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## Taking the Public out of Determining Government Policy: The Need for an Appropriate Scope of Bargaining Test in the Illinois Public Sector, 29 J. Marshall L. Rev. 531 (1996)

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# TAKING THE PUBLIC OUT OF DETERMINING GOVERNMENT POLICY: THE NEED FOR AN APPROPRIATE SCOPE OF BARGAINING TEST IN THE ILLINOIS PUBLIC SECTOR

## INTRODUCTION

The Hartford School District (Hartford) is an Illinois school district that is having financial trouble.<sup>1</sup> Hartford's population is declining and so is the average class room size in its school system. In response to this decline in the student body, the Hartford community voted to reduce its educational budget. To implement this reduction, Hartford decided to decrease the number of its teaching staff through a reduction in force (RIF). Although this choice was difficult, Hartford carefully made the decision through the political process and the community feels it is the logical decision under the circumstances.<sup>2</sup>

The Hartford teachers union (Union), representing a collective bargaining unit<sup>3</sup> under the Illinois Education Labor Relations Act (IELRA),<sup>4</sup> did not react favorably to the RIF decision. Although Hartford cannot financially maintain its current teaching staff, the Union decided to file an "unfair labor practice" claim with the Illinois Education Labor Relations Board (IELRB).<sup>5</sup> Un-

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1. The illustrative budgetary dilemma of the Hartford School District is fictitious. The Hartford School District represents the many public sector employers in Illinois who annually face budget concerns. This Note focuses on educational employers; however, the discussions and conclusions are equally applicable to all Illinois public sector employers.

2. Budget concerns over the allocation of public funds are common concerns. The public's recent dissatisfaction with local government stems from the view that government is "pursuing internal goals instead of solving the problem of the customer." Charles C. Mulcahy & Marion E. Mulcahy, *Innovation is the Key to a Redesign and Cost Effective Local Government*, 78 MARQ. L. REV. 549, 549 (1995). This Note addresses this dissatisfaction by focusing on the problems with collective bargaining in the Illinois public sector.

3. 115 ILCS 5/2(m) (1993). Bargaining unit is defined as "any group of employees for which an exclusive representative is selected." *Id.*

4. See *infra* notes 27-34 and accompanying text for a discussion of the design and creation of the Illinois Educational Labor Relations Act (IELRA) and the Illinois Public Labor Relations Act (IPLRA).

5. See *infra* note 43 and accompanying text for a discussion of the procedures under the IELRA for filing an unfair labor practice claim.

der the current Illinois system, the Union can effectively demand, and receive, an opportunity to force bargaining over the RIF order and effectively usurp the public's decision.<sup>6</sup>

Determining which types of employment decisions are subject to mandatory bargaining is a recurring issue in the Illinois public employment sector.<sup>7</sup> The center of this problem focuses on the inherent contradiction between two identical sections which appear in both of the Illinois acts that govern public sector bargaining.<sup>8</sup> These two sections attempt to define the scope of topics which are subject to mandatory bargaining.<sup>9</sup> The interpretation and development of a test to reconcile these two scope of bargaining sections has caused considerable debate.<sup>10</sup>

Prior to 1992, each of the three Illinois public labor relations boards had similar methods for determining whether a subject was mandatorily bargainable.<sup>11</sup> However, in 1992, the Illinois Supreme Court promulgated a new three-part test for the Illinois public labor boards to use when determining whether a subject is mandatorily bargainable.<sup>12</sup> By setting forth this test in *Central*

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6. See *infra* notes 142-202 and accompanying text for a discussion of the problems with the current Illinois scope of bargaining test.

7. Jill D. Leka, *Survey of Illinois Law: Employment Law*, 17 S. ILL. U. L.J. 823, 829 (1993).

8. *Central City Educ. Ass'n, IEA/NEA v. IELRB*, 599 N.E.2d 892, 900 (Ill. 1992).

9. See 5 ILCS 315/4, 315/7 (1993) (setting forth employers' and employees' rights with respect to their duty to bargain under the IPLRA); see also 115 ILCS 5/4, 5/10 (1993) (setting forth employers' and employees' rights with respect to their duty to bargain under the IELRA).

10. See, e.g., *Central City*, 599 N.E.2d at 898 (discussing the dilemma of interpreting the IELRA); see also Michael Jenkins, *Collective Bargaining for Public Employees: An Overview of Illinois' New Act*, 1983 S. ILL. U. L.J. 483, 490 (discussing the problems that the IPLRA will pose with regard to the scope of bargaining).

11. See, e.g., *Decatur Sch. Dist. No. 61, 4 Pub. Employee Rep. Ill. (LRP) ¶ 1076, 315, 319 (IELRB 1988)* (adopting a scope of bargaining test which initially weighed the two parts in section 4 of the IELRA and then weighed the benefits against the burdens of determining if a subject is mandatorily bargainable), *aff'd sub. nom.*, *Decatur Board of Educ., Dist. No. 61 v. IELRB*, 536 N.E.2d 743, 746 (Ill. App. Ct. 1989); *Cermak Health Services*, 3 Pub. Employee Rep. Ill. (LRP) ¶ 3030, 156, 161 (IELRB 1987) (citing *Beloit Educ. Ass'n v. W.E.R.C.*, 242 N.W.2d 231 (Wis. 1976) and *Pennsylvania Labor Relations Bd. v. State College Area Sch. Dist.*, 337 A.2d 262 (Pa. 1975) in applying a test which balances the impact on employees' wages, hours and terms and conditions of employment against the extent to which negotiations would interfere with officials' formulation or management of public policy); *American Fed'n of State, County and Mun. Employees*, 5 Pub. Employee Rep. Ill. (LRP) ¶ 2001, 1, 3-5 (IELRB 1988) (adopting the application of a balancing test which determined that corrections department's interest in drug testing outweighed employees' interest in bargaining over whether bargaining would occur), *aff'd sub. nom.*, *American Fed'n of State, County and Mun. Employees v. IELRB*, 546 N.E.2d 687 (Ill. App. Ct. 1989).

12. See *infra* note 125 for a statement of the *Central City* test.

*City Educational Ass'n v. IELRB*,<sup>13</sup> the Illinois Supreme Court deviated from prior public labor board methods and the mandates of the two Illinois public labor acts themselves.<sup>14</sup> Although the Illinois legislature enacted the two Illinois public sector acts to cover public employees,<sup>15</sup> the court in *Central City* essentially adopted a private sector test.<sup>16</sup> Furthermore, the *Central City* court failed to appraise and accommodate for the unique economic and political characteristics of public sector bargaining when it created the test.<sup>17</sup>

This Note examines the differences between labor relations in the public sector and the private sector and focuses on the problem posed by the *Central City* decision. Part I of this Note looks at Illinois public sector bargaining procedure and gives a history of Illinois public labor cases dealing with the issue of what is subject to mandatory bargaining. Part II closely examines the *Central City* decision and discusses its ramifications. Part III of this Note examines why the *Central City* court erroneously justified the adoption of its scope of bargaining test by relying on private sector and Pennsylvania precedent. Finally, Part IV of this Note

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13. 599 N.E.2d 892 (Ill. 1992).

