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INTEREST ARBITRATION DURING ECONOMIC AND SOCIAL CRISIS

By Tom Bradley, Mark Bennett, and John R. Russell

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By Tom Bradley, Mark Bennett, and John R. Russell[1]

I. INTRODUCTION

Four decades ago, the firefighters of Chicago went on strike, and the citizens of the city witnessed what happens when concerted collective activity places public safety at risk and there is no legal mechanism in place to easily protect the interests of either side. Because so many do not know the story, are in disbelief when they hear it, or cannot conceive of a city where firehouses are empty or employees lack the legal right to petition collectively for better terms and conditions of employment, we revisit the history of the strike, which looms over the passage of the Illinois public sector labor laws that followed three years later as a point of no return, showing the moment when the old ways of doing business (for public sector workers, handshake deals with no enforceable rights) ceased to be tenable. We further use the strike as a departure point to discuss the interest arbitration process that evolved in its wake to resolve disputes between public employers and their employees who are denied the right to strike, and the challenges this process faces in light of the rapidly changing workplace of the twenty-first century.

Interest arbitration is a part of the collective bargaining process in which an arbitrator determines certain terms and conditions of a collective bargaining agreement for public sector employees who are either statutorily denied the right to strike,[2] or are granted the right to strike but can be enjoined from doing so.[3] But it was not always the law. The following is a brief explanation of how interest arbitration became the law in Illinois, how it operates, and the challenges that employers and unions now face applying interest arbitration in the setting of emergency developments to the workplace.

A. How interest arbitration came to be the law in Illinois: a brief historical context

1. The slow evolution of public sector bargaining rights.

In the beginning, public sector employees in America had no statutory right to unionize. Attempts by ad hoc bargaining units of public workers to obtain voluntary recognition

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[2] *See, e.g.*, 5 ILCS 315/14 (setting forth interest arbitration procedure for units of security employees of a public employer, peace officer units, or units of fire fighters or paramedics).

[3] *See, e.g.*, 5 ILCS 315/18 (granting interest arbitration to employees who are enjoined from striking because such a strike may cause a clear and present danger to the public).

from government employers met with limited success.[4] When, in 1935, Congress passed a law granting private-sector workers that right, the National Labor Relations Act ("NLRA") expressly excluded public sector workers from its legal protections, saying the employers who were covered by its terms "shall not include the United States or any wholly owned Government corporation, . . ., ***or any State or political subdivision thereof.***"[5] Two years later, the president who signed the NLRA into law, Franklin Delano Roosevelt, made clear his belief that the right to collectively bargain as usually understood could not be given to public sector employees:

> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.[6]

Most notably for our discussion here, FDR asserted his view that strikes by public sector workers were "unthinkable" and "intolerable":

> Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis

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[4] The initial resistance to public sector collective bargaining led to the formation of employee associations that sought change through traditional lobbying. The Illinois State Employee Association (ISEA) was one such group, formed in 1921 and which lobbied the Governor and the General Assembly for changes in employee benefits for more than 50 years. Reginald D. Ankrom, *What is organized labor going to do for state employees? New OCB plays key role for agencies under governor*, ILL. ISSUES (Mar. 1975), https://www.lib.niu.edu/1975/ii750372.html.

[5] 29 U.S.C. § 152(2). Emphasis added.

[6] *Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service*, THE AMERICAN PRESIDENCY PROJECT , https://www.presidency.ucsb.edu/documents/letter-the-resolution-federation-federal-employees-against-strikes-federal-service (last visited Sept. 12, 2021).

> of Government by those who have sworn to support it, is unthinkable and intolerable.[7]

Twenty-five years later, a different president, leading what he described as "a new generation of Americans, born in this century, tempered by war, disciplined by a hard and bitter peace,"[8] reversed FDR's course, ordering the Federal Government to allow most federal employees to unionize. President Kennedy's Executive Order 10988 did not afford federal employees all of the rights of their private sector brethren (for example, it did not allow them to bargain over wages or to strike), nor was it the nation's first large-scale experiment in unionizing the public sector (the state of Wisconsin and the city of New York had afforded such rights to their public workers four years earlier—rights that the Wisconsin legislature largely eliminated in 2011).[9] Kennedy's executive order changed the public policy landscape, or at a minimum, heralded that change was on its way.[10]

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[7] *Id.*

[8] *Transcript of President John F. Kennedy's Inaugural Address (1961)*, OURDOCUMENTS.GOV, https://www.ourdocuments.gov/doc.php?flash=false&doc=91&page=transcript (last visited Sept. 12, 2021).

[9] In March 2011, the Wisconsin Legislature passed Act 10, which significantly altered Wisconsin's public employee labor laws, prohibiting general employees from collectively bargaining on issues other than base wages, prohibiting municipal employers from deducting labor organization dues from paychecks of general employees, imposing annual recertification requirements, and prohibiting fair share agreements requiring non-represented general employees to make contributions to labor organizations. *Madison Teachers, Inc. v. Walker*, 358 Wis. 2d 1, 19 (2014). Several unions representing public employees sued, alleging that the limitations on collective bargaining, prohibition on payroll deductions for union dues and fair share agreements violate the constitutional associational and equal protection rights of the employees. *Id.* September 14, 2012, the trial court ruled in favor of the unions, finding that Act 10 violated the employees' rights of association, free speech, and equal protection. *Id.* at 24. The State appealed, and the appellate court certified the case to the Wisconsin Supreme Court. *Id.* The Supreme Court reversed, stating that collective bargaining is a statutory, not a constitutional right. Act 10 provided the employees with a benefit, granting a statutory right to force their employers to negotiate over base wages. But the limitations imposed by the Act did not bar the creation of advocacy groups or other concerted activity; employees could still freely associate. Collective bargaining, no matter what specific statutory limitations are in place, is not constitutionally protected. *Id.* at 36-40. The equal protection arguments also failed because the employment classifications created by the Act rationally advanced a legitimate legislative purpose of improving the State's fiscal position through enhanced control over public expenses. *Id.* at 57-59. Various Wisconsin public employee unions also mounted challenges to Act 10 in Federal Court. In each case, the 7th Circuit ruled that Act 10's limitations did not violate the employees' constitutional rights. *International Union of Operating Engineers, Local 139 v. Daley*, 983 F.3d 287, (7th Cir. 2020) (Act 10's recertification requirements, collective bargaining restrictions, and prohibition of payroll deductions do not violate the first amendment, despite the recent decision in *Janus v. AFSCME Council 31,* 138 S. Ct. 2448 (2018); Court held *Janus* prohibits compelled speech via mandatory agency fees, but State had no obligation to provide any payroll deductions at all); *Laborers Local 236, AFL-CIO v. Walker,* 749 F. 3rd 628, (7th Cir. 2014) (Act 10's collective bargaining limitations do not violate 1st Amendment or Equal Protection); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 645-57 (7th Cir. 2013) (Act 10's prohibition on union dues deductions does not violate 1st Amendment or Equal Protection).

[10] *Executive Order 10988—Employee-Management Cooperation in the Federal Service*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/executive-order-10988-employee-management-cooperation-the-federal-service (last visited Sept. 12, 2021).

2. Illinois state political leaders support public sector collective bargaining.

Four years later, Illinois governor Otto Kerner created an Advisory Commission to study the issue of collective bargaining for public sector employees in Illinois. In 1967, the Commission issued a report that recommended the enactment of a statute that would: (1) grant public employees the right to bargain; (2) establish an administrative agency to determine units, conduct representation elections, and enforce a prohibition of unfair labor practices; and (3) declare public sector strikes illegal and authorize courts to issue antistrike injunctions.[11] A bill was introduced into the Illinois General Assembly to enact these recommendations into law, but it failed to pass over union opposition to the provision preventing strikes.[12]

Although the Illinois General Assembly passed laws allowing certain bargaining units limited opportunity for collective bargaining and arbitration,[13] the courts held public sector strikes to be illegal,[14] and the question of public sector collective bargaining remained as a statewide political campaign issue. In his 1972 campaign for governor, independent Democrat Dan Walker promised that if elected he would give public sector employees the right to bargain.[15] When, eight months after his election, the general assembly did not pass such a bill, then-Governor Walker issued Executive Order 6 on September 4, 1973, granting collective bargaining rights to employees in the executive branch under the governor,[16] exempting only "supervisors, confidential employees,

[11] *See* Gregory M. Saltzman, *Public Sector Bargaining Laws Really Matter: Evidence From Ohio and Illinois* 49 in WHEN PUBLIC SECTOR WORKERS UNIONIZE (Richard B. Freeman & Casey Ichniowski, eds., (1988)).

[12] *Id.* S.B. 452 contained the no-strike provision and was passed by the Senate; the bill was subsequently amended in the House to delete the no-strike provision and was passed by the House; when a conference committee reinstated the no-strike provision the House voted the bill down. *Id.*

[13] See, *e.g.*, Ill. Rev. Stat. ch. 24, pars. 13A -- 1 to 13A -- 4 (1951) (firemen); Ill. Rev. Stat. 1945, ch. 111 2/3, par. 328a (1945), (Chicago Transit Authority); Public Act 78 -- 5, § 2.15 (3d Special Session 1973) (Regional Transit Authority).

[14] See *City of Rockford v. Local 413, Int'l Ass'n of Firefighters* (1968) 98 Ill. App. 2d 36, 240 N.E.2d 705 (firemen); *Board of Junior College District No. 508 v. Cook County College Teachers Union* (1970), 126 Ill. App. 2d 418, 262 N.E.2d 125; *cert. denied* (1971), 402 U.S. 998, 29 L. Ed. 2d 165, 91 S. Ct. 2168 (college teachers); *Fletcher v. Civil Service Com. of Waukegan* (1972), 6 Ill. App. 3d 593 at 598-599, 286 N.E.2d 130 at 134-135 (police officers); *Allen v. Maurer* (1972), 6 Ill. App. 3d 633, 286 N.E.2d 135 (school teachers); *Board of Education v. Kankakee Federation of Teachers* (1970), 46 Ill.2d 439, 264 N.E.2d 18 (1971), *cert. denied* 403 U.S. 904 (a strike by school employees is unlawful as being in violation of the expressed public policy of this State).

[15] Saltzman, *supra* note 10, at 49.

[16] Ill. Exec. Order No. 6 (Sept. 04, 1973).

managerial employees, and temporary and emergency employees."[17] The order granted employees covered by the order the right, "freely and without fear of threat or reprisal, to voluntarily form, join, and assist an employee organization and the right to refrain from any such activity."[18] It required the director of personnel[19] to inform employees about these rights and to prohibit any "interference, restraint, coercion, or discrimination against employees" in their exercise of them.[20] The order further created an Office of Collective Bargaining to determine whether employees were appropriate for inclusion into a bargaining unit, and to certify an employee organization as the exclusive bargaining representative in an appropriate unit if, in an election by secret ballot, the organization was designated as its representative by a majority of employees in the unit.[21] The order also required the director, with the advice of a panel of labor experts called the Labor Relations Council, to issue rules and regulations governing certification and clarification procedures and to address unfair labor practices.[22] Walker's Executive Order 6 did not, however, grant public sector employees of the executive branch the right to strike[23] (or to interest arbitration) and did not grant any collective bargaining rights to any employees outside the executive branch. So, not surprisingly, the issue of a comprehensive statutory scheme for public sector bargaining rights remained a campaign issue.[24]

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[17] *Id*., para. 1. Today, the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq., ("Labor Act") continues the exemption from collective bargaining for confidential, managerial, supervisory and temporary employees, with some modifications, among other exempted categories. *See* 5 ILCS 315/3(n) (defining "public employee" or "employee" to mean "any individual employed by a public employer, . . . but excluding all of the following: . . . managerial employees; short-term employees; . . . confidential employees; . . . and supervisors except as provided in this Act").

[18] Ill. Exec. Order No. 6 (Sept. 4, 1973), at para. 2.

[19] The Personnel Code had already authorized the dDirector of personnel "to conduct negotiations affecting pay, hours of work or other working conditions subject to this Act."20 ILCS 415/9 (7).

[20] Ill. Executive Order No. 6 (Sept. 4, 2973) at para. 3.

[21] *Id*. at paras. 4, 5.

[22] *Id*. at paras 6-7.

[23] Although there was, at the time, no right for public employees to strike, government statistics show that from 1974-1980 there were, on average, some 40 strikes per year by public school employees in Illinois. Martin H. Malin, *Public Sector Collective Bargaining: The Illinois Experience* 2, NIU POL'Y PROFILES (Vol. 2, No. 1, Jan. 2002).

[24] Initially there was resistance to collective bargaining from among some State employees. The ISEA, for example, questioned the need for its implementation, in light of the gains that traditional lobbying had achieved. However, this rift in the employee ranks between traditional lobbying and collective bargaining was quickly eliminated as the ISEA was absorbed into the Service Employees International Union (SEIU). Reginald D. Ankrom, *What is organized labor going to do for state employees? New OCB plays key role for agencies under governor*, ILL. ISSUES (Mar. 1975), https://www.lib.niu.edu/1975/ii750372.html.

Walker's successor,[25] Republican governor Jim Thompson, in his first run for re-election in 1978, stated "I will not be satisfied until every public sector employee has the right to collective bargaining," promised "[i]f the legislature passes the collective bargaining bill, I will sign it," and further promised to veto any right-to-work legislation, should the general assembly pass such a bill.[26] Thompson's pro-collective bargaining position was not contrary to his party's national platform at the time, which in the 1976 presidential election had said: "The special problems of collective bargaining in state and local government should be addressed at those levels. . . . While we oppose strikes by public employees, we recognize that states have the right to permit them if they choose."[27] Thompson's position was, however, more progressive than the state's Republican legislative leadership, as the then House speaker (and future governor) George Ryan demonstrated when he used the occasion of a large union rally in Springfield to send to the floor a bill that would have made Illinois a right-to-work state.[28]

3. A Chicago mayor supports public sector collective bargaining rights.

The issue of public sector collective bargaining was also seized upon by the insurgent candidate for mayor of the city of Chicago. In August 1978, the then-candidate and future Chicago mayor Jane Byrne called a press conference to announce that if elected she would give all city workers written labor union contracts—a promise her opponent, the incumbent mayor Michael Bilandic, refused to make.[29] Journalists chronicling Byrne's career arc called it a "revolutionary proposal," noting that up to that point city workers had to make do with handshake deals from the Mayor, which avoided crippling strikes.[30] Byrne rode to victory against incumbent Michael Bilandic on an electoral coalition of

[25] Walker, who had feuded with Chicago mayor Richard J. Daley during most of his four years, lost the 1976 Democratic nomination to Michael Howlett. Thompson, the 1976 GOP nominee for Governor, defeated Howlett in the general election by more than 1.390 million votes. By comparison, the GOP nominee for president, Gerald Ford, defeated Jimmy Carter by only 122,974 votes in Illinois. State Board of Elections Official Vote of the 1976 General Election. So, more than a million Illinois voters voted for the Democratic nominee for president in 1976, and then crossed over to vote for Thompson for governor, a testament to the personal popularity he enjoyed at the time. State of Illinois State Board of Elections, Official Vote Cast at the November 2, 1976 General Election.

