early 2010 when the Employer compiled a list of twenty-seven employees for a reduction-in-force (“RIF”). The list included five employees who Complainants alleged were targeted for their union activity. Prior to the final determination by the Employer one of the five employees resigned from employment. In March, the Employer determined it would be necessary to lay-off twenty-one employees. All four of the remaining employees who Complainant alleged were targeted for union activity, were laid off. When the Employer recalled ten employees, none of the four were recalled.

The IELRB Board analyzed the three elements of a prima facie case of discrimination. The first element, that the employees participated in activity protected by the Act, was satisfied, and the Employer did not contest that assertion. The IELRB found that that the second element of the prima facie case, that the employer was aware of the protected activity, was also satisfied despite the Employer’s exception with respect to two of the employees. The Board found that both employees were heavily involved with noticeable union activities. One was a member of the union negotiating team, and the other one was a treasurer for the union.

The Board found that the third element of the prima facie case, that the employer took action to encourage or discourage the protected activity, was not satisfied. There was adverse action taken against the Complainants when they were laid-off, but the IELRB stated that the Complainants must also show that the adverse action was taken because of protected activity. The Complainants pointed to many instances of what they perceived as disparate treatment against employees heavily involved in the union, such as: not allowing one employee to teach summer school, requesting the same employee not be a union negotiator, and forcing another employee to teach at multiple campuses rather than just one. The IELRB determined that all instances provided, other than one, were too remote in time to show anti-union animus. In addition, the Board found that there was little evidence to show that union supporters were singularly

punished for actions tolerated with respect to other employees. The Complainants also pointed to a prior history of grievances as proof of anti-union animus, but the IELRB stated that a history of prior grievances or unfair labor practices is not enough on its own to show unlawful motive. The IELRB also rejected the Complainant's contention that all four recalled union activists were not recalled as not establishing a prima facie case of discrimination because there was no showing of how active the others in the non-recalled group were or how active all the members of the union as a whole were when compared to the group the was not recalled.

II. IPLRA Developments

A. Duty to Bargain

In *Midlothian Professional Fire Fighters Association, Local 3148, International Association of Fire Fighters and Village of Midlothian*, 29 PERI ¶ 125 (IL LRB-SP 2013) (Case No. S-CA-10-287), the ILRB State Panel held that the Village of Midlothian ("Midlothian") violated IPLRA Section 10(a)(4) and (1) by bargaining to impasse on its proposal that employee discipline or discharge not be subject to the parties' grievance and arbitration procedures.

The parties had a collective bargaining agreement that provided Midlothian with authority to discipline or suspend employees for just cause. The agreement also recognized the statutory authority of Midlothian's board of fire and police commissioners to discipline employees, and it indicated it did not intend to diminish the authority of that entity. During negotiations for a successor agreement, the Union made a proposal that would allow it to grieve, to arbitration, terminations or suspensions exceeding five days. Midlothian rejected the proposal and the successor agreement included a just cause provision. Subsequently, Midlothian became a home rule municipality and, during additional negotiations, Midlothian argued to the point of impasse that neither employee discipline nor discharge should be subject to the grievance procedure. Instead, Midlothian adopted an ordinance prohibiting the removal or discharge of employees except for cause. The Union filed an unfair labor practice charge.

The ILRB noted that the primary issue in the case was whether the proposal made by Midlothian, a home-rule municipality, to have discipline considered by its board of fire and police commissioners and not pursuant to the arbitration provisions of the parties' collective bargaining agreement concerned a permissive subject of bargaining. The State Panel applied its decision in *Village of Wheeling*, 17 PERI ¶ 2018 (ILRB-SP 2001). The Board found that *Village of Wheeling* was sound and that subsequent legislative activity revealed an intent to broaden its applicability to include the instant matter.

The State Panel noted that the statutory amendment at issue in *Village of Wheeling*, Public Act 91-650, was intended to “undo” an appellate court decision that held that a city is precluded from bargaining over matters that are covered by the Municipal Code. The Board noted that its *Village of Wheeling* decision is based on the premise that any substantive term agreed to by the parties pursuant to their Section 7 bargaining obligation creates a statutory right to grievance arbitration pursuant to the contractual provision required by Section 8 in all circumstances, “unless [as Section 8 permits] mutually agreed otherwise.” Thus, while the substantive matters affecting terms and conditions of employment bargained in Section 7 are mandatory, the Board in *Village of Wheeling* found that Section 8’s reference to the “mutual agree[ment]” to avoid arbitration on substantive matters was a permissive subject of bargaining.