14. See *supra* note 11 and accompanying text for discussion of the tests used by the IELRB, ILLRB and ISLRB in determining the scope of bargaining in the Illinois public sector.

15. See 5 ILCS 315/1 (1993) (stating that the purpose of the IPLRA is to regulate labor relations between Illinois public employers and employees); see also 115 ILCS 5/1 (1993) (stating that the purpose of the IELRA is to promote orderly and constructive relationships between Illinois educational employees and their employers).

16. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964). In *Fibreboard*, the Supreme Court addressed the issue of whether an employer's economically motivated decision to replace some of its employees with those of an independent contractor was subject to mandatory bargaining. *Id.* at 205. In, citing *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952), the Court looked to industrial bargaining practices in assessing the appropriateness of including a subject within the scope of bargaining. *Fibreboard*, 379 U.S. at 211. The Court held that this "industrial experience" reflects the interests of labor and management and is "indicative of the amenability of such subjects to the collective bargaining process." *Id.* Looking to this analysis, the Court held that the employer's decision to replace his employees was a mandatory subject of bargaining. *Id.* at 212. See also *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 666 (1981). In *First Nat'l Maintenance*, the Court addressed the issue of whether an employer was required to bargain about the effect of its decision to terminate a contract with one of its customers for economic reasons. *Id.* In holding that the employer had no duty to bargain with the union regarding the decision itself, the Court clarified the *Fibreboard* analysis in promulgating a benefits/burdens test to determine the scope of bargaining under the NLRA. *Id.* at 677-79. This test specifically weighs the benefits that bargaining would produce over the specified subject against the burdens that bargaining puts on management. *Id.*

17. See *infra* notes 192-97 and accompanying text for a discussion of the unique political and economic characteristics involved in public sector bargaining.

discusses how other jurisdictions define the scope of bargaining in the public sector, and proposes a revised test for the Illinois Supreme Court to adopt which gives necessary weight to the unique economic and political characteristics of public sector bargaining.

## I. THE SCOPE OF BARGAINING IN THE ILLINOIS PUBLIC SECTOR MODEL

A problem exists in determining what matters are subject to mandatory bargaining under the Illinois public labor acts. The development of a test designed to resolve this scope of bargaining problem should incorporate the unique aspects of public sector bargaining. This Part discusses the history of the Illinois public labor acts, and describes how the Illinois courts have interpreted the acts to define the scope of bargaining.

### A. *Legislative History of Public Labor Law in Illinois*

The enactment of the Illinois public labor acts was the first comprehensive statutory regulation of public sector collective bargaining in Illinois history.<sup>18</sup> The Illinois General Assembly used the National Labor Relations Act (NLRA),<sup>19</sup> which governs private sector bargaining, and the Pennsylvania Public Employee Relations Act<sup>20</sup> as models for its public sector labor acts.<sup>21</sup> Both of the Illinois public labor acts provoked extensive debate in the House and Senate, each act passing only after the Governor's amendatory veto.<sup>22</sup> The result of the Governor's amendatory veto

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18. Martin H. Malin, *Implementing the Illinois Educational Labor Relations Act*, 61 CHI.-KENT L. REV. 101, 101 (1985); see also *Developments in the Law - Public Employment*, 97 HARV. L. REV. 1611, 1679 (1984) [hereinafter *Developments*]. Relatively speaking, the Illinois enactment of public sector labor legislation was late compared to other states. By 1984, most states had adopted some form of public labor statutory bargaining legislation. *Id.*

19. 29 U.S.C. §§ 103-321 (1992).

20. See *Decatur Bd. of Educ., Dist. No. 61 v. IELRB*, 536 N.E.2d 743, 745 (Ill. App. Ct. 1989) (noting that Illinois used Pennsylvania's public labor act as a model); see also PA. STAT. ANN. tit. 43, § 1101.201 (1988). The Pennsylvania statute is very similar to the Illinois acts. *Decatur*, 536 N.E.2d at 746. However, the Pennsylvania statute only entitles employees to "meet and discuss" with the public employer about employment conditions while the Illinois statute requires collective bargaining. *Id.* at 747. Under this "meet and discuss" standard the employer merely has to listen to the employees' grievances and take them into consideration. *Id.* Pennsylvania defines "meet and discuss" as "the obligation of a public employer upon request to *meet* at reasonable times and *discuss* recommendations submitted by representatives of public employees: provided that any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final issue or issues raised." PA. STAT. ANN. tit. 43, § 1101.301(17) (1988) (emphasis added).

21. Malin, *supra* note 18, at 101.

22. See ILL. CONST. art. IV, § 9(b); Malin, *supra* note 18, at 101. In Illinois, the

was that the two Illinois public sector labor acts have many identical provisions.<sup>23</sup> Although the three separate public sector labor boards are instructed to merely interpret each others' decisions as persuasive authority,<sup>24</sup> the existence of identical wording in both of the Illinois labor acts and the close timing of their passage creates a *pari materia* effect concerning the scope of bargaining.<sup>25</sup>

The implementation of these acts produced an immediate impact on the scope of collective bargaining in Illinois.<sup>26</sup> However, the implementation of these acts was only half the battle; finding an effective way to interpret the acts is where the real controversies arose.

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governor may veto a bill in its entirety through his veto powers. Malin, *supra* note 18, at 101 n.4. However, the legislature may override this veto by a three-fifths vote in each house. *Id.* This veto power, termed an "amendatory veto," mandates that the governor return the bill to the house of origination with recommendations for specific change. *Id.* If each house accepts the change by majority vote, the governor may certify that the acceptance conforms to the recommendations and allow the bill to become law. *Id.*

23. In his amendatory veto, Governor Thompson provided:

House Bill 1530 provides for a system of collective bargaining for the educational employees of Illinois. As this fundamental right was granted to all private sector employees more than a half century ago, I deem it appropriate to extend that right to educational employees. However, I believe that several changes need to be made in the legislation to create a workable and fair system that balances the rights of educational employees with the unique managerial problems that beset educational employers and the taxpayers who ultimately pay the bill.

JOURNAL OF THE HOUSE OF REPRESENTATIVES, HOUSE BILL 1530, 83d Cong. Ill., 9134, 9135 (Oct. 5, 1983). The IPLRA was passed before the IELRA. Therefore, in an effort to hasten the IELRA's implementation, Governor Thompson proposed that many of the same sections of the IPLRA be implemented into the IELRA. *Id.* The IELRA passed relatively easily after Governor Thompson made these changes in his amendatory veto. See H.R. CONG. REC. Ill. 83d 105 (Oct. 19, 1983) (as codified in 115 ILCS 5/1-27 (1993)) (accepting Governor Thompson's recommendations for the changes regarding House Bill 1530 by an 86 to 26 vote).

24. See 5 ILCS 315/27 (1993) (stating that other labor boards' decisions are persuasive, but not binding under the IPLRA); see also 115 ILCS 5/17.1 (1993) (stating that other labor boards decisions are persuasive, but not binding under the IELRA).