[26] Mark DePue & James Thompson, Interview with James Thompson p. 348, Abraham Lincoln Presidential Library (2014).

[27] Republican Party Platform of 1976, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1976.

[28] DePue & Thompson, *supra* note 26, at 348-49.

[29] BILL GRANGER AND LORI GRANGER, FIGHTING JANE: MAYOR JANE BYRNE AND THE CHICAGO MACHINE (1980).

[30] *Id.*

various voters who, for very different reasons, felt aggrieved by the Bilandic administration,[31] and others looking to shape a post-patronage era of government.

Once in office,[32] Byrne, who had promised to sign union contracts, experienced the very public sector strikes her predecessors had, by refusing to sign such contracts and offering union leaders only handshake deals, largely avoided. Her first twelve months in office saw strikes by transit workers, teachers and, most notable for our analysis of the development of interest arbitration, firefighters.[33] Key issues holding up a deal with the firefighters included the size of the bargaining unit (the union wanted virtually every firefighter in the union), the right to strike (the union wanted to be prohibited from striking only during the contract), economics, the process by which disputes would be resolved, staffing, and whether the City could pass ordinances to trump negotiated terms (a major stumbling block).[34] The City wanted a perpetual ban on the right to strike and offered binding arbitration with a three-arbitrator panel to resolve disputes.[35] An October 1979 strike vote by the firefighter union narrowly failed, as 1664 voted to authorize the strike while 1729 opposed; a second strike vote in December 1979 overwhelmingly authorized the strike, 2326 for to 658 against.[36]

In the midst of the negotiations, Byrne had made a series of missteps that weakened her electoral base and, thereby, her power. After making an endorsement of President Carter for reelection that didn't even utter his name—i.e., "if the convention were tonight, I would vote in our party caucus without hesitancy to renominate our present leader for

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[31] On New Year's Eve 1978, twenty-two inches of snow fell, crippling the mass transit system. Twelve days later, twenty more inches fell, and then cold air settled in. *Id*. at 210. Bilandic responded by issuing an emergency order directing the rapid transit trains to run express from downtown to the suburbs, bypassing the African American communities on the south and west sides. DAVID AXLEROD, BELIEVER: MY 40 YEARS IN POLITICS 44 (2015). Political observers surmised that much of the vote Ms. Byrne received was on account of the Bilandic administration's failure to react to the weather. *Id*. The *New York Times* observed: "The total turnout of 839,443, or 58.97 per cent of the city's 1,423,476 voters, exceeded by about 10 percentage points the average since 1955. With this outpouring of voters, many of whom apparently were disgruntled after weeks of subfreezing temperatures and a record snowfall that City Hall was unable to handle, Mrs. Byrne carried more than half of the city's 50 wards, including several ostensibly in the firm grip of powerful Democratic committeemen. In the black wards, she scored a sweep, running up about a two-to-one margin against the Mayor." Douglas E. Kneeland, *Jane Byrne's Defeat of Mayor Shatters Image of Democratic Machine in Chicago*, N.Y. TIMES (Mar. 1, 1979) https://www.nytimes.com/1979/03/01/archives/jane-byrnes-defeat-of-mayor-shatters-image-of-democratic-machine-in.html.

[32] Byrne was sworn into office on April 16, 1979. Perhaps foreshadowing the labor strife she would soon experience, she stated in her inaugural address: "The people ask much, often more than any government can give. We must resist the temptation to promise solutions to all problems." Mayor Jane M. Byrne, Inaugural Address, Apr. 16, 1979, https://www.chipublib.org/mayor-jane-byrne-inaugural-address-1979/.

[33] GRANGER & GRANGER, *supra* note 29, at 226.

[34] Richard Ornberg, *Chicago 1980: Anatomy of a Firefighters' Strike*, FIREHOUSE MAG., May, 1980.

[35] *Id*. at 2. Banning strikes among some public sector workers and granting them binding arbitration instead would become a key principle of interest arbitration. *See also* 5 ILCS 315/16.

[36] Chicago Firefighter Union Local 2, History, https://iaff2.org/index.cfm?section=28&pagenum=171.

another four years"[37]—two weeks later she changed her mind and endorsed Senator Kennedy to replace him, saying it would be a disaster to renominate President Carter.[38] Then, when the son of the late mayor, State Senator Richard M. Daley, announced that he would be seeking the party's nomination for state's aAttorney, Byrne declined to support Senator Daley, instead supporting an alderman for the job.[39] These stumbles produced war with both the Carter and Daley political organizations,[40] and come primary election day in March 1980, Byrne, who had, just a few months earlier, defeated the incumbent mayor in the primary and had won the general election with 82% of the vote, saw her candidates lose by an approximately 2-to-1 margin.[41]

4. The firefighters strike gives birth to a beta version of interest arbitration.

It was during this political reversal of fortune—from surprise landslide winner to landslide loser—that Byrne's negotiations with the firefighters reached a head. At 5:15 p.m. on Valentine's Day 1980, the firefighters, whose union had been the only one to endorse Byrne when she was a candidate for mayor,[42] began a 23-day strike, their first and only in the history of the city.[43] Independent estimates on the number of firefighters who walked out ranged from 50%87%,[44] to as high as 94%,[45] and the union's leaders claimed 97% walked out.[46] On the third day of the strike, the *Chicago Tribune* estimated that only 350 of 4,350 firefighters crossed the picket line—and that 970 firefighters were needed on each of three shifts, leaving firehouses empty or on skeleton staffs.[47] By the fifth day of the strike, the Fire Department reported no more than 550 firefighters were working on any given shift.[48] There were reports of striking firefighters showing up to the scene of fires to taunt and curse those firefighters who had crossed the picket line to

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[37] Axelrod, *supra* note 31, at 47.

[38] *Id.*

[39] Douglas Kneeland, *MRS. BYRNE A TARGET OF CARTER CAMPAIGN; President's Aides Act to Discredit Mayor, a Kennedy Supporter, in Illinois Primary Fight*, N. Y. TIMES (Dec. 9, 1979.

[40] *Id.* ("the President's political camp has passed up few opportunities to portray Mrs. Byrne as a turncoat, ungrateful for the largesse bestowed upon Chicago by the Administration").

[41] *See* Illinois State Board of Elections Official Vote Cast at the General Primary Election March 18, 1980 (Carter defeated Kennedy 65% to 29%, with 138 delegates pledged to Carter compared to 14 delegates pledged to Kennedy), OurCampaigns.com (Daley defeated Burke 62.7% to 37.2%).

[42] Michael Zielenziger, *Chicago Mayor Begins Replacing Striking Firemen,* WASH. POST (Feb. 19, 1980).

[43] Ornberg, *supra* note 34, at 3; GRANGER & GRANGER, *supra* note 33, at 226.

[44] Ornberg, *supra* note 34, at 3

[45] GRANGER & GRANGER, *supra* note 29, at 226.

[46] Chicago Firefighter Union Local 2, History, https://iaff2.org/index.cfm?section=28&pagenum=171.

[47] Ron Grossman, *Flashback: Chicago's first firefighters strike created a battle line between brothers,* CHI. TRIB. (Feb. 7, 2020).

[48] Michael Zielenziger, *Chicago Mayor Begins Replacing Striking Firemen,* WASH. POST (Feb. 19, 1980).

serve.[49] A paramedic reported watching many victims die before the thinned ranks of fire department members could reach them.[50] One firefighter resigned after watching a seventy-seven year-old woman die after her call for a fire department ambulance went unanswered.[51] In all, twenty-four people died in incidents resulting in calls for help from the Fire Department during the strike.[52]

When Byrne turned to Governor Thompson for support from the National Guard, Thompson declined to help, noting the troops did not have the training to fight fires.[53] Byrne threatened to fire hundreds of striking firefighters[54] and went on television to tell the voters: "These men will never again wear a City of Chicago uniform"—a threat upon which Byrne was never able to deliver.[55] When the union did not direct its members to return to work, a judge jailed union leader Frank Muscare[56] for contempt of court, requiring the City to communicate each proposal to his jail cell.[57] FDR's warning—that public sector strikes intend to "prevent or obstruct the operations of Government . . . looking toward the paralysis of Government by those who have sworn to support it"—was laid bare for all Chicago voters to see.[58]

When Byrne's chosen presidential candidate, Senator Edward Kennedy, flew to Chicago to attend a fundraiser Byrne hosted at the Conrad Hilton Hotel on Michigan Avenue, the firefighters picketed the event, requiring the Kennedy campaign to engage in negotiations with the union to create a reserve gate so that the senator, who had been a lifelong

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[49] *Id.*

[50] Grossman, *supra* note 47.

[51] *Id.*

[52] Andrew Martin, *1980 Strike Still Kindles Pride With Firefighters,* CHI. TRIB. Feb. 20, 2000, at C_A1. When the estate of one such citizen sued the union, alleging the relief workers employed by the department during the strike were inept, the Court dismissed the lawsuit. *Id.* Whether there is a cause and effect relationship between the strike and the deaths is unclear. One year earlier, 26 people died in fires in relatively the same period; 13 people died in fires two year earlier. Ornberg, *supra* note 34, at 7.

[53] Ornberg, *supra* note 34, at 4 (quoting Gov. Thompson as saying "The Illinois National Guard is not trained to fight fires, and will not fight fires. They will not enter burning buildings.").

[54] Michael Zielenziger, *Chicago Mayor Begins Replacing Striking Firemen,* WASH. POST, (Feb. 19, 1980) https://www.washingtonpost.com/archive/politics/1980/02/19/chicago-mayor-begins-replacing-striking-firemen/1f16abad-e890-4585-aaa7-b37fdda19a4f/ (last visited 9/16/21).

[55] GRANGER & GRANGER, *supra* note 29, at 226.

[56] Muscare was no stranger to legal battles with the Fire Department, having previously taken the it to the Supreme Court in opposition to discipline he had received after refusing to shave. *Quinn v. Muscare*, 425 U.S. 560 (1976).

[57] Grossman, *supra* note 46.

[58] Inadvertently, the strike caused some social progress. The Fire Department hired its first female recruit as a relief worker, breaking the gender barrier. *Id.* A decade later, a federal court would determine that there was also "direct evidence of racial discrimination in the Chicago Fire Department up to and into the 1980s." *McNamara v. City of Chicago*, 138 F.3d 1219, 1224 (7th Cir. 1998).

supporter of organized labor, could enter the building without crossing the picket line.[59] When he marched in the St. Patrick's Day Parade in Chicago a day before the Illinois primary, Senator Kennedy was openly heckled.[60] At least one then-journalist reported that the heckling came from firefighters who were fighting with Byrne over a contract.[61]

After many starts and stops, the firefighters went back to work on March 8, 1980, after an agreement was brokered over the process that would be used going forward—which called for the striking firefighters to return with limited amnesty, and the open disputes would be submitted to a five-person fact-finding commission charged with making recommendations over open issues.[62] If the recommendations were not accepted the parties would return to negotiations for two months.[63] Any remaining items thereafter would be submitted to binding arbitration and, if the City rejected the decision, the firefighters could strike again upon ten days' notice.[64] The plan, which today seems something like a beta version of interest arbitration, ended the strike.[65] After two years of this process, the parties finally agreed on a contract.[66]

The labor dispute was not kind to its leaders. Union chief Frank Muscare was sentenced to five months in jail for contempt of court for failing to call off the strike[67] and saw his one term as union president end in 1982.[68] Jane Byrne lost her bid for reelection and largely disappeared from public service. Even Governor Thompson was not spared, barely

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[59] One of the authors of this article was involved in Senator Kennedy's campaign in Illinois and reports these events based on his knowledge of them.

[60] *See* AXELROD, *supra* note 31, at 47-8. It was a far different reception from the nationally televised torchlight parade Chicago had given his older brother days before a different election two decades earlier. https://www.nbcchicago.com/news/local/chicagos-1960-torchlight-parade-leaves-lasting-legacy/2047826/ (last visited Sept.17, 2021).

[61] *See* AXELROD, *supra* note 31, at 47-8. The hecklers were heard to boo and yell "Where's Mary Jo?" a reference to a Kennedy campaign worker who died in a car accident involving the senator. JON WARD, CAMELOT'S END 211 (2019).

[62] Ornberg, *supra* note 34, at 6-7.

[63] *Id.*

[64] *Id.*

[65] *Id.* This was not the first instance of collective action by public employees in Chicago who today are bound to engage in interest arbitration. In September 1972 some 13,000 Chicago policemen went on a ticket-writing blitz in support of their demand for a written contract. Vehicles ticketed in the blitz included CTA buses and taxicabs—but left unticketed was the Mayor's limousine that regularly parked illegally outside City Hall. *Drivers and Police in Chicago Irked by Ticket-Writing Blitz*, N.Y. TIMES (Oct. 1, 1972), at 34.

[66] *Id.*

[67] Ornberg *supra* note 34, at 5.