Moreover, the Board noted that the language in the Municipal Code relied on by the *Village of Wheeling* was amended in 2007 to the following (strike-outs show language stricken by the 2007 amendment and the italicized portion shows language newly added in 2007):

§10-2.1-17. Removal or discharge; investigation of charges; retirement. Except as hereinafter provided in this Section, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. The hearing shall be as hereinafter provided, unless the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement. Such ~~In non-home rule units of government, such~~ bargaining shall be ~~permissive rather than~~ mandatory unless *the parties mutually agree otherwise. Any such alternative agreement shall be permissive.* ~~such contract term was negotiated by the employer and the labor organization prior to or at the time of the effective date of this amendatory Act, in which case such bargaining shall be considered mandatory.~~

Further, the State Panel noted that the legislative history confirmed that the General Assembly intended to make the holding of *Village of Wheeling* universally applicable. Specifically, the Board relied on a comment by Illinois Representative Dugan that stated that the 2007 amended Code provision was intended to create equal bargaining rights for all professional firefighters, regardless of whether their employer was a home rule municipality, a non-home rule municipality, or a fire protection district.

B. Supervisors

On April 5, 2013, Governor Pat Quinn signed SB 1556 into law (Public Act 097-1172), *available at*, <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=097-1172>, which makes several changes to the Illinois Public Labor Relations Act (IPLRA). The bill was passed in the Senate on January 8, 2013, after passing the House back in May 2011, but the bill remained on the Governor's desk for several months before he signed it in early April. The amendments to the IPLRA contained in the bill went into effect immediately.

SB 1556 makes several changes to the IPLRA, each of which make it easier to exclude managers and supervisors from coverage under the Act and some provisions that give the Governor power to remove individuals from bargaining units. Under the IPLRA as now amended, state employees working under the Attorney General, the Comptroller, the Secretary of State and the Treasurer, that were certified in a bargaining unit on or after December 2, 2008, which a petition was filed with the ILRB on or after the effective date of SB 1556, or for which a petition is pending before the ILRB, now are covered by a much more narrow definition of "managerial employee." The new definition no longer requires that an individual be "predominantly" engaged in managerial and executive functions to qualify as a managerial employee. Further, the definition was also expanded by adding language to exclude workers "who [represent] management interests by taking or recommending discretionary actions that effectively control or implement policy."

The bill also makes substantive changes to the supervisory exclusion for the same class of workers covered by the definitional change for managerial employees. These workers are now subject to the same standards used under the National Labor Relations Act, as the changes to the IPLRA explicitly reference the NLRA and relevant NLRB precedent. The changed language states that these employees will qualify as a supervisor based on "(A) Section 152 of the National Labor Relations Act and (B) orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board."

The amendments also limit which workers can be included in bargaining units by amending the definition of "public employer" to exclude the Office of the Governor, the Governor's Office of Management and Budget, the Illinois Finance Authority, the Office of the Lt. Governor, and the State Board of Elections.

Another important change made by SB 1556 was defining a new class of employees labeled “legislative liaisons,” which are also excluded from the IPLRA’s coverage. The Act defines legislative liaisons as “a person who is an employee of a State agency, the Attorney General, the Secretary of State, the Comptroller, or the Treasurer, as the case may be, and whose job duties require the person to regularly communicate in the course of his or her employment with any official or staff of the General Assembly of the State of Illinois for the purpose of influencing any legislative action.”

Finally, one of the most significant changes contained in SB 1556 is the addition of Section 6.1 to the IPLRA, which gives the Governor the power to exempt up to 3,580 positions in agencies directly responsible to him from the Act’s coverage. Out of this total number of positions that can be exempted, the Governor is able to exempt up to 1,900 that are already included in a bargaining unit; effectively giving the Governor power to remove employees added to bargaining units over the last several years. However, this provision of the Bill does include some limitations on the types of positions that may be exempted. The Governor has one year from the effective date of the amendatory Act to exercise the powers added by Section 6.1.