25. See BLACK'S LAW DICTIONARY 711 (5th ed. 1979) (defining statutes in *pari materia* as "those relating to the same person or thing or having a common purpose"); see also Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Cannons of Construction do not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 949 (1994). As Sutro discusses, this type of statutory interpretation stems from the theory that "when [a] legislature enact[s] statutes on the same topic, it most likely intended that they be consistent with each other. . . ." *Id.* Although the IPLRA and IELRA are distinguishable as to whom they cover, the IELRB, ISLRB and ILLRB utilize the *Central City* test when making scope of bargaining decisions. See *infra* note 141 and accompanying text discussing IELRB, ISLRB and ILLRB decisions which have adopted the *Central City* test.

26. Malin, *supra* note 18, at 102.

*B. The Public Labor Model in Illinois as it Relates to the Scope of Bargaining Dilemma*

Three agencies govern collective bargaining in the Illinois public sector.<sup>27</sup> Two separate acts provide the agencies with their authoritative power.<sup>28</sup> The Illinois Public Labor Relations Act<sup>29</sup> (IPLRA) governs most of the public sector through the Illinois State Labor Relations Board<sup>30</sup> (ISLRB) and the Illinois Local Labor Relations Board<sup>31</sup> (ILLRB).<sup>32</sup> The IELRA<sup>33</sup> regulates collective bargaining in public education through the IELRB.<sup>34</sup>

In drafting the IPLRA and the IELRA, the Illinois legislature looked to the NLRA and the public sector collective bargaining statutes of other jurisdictions as models.<sup>35</sup> However, the IPLRA and the IELRA differ from the NLRA in a number of ways.<sup>36</sup> One of the more significant differences is that the Illinois acts include sections which delineate employers' rights as they relate to bargaining; the NLRA is silent on the subject of employers' rights.<sup>37</sup>

A central issue which these boards frequently debate is whether management may unilaterally implement a change without subjecting that change to mandatory bargaining.<sup>38</sup> In addition to interpreting their respective acts, the ILLRB, ISLRB and

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27. Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REF. 313, 336 (1993) [hereinafter *Right to Strike*].

28. *Id.*

29. 5 ILCS 315/1-27 (1993).

30. See 5 ILCS 315/5(a) (stating that the ISLRB has jurisdiction over "collective bargaining matters between employee organizations and the State of Illinois, excluding the General Assembly of the State of Illinois, between organizations and units of local government and school districts with a population not in excess of one million persons, and between employee organizations and the Regional Transportation Authority").

31. See 5 ILCS 315/5(b) (stating that the ILLRB has jurisdiction over "collective bargaining agreement matters between employee organizations and units of local government with a population in excess of one million persons, but excluding the Regional Transportation Authority").

32. *Right to Strike*, *supra* note 27, at 336.

33. 115 ILCS 5/1-21 (1993).

34. 115 ILCS 5/5; *Right to Strike*, *supra* note 27, at 336.

35. Malin, *supra* note 18, at 101.

36. See, e.g., *id.* (citing differences in the IELRA, including a different definition of supervisors and managerial employees who are excluded from coverage and stipulation of procedures for employers to voluntarily recognize employee organizations).

37. *Id. Compare* 5 ILCS 315/4 (stating employer rights with respect to their duty to bargain under the IPLRA) and 115 ILCS 5/10 (stating employer rights with respect to their duty to bargain under the IELRA) with 29 U.S.C. §§ 103-321 (1988) (failing to recognize employer rights in the private sector).

38. Leka, *supra* note 7, at 834.

IELRB also look to the National Labor Relations Board<sup>39</sup> (NLRB) and each other's decisions for precedent.<sup>40</sup> Scope of bargaining problems arise when management desires to make a change, and a group of affected employees, who are organized in a collective bargaining unit,<sup>41</sup> want a say in that change.<sup>42</sup> If management and the union representing the affected employees cannot agree upon whether the union has a right to bargain about a proposed change, the union may file an "unfair labor practice"<sup>43</sup> claim with one of the labor boards.<sup>44</sup>

Initially, the labor boards respond to these grievances by having a hearing officer examine the circumstances and determine if collective bargaining is necessary.<sup>45</sup> If the officer determines

39. 29 U.S.C. § 153. The NLRB is the governing body which hears and decides controversies under the NLRA. *Id.*

40. Leka, *supra* note 7, at 833-34. The Illinois legislature provides that, unless contradicted by administrative precedent previously established by the IELRB, ILLRB or the ISLRB, all final decisions and unfair labor practice cases decided by each separate board, may be considered, but need not be followed by the other boards. *Id.*

41. See 5 ILCS 315/9 (stating procedure on how to receive recognition as a collective bargaining unit under the IPLRA); 115 ILCS 5/7 (stating procedure on how to receive recognition as a collective bargaining unit under the IELRB). See also Malin, *supra* note 18, at 107 (discussing how public employees covered under the IELRA may organize and be recognized as a bargaining unit); Jenkins, *supra* note 10, at 487 (discussing how public employees covered under the IPLRA may organize and be recognized as a bargaining unit).

42. See 5 ILCS 315/7 (setting forth the duty to bargain under the IPLRA); see also 115 ILCS 5/10 (setting forth the duty to bargain under the IELRA).

43. The IELRA provides:

Unfair labor practices. (a) Educational employers, their agents or representatives are prohibited from:

(1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act. . . .

(5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative; provided, however, that if an alleged unfair labor practice involves interpretation or application of the terms of a collective bargaining agreement and said agreement contains a grievance and arbitration procedure, the Board may defer the resolution of such dispute to the grievance and arbitration procedure contained in said agreement. . . .

115 ILCS 5/14. See also 5 ILCS 315/10 (setting forth unfair labor practices as they pertain to the IPLRA). Both the IELRA and the IPLRA set forth a number of other "unfair labor practices," including, interfering with the formation of an employee organization, discriminating against members of any employee organization, violating election regulations, refusing to comply with provisions of a binding arbitration award and the misuse of public funds in representation elections. *Id.*; 115 ILCS 5/14.

44. See 5 ILCS 315/5(a), (b) (setting forth the powers of the ISLRB under section (a) and the powers of the ILLRB under section (b)); see also 115 ILCS 5/5 (setting forth the powers of the IELRB).

45. 115 ILCS 5/15(i); 5 ILCS 315/5(j). Under the IPLRA and the IELRA the



that the proposed change is subject to mandatory bargaining, management must bargain in good faith over the change with an employee representative.<sup>46</sup> Once the parties settle their differences on the proposed change, they must execute a written contract, commonly referred to as a "collective bargaining agreement,"<sup>47</sup> which incorporates any agreement reached between the two parties.<sup>48</sup> However, if the hearing officer determines that the proposed change is only a permissive<sup>49</sup> subject, management may

boards may adopt, promulgate, amend or rescind rules and regulations in accordance with the Illinois Administrative Procedure Act as they deem necessary to carry out the scope of their respective acts. *Id.* Each of the Board's have created rules which allow for initial findings by a hearing officer. *See* ILL. ADMIN. CODE tit. 80(c), § 1200.40 (1994) (setting forth the authority of an administrative law judge under the ISLRB and the ILLRB, including the authority to "render and serve the recommended decision and order on the parties to the proceeding"); *see also* ILL. ADMIN. CODE tit. 80(c), § 1105.80 (1994) (setting forth the authority of a hearing officer to issue a decision and give reasons for that decision under the IELRA).