[68] Barbara Sherlock, *Frank J. Muscare, 79*, CHI. TRIB., (Mar. 2, 2005), https://www.chicagotribune.com/news/ct-xpm-2005-03-02-0503020300-story.html (last Sept. 16, 2021).

winning reelection over Adlai Stevenson III—Thompson's 1.39 million plurality from 1976 was reduced to a 5000-vote margin in 1982.[69]

5. Three years later, a push to pass public sector labor laws emerges, and interest arbitration is included.

In the 1983 legislative session Thompson supported two bills to address the issue of public sector collective bargaining, one that would afford collective bargaining rights to teachers, and a second that would give collective bargaining rights to almost all public sector workers. The first bill, H.B. 1530, which, when passed, became the Illinois Educational Labor Relations Act ("IELRA" or "Ed Act") covered employees of public schools, colleges, and universities.[70] The second, S.B. 536, was a comprehensive bill covering almost all public employees (including, originally, but not after an amendatory veto, educational employees), and ultimately became the Illinois Public Labor Relations Act ("IPLRA" or "Labor Act").[71] S.B. 536, which was endorsed by the International Association of Fire Fighters (IAFF), banned strikes by public safety employees and substituted interest arbitration.[72]

The legislative push to create collective bargaining rights for public sector employees also benefitted from the strong support of newly-elected Chicago mayor Harold Washington, who had pledged during his mayoral campaign to win collective bargaining rights for city workers, an effort he would later describe as an "historic effort . . . [that] ranks among our best efforts to end patronage and waste once and for all in city employment."[73] Washington left his mark on the substance of the bill, reportedly insisting that a local panel of the Labor Board be created because he did not want gubernatorial appointees creating labor policy for the city.[74] In his reelection campaign Washington would later describe his support for the collective bargaining bills as follows: "We opened up City Hall, we ended patronage, and, I submit to you, patronage is dead. I buried it . . . In its place, we have organized labor and a system of collective bargaining."[75]

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[69] Illinois State Board of Elections, Official Vote Cast at the November 2, 1982 General Election at 3. Thompson's re-election campaign also took place during rising unemployment resulting from fellow Republican President Reagan's economic policies. By the end of 1982 unemployment exceeded 10% nationwide, higher than at any time since World War II. *See* Michael A. Urquhart and Marillyn A. Hewson, *Unemployment Continued to Rise in 1982 as Recession Deepened,* MONTHLY LABOR REVEIW, Bureau of Labor Statistics (1983), https://www.bls.gov/opub/mlr/1983/article/unemployment-continued-to-rise-in-1982-as-recession-deepened.htm (last visited Sept. 16, 2021).

[70] 115 ILCS 5/1, *et seq.* (adopted as P.A. 83-1014, and approved by the Illinois House on October 19, 1983. H.B. 1530, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 House Debates 10/19/1983, Tr. at 99-105).

[71] 5 ILCS 315/1, *et seq.* (adopted as P.A. 83-1012, and approved by the Illinois Senate on October 20, 1983. S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 Senate Debates 10/20/1983, Tr. at 24-8).

[72] Saltzman, *supra* note 11, at 52.

[73] James Warren & Manuel Galvan, *Mayor Oks Pay Boost for 7500*, CHI. TRIB., Dec. 14, 1985, at 1.

[74] Saltzman, *supra* note 11, at 51.

[75] Kenneth M. Reardon, "Local Economic Development in Chicago 1983-1987: The Reform Efforts of Mayor Harold Washington," (May 1990) (Doctoral Dissertation, Cornell University) (available at

The legislative majority to pass the legislation emerged after the passage of a constitutional amendment in 1980 eliminating cumulative voting to elect House members. From 1870 to 1980, House members were elected from fifty-nine legislative districts using a process known as cumulative voting.[76] Such cumulative voting as it was then known enabled voters to make one vote for three candidates, one and a half votes for two candidates, or three votes for one candidate.[77] A constitutional amendment eliminating cumulative voting, creating single member districts, and reducing the size of the House by onethird was approved in the 1980 election and was implemented in the 1982 election.[78] The effect was to tip the leadership in the House to Democratic for the 1983 legislative session,[79] which supported the legislation to provide public sector employees with collective bargaining rights.

B. S.B. 536's legislative history: a tension between prohibiting strikes, maintaining collective bargaining's integrity, and protecting employers from unfunded mandates.

1. S.B. 536, as originally drafted, called for binding arbitration.

When S.B. 536 was presented for discussion on May 27, 1983, the bill's sponsor, Senator Earlean Collins, stated that it:

> prohibits the right to strike for category [sic] of employees; firemen, police, security personnel, and we have agreed that it will be amended in the House to include other life safety personnel . . . to be covered under this bill. For other employees, such as teachers [and] those who are currently covered under AFSCME, we have an impasse procedure that I feel will totally minimize the possibility of strikes.[80]

Senator Sangmeister asked whether others, such as hospital personnel, garbage collectors, and sanitation workers would be under binding arbitration as well. Senator Collins assured that "Employees that protects the life and health, safety workers," would be specifically included.[81]

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https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.882.8273&rep=rep1&type=pdf) (last visited 9/16/21) at 96, *citing* Michael Galvin & Mitchell Locin, *83 Spirit Rekindles by Mayor*, CHI. TRIB., Feb. 17, 1987, at 1-2.

[76] 1970 Illinois Constitution Annotated for Legislators 48 (Legislative Research Bureau 2018).

[77] *Id.*

[78] *Id.*

[79] The shift to Democratic leadership in the House remained in place from 1983 to the present, except for one two year term in the mid-1990s.

[80] S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 Senate Debates 5/27/1983, Tr. at 296.

[81] *Id.* at 306-07.

Senator DeAngelis argued, however, that binding arbitration "destroys the good faith of collective bargaining," commenting that parties need not bargain in good faith if binding arbitration will settle the matter anyway. He also was concerned that a municipal employer could be forced to raise taxes to cover the costs of an arbitrator's binding decision. Senator Collins responded by saying that the bill required the arbitrator to take the employer's financial position into consideration.[82] Senator Grotberg followed up with the same issue: could binding arbitration force local officials to raise taxes? Senator Collins replied that it could not.[83]

Senator Schuneman asked for a point of interpretation. While police and fire personnel are prohibited from striking, what about the instances where such employees "simply don't show up," in other words, "the blue flu"? The bill provided that "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent" and "[n]or shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act." Senator Schuneman argued that this is what "blue flu" is by definition, and therefore, there was no protection in the Act from strikes by police, and the legislation actually gives every public employee in the State the right to strike.[84] Senator Collins responded by saying these provisions were "directly worded from the National Labor Relations Act."[85]

The Bill passed the Senate by a vote of 31 to 23.[86]

2. In the House, S.B. 536 was amended to allow the public employer to reject the award.

On June 8, 1983, the House Committee on Labor and Commerce considered S.B. 536. The Committee heard testimony from the opponents of arbitration who believed that final and binding arbitration would destroy the incentive to bargain. The president of the village of Arlington Heights, Illinois, testified by quoting Mayor Coleman Young of Detroit, saying "compulsory interest arbitration destroys collective bargaining . . . and destroys sensible fiscal management." The mayor of Niles, Illinois added, "collective bargaining with a binding arbitration clause has dramatic consequences." Steve Rosebaum, assistant manager for the Labor Relations Department of the Illinois State Chamber of Commerce, concluded that "It's a disaster[.]"[87] Both sides responded with statistics and surveys from other states that had adopted some form of interest

[82] *Id.* at 309-11

[83] *Id.* at 312-13.

[84] *Id.* at 316-317.

[85] *Id.* at 317.

[86] *Id.* at 318-20.

[87] Sally J. Whiteside, Robert P. Vogt & Sherryl R. Scott, *Illinois Public Labor Relations Law: A Commentary and Analysis,* 60 CHI.-KENT L. REV, 883, 914 n. 193 (1984) *quoting 83rd General Assembly, House Committee on Labor and Commerce (June 8, 1983).*

arbitration. Opponents of the bill predicted financial ruin for state employers because of unfunded mandates.[88]

In response to these concerns, a series of amendments were introduced during the bill's second reading before the House. In response to the concerns that forcing a government entity to accept the mandatory and binding decision of an arbitrator and therefore require that entity to expend funds it did not have, the House adopted an amendment allowing an employer's governing body to reject an award. The amendment's sponsor, Representative Greiman, stated that the amendment "contains no binding arbitration for economic decisions."[89] He explained that the basic principles contained in S.B. 536 remain the same: public employees are allowed the right to collective bargaining, with most employees having the right to strike "if there is an impasse."[90] However,

> essential services . . . ought not be able to strike. . . policemen, peace officers, . . . will not be given the right to strike, but they will not be given binding arbitration either. They will be given arbitration. If the parties cannot end their impasse, . . . they will reach arbitration. They will give their last best offer, a process that will bring them close together, and after that, the specific governing board of the employer . . . will be required to accept the arbitrator's report. And if they do not accept it, it goes back to arbitration without the right to strike.[91]

This amendment also focused on defining "essential service employees" and "security employees" together, stating that a "strike which may constitute a clear and present danger to the health and safety of the public" would be required to go through the impasse procedure.[92] However, the amendment's sponsor emphasized that while these essential service and security employees were prohibited from striking and had the right to interest arbitration, the government entity had the right to reject an arbitration award: "For the security people, and the essential people, and later on for the policemen, they are in the arbitration process. And they must get into the arbitration process, but the bottom line is that the employer has the right to reject it all."[93] The amendment was approved on a vote of 69 to 45.[94]

In order to help control the "extraordinary expenses" local governments would incur as a result of interest arbitration awards, an amendment was proposed to subject the bill to

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[88] *Id.* at 914.

[89] S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 House Debates 6/23/1983, Tr. at 294-95.

[90] *Id.* at 295.

[91] *Id.*

[92] *Id.* at 298-300.

[93] *Id.* at 304.

[94] *Id.* at 306.

the State Mandates Act. This was defeated.[95] More amendments were proposed that sought to blunt the arbitrator's decision-making authority. The amendments proposed required referendum approval of arbitration agreements,[96] residency requirements for arbitrators,[97] and a requirement that arbitrators provide an analysis for how the government entity would pay for the arbitrator's decision.[98] All these amendments were defeated.

After the amendment process was concluded, the House immediately considered the bill for approval. Representative Greiman spoke to the bill, again emphasizing that "this Bill contains no compulsory arbitrations on the economic issues involved in labor management. It has advisory arbitration with a legislative veto, and that's all."[99] Most of the remaining discussion involved other details of the bill, and eventually, a vote was taken, and the bill passed the House by a vote of 72 to 45.[100]

3. Upon return to the Senate, S.B. 536 was approved.

The amended version of S.B. 536 went back to the Senate,[101] where it was presented on June 30, 1983.[102] While explaining the many amendments to the bill, the sponsor, Senator Collins, noted that the House amendments had "eliminated compulsory arbitration for the . . . impasse procedures for all employees with the exception of security employees under the correctional system, and it replaces that section with . . . advisory open-ended arbitration; it excludes police, firemen, . . . and part-time employees of the community college[s]."[103] When asked if the amended bill would allow the personnel at a county

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[95] S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 House Debates 6/24/1983, Tr. At 238-39.

[96] *Id.* at 253-55.

[97] *Id.* at 257-58.

[98] *Id.* at 269-71.

[99] *Id.* at 290-91.

[100] *Id.* at 297.

[101] The Senate considered HB 1530, the Educational Labor Relations Act, and approved it on June 27, 1983. H.B. 1530, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 Senate Debates 6/27/1983, Tr. at 21- 40. There was a discussion of a conflict between the IELRA and the still pending S.B. 536, to which Senator Bruce replied, "if 536 is [approved] later, it would supersede this Act," noting that "if you amend the same section in a later amended bill, it supersedes, that's all. I mean if 536 is [approved] . . . it will take precedence and that language, in fact, I think, is in [S.B.] 536." *Id.* at 39. Indeed, the Senate also considered H.B. 375 that day, which sought to create the Firefighter's Collective Bargaining Act. *Id.* at 277. Senator D'Arco expressed opposition to the bill because "[S.B.] 536 was going to be the bill that contained collective bargaining for all of the . . . public employees in the State of Illinois." *Id.* In support of the bill, Senator Geo-Karis stated that "I have consistently said that I would support a collective bargaining bill with no right of strike for any public employee but with binding arbitration which is subject to the review of the court if the event so be. In that case, I think this bill probably satisfies . . . those requirements[,] . . . I do not believe public employees . . . like the firemen should be allowed to strike because they do affect the health, safety and welfare of the people[.]" *Id.* at 282. The firefighters bill was voted down 28-25. *Id.* at 288-89.

[102] S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 Senate Debates 6/30/1983, Tr. at 96.

[103] *Id.* at 97.

nursing home to strike, the sponsor responded, "Yes. However, their . . . administrator can, in fact, petition the board to go into the courts . . . to determine whether or not that strike imposes a clear and imminent danger to the health and safety of the public; and through injunctive relief of a court, they will be ordered back to work."[104] Senator Geo-Karis continued this line of questioning—would this also include nurses working at the State psychiatric hospital? Could they go on strike? Senator Collins answered it would be same, and that this standard (the "clear and imminent danger to health and safety" standard) would apply to all employees except for security employees, who would not have the right to strike.[105]

Senator Geo-Karis noted that the Senate had recently approved the Educational Labor Relations Act, and asked which bill would take priority over teachers. Senator Collins replied that S.B. 536 would "take priority over any other labor collective bargaining bill we pass this Session."[106] Later, Senator Dawson interjected that

> the courts do have the right to enjoin any legal strike, or any job action, or any strike endangering the public health or safety of the people of this State. Any and all arbitration decisions are to be reviewed and ratified by either the counsel [sic] or other governing body in order to become final and binding. Also, any of the counsel-rejected decisions shall be returned for further consideration, then a counsel must review and approve the subsequent decision in order for it to take an effect.[107]

In the context of the Board's making the determination that workers were essential, Senator D'Arco asked, "this is not a binding arbitration bill because the decision of the board is not final, is that correct?" Senator Collins responded, "This is advisory arbitration and the final decisions have to be approved by the governing body . . . when it deals with wages, hours, [or] other conditions of employment."[108]

As Senators raised questions about particular amendments added to the House version of S.B. 536, Senator Hudson moved to "divide the question[,]" which meant there would be a separate vote and roll call on each of the amendments the House made to S.B. 536.[109] When the discussion came to Amendment 6, which included the section addressing interest arbitration, Senator Collins again explained that the amendment changed this section from "compulsory binding arbitration . . . to advisory arbitration; . . . [and] it sets

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[104] *Id.* at 100.

[105] *Id.*

[106] *Id.* at 100-01.

[107] *Id.* at 102-03. In the floor debate Senator Hudson quoted from and agreed with the above-quoted *(supra* note 6) Letter from FDR. S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 Senate Debates 6/30/1983, Tr. at104.

[108] *Id.* at 112.

[109] *Id.* at 116-17.

forth criteria which . . . must be met before a strike can take place."[110] After a debate over the application of the State Mandates Act, the Senate voted on Amendment 6 (after approving all the other amendments),[111] and approved the measure on a vote of 33 to 23, meaning S.B. 536 had passed both houses of the Illinois General Assembly.[112]

Section 14 of S.B. 536 became Section 14 of the Labor Act, which contained the language dealing with the arbitration impasse procedures. It originally covered all "essential service employees."[113] The original title of this section of the final version of S.B. 536 as approved on June 30, 1983, was "Security Employees and Essential Service Employee Disputes."[114] The governor, using his amendatory veto[115] deleted "Essential Service Employee" and replaced it with "State Police Officer and State Fire Fighter."[116]

However, the concept of the "Essential Service Employee" was otherwise included in Section 18 of the bill, which was enacted as Section 18 of the Labor Act. Even in instances outside of the employment categories that are strictly prohibited from striking which must rely on interest arbitration, Section 18 provides that if a strike is about to occur, an employer can petition the Labor Board for a determination of whether the strike would be a clear and present danger to the health and safety of the public. If the Board determines that the strike would present such a danger, the employer can petition the court to enjoin the strike.[117]

4. The governor issued an amendatory veto, which the Illinois general assembly approved.

When the bills reached Governor Thompson for signature, he issued an amendatory veto to, among other things, remove teachers from the bill that became the Illinois Public Labor Relations Act (IPLRA), the end result of which was to give the teachers their own

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[110] *Id*. at 123.

[111] *Id*. at 117-22.

[112] *Id*. at 124-25.

[113] *See* S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 Senate Debates 5/27/1983, Tr. at p. 311; S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 House Debates 6/23/1983, Tr. at pp. 294–95.

[114] Sally J. Whiteside, et al., *Illinois Public Labor Relations Law: A Commentary and Analysis*, 60 CHI.-KENT L. REV. 883, 916 (1984).

[115] S.B. 536 was comprehensive, designed to cover all public employers in the state, including public schools. At virtually the same time, the legislature passed the Illinois Educational Labor Relations Act (IELRA, which was created by H.B. 1530) which covered only public education. As noted above, Governor James Thompson, using his amendatory veto, deleted the coverage of public education from the IPLRA and then signed both bills. Martin H. Malin, *Public Sector Collective Bargaining: The Illinois Experience*, 2 POL'Y PROFILES, CTR. FOR GOVERNMENTAL STUDIES, N. Ill. Univ., 2 (2002).

[116] Sally J. Whiteside, et al., *Illinois Public Labor Relations Law*, CHI.-KENT L. REV. at 916, n.207 (1984). (citing Governor's Amendatory Veto Message of S.B. 536, p. 5).

[117] *See* S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 House Debates 6/24/1983, Tr. at pp. 248–49.

law.[118] Thompson signed H.B. 1530 on September 23, 1983, at a specially convened meeting of the state's largest teacher's union, the Illinois Education Association.[119] The Illinois State Senate took up consideration of the governor's amendatory veto on October 20, 1983. Senator Collins briefly explained the governor's amendments to the bill, which included "clarified language in . . . binding arbitration."[120] After a brief debate over the philosophical benefits of public employee collective bargaining, the Senate approved the governor's amendments by a vote of 32 to 22.[121] The House considered the governor's amendments on November 2, 1983.[122] The determination of whether an employee was "essential," and therefore ineligible to go on strike under Section 18 was discussed at length.[123] After more debate, the House approved the Governor's amendments by a vote of 73 to 42.[124]

H.B. 1530 became law on January 1, 1984,[125] and S.B. 536 became effective July 1, 1984. In 1986 one of the chief proponents of S.B. 536, the 900,000-member State AFL-CIO, endorsed Thompson for re-election—the first time a Republican governor had received such an endorsement,[126] and he won reelection, handily defeating his 1982 opponent, Adlai Stevenson III, by a decidedly larger margin.[127] One year later the Supreme Court reviewed the legislative history of the IELRA and the IPLRA and concluded their

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[118] Martin H. Malin, *Public Sector Collective Bargaining: The Illinois Experience*, 2 POL'Y PROFILES, CTR. FOR GOVERNMENTAL STUDIES, N.Ill. Univ., 2 (2002).

[119] Joyce M. Najita, et al., COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 199 (Joyce M. Najita and James L. Stern, eds. 2001). The authors also quote Thompson as saying: "Without the support of the IEA I would not have been re-elected [in 1982]. There was no way I was not going to sign this bill." *Id.*

[120] S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 Senate Debates 10/20/1983, Tr. at pp. 24–25.

[121] *Id.* at 27.

[122] S.B. 536, 83rd Ill. Gen. Assemb. Reg. Sess., 1983 House Debates 11/2/1983, Tr. at p. 179.

[123] *Id.* at 193–95.

[124] *Id.* at 211.

[125] Thompson would later observe: "Now, I was always a strong champion of unions—I gave them the right to strike—and they were strong supporters of mine. There were Republicans in the IEA downstate; they were Democrats in the IFT, the Illinois Federation of Teachers downstate, and the CFT, the teachers in Chicago; yet they all supported me, almost 100 percent." Interview by Mark DePue of James R. Thompson, former Governor of Illinois, in Chi., Ill., (March 30, 2015).

[126] James Strong, *Thompson, Edgar Get Labor Backing,* CHI. TRIB., (Aug. 2, 1986), https://www.chicagotribune.com/news/ct-xpm-1986-08-02-8602250555-story.html (last visited Sept. 16, 2021).

[127] Thompson, who had barely defeated Stevenson in 1982, sailed past him in 1986 by more than 400,000 votes. Ill. State Bd. of Elections, Official Vote Cast at the November 1986 General Election. Some contemporary political observers surmised Thompson wanted to win a fourth term in 1986 so that he could run for president in 1988, replacing President Reagan. Andrew H. Malcolm, *Thompson, A 4th Term, Looking Beyond Illinois,* N.Y. TIMES, January 11, 1987, at 14 (noting Thompson had signed high school yearbooks as "Jim Thompson, President, 1984–92"). However, the campaign never materialized, and Thompson retired from politics in 1991 to join a big Chicago law firm as chairman of its executive committee.

"provisions set out a comprehensive scheme regulating collective bargaining for public employees."[128] Consequently, decisions made under one statute are often determinative of issues arising under the other statute.[129]

C. How interest arbitration works under Illinois law.

Illinois law provides public sector employees who are represented by a union under either the Labor Act or the Ed Act do not have the right to strike during the duration of a collective bargaining agreement. Both statutes make expiration of the contract one of several preconditions that must be met in order for a strike to take place.[130] The IPLRA implies that employees covered by it give up the right to strike during the contract in consideration for a grievance and arbitration procedure to resolve all disputes arising under the agreement.[131]

However, even once the Collective Bargaining Agreement (CBA) has expired and, even when the other statutory preconditions required for a strike to occur have been fulfilled,[132] not all employees covered by the IPLRA may engage in a strike. The IPLRA expressly prohibits the following classes of employees from striking: security employees, peace officers, firefighters, and paramedics employed by fire departments and fire protection districts.[133] The statute also sets forth a process by which an employer may seek to prevent other employees from striking on the grounds that such employees are essential service workers and that a strike by them would cause a clear and present danger to the health and safety of the public.[134] The IPLRA prescribes that the State's policy is that the right to strike may be prohibited by law, and that collective bargaining disputes involving security

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[128] *Cnty. of Kane v. Carlson*, 116 Ill.2d 186, 507 N.E.2d 482 (1987).

[129] *City of Belvidere v. Ill. State Lab. Rels. Bd.*, 181 Ill.2d 191, 206–11, 692 N.E.2d 295, 302–05 (1998) (applying the three-pronged test for determining whether an issue is a mandatory subject of collective bargaining under the IELRA, set forth in *Central City Education Ass'n. v. Illinois Educational Labor Relations Board*, 149 Ill.2d 496, 599 N.E.2d 892 (1992) to determine whether an issue is a mandatory subject of bargaining under the IPLRA).

[130] 115 ILCS 5/13(b)(4) ("employees in a school district organized under Article 34 of the School Code shall not engage in a strike except under the following conditions . . . the collective bargaining agreement between the educational employer and educational employees, if any, has expired or been terminated"); *see also* 5 ILCS 315/17(a)(2) ("Public employees who are permitted to strike may strike only if: . . . (2) the collective bargaining agreement between the public employer and the public employees, if any, has expired, or such collective bargaining agreement does not prohibit the strike[.]")

[131] *See* 5 ILCS 315/8 (requiring CBAs to contain provisions for final and binding arbitration of disputes unless otherwise agreed to by the parties and stating "[a]ny agreement containing a final and binding arbitration provision shall also contain a provision prohibiting strikes for the duration of the agreement.")

[132] *See* 5 ILCS 315/17.

[133] *Id.*

[134] 5 ILCS 315/18. The IELRA has a similar provision that establishes a slightly different process by which a strike may be stopped where it would cause a clear and present danger to the health and safety of the public. *See* 115 ILCS 5/13(b).

employees and employees whom the Labor Board designates as performing essential services shall be submitted to arbitration:

> To prevent labor strife and to protect the public health and safety of the citizens of Illinois, all collective bargaining disputes involving persons designated by the Board as performing essential services and those persons defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such disputes. It is the public policy of the State of Illinois that where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act.[135]

In order for an interest arbitration to be convened the parties must first engage in mediation,[136] and the interest arbitration process is commenced by a writing to the Board requesting such mediation take place.[137] If mediation does not settle the contract, a written request for arbitration must be submitted thereafter to the Labor Board to initiate the arbitration hearing. The Labor Act provides that the hearing shall be held before a three-member arbitration panel, with each party selecting one panel member and a neutral third panel member selected jointly by the parties. The neutral member acts as the panel chair. [138] In practice, the parties often forego the use of a panel and, instead, jointly select a single neutral arbitrator who hears the case and issues an award. Once the parties select an arbitrator,[139] the arbitrator convenes an informal hearing during which the rules of evidence do not apply.[140] In determining the wages, hours, and other terms and conditions of employment for the next collective bargaining agreement, the arbitrator considers a number of factors set forth in the IPLRA, including but not limited to the wages and benefits that comparable employees receive; the employer's financial ability to

[135] 5 ILCS 315/2.

[136] *See* 5 ILCS 315/14(a).

[137] *See* 5 ILCS 315/14(j).

[138] *See* 5 ILCS 31/(14(a).

[139] *See* 5 ILCS 315/14(c) (setting forth the process by which the parties may select the arbitrator).

[140] *See* 5 ILCS 315/14(d). Lawyers and other party representatives may, and often do, present evidence that in a formal hearing would have to be introduced with proper foundation, by testimony from a witness having personal knowledge of the facts adduced.

pay such costs; the interest and welfare of the public; changes in the cost of living; and the value of the total compensation package the employee receives, among others.[141]

Before the hearing closes, the parties are required to submit to one another their last offer on economic terms, and if no settlement is reached the arbitrator's decision includes a determination of what such terms will be in the new contract.[142] As to each economic issue, the arbitration panel or arbitrator must adopt the last offer of settlement on each economic issue which most closely complies with the applicable statutory factors set forth in subsection (h).[143] On non-economic issues, the panel or arbitrator is free to select one of the final offers of either party or craft its own language so long as the decision is based upon the application factors.[144] Typically, at the close of the hearing, the parties submit briefs to the arbitrator arguing what the evidence adduced at the hearing proved, and how the statutory factors should be applied in light of the evidence. For peace officers and firefighters, the IPLRA excludes certain operational issues from the scope of the arbitration award, such as residency requirements in municipalities with at least 1,000,000 residents; equipment, other than uniforms, which is issued; and the total number of employees.[145]

All of the terms decided upon by the arbitration panel are included in an agreement that is submitted to the public employer's governing body for ratification and adoption by law, ordinance, or the equivalent appropriate means.[146] Each term that the employer's governing body does not reject by a 60% vote become part of the next contract.[147] If the governing body rejects the award it returns to the arbitration panel to issue a

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[141] *See* 5 ILCS 315/14(h). The IPLRA states: ". . . the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable: (1) The lawful authority of the employer. (2) Stipulations of the parties. (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs. (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally: (A) In public employment in comparable communities. (B) In private employment in comparable communities.(5) The average consumer prices for goods and services, commonly known as the cost of living. (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received. (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings. (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment." Much academic literature has been devoted to a discussion of how these factors have been and/or should be applied, which is beyond the scope of this article.

[142] *See* 5 ILCS 315/14(g).

[143] *Id.*

[144] *Id.*

[145] *See* 5 ILCS 315/14(i).

[146] *See* 5 ILCS 315/14(n).

[147] *Id.*

supplemental award.[148] The employer also has the right to seek to vacate the arbitration award on the grounds that the arbitration panel was without or exceeded its statutory authority; that the order is arbitrary, or capricious; or that the order was procured by fraud, collusion or other similar and unlawful means for reasons applicable to vacatur of other arbitration awards.[149]

II. APPLICATION OF INTEREST ARBITRATION IN CRISIS SITUATIONS

A. Overview

As discussed above, the Illinois Labor Acts were born out of crisis—the need for the State to regulate labor relations between public employers and public employees as demonstrated by the Chicago firefighters strike, and the political crisis arguably faced by Governor Thompson, who saw his once huge electoral margin virtually disappear in the 1982 election, and sought to expand his electoral base. Additionally, the interest arbitration provisions of the IPLRA granting interest arbitration rights to employees enjoined from striking on the basis that their strike would create a clear and present danger to the health and safety of the public and to police, firefighters, and security personnel were designed to create a process by which these individuals could collectively bargain while averting the crisis that would occur if they were allowed to strike. But how does the interest arbitration process in Illinois respond to crisis? Recent economic crises, the last eighteen months of the COVID-19 pandemic, and the social unrest and intense focus on police reform and the Black Lives Matter movement following the murder of George Floyd provide an opportunity to explore that issue.