46. *See, e.g.,* Kewanee Educ. Ass'n, IEA-NEA, 4 Pub. Employee Rep. Ill. (LRP) ¶ 1136, 549, 552 (IELRB 1988). In *Kewanee*, the IELRB defined "good faith" as follows:

Good faith requires a state of mind which is conducive to reaching an agreement. . . . Good faith bargaining requires more than going through the motions of bargaining and the making of counterproposals since one may comply with all these formalities with a mind completely closed and with no intention or desire to reach an agreement.

*Id.* The IELRB looks to the totality of the circumstances and makes the determination whether the party at issue had a predetermination not to reach an agreement. *Id.* at 553. In *Kewanee*, the IELRB held that since the school district made a final offer early in negotiations refusing to budge and responding to the issues raised by the union by rejecting them "out of hand without any explanation or without offering counterproposals," the school district was not bargaining in good faith. *Id.*

47. *Black's Law Dictionary* defines a collective bargaining agreement as:

[An] [a]greement between an employer and a labor union which regulates terms and conditions of employment. The joint and several contract of members of union made by officers of union as their agents. Such is enforceable by and against union in matters which affect all members alike or large classes of members, particularly those who are employees of other party to contract.

BLACK'S LAW DICTIONARY 239 (5th ed. 1979)

48. *See* 5 ILCS 315/7; 115 ILCS 5/10 (defining the duty to bargain under the IPLRA and the IELRA).

49. *See* NLRB v. Wooster Div. of the Borg-Warner Corp., 356 U.S. 342, 344 (1958) (adopting the terms mandatory, permissive and illegal or prohibited for classifying subjects of bargaining). The public sector has adopted the terms "mandatory," "permissive" and "prohibitive" from the private sector. Jane Wandel Nelson, Comment, *State Court Interpretation of Teacher Collective Bargaining Statutes: Four Approaches to the Scope of Bargaining Issue*, 2 INDUS. REL. L.J. 421, 425 (1977). When a subject of bargaining is deemed "permissive," employers may unilaterally act without incurring unfair labor practice charges. *Id.* at 426. The Illinois labor relations boards have adopted the term "permissive" to have the same meaning in Illinois. *See, e.g.,* Mt. Vernon Educ. Ass'n, 10 Pub. Employee Rep. Ill. (LRP) ¶ 1058, 234, 236 (IELRB 1994) (holding that the right to bargain is a statutory right that, if waived, is a "permissive" subject of bargaining).

implement its proposed change without bargaining with employee representatives.<sup>50</sup>

If management or the union disagrees with the hearing officer's decision, they are permitted to appeal to one of the labor boards.<sup>51</sup> Then, much like a district court to a magistrate, the board reviews the facts of the case and writes its own decision regarding the hearing officer's decision.<sup>52</sup> If either of the parties do not agree with the respective board's decision, they may then appeal to the Appellate Court presiding over the district in which the board sits.<sup>53</sup> From the appellate level, the respective parties may appeal to the Illinois Supreme Court.<sup>54</sup> The reviewing courts give considerable deference to the boards' decisions pertaining to the scope of bargaining because of each board's recognized expertise in its respective field.<sup>55</sup>

A commonly litigated issue under both of the Illinois labor acts arises when determining which types of employment deci-

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50. *Mount Vernon*, 10 Pub. Employee Rep. Ill. (LRP) ¶ 1058, at 239.

51. See ILL. ADMIN. CODE tit. 80(c), § 1220.60 (setting forth procedural review of administrative law judge's decision under the IPLRA including limit to file an exception to administrative law judge's decision); ILL. ADMIN. CODE tit. 80(c), § 1105.80 (setting forth procedural review of hearing officer's decision under the IELRA including 14 day limit to file exception to hearing officer's decision).

52. See ILL. ADMIN. CODE tit. 80(c), § 1220.60 (discussing procedural review under the IPLRA); ILL. ADMIN. CODE tit. 80(c), § 1105.80 (discussing procedural review under the IELRA).

53. The IELRA addresses judicial review in Section 16, which provides:

Judicial review. (a) A charging party or any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may apply for and obtain judicial review of an order of the Board entered under this Act in accordance with the provisions of the Administrative Review Law, as now or hereafter amended, except that such judicial review shall be taken directly to the Appellate Court of a judicial district in which the Board maintains an office. . . .

115 ILCS 5/16. See 5 ILCS 315/1-27 (allowing appeal to the Appellate Court in which the aggrieved party resides or transacts business).

54. See 735 ILCS 5/3-101 (1993) (setting forth procedure for administrative review in Illinois).

55. See, e.g., *County of Cook v. ILLRB*, 639 N.E.2d 187, 190 (Ill. App. Ct. 1994) (conceding deference to the ILLRB in interpretation of the IELRA); *Village of Franklin Park v. ISLRB*, 638 N.E.2d 1144, 1147 (Ill. App. Ct. 1994) (conceding deference to the ISLRB in interpretation of the IPLRA); *Decatur Bd. of Educ. Dist. No. 61 v. IELRB*, 536 N.E.2d 743, 746 (Ill. App. Ct. 1989) (conceding deference to the IELRB in interpretation of the IELRA). The reviewing courts of Illinois adopted this "considerable deference" standard from a private sector case relating to the NLRB's decisions. *Decatur*, 536 N.E.2d at 746 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 494 (1979)). Illinois courts have recognized the need to defer to an administrative board's decisions under its respective acts. *Id.* If a court did not adhere to this principle it would be "substitut[ing] [its] general knowledge and study for the expertise required of [the] Board members by [the respective act setting forth the power of the board]." *Id.*

sions are subject to mandatory bargaining.<sup>56</sup> The RIF hypothetical at the introduction of this Note is an excellent example of this type of decision. These types of problems revolve around the interpretation of two sections included in both the IELRA and the IPLRA.<sup>57</sup> For simplicity, this Note will use the IELRA's section numbering.