Although much has been written about the potential drawbacks of interest arbitration, such commentary has tended to focus on the outcome of the negotiations and the potential impact interest arbitration may have on future negotiations as opposed to the context in which the negotiations arose. In sum, commentators initially expressed concern that interest arbitration would have a "chilling" and "narcotic" effect on negotiations.[150] Instead of negotiating their own agreements, parties would rely on an arbitrator to decide the terms for them.[151]

The chilling effect has been described as "the theory . . . is that parties will inflate their positions on the assumption that an arbitrator will issue an award at the midpoint between the parties' final offers. They fear that making concessions in negotiations will

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[148] *See* 5 ILCS 315/14(o). The statute is silent as to whether the arbitration panel is required to issue a supplemental award that changes any terms of the original award.

[149] *See* 5 ILCS 315/14(k).

[150] Michelle T. Sullivan, *Binding Arbitration as a Means of Settling Public Sector Union Contracts: A Process with an Image Problem?*, 43 U. TOL. L. REV. 655, 657-658 (2012); Malin, Martin H., *The Role of ADR Mechanisms in Public Sector Labor Disputes: What is at Stake, Where We Can Improve & How We Can Learn From the Private Section: Two Models of Interest Arbitration*, 28 OHIO ST. J. ON DISP. RESOL. 144, 150 (2013).

[151] *Id.*

undermine their positions before the arbitrator."[152] In Illinois, the legislature attempted to limit the impact of such an effect by requiring, at least with respect to economic issues, that the arbitrator chose from one of the parties' final offers on each economic item rather than split the difference between the two.[153] The narcotic effect has been described as "the potential for parties who resolve their contract through interest arbitration to use interest arbitration again to resolve future contracts."[154] These were the effects that those who spoke against compulsory interest arbitration warned of when the Labor Act was being debated.[155]

There is no clear consensus on the extent to which the fears of the chilling effects of interest arbitration have been realized. Some have taken the position that these concerns have not come to fruition. For example, one commentator noted in 2012 "that the use of arbitration as a means of settling contract disputes declined between the time when most public sector bargaining laws were introduced and the present." [156] Others have argued that the proper analysis should be between similar bargaining units in interest arbitration and right-to-strike schemes, and that such comparisons show a greater use of interest arbitration to settle the contract.[157]

The data on the narcotic effect or repeat use of interest arbitration is similarly inconclusive. In Illinois, going back to 2006, the number of interest arbitration awards issued has ranged from a low of thirteen in 2019 to a high of fifty-one in 2012.[158] Although the year is not yet complete, 2021 is on pace to have the fewest arbitration awards issued; through July, there have been only six published awards.[159] The overall pattern of the number of published awards demonstrates that the use of interest arbitration trended upward from 2006 to a peak in 2012 and then began to trend downward, [160] suggesting that the parties' reliance on interest arbitration was based on factors other than past use

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[152] *Id.*

[153] 5 ILCS 315/14(g).

[154] *Id.*

[155] *See supra* notes 80, 87, 107

[156] Sullivan, *supra* note 150 at 658.

[157] Malin, *supra* note 144, at 150. Professor Malin wrote that determining whether interest arbitration chills the bargaining process depends on "how one spins the data rather than on the data itself." "Most contracts negotiated under the threat of going to interest arbitration settle. That leads some to conclude that interest arbitration does not chill collective bargaining. The rate of usage of interest arbitration, however, exceeds the rate of resorting to strikes and a higher percentage of contracts negotiated in right-to-strike regimes settle without a strike than the percentage in interest arbitration regimes that settle without resort to arbitration."

[158] Arbitrations Awards, Illinois Labor Relations Board, https://www2.illinois.gov/ilrb/arbitration/Pages/default.aspx (last visited Sept. 16, 2021).

[159] *Id.*

[160] *Id.*

of the process. This point is further evidenced by the fact that, although there were some repeat users of interest arbitration, the number of repeat users was not significant.[161]

Contracts that were being negotiated in 2010, 2011, and 2012—the years that saw the most significant increase in the use of interest arbitration in Illinois—were the first contracts to be negotiated in the midst of the Great Recession and its aftermath, suggesting that the challenges facing public sector employers as a result of the loss of revenue made it much more difficult for parties to reach agreement on their own. [162] One commentator has addressed the increase in the use of interest arbitration during this period to argue that the more likely disadvantage to interest arbitration is not its potential chilling or narcotic effects on bargaining but instead: 1) its use of a means by which union leaders and public officials can avoid accountability to their constituents for the hard decisions necessary to conclude an agreement; 2) its inherently conservative nature, which stifles innovation; and 3) its tendency to divert rather than resolve conflict.[163] This commentator suggested that to avoid an overreliance on interest arbitration, the process should be established in such a manner that the outcome is less predictable, just as the effects and outcome of a strike is inherently unpredictable.[164]

Specifically, economic crisis may (and usually does) cause a public employer to see the projected tax revenues it needs to fund the terms of the next collective bargaining agreement drop. Such an employer is then faced with the Hobson's choice of raising taxes in the midst of an economic downturn—which may not be a good reelection strategy—or going to the bargaining table and proposing economic concessions for the next contract. If the concessions are not contained in the award, an employer may have to campaign on the concessions demanded, not the terms of the award. Where such concessions are proposed, union officials are likewise faced with a Hobson's choice: propose to the union members (whose votes the officials need for reelection) that they ratify a new CBA containing such worse economic terms, or present the matter to an interest arbitrator who may or may not include such concessions in the next contract. Thus, interest arbitration affords both public employers and the union officials with whom they must bargain the opportunity to claim credit for the fight and not the outcome when adverse terms are awarded during economic crisis.

However, an employer who chooses to go to interest arbitration must understand that it is not a cost-free choice. First, the evidence suggests collective bargaining agreements born in interest arbitration have a higher rate of grievance arbitrations than those

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[161] *Id.*

[162] *See id.*

[163] Malin, *supra* note 144, at 151, 155, and 165.

[164] *Id.* at 157.

agreements that are concluded at the bargaining table.[165] The cost of such grievance arbitrations must be weighed against any perceived benefit arising from having the interest arbitrator determine the terms of the next contract. Further, the public employer who chooses interest arbitration may effectively consign itself to the outcome of the award. As the interest arbitration over the 2015–19 State Troopers Collective Bargaining Agreement discussed next showed, although interest arbitration produces an agreement that becomes binding only if the employer does not reject it, which, as noted above, is the process the drafters expressly intended, the interest arbitration process as set forth in the IPLRA may effectively afford the employer no terms other than those the arbitration panel produces.[166] This is a problem for employers who, in times of economic crisis, hope to address structural funding issues by negotiating different economic terms with their employees.

B. Economic crisis: The 2015–19 State Troopers Interest Arbitration

On the evening of May 4, 1969, Governor Richard B. Ogilvie gave a statewide TV and radio address to the voters on the state's finances.[167] He explained the state's inability to fund its many needs through current revenue sources, and proposed the implementation of an income tax to provide the needed funding.[168] The general assembly passed a bill to implement Ogilvie's income tax plan, the governor signed it, and notwithstanding the fact that the Illinois Supreme Court had previously held such a tax plan to be unconstitutional under the 1870 Constitution, the Supreme Court reversed course and upheld the

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[165]Malin, *supra* note 144, at 156 (citing Robert P. Hebdon & Robert N. Stern, *Tradeoffs Among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations*, 51 Indus. & Lab. Rel. Rev. 204 (1998). Hebdon and Stern compared public sector bargaining units in Ontario that had a right to strike to resolve their bargaining impasses to those who did not have the right to strike, but instead had the right to interest arbitration. Hebdon and Stern found that there were significantly higher rates of grievance arbitration in units that where strike were prohibited and impasses resolved through interest arbitration. Hebdon and Stern concluded that rather than forcing parties to resolve conflicts in an effort to avoid a strike, the use of interest arbitration redirected the conflict to contract administration. In a separate analysis, Hebdon also found that in the United States, prohibiting bargaining units from striking, with or without the right to interest arbitration, also led to significantly higher rates of grievance arbitration and unfair labor practices. Malin, *supra* note 144, at 156 (citing Robert P. Hebdon, T*oward a Theory of Workplace Conflict: the Case of U.S. Municipal Collective Bargaining,* 14 Advances in Indus. Rel. 33, 60-61 (2005)).

[166] The Illinois Department of State Police and Illinois Troopers Lodge #41, Fraternal Order of Police, Case No. S-MA-15-347, (2020) (Nielson, Arb., Bialorucki, Arb., & Hartzler, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-15-347ArbAward.pdf.

[167] Office of the Illinois Secretary of State, *Governor Ogilvie Addresses the State on an Income Tax* (1969), https://www.cyberdriveillinois.com/departments/archives/online_exhibits/100_documents/1969-ogilvie-income-tax.html (last visited Sept. 16, 2021).

[168] *Id.*

constitutionality of the tax.[169] From 1969 to 1982 the income tax rate for individuals was 2.5%, which increased to 3% beginning in 1990.[170]

In 2007–09 the nation experienced the worst financial crisis since the Great Depression, a crisis that wiped away millions of jobs and billions of dollars of income, and from which the economy took almost a decade to return to normal.[171] The Great Lakes states were hit the worst and, among those, Illinois experienced multi-billion-dollar budget deficits. Its bond rating, which determines the rate of interest Illinois must pay to satisfy investors to buy the bonds it issues, dropped below any other state. To increase revenues the General Assembly passed a temporary increase in the state income tax for individuals to 5% and for corporations to 7% effective January 1, 2011.[172] In signing the measure into law, Governor Quinn noted the State was experiencing a "fiscal emergency," explaining the tax hike was necessary because our "fiscal house was burning."[173]

Although the temporary tax hike provided temporary budget relief, it was set to sunset January 1, 2015.[174] As the sunset date approached, the Governor's Office of Management and Budget ("GOMB") projected the State would again experience large budget deficits and even larger amounts of unpaid bills once the hike was over.[175] A 2014 GOMB report projected that the State would have a $4.1 billion deficit in its operating budget for in FY-16 (the year from July 1, 2015, to June 30, 2016) along with an end-of-year gross backlog of unpaid bills of $11.6 billion. In FY-17, the State would have a $4.5 billion budget deficit for the year and a gross backlog of unpaid bills at the end of the year of $16.2 billion.[176] On the literal eve of the day the tax hikes were set to expire, December 31, 2014, GOMB projected that the State would operate in the next three fiscal years with annual budget deficits of $5.7 billion, $5.8 billion, and $5.5 billion, respectively, and end the next three

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[169] *See* 35 ILCS 5/201*, et seq*. (State income tax statute); *see Bacharach v. Nelson,* 349 Ill. 579 (1932) (declaring income tax unconstitutional under 1870 Constitution), *overruled by Thorpe v. Malin,* 43 Ill. 2d 36 (1969) (The holding in *Bachrach v. Nelson*, that an "income tax" is a "property tax" and subject to the limitations article IX places on property taxes, is overruled, upholding the constitutionality of the State income tax statute).

[170] *See* 35 ILCS 5/201(b)(1)-(5).

[171] Peter Bondarenko, *5 of the World's Most Devastating Financial Crises*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/list/5-of-the-worlds-most-devastating-financial-crises (last visited Sept. 16, 2021).

[172] 35 ILCS 201/5 (5),(10).

[173] Monique Garcia and Todd Wilson, *Quinn, Madigan defend Illinois tax hike,* CHI. TRIB. (Jan. 12, 2011), https://www.chicagotribune.com/news/ct-xpm-2011-01-12-ct-met-tax-hike-0113-20110112-story.html.

[174] *See* 35 ILCS 5/201(b)(5).

[175] State of Illinois Governor's Office of Management & Budget, *Three Year Budget Projection (General Funds), FY15-17* (January 1, 2014), http://www.voices4kids.org/wp-content/uploads/2014/01/GOMB-FY15-17-Budget-Projection-and-Report.pdf.

[176] *Id.*

fiscal years with a projected backlog of unpaid bills at year-end of $9.8 billion, $15.7 billion and $21.2 billion.[177]

Beginning January 1, 2015, the individual tax rate dropped to 3.75% and the corporate rate dropped to 5.25%.[178] For the twenty-four months that followed, the State accumulated some $14 billion in unpaid bills, and Illinois bonds were repeatedly downgraded, reaching just above junk status.[179]

It was against the backdrop of this economic crisis that an interest arbitration was conducted to set the terms of the 2015–2019 collective bargaining agreement between the State and the Fraternal Order of Police Troopers Lodge 41—the union representing Illinois State Police Troopers. In 2016, the parties presented evidence and post-hearing briefs on the relevant issues (including the economic crisis) and on December 2, 2016, the Arbitration Panel issued its Opinion and Award ("Initial Award").[180] On December 13, 2016, the State convened a meeting of its Governing Body for the purpose of determining whether to accept or reject one or more terms of the Initial Award pursuant to Sections 3(h) and 14(n) of the IPLRA.[181] On December 13, 2016, the Governing Body rejected certain economic terms of the Initial Award decided in favor of Lodge 41—chief of which was the health care package, changes to which the employer had said were required to address the economic crisis—and, pursuant to the terms of the Initial Award, informed the Lodge it was implementing a freeze on longevity step increases.[182] The Lodge filed suit to protest such implementation,[183] and on December 23, 2016, the State filed an unfair labor practice charge alleging that the lawsuit violated the IPLRA.[184]

On January 3, 2017, the parties held a supplemental interest arbitration hearing before the Arbitration Panel as required by 5 ILCS 315/14(n).[185] As a result, the Arbitration Panel issued a Supplemental Interest Arbitration Award ("First Supplemental Award") that affirmed the terms contained in its Initial Award.[186] On February 7, 2017, the State's Governing Body again rejected certain economic terms of the First Supplemental Award

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[177] State of Illinois Governor's Office of Management and Budget Three Year Projection (General Funds), FY16-18, December 31, 2014.

[178] *See* 35 ILCS 5/201(b)(5.2), (12).

[179] Elizabeth Campbell, *Illinois cut near junk by Moody's and S&P, lowest ever for a U.S. state,* CHI. TRIB. (June 2, 2017), https://www.chicagotribune.com/business/ct-illinois-bond-rating-20170601-story.html.

[180] Memorandum of Understanding Between the Illinois State Police and the Fraternal Order of Police Troopers Lodge No. 41, October 2, 2019.

[181] *Id.*at para 5.

[182] *Id.* at para 6.

[183] *Id.* at para 8.

[184] *Id.* at para 9.

[185] *Id.* at para 10.

[186] *Id.* at para 11.

and the parties returned to the Arbitration Panel for further proceedings.[187] On July 24, 2017, the Arbitration Panel issued a Second Supplemental Award.[188] The terms of the Arbitration Panel's Initial Award, as well as its First and Second Supplemental Interest Arbitration Awards, were never implemented and the status quo prevailed for that which would have been the entire term of the collective bargaining agreement.[189]

Effective July 7, 2017, the general assembly raised the income tax rate on individuals from 3.75% to 4.95% and raised the rate on corporations from 5.25% to 7%.[190] The increases were estimated to produce an additional $5 billion per year in projected revenue to the State.[191] In October 2017 GOMB projected that, based on the additional revenues and a refinancing of old debt, the State would finish FY 18 with a surplus, and estimated much smaller deficits in the next four fiscal years.[192]

The 2015–2019 collective bargaining agreement between the State and the Troopers would, had it been implemented, have expired June 30, 2019, and in 2019 the parties began work on a new collective bargaining agreement for the next four years. On October 8, 2019, the State and the Troopers agreed to a 2019–2023 CBA, a result achieved at the bargaining table and not through interest arbitration—the first time the parties had done so since 2008. It was a deal that resolved all of the disputes and lawsuits filed over the prior four years.

The words of the IPLRA's sponsor, Senator Earlean Collins, that interest arbitration "is advisory arbitration and the final decisions have to be approved by the governing body when it deals with wages, hours, [or] other conditions of employment"[193] punctuate the history of the 2016-17 interest arbitration between the State and the Troopers. Although interest arbitration does not bind the public employer to an interest arbitration award unless and until the governing body accepts the award, the obligation to maintain the status quo during bargaining imposed by the IPLRA may bind the employer to continue to provide economic benefits the employer can no longer afford in times of economic crisis after the contract expires. Further, because nothing in the IPLRA prevents the interest arbitration panel from issuing the same award over and over, a governing body that rejects the award is not assured subsequent awards will be any different from the terms they rejected. Moreover, under the IPLRA, the employer is responsible for the entire cost

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[187] *Id.* at para 12-13.

[188] *Id.* at para 14.

[189] *Id.* at para 15.

[190] *See* 35 ILCS 201/5(b)(5.4), (13).

[191] Dave McKinney and Karen Pierog, *Illinois House passes $5 billion tax package, spending plan*, Reuters (July 2, 2017), https://www.reuters.com/article/us-illinois-budget/illinois-house-passes-5-billion-tax-package-spending-plan-idUSKBN19O020.

[192] State of Illinois Financial Walkdown (October 11, 2017), https://www2.illinois.gov/sites/budget/Documents/Economic%20and%20Fiscal%20Policy%20Reports/FY%202017/Economic_and_Fiscal_Policy_Report_Five-Year_Projection_10.12.17.pdf.

[193] *See supra* note 95.

of any arbitration proceedings following the rejection of the award.[194] Thus, a public employer considering rejecting economic terms contained in an award as a strategy for addressing a need to reduce expenditures as a result of an economic crisis needs to consider carefully what its next steps will be if, after further presentation before the arbitration panel, the terms it finds objectionable do not change, and if in the interim it is forced to continue to pay the very benefits from the expired contract that, as a result of an economic crisis, it can no longer afford.

C. Other crises

Based on the analysis above, the evidence suggests that in the face of an economic crisis, public sector employers and unions are more likely to rely on interest arbitration to resolve bargaining impasses. In other words, when the crisis is of an economic nature, interest arbitration is perceived more favorably as a way of resolving bargaining impasses. As was discussed earlier, the predictability of interest arbitration due to its conservative, non-innovative nature and the ability of the parties to escape accountability are likely to blame. However, what if the crisis goes beyond economics? What if the crisis under which bargaining is conducted is itself unpredictable and significantly impacts other aspects of the employment relationship or, even, life itself? The COVID-19 pandemic and the increased focus on racial equity and justice resulting from the murder of George Floyd and related social unrest and calls for police reform provide an opportunity to explore that question.

As an initial matter, looking solely at the number of interest arbitration proceedings that have resulted in published awards since the beginning of the Covid-19 pandemic and period of social unrest to the number of arbitration proceedings that resulted in published awards during the Great Recession and its aftermath, it appears that employers and unions are less willing to rely on the interest arbitration process in the face of the unpredictable nature of the pandemic and social justice reform movements as compared to the purely economic crisis.[195] As discussed above, the use of interest arbitration significantly increased during the Great Recession and its aftermath, culminating in fifty-one published awards in 2012.[196] In stark contrast, in 2021, through the end of July, there were only six published interest arbitration awards reported on the Illinois Labor Relations Board's website.[197] Further, for 2020, there were only sixteen published awards in the entire year and the overwhelming majority of those awards resulted from interest arbitration proceedings that began prior to March 2020 when the real effects of the pandemic reached the state of Illinois.[198] Earlier, it was noted that at least one commentator believed that by making the outcome of the interest arbitration process unpredictable, parties would be less likely to rely upon it to resolve their disputes. Here,

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[194] *See* 5 ILCS 315/14(o).

[195] Arbitrations Awards, Illinois Labor Relations Board, https://www2.illinois.gov/ilrb/arbitration/Pages/default.aspx (last visited Sept. 16, 2021).

[196] *Id.*

[197] *Id.*

[198] *Id.*

the unpredictability of the environment in which the interest arbitration process occurs appears to be making employers and unions less willing to rely upon the process to settle their disputes.

1. The factors to be considered by interest arbitrators in fashioning an award.

To better understand how interest arbitration responds to crisis, a discussion of the factors relied upon by interest arbitrators in fashioning their awards in instructive. Section 14(h) of the IPLRA states as follows:

> Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:
>
> (1) The lawful authority of the employer.
>
> (2) Stipulations of the parties.
>
> (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
>
> (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
>
> (A) In public employment in comparable communities.
>
> (B) In private employment in comparable communities.
>
> (5) The average consumer prices for goods and services, commonly known as the cost of living.
>
> (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
>
> (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
>
> (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining,

> mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.[199]

Under the IPLRA, by requiring the application of these factors *if applicable* arbitrators are left with significant discretion to apply the factors they deem most relevant and to ignore others altogether. Arbitrator Peter Meyers recently wrote: "The factors set forth in §14(h) of the Illinois Public Labor Relations Act serve as a framework for determining the appropriate resolution of the outstanding issues between the parties. . . . As expressed by the plain language of §14(h), however, not all of the eight listed factors will apply in each case, or with equal weight."[200]

This article will not address in detail all the eight factors and how they have been historically applied, as such an analysis could easily be the subject of an entire article unto itself. However, this article will address how some of the most oft applied factors—namely, the interests and welfare of the public and the financial ability of the unit of government to meet those costs, comparable employers, and changes in any of the foregoing—have been applied by arbitrators in addressing the unique nature of the issues raised by the COVID-19 pandemic and the social justice and police reform movements.

2. Applying interest and welfare of the public and the financial ability of the employer in recent health crises and social unrest.

The interest and welfare of the public and the financial ability of the unit of government to meet the costs of the competing proposals are typically discussed as two separate components—the interest and welfare of the public and, separately, the ability of unit of government to pay. The public employer's ability to pay is always at issue, even though the employer may not make a specific argument about it, and it is usually considered a factor in considering whether a union's proposal is disqualified, but not in whether to award an employer's proposal.[201] The welfare of the public factor, by contrast, involves

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[199] 5 ILCS 315/14(h).

[200] *United Steelworkers, Local 9189 AFL-CIO-CLC and City of Wood River*, Case No. S-MA-19-227, at 5 (April 16, 2020) (Myers, Arb). Available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-227_Arb_Award.pdf; *see also City of Decatur and International Assoc. of Firefighters, Local 505*, S-MA-29, at 3-4 (1986) (Eglit, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-86-029.pdf, in which Arbitrator Eglit observed: "the statute makes no effort to rank these factors in terms of their significance, and so it is for the panel to make the determination as to which factors bear most heavily in this particular dispute."

[201] Steelworkers *supra* at 5 (holding "[I]t is appropriate to consider prevailing revenue and economic conditions and connect them with the economic issues in dispute here, even if the City is not specifically asserted an 'inability to pay' under §14(h)(3) of the Act."); *see also County of Williamson and the Illinois Fraternal Order of Police Labor Council*, Case No. S-MA-19-007, at 12, (April 3, 2020) (Diekemper, Arb.), available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-007_Arb_Award.pdf (holding "[T]he Arbitrator regards the ability to pay factor as one that would disqualify a demand that could not be met, but not as a factor that requires the adoption of a demand that can be met.")

balancing between the public's need to have high quality public servants and the public employer's ability to afford them.[202]

Unions have argued that in the context of recent social and health crises, public interest and welfare requires more favorable economic packages to overcome the obstacles in recruitment the crises have caused. Arbitrator Reynolds recites a union's argument regarding a decrease in deputy applicants stating:

> [t]he union asserts that the decline in applicants may be due to the existence of two factors affecting the deputies: (1) the Covid pandemic which has increased the dangerousness of the deputy's work; and (2) Black Lives Matter demonstrations which not only created dangerous work for the deputies, but also created an atmosphere of public antipathy towards the deputies that both affects recruitment and morale along with increasing the danger of deputies out in the public. The Union is also asserting that not only does covid affect recruitment mandating a higher salary, but that the unit member should receive a higher increase as additional compensation for working through such dangerous conditions. The Union provided evidence of Covid impacting the deputies' work and how the deputies' work was more hazardous during the demonstrations and pandemic.[203]

Employers tend to point out the temporary nature of these crises and the problems in recruitment and danger in employment they may cause, and the permanent nature of any increased economic terms required to address a short run problem. Again, Reynolds notes: "In reply, the employer points out that these salary increases are permanent ones and questions if salary decreases will result when the pandemic is over, and work becomes less hazardous. The employer also maintains that the reduction in applicants is widespread, and that the employer is competitive in attracting applicants."[204]

In the case of the deputies, Reynolds agreed with the employer that the crisis was temporary and required a similar solution—and awarded the employer's economic proposal.

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[202] *See* Steelworkers *supra* at 11-12 (holding "The public's interest and welfare, obviously cannot be left out of any analysis of the issues to be resolved in this proceeding. It is evident that this factor involves balancing competing concerns and considerations that affect the proper resolution of the issues remaining in dispute between the parties. These competing concerns include the City's need to attract and retain high-quality personnel within its police department so that the department will continue to function at the highest operational levels, the City's need to remain within reasonable and necessary budget constraints, the employees' expectation of the competitive compensation and benefit structure, and the employees' need for terms and conditions of employment that reasonably accommodate the concerns and issues in their daily lives. The public, of course, has a very real interest in the departments being able to maintain the highest level of quality among its first responders, while also ensuring that the City makes every tax dollar count.")

[203] *County of Sangamon and the Sangamon County Sheriff and the Illinois Fraternal Order of Police Labor Council,* Case No. S-MA-20-057, at 22 (Oct. 20, 2020) (Reynolds, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-20-057_arb_award.pdf.

[204] *Id* at 22-23.

> While the unit members have faced increasingly difficult working conditions, I don't believe permanent extra wage increases are the warranted response. The pandemic hopefully won't be permanent. In the interim, if certain assignments involve especially hazardous work warranting additional compensation, some type of stipend or bonus would be more appropriate than a permanent extra percentage salary increase. I also find that the employer's proposed wage increase is sufficient to avoid dramatically affecting retention, recruitment, or staff morale. The employer views the COVID[-19] pandemic as supporting the need for lower, rather than higher, salary increases. The pandemic has caused businesses to decline and restaurants to close, which will lead to lower sales tax revenues and possibly lower property tax revenues. Also, the Black Lives Matter movement promotes the concept of defunding the police, a movement which fosters the idea of spending less money on policing and more money on other methods of preventing crime such as mental health professionals. The Union replies that the employer may obtain federal or state COVID[-19] fund subsidies that are available. It also asserts that the employer's general funds are in sufficient abundance to fund the union wage increase proposal. A problem with evaluating the parties' assertion is the lack of statistical evidence. However, all of these factors, especially the pandemic, do create more uncertainty than usual and the amount of certain funds that will be available for the employer to spend on the unit members' salaries. . . . While the public interest and the ability to pay can be cited to support both offers, the uncertainty caused by the pandemic warrants taking a careful approach to spending future funds. Thus, based on the above, I find Section 14(h) factors as a whole clearly support awarding the employer's offer.[205]

3. Viewing the health and social crisis through the lens of changed circumstances.

As noted, one of the factors the interest arbitrator must consider is any changed circumstances during the pendency of the arbitration. One interest arbitrator considered the effect of the COVID-19 health crisis even though the parties had filed their post-hearing briefs before its onset to determine the adverse effect the crisis would have on the award. Relying chiefly on facts gleaned through arbitral notice, Arbitrator Szuter explained the changed circumstances as follows:

> There was no evidence presented of any change in any of the foregoing circumstances during the pendency of the arbitration proceedings. It would be remiss of the Arbitrator not to take "arbitral notice" of the novel coronavirus pandemic (COVID[-]19) which between the hearing date and the filing of briefs, has resulted in protracted shutdown of the economy in every state. In Illinois, closure of non-essential business was ordered on March 12, 2020 to expire on March 30, 2020. Before the expiration, the State issued a stay-at-home order on March 21 to expire on April 30 but

[205] *Id.* at 23-24.