Section 10(a) of the IELRA sets forth the extent and limits of mandatory bargaining under the Act. Section 10(a) provides:

Duty to bargain. (a) An educational employer and the exclusive representative<sup>58</sup> have the authority and the duty to bargain collectively as set forth in this Section. Collective bargaining is the performance of the mutual obligations of the educational employer and the representative of the educational employees to meet at reasonable times and confer in good faith *with respect to wages, hours and other terms and conditions of employment*, and to execute a written contract incorporating any agreement reached by such obligation, provided such obligation does not compel either party to agree to a proposal or require the making of a concession.<sup>59</sup>

However, Section 4 of the IELRA limits the duty to bargain provided for in Section 10(a).<sup>60</sup> Section 4 of the IELRA provides:

Employer rights. Employers shall not be required to bargain over matters of *inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees*. Employers, however, shall be required to bargain collectively with regard to policy matters *directly affecting wages, hours and terms and conditions of employment* as well as the impact thereon upon request by employee representatives. To preserve the rights of employers and exclusive representatives which have established collective bargaining relationships or negotiated collective bargaining agreements prior to the effective date of this Act, employers shall be required to bargain collectively with regard to any matter concerning wages, hours or conditions of employment about which they have bargained for and agreed to in a collective bargaining agreement prior to the effective date of this Act.<sup>61</sup>

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56. Leka, *supra* note 7, at 835.

57. See generally *Central City Educ. Ass'n IEA-NEA v. IELRB*, 599 N.E.2d 892, 898 (Ill. 1992) (noting the difficulty in interpreting the two sections of the IELRA).

58. Jenkins, *supra* note 10, at 487 (discussing representative certification under the IPLRA); Malin *supra* note 18, at 112-14 (discussing representative certification under the IELRA). For a further illustration of the differences between certification under the IELRA and the IPLRA compare 5 ILCS 315/6 with 115 ILCS 5/7.

59. 115 ILCS 5/10(a) (emphasis added). The corresponding section of the IPLRA is 5 ILCS 315/7.

60. Decatur Sch. Dist. No. 61, 4 Pub. Employee Rep. Ill. (LRP) ¶ 1076, 315, 320 (IELRB 1988).

61. 115 ILCS 5/4 (emphasis added). The corresponding section of the IPLRA is 5

In *Central City*, the Illinois Supreme Court mandated a scope of bargaining test which attempts to reconcile these two sections.<sup>62</sup> However, the *Central City* test fails to give proper weight to the limiting language depicted in Section 4 and fails to recognize that some subjects are the exclusive domain of the public. An examination of how the boards interpret the two scope of bargaining sections is essential to understand how the Illinois Supreme Court came to its decision in *Central City*.

*C. A Historical Case Analysis: The Development of a Scope of Bargaining Test*

The case analysis section of this Note focuses on the IELRB decisions. These illustrations depict the historical attempts at reconciling the corresponding sections of the two Illinois public labor acts.<sup>63</sup>

*1. The IELRB'S First Examination into the Realm of Mandatory Bargaining*

Subsequent to the creation of the IELRB, the first significant case to deal with the duty to bargain was *Board of Education Berkeley School District No. 87*.<sup>64</sup> In *Berkeley*, the Board of Education made what it thought was a "managerial" decision under Section 4 by unilaterally implementing a change from an interscholastic athletic program to an intramural sports program.<sup>65</sup> The Berkeley Educational Association asserted that this decision required bargaining and brought the matter to an IELRB hearing officer.<sup>66</sup> The hearing officer determined that the decision was permissive and not a subject of mandatory bargaining.<sup>67</sup>

On appeal, the IELRB upheld the hearing officer's decision that allowed the school district to forgo bargaining over its decision to change its athletics programs.<sup>68</sup> In so holding, the IELRB looked to the legislative history of the IELRA and recognized the

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ILCS 315/4.

62. *Central City Educ. Ass'n IEA-NEA v. IELRB*, 599 N.E.2d 892, 905 (Ill. 1992).

63. This Note focuses on the IELRB's decisions because they are an excellent example of how the scope of bargaining dilemma arose in Illinois. Furthermore, the Illinois Supreme Court promulgated its scope of bargaining test from cases which originated under the IELRB. *Id.* at 895. The *Central City* decision consolidated appeals from the First and Fourth District Appellate Courts. *Id.*

64. 2 Pub. Employee Rep. Ill. (LRP) ¶ 1066, 171 (IELRB 1986).

65. *Id.* at 175.

66. *Id.* at 172.

67. *Id.*

68. *Id.* at 173.

inherent contradiction of Section 10(a) and Section 4.<sup>69</sup> In *Berkeley*, the IELRB created a test which classified subjects of bargaining as either "primarily" or "indirectly" related to the "hours, wages and terms and conditions of employment" as set forth in Section 4 of the IELRA.<sup>70</sup> The majority in *Berkeley* avoided the interplay between Section 4 and Section 10 of the IELRA by holding that the decision to switch programs "does not have wages, hours and terms and conditions of employment as its primary subject and only indirectly affects those matters."<sup>71</sup> The *Berkeley* holding illustrates the deliberate choice by the IELRB to avoid the contradiction of Section 4 and Section 10.

## 2. Addressing the Scope of Bargaining Issue Directly: District No. 59

The scope of bargaining issue was unavoidable in *District No. 59 Educational Ass'n*.<sup>72</sup> The problem in *District No. 59* required the IELRB to directly address the conflict between Section 4 and Section 10 of the IELRA.<sup>73</sup> The issue before the IELRB in *District No. 59* was whether the school district had a duty to collectively bargain over the formation and execution of a teacher evaluation process which the school code mandated.<sup>74</sup> In holding evaluation plans were subject to mandatory bargaining, the IELRB devised a "continuum of decision making."<sup>75</sup> The "continuum" plotted subjects regarding wages, hours and terms and conditions of employment at one end of the continuum, and subjects involving managerial policy at the other.<sup>76</sup> The IELRB then

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69. *Id.* at 173-74. The IELRB recognized that some matters are arguably a matter of inherent managerial policy as set forth in Section 4 of the IELRA, yet still involve the terms and conditions of employment as set forth in Section 10 of the IELRA. *Id.*

70. *Id.* In *Berkeley*, the IELRB set forth its analysis as follows:

In our judgment, the interpretation of Section 4 most consistent with a reasoned attempt to relate each of the sentences and phrases of Section 4 to the underlying purpose of the entire Section and to the legislative history is that "policy matters directly affecting wages, hours and terms and conditions of employment" are those policies that have wages, hours and terms and conditions of employment as their primary subject; clearly, decisions concerning such policies are mandatory subjects of bargaining. However, the inherent managerial policy decision involved here — a change in the nature of the District's athletic program — does not have wages, hours and terms and conditions of employment as its primary subject and only indirectly affects those matters; thus it is not a mandatory subject of bargaining.

*Id.* at 176.

71. *Id.*

72. 3 Pub. Employee Rep. Ill. (LRP) ¶ 1094, 269 (IELRB 1987).

73. *Id.* at 272.

74. *Id.*

75. *Id.* at 273.

76. *Id.* at 272-73. In *District No. 59* the Board stated:

determined that subjects which fall closer to wages, hours and terms and conditions of employment on the continuum are subject to mandatory bargaining, while subjects which fall closer to the core of managerial discretion are permissive and not subject to bargaining.<sup>77</sup> The IELRB applied this test and determined that the development and implementation of the teacher evaluation process fell closer to wages, hours and terms and conditions of employment on the continuum; therefore, the evaluation process was subject to mandatory bargaining.<sup>78</sup> This "continuum" was the first formal test developed by the IELRB to reconcile the contradictory sections of the IELRA.