> extended to May 30. Over half a million unemployment claims were made in the five-week period from March 1 to April 30. Notwithstanding the admission of the employer's current ability to pay, the failure of some anticipated revenue sources to arrive is very likely, but the amount is not currently measurable, and the timing is not identifiable. This would be the result of lower sales and hence, lower sales tax as a result of a shutdown economy for whatever period, and may slow or delay property tax receipts resulted from protracted unemployment. All these factors from family income to employer revenue to insurance costs are far from quantifiable now. The only certainty is an uncertainty with bleak prospects.[206]

The arbitrator made reasonable inferences that the crisis would likely adversely affect the employer's revenue stream, which counseled a conservative approach to the arbitration award finding:

> The COVID[-]19 outbreak is the most significant changed circumstance. It impacts the employees on a day-to-day basis being first responders. The duration is unknown, but the end is imminent with the reopening of the economy in many states. The impact the COVID[-]19 outbreak has on the employer is as potentially significant but also has effects both on the employer and the employees. With so much of its revenue dependent on tourism, it is likely the County's revenue produced by that source will severely decline in 2020. On a generous assumption that a recession will not ensue, that nonetheless strains the carryover to the following years. Revenue reduction is in part a result of the government restrictions and/or guidelines on social distancing and restricted capacities for facilities continuing into the summer. Even with reopening the Illinois economy, which in other states seems imminent for the summer, some seasonal traffic has already been impaired. The hope is that after a period of stay-at-home orders there would be a surge of economic activity. The more likely reality is that public response to travel and open gatherings is expected to be extremely conservative and the environment where there is no therapy or vaccines for the disease. The consequence in both to potential reduction of revenue and tourism, not only impairs the County finances, but could have an impact on the stability of the workforce. There are no assurances either way on the effects of the changed circumstances. However, the factor of changed circumstances counsels a conservative instinct which is the final support for adopting the employer's final offer for the deputy unit base wage increase.[207]

The arbitrator also made reasonable inferences that the crisis would likely cause an uptick in the cost of health care, affecting both insurance premiums and the employees' out-of-

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[206] *Shelby County Sheriff Office and FOP Labor Council*, S-MA-18-345 and 346, at 15 (May 11, 2020) (Szuter, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-18-345,%20346_Arb_Award.pdf.

[207] *Id.* at 21.

pocket expenses, which the arbitrator applied to justify an award that would allow the employees to meet rising costs:

> Relative to factors #7 and #8 are the consideration of the unknown future premium charges of the carrier. As of the hearing, nothing unusual was expected from the carrier. Since the COVID[-]19 outbreak, that is up for serious question. The cost of the disease itself, although it has undershot the projections, is a continuing fact of life until there is a successful therapy or vaccine. The deflection of healthcare resources away from the routine disease and injury states is another potential cause of premium increases. Of course, employees face the possibility of the disease itself and resilient cost of care. Taken in context of the reduction in wages in the employer's offer with retroactivity, the factor of changed circumstances supports the union offer. The lack of retroactive reduction in wages in the union offer can rationalize it as a concession towards a token hazard pay for these first responder classifications in light of changed circumstances.[208]

Similarly, Arbitrator Bierig, considering the change in circumstances resulting from the COVID-19 pandemic and social justice movements wrote:

> I also find that the change in the socio-economic circumstances during the pendency of arbitration favors the Village's proposal. It is undisputed that, since the instant arbitration hearing took place on February 25, 2020, the economic outlook has been significantly impacted by the COVID-19 pandemic. The COVID-19 pandemic has created a great deal of uncertainty because its duration and full effects cannot be determined. What can be determined, however, is that the economic ramifications to the Village are undoubtedly significant. I also note that the recent unrest has affected the Village's finances. In addition, the Village has been notified that disbursement of its share of state tax revenues collected will be delayed. Therefore, based on these factors, committing the Village to a two and a half percent raise in 2020 for the Command Unit, which the other public safety bargaining units will undoubtedly want mirrored in its contracts, is not reasonable. I find that the Village's proposal offers a compelling argument against the Union's 4-year contract proposal that includes a 2.5 percent increase for 2020.[209]

4. Applying comparables in the context of health crises and social unrest.

External comparables have long been one of the most significant factors relied upon by arbitrators in issuing their awards. However, during the Great Recession and its

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[208] *Id.* at 27.

[209] *Village of Dolton and Illinois FOP Labor Council,* Case No. S-MA-17- 296, at 33-34 (August 18, 2020) (Bierig, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-17-296_arb_award.pdf .

aftermath, some arbitrators have questioned the appropriateness of such reliance. Arbitrator Edwin Benn has been the most vocal on this point. Although his opinion on the use of external comparables took greater shape during the Great Recession and the ensuing years, his analysis of the issue could equally apply in the context of the health and social crisis now faced by employers and unions. Recently, Arbitrator Benn summarized his position on external comparables as follows:

> The use of external comparability to set contract terms is not required and just makes no sense. . . . At the hearing, I explained . . . in very simple terms, external comparability is essentially the equivalent of allowing somebody else to set the terms of your contract. And isn't it better for the parties to set the terms of their own contract rather than having somebody else do it? When you get the economic items, especially in times like this, you start looking around and it's going to cut both ways. Some municipalities will recover quicker than others depending on when the recovery started, and some may not . . . So again, external comparability whether its economic or non-economic to me is not helpful and it's not helpful to the parties because you are stuck with the products of somebody else's negotiations. . . . All legalisms aside, that's just not right.[210]

Arbitrator Kossoff, although not discounting external comparables altogether, recently wrote:

> The fact that a number of comparable jurisdictions have already settled for 2022 cannot outweigh the fact that as of now we do not know and cannot reliably approximate the economic picture for the Village for 2021-2022. That was also the determination of Arbitrator Goldstein in the DuPage County Forest Preserve case discussed above where the Union contended the longer contract terms of the external comparable jurisdictions supported its proposal.
>
> The weight to be given to the contract terms of the comparable jurisdictions is even less here since the great majority of other jurisdictions negotiated the terms for 2022 before March 2020 when public measures against the pandemic began to be imposed. The economic uncertainties that now prevail make it more reasonable to enter into a contract for three years than four years. With regard to the Union's argument that the parties need a hiatus from continuous negotiations, they will have over a year's time before they are required to start negotiations for a new agreement. For all these reasons the Arbitrator selects the Village's proposal for a three-year

[210] *Village of River Forest and Illinois Fraternal Order of Police Labor Council*, Case No. S-MA-19-132, at 1-17 (June 1, 2021) (Benn, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-132_arb_award.pdf.

> collective bargaining agreement over the Union's final offer of a four-year agreement.[211]

He continued:

> In the present case, however, the question is not whether or not the comparable jurisdictions were negatively affected by the pandemic to the same extent as Skokie, but whether the jurisdiction's collective bargaining agreement was negotiated and agreed to after its revenue receipts had already been diminished because of the pandemic and with full knowledge of the likely long-term effects of the pandemic on future revenue receipts. In this arbitrator's opinion contracts negotiated and agreed to before the ramifications of Covid 19 on a jurisdiction's finances were known are of dubious value as a comparator for Skokie's salary terms for its police officers that are being negotiated or decided in arbitration during the period of the Covid 19 pandemic with the knowledge of its devastating effects on the Village's finances.[212]

In the awards discussed above, the arbitrators, facing the uncertainty of the pandemic and reform movements, appeared to give greater deference to the positions of the employer when considering the positions of the parties in light of the statutory factors. In one case, the arbitrator issued his award on a non-precedential basis: "This award issues on a non-precedential basis and takes into account the uncertainties and difficulties caused by the coronavirus and impact it has had on the economy and uncertainties for the immediate future, and further takes into account that this contract covers periods before those events occurred."[213] Of the six awards published through July 2021, four were two-to-four page awards issued without discussion or analysis of the issues, suggesting that they may have been agreed upon awards.[214] One of the 2021 cases addressed a single, non-

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[211] *Village of Skokie and the Illinois Fraternal Order of Police Labor Council*, Case No. S-MA-113, at 43 (Nov. 27, 2020) (Kossoff, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-113_Arb_award.pdf.

[212] *Id.* at 14-15.

[213] *City of Sycamore and Illinois FOP Labor Council,* Case No. S-MA-19-220, at 1 (June 22, 2020 (Benn, Arb.)) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-220_arb_award.pdf.

[214] *City of Geneva and IAFF Local 4287*, Case No. FMCS 210120-0312, (June 16, 2021) (Benn, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/Geneva_and_IAFF_Benn.pdf; *County of Cook/Cook County Sheriff and Illinois FOP Labor Council*, Case No. L-MA-19-001 (July 15, 2021) (Benn, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/L-MA-19-001_arb_award.pdf ; *County of Randolph and the Randolph County Sheriff and AFSCME, Council 31,* Case No. S-MA-20-065 (February 4, 2021) (Reynolds, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-20-065_arb_award.pdf; and *McHenry County and the McHenry County Sheriff and Illinois Fraternal Order of Police Labor Council*, Case No. S-MA-20-005 (March 2, 2021) (Benn, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-20-005_arb_award.pdf.

economic issue—the arbitration of discipline.[215] In sum, not only did use of interest arbitration drop precipitously during the current health crisis and social unrest; but the role the interest arbitrator may have played—either by giving the employer's position greater deference in the face of the crisis, helping the parties reach an agreed award, and/or issuing non-precedent-setting awards—may have been altered as well.

III. CONCLUSION

The IPLRA and IELRA grant public workers the right to bargain collectively and strike in support of their bargaining proposals, except for public safety employees and those essential workers for whom a strike would cause a clear and present danger to the health and safety of the public. Employees who are denied the right to strike may negotiate the terms of the next contract at the bargaining table and, should they reach impasse, ask an interest arbitrator to determine the terms of the next contract. History shows that parties resort to interest arbitration most in times of economic crisis, when falling tax revenues cause employers to go to the bargaining table with economic demands that union leaders cannot recommend to their members, and the interest arbitration process serves as a procedure to resolve such economic impasse. Where the bargaining table does not sit in the shadow of economic crisis, parties less often resort to interest arbitration, even when they are bargaining against a backdrop of health and/or social crisis. Critics of interest arbitration assert that if the risk of choosing interest arbitrator were increased, presumably by affording the arbitrator greater flexibility in determining the economic terms of the next contract, parties would be less likely to choose interest arbitration and would stay at the bargaining table to produce contract terms based on mutual assent. However, because the guiding principle of interest arbitration is to determine a contract the parties would have, themselves, chosen had they not reached impasse, it is unclear whose intent would be reflected in any contract issued under such a system of greater arbitral flexibility. One thing is clear: the history of the Chicago firefighters strike stands as a reminder to all that any system of impasse resolution must recognize that in public sector collective bargaining the bargaining table is, in reality, three-cornered, with a seat for the citizens who are served by the bargaining unit members, and the interests of such citizens must be protected from harm.

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[215] *Village of River Forest and Illinois Fraternal Order of Police Labor Council*, Case No. S-MA-19-132, at 3 (June 1, 2021) (Benn, Arb.) available at: https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-132_arb_award.pdf (last visited Sept. 16, 2021).

RECENT DEVELOPMENTS

By Student Editorial Board:
Enrique Espinoza, Eric R. Halvorson, MaryKate Hresil, Erin Monforti

I. IELRA DEVELOPMENTS

A. P.A. 102-0596—New Union Showing of Interest Methods

On August 27, 2021, Governor Pritzker signed amendments to the Illinois Public Labor Relations Act (IPLRA) and the Illinois Educational Labor Relations Act (IELRA) to accommodate novel methods for evidencing union support and conducting representation elections. The showing of interest in support of a petition for exclusive representation may be evidenced by electronic communications and electronic signatures, as can a secret ballot election as provided for by each statute. The legislation also provides further amendments to the IELRA to prevent employers from taking punitive actions against an employee who participates in a lawful strike under the act or advocates for a lawful strike, including replacing the employee, discriminating against the employee, or suspending the employee.

B. Remote Learning Tech Issues and Direct Dealing

In *Non-Tenure Faculty Coalition, Local 6546, IFT-AFT, AFL-CIO and University of Illinois, Urbana-Champaign* 37 PERI ¶ 116 (IELRB 2021) the Illinois Educational Labor Relations Board, in a nonprecedential decision, adopted the Executive Director's dismissal of the Union's unfair labor practice charge, finding that the University had not engaged in direct dealing with bargaining unit members over the resolution oftechnology issues. In the fall of 2020, bargaining unit members were experiencing difficulties with the technology used for remote learning. At one bargaining session the Union raised this issue with the University, and together the University and Union resolved many of the issues. The Union then requested that the University resolve the remaining technology issues through bargaining. The University responded that the individuals still experiencing technology issues should try and resolve them first with their supervisors and departmental IT staff. The Union then filed a charge alleging the University was engaged in direct dealing with bargaining unit members. The Executive Director found that there was no evidence to suggest that the University's policy was an attempt to coerce bargaining unit members in the exercise of their right to bargain through representatives of their own choosing. Instead, the University was attempting to resolve technological issues in the most efficient manner possible. The Executive Director found no evidence of direct dealing and dismissed the charge. The parties did not file exceptions to the decision, and it was adopted by the Board as binding on the parties only.

II. IPLRA DEVELOPMENTS

A. Strike Injunctions

1. *County of Cook and Cook County Health & Hospital System and National Nurses Organizing Committee*

In *County of Cook and Cook County Health & Hospital System and National Nurses Organizing Committee,* Case No. L-SI-21-003 (ILRB Local Panel June 22, 2021), CCH, the employer, filed a petition for Strike Investigation against National Nurses Organizing Committee (Union) under section 18(a) of the Illinois Public Labor Relations Act (the Act), which allows an employer to request an investigation of a strike when a stike would constitute a clear and present danger to the health and safety of the public, and allow for judicial relief to stop it or set requirements to avoid the danger. The Union was seeking to strike for one day over the lack of a new contract and filed two ULP's for alleged refusal by the Employer to negotiate in good faith; retaliation; failing to process grievances; failure to furnish information; and disparaging the Union in front of its members. The petition was filed, and a hearing was held by the Illinois Labor Relations Board (the Board) on June 22, 2021. To determine whether the strike was a clear and present danger, the Board considered the striking employees' duties, length of the strike, and effect on the public.

In its decision, the Board considered where covered employees worked and analyzed whether their absence would present a clear and present danger to the health and safety of the public. In its analysis, the Board determined the minimum staff required to avoid that danger in each location, and allowed the rest of the bargaining unit employees to strike.

2. *County of Cook and Cook County Health & Hospital System and Service Employees International Union, Local 73*

In *County of Cook and Cook County Health & Hospital System and Service Employees International Union, Local 73*, Case No. L-21-004 (ILRB Local Panel June 23, 2021), the Board considered an additional Petition for Strike Investigation under section 18 of the Act for a planned, open-ended strike by SEIU. In December 2020, the Board had issued an order (Case No. L-SI-21-001), enjoining 342 SEIU members from striking. In this matter, the CCH sought to increase the number of enjoined members to 473. In an affidavit to the Board, CCH Interim Chief Operating Officer Robert Sumter justified the increase based on a survey of current patients; the number of patients in hospital beds, critical care and medical-surgical volumes, levels of patients coming through the emergency department, the need for staff following the end of doctors' residencies, and high levels of intensive care patients related to the COVID-19 pandemic.

Initially, the Board enjoined the original 342 employees from striking by reaffirming its original December order, which found that a strike would create a clear and present danger to society. The Board found that, while the COVID-19 pandemic impact had softened, the minimum number of employees necessary for the hospital to function had

actually increased, as CCH had resumed services that were paused during the height of the pandemic. Additionally, the Board found the open-ended strike proposed by the Union influenced its decision to allow the same number of enjoined employees as the December order, despite not being the height of a pandemic, because the strike could last days to weeks creating a risk to the general health and safety of the public. As for increasing the number of employees enjoined by the December order, the Board determined all but two categories of additional employees were prohibited from striking on account of the health risks a strike would pose to society, granting most of what CCH sought to enjoin.

B. Duty to Bargain

1. Residency "Points"

In *City of Springfield v. Policemen's Benevolent & Protective Association, Unit No. 5., Unit No. 5, 2021 IL App (4th) 200164*, the Illinois Appellate Court for the Fourth District affirmed the order of the the Board and held that the City of Springfield had committed unfair labor practices under sections 10(a)(1), 10(a)(4), and 14(1) of the Act.

In September 2018, the Civil Service Commission for the city of Springfield adopted an amendment to standards for Springfield employees, allowing for the award of residency "preference points" to employees on examinations for promotion. In the following months, both the firefighter's union and the police union filed unfair labor practices with the Board in reaction to this amendment. The two unions alleged that the City had violated the Act by enacting a unilateral change to the status quo without notice, or an opportunity for bargaining with each union. The change to the promotion examination rule was enacted during a time when contract negotiations were ongoing and after both unions had invoked interest arbitration procedures.

Before the court, the City argued that no impermissible unilateral change had occurred because the amendment would not have a practical impact on any current employees given the language in the City's municipal code that prohibited the tightening of residency requirements for current employees. The City advanced that the rule would not be applicable to future employees for several years, and thus that the union members were in no worse position than before the amendment. The Court, however, found that the City had made an impermissible unilateral change because it provided no opportunity for the unions to bargain before the rule went into effect—regardless of the contemporaneous effect on individual members of the union upon its passage. The court held that the case authority provided by the City was too distinguishable to support the arguments it was asserting to reverse the decision of the Board.

2. Body Cameras

In *Fraternal Order of Police, Lodge #7 and City of Chicago (Department of Police)* 38 PERI ¶ 20 (ILRB Local Panel 7/22/2021) the Board accepted and adopted two Recommended Orders and Decisions (RDOs) by an administrative law judge (ALJ) finding that the City of Chicago (City) had violated Section 10(a)(4) and 10(a)(1) of the

Illinois Labor Relations Act when it failed to bargain over the effects of the expansion of a Body Worn Camera (BWC) program, unilaterally increased the buffering times of the cameras, and implemented its Last, Best, and Final Offer (LBFO) on the effects of the cameras.

In the first charge (L-CA-17-037) the Union accused the City of unilaterally expanding a pilot BWC program to all patrol districts without bargaining over the effects of the expansion. The ALJ concluded that the expansion of the pilot program did have bargainable effects as it constituted a material change to the terms and conditions of employment regarding employee discipline, safety, and privacy. The ALJ rejected the City's argument that the General Assembly's "Law Enforcement Officer-Worn Body Camera Act" (50 ILCS 706/10-1 et. seq.) preempted bargaining, as the Act enabled the Union to bargain for greater protections for its members than the Act itself afforded. The ALJ then found that the City had failed to provide the Union with a sufficient opportunity to bargain regarding the effects of the expansion of the BWC program, and further that the City could not discharge its duty to bargain by discussing a subject while also maintaining that it had no duty to bargain over it. The ALJ ordered a limited remedy, requiring the City to bargain over the safety and disciplinary effects of the BWC expansion, but not to rescind discipline imposed based on BWC footage, to make officers whole, or to recall cameras that had already been issued**.**

In the second charge (L-CA-20-024) the ALJ found that the City had committed an unfair labor practice by unilaterally changing its policy regarding BWCs during interest arbitration. In January 2019, almost a year after the first RDO, and after the Union and City entered into bargaining over the effects of BWCs, the City tendered the Union its LBFO. It stated that within ninety days the City would update its policies regarding BWCs, would establish a Labor/Management committee to analyze the program, and would expunge discipline of certain officers for BWC infractions. The Union maintained that there were still outstanding issues regarding the meaning of the term "misuse" regarding BWCs. In May 2019 the City announced its intent to increase the buffering time (recording time prior to formal activation of the camera which saves video but not audio) from thirty seconds to two minutes. The Union asked to bargain over the increase in buffering time. The City maintained that it was not required to do so. In June the City implemented the increase in buffering time and in July implemented the LBFO. The ALJ found that the City was not able to unilaterally implement its LBFO as the Union represents employees without the right to strike, and that neither impasse on the issues, nor the Union's alleged bad faith bargaining, allowed the City to implement its proposals unilaterally. The ALJ then found that the LBFO did alter the status quo of officers regarding discipline and privacy. The ALJ also found that the increase of buffering times was a permissive subject of bargaining, and that it was undisputed that the City had unilaterally increased the time during interest arbitration. The ALJ concluded that the City was obligated to bargain over the effects of increasing the buffering time, and had violated the Act by refusing to do so. The ALJ ordered that the City rescind its LBFO and restore the status quo, but limited the remedy to a bargaining order on the issue of buffering times.

The City filed exceptions to both RDOs before the Board. It argued that the ALJ erred in determining that the expansion of BWCs resulted in bargainable effects on employee safety and discipline issues. The Union argued that the City's exceptions did not comply with Section 1200.135(b)(2) of the Board's rules, and that the Board should ignore them. The Board agreed with the Union and disregarded the City's exceptions as they did not specifically identify which portion of the RDOs it was objecting to and explain why the ALJ's findings and analysis was incorrect. The Board adopted both RDOs as decision of the Board.

C. COVID-19 & Board Jurisdiction

On July 22, 2021, in *In re Jonnie Bankston and the American Federation of State, County, and Municipal Employees, Council 31, Case No. S-CB-21-006,* the State Panel of the Illinois Labor Relations Board affirmed the dismissal of a charge filed by an inmate at an Illinois correctional center complaining of the living conditions in the facility brought on by the COVID-19 pandemic. The charge alleged that the correctional facility was not complying with state and federal guidance to mitigate the impact of the pandemic by failing to properly quarantine inmates after exposure, failing to provide disinfectant and sanitizer, and failing to provide personal protective equipment to inmates. Ultimately, however, the charge was dismissed for two primary reasons: first, the inmate was not a public employee covered under the Illinois Public Labor Relations Act; and second, the complaint did not contain allegations which fall under the purview of the Act. The Board declined to extend its jurisdiction to matters not contained in the statute.

III. OTHER DEVELOPMENTS

A. Prevailing Wage Act

The Illinois Supreme Court ruled on an issue related to prevailing wage rate in contracts between private employers and Illinois government entities in *Samuel Valerio, et al. v. Moore Landscapes, 2021 IL 126139*. Employees of Moore Landscapes, LLC, sought backpay, punitive damages, prejudgment interest, costs, and attorneys fees from Moore on the basis section 11 of the Illinois Wage Payment and Collections Act.

The Employees alleged Moore had three contracts with the Chicago Park District from 2012 through 2018 for landscaping work and that, during this time, despite a provision requiring Moore to pay a prevailing wage rate of $41.20 per hour, the employees were paid $18.00 per hour. As a rebuttal, Moore argued the employees did not have a remedy available as the contracts did clearly agree they would be paid the prevailing wage rate for services, only that he would pay prevailing wages "where applicable." Moore also argued the landscaping work performed was outside the scope of work covered by the Act. The Circuit Court granted the motion to dismiss, agreeing with Moore that the contract did not stipulate to pay the prevailing wage rate. The employees appealed.

On Appeal, the Appellate Court reversed and remanded, holding that while the contract had in fact been vague related to payment of prevailing wages, this fact did not bar the

employees from a right of action pursuant to section 11. Moore appealed to the Illinois Supreme Court.

The Supreme Court held the contract did not have a clear stipulation requiring Moore to pay the prevailing wage rate because the "when applicable" language was not sufficient to give Moore notice of the higher wages. Further, because the Chicago Park District did not sufficiently provide notice in the contract, the Park District, and not Moore, was liable for interest, penalties, or fines pursuant to section 4(a-3) of the Act. This portion of the Act stipulates contractors with sufficient notice are responsible for interests, penalties, or fines, and therefore, if the contractor is not given notice, the public body is at fault. The Supreme Court found while Moore was not liable for interest, penalties, or fees, the employees could still pursue back wages in the amount of the difference between the prevailing wage rate and wages paid, but not under section 11. The matter was dismissed, affirming the Circuit Court.

B. Mandatory Vaccinations at Public Universities

The Seventh Circuit upheld provisions related to COVID-19 instituted by Indiana University in *Ryan Klaassen, et al. v. Trustees of Indiana University* and denied Student-Plaintiffs' motion for an injunction (No. 21-2326, (7th Cir. 2021)). IU mandated vaccinations for students with exemptions for religious or medical purposes but required exempted student to wear masks and be tested twice a week for COVID-19. Eight students brought action against IU, citing a Fourteenth Amendment due process violation. The Seventh Circuit drew a parallel to *Jacobson v. Massachusetts*, which found the state could mandate smallpox vaccinations (197 U.S. 11 (1905)). Further, the Seventh Circuit found that because IU permitted exemptions, there was no constitutional violation. And furthermore, IU was not requiring the general public, but rather its students, to be vaccinated; the Plaintiffs in this matter were not required to attend IU. The Seventh Circuit stated there are frequently conditions to a person's enrollment in an institution of higher education, including paying tuition, so it did not find the setting of medical conditions for matriculants to be problematic. The U.S. Supreme Court later denied certiorari.

C. Legislative Updates

1. P.A. 102-0177

Perhaps one of the most newsworthy legislative updates from the spring session of the Illinois General Assembly is Public Act 102-0188, amending the Election Code and School Code to provide for a nonpartisan elected school board in Chicago, starting in 2024. The legislation provides that the school board will have eleven members appointed by Chicago's mayor, and ten elected by general election until 2027, when all members will be elected to four-year terms. While this legislation does not present an immediate change to the composition or structure of the board, it represents a change to education in Chicago following a large and highly contested campaign for such a shift.

2. P.A. 102-0562

On July 22, 2021, Governor Pritzker signed into law an amendment to the Personnel Records Review Act, effective January 1, 2022. This amendment provides that an individual who believes their disciplinary records have been impermissibly disclosed in accordance with the Act may file an action or complaint within three years that the report, letter, or disciplinary action is disclosed.

3. P.A. 102-0358

On August 13, 2021, Public Act 102-0358 was signed into law, amending the Illinois Freedom to Work Act (the IFWA). The amendments concern non-compete agreements, or, as the IFWA refers to them, covenants not to compete. As of January 1, 2022, these agreements will now only be enforceable for employees who earn at least $75,000 a year, with that threshold set to increase gradually in five-year increments to $90,000 by 2037. Non-compete agreements are unenforceable for employees that have been terminated, furloughed, or laid off due to the COVID-19 pandemic unless their compensation at the time of separation has been adjusted according to the strictures provided in the amendment. Public employees engaged in collective bargaining agreements under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act cannot be subject to terms in covenants not to compete. Lastly, the amendment provides administrative remedies and related requirements for employers seeking to advocate non-compete agreements.

4. P.A. 102-0233

As of August 2, 2021, the Illinois Human Rights Act has been amended to provide protection for employees based on work authorization status. The Human Rights Act now prohibits discrimination based on a person's being born outside the United States who has been authorized by the government to work in the country. The amendment, however, does not require any affirmative action on the part of employers by way of sponsoring any applicant or employee to obtain or modify their work authorization status, unless otherwise required by federal law.

5. P.A. 102-0487

On January 1, 2022, the Victims' Economic Security and Safety Act (VESSA), will be amended to extend its protections to victims of violent crimes as well as their families. Historically VESSA has provided certain benefits to victims of domestic violence, sexual violence, and gender-based violence and their family members. These benefits include the ability to take up to twelve weeks of unpaid leave each year to seek medical help, legal assistance, counseling, or any other assistance pursuant to their status as victims. These protections are now extended to victims of violent crimes as defined by the Illinois Criminal Code.

6. P.A. 102-0596

On August 27, 2021, Governor Pritzker signed amendments to the Illinois Public Labor Relations Act (IPLRA) and the Illinois Educational Labor Relations Act (IELRA) to accommodate novel methods for evidencing union support and conducting representation elections. The showing of interest in support of a petition for exclusive representation may be evidenced by electronic communications and electronic signatures, as can a secret ballot election as provided for by each statute. The legislation also provides further amendments to the IELRA to prevent employers from taking punitive actions against an employee who participates in a lawful strike under the Act or advocates for a lawful strike, including replacing the employee, discriminating against the employee, or suspending the employee.