### 3. Reconstruction and Adoption of a Formal Balancing Test

The next case before the IELRB dealing with the duty to bargain was *Decatur School Dist. No. 61 (Decatur I)*.<sup>79</sup> In *Decatur I*, the board examined whether the issue of class size was subject to mandatory bargaining.<sup>80</sup> The IELRB reviewed its decisions in *Berkeley* and *District No. 59*, and again wrestled with the overlapping line between "hours, wages and terms and conditions of employment" in Section 10 and "managerial policy" as set forth in Section 4.<sup>81</sup> Citing a need to accommodate management prerogatives with the duty to bargain, the IELRB devised a test utilizing both sections 4 and 10 of the IELRA. The *Decatur I* test first looks to the complete wording of Section 4 to determine if the issue involves a matter of "inherent managerial policy as set forth in Section 4."<sup>82</sup> The *Decatur I* test then looks to the complete wording of Section 10 to determine whether the issue also concerns "terms and conditions of employment."<sup>83</sup> If the IELRB de-

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[T]here exists a continuum of decision making. At one end of the spectrum are decisions which vitally and centrally concern wages, hours and terms and conditions of employment. At the other are decisions which form the core of management responsibilities and prerogatives. In each case, we must examine where the decision fits on that continuum.

*Id.*

77. *Id.* at 272.

78. *Id.* at 273.

79. 4 Pub. Employee Rep. Ill. (LRP) ¶ 1076, 315 (IELRB 1988).

80. *Id.* at 319.

81. *Id.* at 320 (comparing 115 ILCS 5/4 and 115 ILCS 10(a)).

82. *See id.* at 321 (stating that the entire wording of Section 4 of the IELRB should be given consideration); 115 ILCS 5/4 (setting forth matters of inherent managerial policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees).

83. *Decatur Sch. Dist. No. 61*, 4 Pub. Employee Rep. Ill. (LRP) ¶ 1076, at 322-23 n.8 (differentiating a private labor sector test which focuses on managements "profit/cost motive" and "need to exercise unfettered entrepreneurial control" versus public labor sector tests where costs do not serve as such a pivot point for the man-

termines that both Section 10(a) and Section 4 are applicable to the subject matter, the board applies a balancing test.<sup>84</sup> In promulgating the *Decatur I* balancing test, the IELRB stated that:

[W]e must strike a balance between the educational employer's need and right to establish and implement educational policy and the interests of educational employees, expressed by their exclusive representative, when such decisions affect employees wages, hours and terms and conditions of employment.<sup>85</sup>

Using the *Decatur I* test, the IELRB held that class size is subject to mandatory bargaining because it is a policy matter which "directly affects wages, hours and terms and conditions of employment within the meaning of Section 4."<sup>86</sup>

The Decatur Board appealed the *Decatur I* holding in *Decatur Board of Education District No. 61 v. IELRB*<sup>87</sup> (*Decatur II*). In *Decatur II*, the court recognized the difficulty in interpreting the conflicting sections of the IELRA.<sup>88</sup> Citing many factors,<sup>89</sup> the

datory/permissive distinction).

84. *Id.* at 322.

85. *Id.* The IELRB noted that the balancing test adopted in *Decatur I* parallels the approach followed by labor boards and courts in other states. *Id.* at 322 n.6. Similar tests adopted by jurisdictions and cited in the IELRB's decision include: *National Educ. Ass'n v. Board of Educ.*, 512 P.2d 426, 431 (Kan. 1973) (weighing impact on individual school teacher against effect on school system as a whole); *City of Biddeford v. Biddeford Teachers' Ass'n*, 304 A.2d 387, 394 (Me. 1973); *Clark County Sch. Dist. v. Local Gov't Employee Mgmt. Relations Bd.*, 530 P.2d 114, 119 (Nev. 1974); *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 393 A.2d 278, 288 (N.J. 1978) (requiring bargaining on matters which affect the "work and welfare" of the public employee and on "which negotiation would not significantly interfere with managerial functions"); *Sutherlin Educ. Ass'n v. Sutherlin Sch. Dist. No. 130*, 548 P.2d 208, 217 (Or. 1976); *Pennsylvania Lab. Relations Bd. v. State College Area Sch. Dist.*, 337 A.2d 262, 272 (Pa. 1975) (allowing the labor board to weigh the impact of the particular issue as to terms and conditions of employment against the effect on the basic policy of the system as a whole); *City of Beloit v. Wisconsin Employment Relations Comm'n*, 242 N.W.2d 231, 238 (Wis. 1976). See *id.*

86. *Decatur Sch. Dist. No. 61*, 4 Pub. Employee Rep. Ill. (LRP) ¶ 1076, 315, 322 (IELRB 1988).

87. 536 N.E.2d 743 (Ill. App. Ct. 1989).

88. *Id.* at 750. The court stated the dilemma as follows:

Section 10(a) and section 4 illustrate the conflicting interests considered at the time of legislative enactment. In attempting to placate the conflicting interests, something less than perfection resulted. Our responsibility is to add some responsible and, hopefully, some understandable interpretation to the seemingly conflicting statutory provisions.

*Id.*

89. *Id.* at 745-46 (conceding deference to the IELRB's interpretation of the IELRA, Governor James Thompson's Amendatory Veto Message of the Act which supports the balancing of employer and employee interests, the Pennsylvania Public Employee Relation Act which served as a guideline for the Illinois act, Pennsylvania court cases which have approved the use of a balancing test in *State*

Appellate Court for the Fourth District of Illinois adopted the *Decatur I* test and affirmed the IELRB's original decision that class size is subject to mandatory bargaining.<sup>90</sup> However, the *Decatur II* court altered the test "subtly"<sup>91</sup> by stating that it would balance the competing interest *only* after finding the subject directly affects "wages, hours and terms and condition of employment."<sup>92</sup>

As *Decatur II* made its way to the Appellate Court, two other "duty to bargain" issues arose in *Central City School District 133*<sup>93</sup> and *LeRoy Community Unit School District*.<sup>94</sup> These cases required the IELRB to again make a determination whether the issue at hand was subject to mandatory bargaining.<sup>95</sup> When *Central City* and *LeRoy* were appealed, the Appellate Courts for the First and Fourth District disagreed as to application of the *Decatur I* test.

## II. THE EMERGENCE OF A UNIFIED TEST: THE EVOLUTION OF CENTRAL CITY

### A. The LeRoy Decisions

In *LeRoy Community Unit School District*<sup>96</sup> (*LeRoy I*), the LeRoy Educational Association (LEA), a representative of the

*College*, 337 A.2d at 271, and the Illinois State Labor Relations Board approved the use of a balancing test in *Cermak Health Services*, 3 Pub. Employee Rep. Ill. (LRP) ¶ 3030, 156, 156 (ILLRB 1987).

90. *Decatur*, 536 N.E.2d at 746 (holding that IELRB's balancing test is necessary to give proper interpretation to the statutory provisions of the IELRA and that the "considerable deference" standard used in *Ford Motor Co. v. NLRB*, 441 U.S. 488, 494 (1979), which gave the National Labor Relations Board's decisions "considerable deference" in making such determinations should apply to the IELRB's determinations).

91. See *Central City Educ. Ass'n IEA-NEA v. IELRB*, 557 N.E.2d 418, 425 (Ill. App. Ct. 1990) (showing that the Appellate Court for the First District was the first to term the Fourth District's change in the *Decatur I* as "subtle").

92. *Decatur Bd. of Educ. Dist. No. 61 v. IELRB*, 536 N.E.2d 743, 745 (Ill. App. Ct. 1989).

93. 5 Pub. Employee Rep. Ill. (LRP) ¶ 1056, 118 (IELRB 1989), *rev'd sub. nom.*, *Central City Educ. Ass'n IEA-NEA v. IELRB*, 557 N.E.2d 418 (Ill. App. Ct. 1990), *modified*, 599 N.E.2d 892 (Ill. 1992).

94. 5 Pub. Employee Rep. Ill. (LRP) ¶ 1131, 298 (IELRB 1989), *rev'd sub. nom.*, *Board of Educ., LeRoy Community Unit School Dist. No. 2 v. IELRB*, 556 N.E.2d 857 (Ill. App. Ct. 1990), *modified*, 599 N.E.2d 892 (Ill. 1992).

95. *LeRoy*, 5 Pub. Employee Rep. Ill. (LRP) ¶ 1131, at 298; *Central City*, 5 Pub. Employee Rep. Ill. (LRP) ¶ 1056, at 118.

96. For purposes of simplicity, this Note will number the *LeRoy* decisions as they progressed through the appeals system. The IELRB's original decision will be referred to as *LeRoy I*. The Appellate Courts decision in *LeRoy* will be referred to as *LeRoy II*. Finally, consistent with the case name titles, the Illinois Supreme Court's decision when it consolidated both the *Leroy* and *Central City* issues on appeal will be called *Central City III*.



certified personnel, requested School District 2 (District 2) to bargain over the "decisions and effects" of teacher evaluation programs which were a requirement under the School Code.<sup>97</sup> District 2 maintained that the construction and implementation of the evaluation program was exempt from bargaining and it sought only "input" from the LEA.<sup>98</sup> The LEA filed unfair labor practice charges with the IELRB alleging that District 2 failed to bargain over a mandatory subject.<sup>99</sup> In *LeRoy I*, the IELRB cited previous decisions relating to evaluation plans and adopted the hearing officer's finding that District 2's failure to bargain was an unfair labor practice.<sup>100</sup>

On appeal in *LeRoy Community Unit School District v. IELRB*<sup>101</sup> (*LeRoy II*), the Illinois Appellate Court for the Fourth District affirmed the IELRB's decision in part, reversed in part and remanded the case to the IELRB.<sup>102</sup> In *LeRoy II*, the Appellate Court affirmed the *Decatur II* test, holding that the balancing of interests occurs *only* after a showing that the issue has a direct affect on the work force.<sup>103</sup> In applying the *Decatur II* test, the *LeRoy II* court held that "substantive criteria of a teacher evaluation" are not subject to mandatory bargaining, while "mechanical procedures involved in the evaluation process and remediation plan" are subject to mandatory bargaining.<sup>104</sup> The LEA and IELRB filed petitions for leave to appeal.<sup>105</sup> At the same time

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97. *LeRoy*, 5 Pub. Employee Rep. Ill. (LRP) ¶ 1131, at 298.

98. *Id.* at 301.

99. *Id.* at 300.

100. *Id.* at 301. The IELRB cited to Mattoon Community Unit Sch. Dist, No. 2, 5 Pub. Employee Rep. Ill. (LRP) ¶ 1199, 540 (IELRB 1988), and Community Consol. Sch. Dist. No. 59, 3 Pub. Employee Rep. Ill. (LRP) ¶ 1094, 269 (IELRB 1989), in holding that the school district violated the IELRA by refusing to bargain with the union over the development and implementation of a teacher evaluation plans mandated by the school code. *Id.* Thus, the IELRB held that the evaluations were a mandatory subject of bargaining. *Id.*

101. 556 N.E.2d 857 (Ill. App. Ct. 1990)

102. *Id.* at 873.

103. *Id.* at 866; *see also* Board of Regents of Regency Univ. v. IELRB, 560 N.E.2d 627 (Ill. App. Ct. 1990) (interpreting *Decatur I* the same way).

104. *LeRoy*, 556 N.E.2d at 867. The court provided:

First, the agency determines the factual question of whether the challenged action involves a policy decision which has a direct or indirect impact on wages, hours, or terms and conditions of employment. If the management policy has a direct effect on the work force, the agency must balance the interests of management with the interests of the work force. Its determination of whose interests are more at risk is a question of law.

*Id.* at 856-57. The Appellate Court applied the *Decatur II* balancing test only after it determined that the teacher evaluations had a direct affect on the work force. *Id.* at 867.

105. Central City Educ. Ass'n IEA-NEA v. IELRB, 599 N.E.2d 892, 897 (Ill. 1992).

the *LeRoy* issue was making its way through the Fourth Appellate District, the *Central City* case made its way through the First Appellate District.

### B. The Central City Decisions

In *Central City School District 133*<sup>106</sup> (*Central City I*), the School District notified its employees that it was contemplating a RIF for the upcoming school year.<sup>107</sup> The School District proceeded to dismiss four employees.<sup>108</sup> The School District laid off the employees because of fragile economic conditions in the School District and declining enrollment.<sup>109</sup> Because the employee's union did not have an opportunity to collectively bargain the decision to lay off the teachers, the employee's union filed an unfair labor charge with the IELRB.<sup>110</sup>

On submitting briefs and arguments before the IELRB, the IELRB in *Central City* applied the *Decatur II* test<sup>111</sup> and held that an initial decision to impose a RIF is not a mandatory subject of bargaining.<sup>112</sup> On appeal in *Central City School District 133*

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106. For purposes of simplicity, this Note will number the *Central City* decisions as they progressed through the appeals system. The IELRB's original decision will be referred to as *Central City I*. The Appellate Court's decision in *Central City* will be referred to as *Central City II*. The Illinois Supreme Court's decision which was consolidated with *LeRoy* will be referred to as *Central City III*. Finally, the *Central City* case on remand from the Supreme Court will be referred to as *Central City IV*.

107. *Central City*, 599 N.E.2d at 895.

108. *Id.* at 895-96.

109. *Id.* at 896.

110. *Id.*

111. See *Central City Sch. Dist. 133*, 5 Pub. Employee Rep. Ill. (LRP) ¶ 1056, 118, 119 (IELRB 1989) (applying test set forth in *Decatur I*).

112. *Id.* at 121. The IELRA stated its reasoning as follows:

Fundamentally, therefore, the decision to [reduce in force] represents a "basic educational policy choice." It is a decision not only about the overall budget, but a decision about educational services as well. Where, as here, the jobs are truly eliminated, the employees are not replaced and the work is not transferred outside the unit, the decision represents a matter of basic educational policy. . . .

RIF decisions are inseparable from the District's responsibility and ability to determine its standards of services and overall budget. These responsibilities are close to the core of the educational employer's prerogative to manage the educational system. Requiring collective bargaining over decisions to reduce the number of teachers would impinge heavily on management's right and ability to make such basic educational policy decisions and choices. Consequently, we conclude that management's need to freely determine educational policy outweighs the interests of employees in bargaining over such decisions. . . .

Our determination that RIF decisions are not subject to mandatory collective bargaining comports with the overwhelming weight of authority under other public sector labor laws. See, e.g., *Schoolcraft College Ass'n of Office Personnel/MESPA v. Schoolcraft Community College*, 156 Mich. App.

v. IELRB<sup>113</sup> (*Central City II*), the Appellate Court of Illinois for the First District reversed the IELRB's decision.<sup>114</sup> The *Central City II* court cited the difference between the *Decatur I* and *Decatur II* tests and concluded that the *Decatur II* court's interpretation of the *Decatur I* test "subtly, but significantly" altered the analysis.<sup>115</sup> The *Central City II* court held that the *Decatur I* test more accurately reflected the terms of the IELRA.<sup>116</sup> The court in *Central City II* then adopted and applied the *Decatur I* test and held that RIF orders are mandatory subjects of bargaining.<sup>117</sup> The School District filed a petition for leave to appeal.<sup>118</sup> This result left an inconsistency between the First and Fourth District Appellate Court's interpretations of the *Decatur I* test.

### C. Consolidation and Adoption of a Formal Scope of Bargaining Test

Citing a need for the development of a standardized test, the Illinois Supreme Court consolidated both the *LeRoy II* and the *Central City II* cases on appeal in *Central City v. IELRB (Central City III)*.<sup>119</sup> The *Central City III* court recognized the difficulty in reconciling the two sections of the IELRA and allowed various amici<sup>120</sup> to file briefs for both the *LeRoy* evaluation program is-

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754, 401 N.W.2d 915, 918-19 (1986); *Old Bridge Township Bd. of Educ. v. New Jersey Public Employment Relations Comm'n*, 10 NJPER 15053 (N.J. App. Div. 1984); *City of Brookfield v. Wisconsin Employment Relations Comm'n*, 87 Wis. 2d 804, 275 N.W.2d 723, 730 (1979); *City of New Rochelle v. New Rochelle Fed'n of Teachers*, 4 PERB 3060 (N.Y. Public Employee Relations Board 1971). These cases recognize that a RIF decision remains at the core of management control and is not subject to mandatory bargaining, even when the decision is for economic reasons.

*Id.*

113. 557 N.E.2d 418 (Ill. App. Ct. 1990).

114. *See id.* at 419 (reversing the IELRB's initial decision in *Central City I* and holding that RIF orders are subject to mandatory bargaining).

115. *Id.* at 425. The Appellate Court held that balancing the competing interest only after finding that the policy decision directly affects wages, hours and terms and conditions of employment was not a proper reflection of the IELRA itself. *Id.* Instead, the court held that it would balance the competing interests only after determining that the subject was both an issue of "wages, hours, and terms and conditions of employment" and a matter of educational policy. *Id.* at 424. The court cited the need for this change because the Fourth District's interpretation "may well tilt the balancing test toward management prerogatives, in contravention of the [IELRA]." *Id.* at 425.

116. *Id.*

117. *Id.* at 427.

118. *Central City Educ. Ass'n IEA-NEA v. IELRB*, 599 N.E.2d 892, 897 (Ill. 1992).

119. *Id.*

120. *Id.* at 894 (allowing amicus curiae from Illinois Association of School Boards

sue and the *Central City* RIF issue.<sup>121</sup> The *Central City III* court then created a three-part test which expanded the scope of bargaining in Illinois.<sup>122</sup>

Analysis of the *Central City III* decision shows that the court placed significant emphasis on the United States Supreme Court's interpretation of the National Labor Relations Act,<sup>123</sup> Pennsylvania precedent and the legislative history of the IELRA.<sup>124</sup> Utilizing these sources, the *Central City III* court created a test for analyzing whether a given issue is subject to mandatory bargaining.<sup>125</sup> The *Central City III* test mirrors the private sector test that the United States Supreme Court set out for the NLRB's use,<sup>126</sup> and provides:

in No. 70425, Illinois Community College Trustees Association in No. 70425, University of Illinois and Public Employer Labor Relations Association in No. 70425 Federation of Teachers in No. 70425, Illinois State Federation of Labor and Congress of Industrial Organizations in No. 70425, Chicago Federal of Labor and Industrial Union Council in No. 70425, Illinois Federation of Teachers in Nos. 70584 & 70609 and Board of Education of School District No. 88, Du Page County in Nos. 70584 & 70609).

121. *Id.* at 897.

122. *See id.* at 905 (establishing three-part test).

123. *See* 29 U.S.C. § 153 (giving the NLRB the power to regulate private sector labor relations under the NLRA); *see also Central City*, 599 N.E.2d at 897 (citing *Fibreboard Paper Products Corp. v. NLRB*, 397 U.S. 203, 217 (1964), which adopts a benefits/burdens). *See supra* note 16 and accompanying text for discussion of the Supreme Court's private sector benefits/burdens test.

124. *Central City Educ. Ass'n IEA-NEA v. IELRB*, 599 N.E.2d 892, 903-05 (Ill. 1992) (using Pennsylvania precedent and the legislative history of the IPLRA because of its similarity with the IELRA).

125. *Id.* The Illinois Supreme Court in *Central City III* provided:

The first part of the test requires a determination of whether the matter is one of wages, hours and terms and conditions of employment. This is a question that the IELRB is uniquely qualified to answer, given its experience and understanding of bargaining in education labor relations. If the answer to this question is no, the inquiry ends and the employer is under no duty to bargain.

If the answer the first question is yes, then the second question is asked: Is the matter also one of inherent managerial authority? If the answer to the second question is no, then the analysis stops and the matter is a mandatory subject of bargaining. If the answer is yes, then the hybrid situation . . . exists: the matter is within the inherent managerial authority of the employer and it also affects wages, hours and terms and conditions of employment.

At this point in the analysis, the IELRB should balance the benefits that bargaining will have on the decisionmaking process with the burdens that bargaining imposes on the employer's authority. Which issues are mandatory, and which are not, will be very fact-specific questions, which the IELRB is eminently qualified to resolve.

*Id.* at 905 (reversing the Appellate Court in *LeRoy II* on other grounds, modifying and remanding the Appellate Court in *Central City II*).

126. *See supra* note 16 discussing the benefits/burdens test promulgated by the Supreme Court for the NLRB to use when making private sector scope of bargain-

(1) Ask "whether the matter is one of wages, hours and terms and conditions of employment[?]"<sup>127</sup> If not, "the inquiry ends and the employer is under no duty to bargain."<sup>128</sup>

(2) "If the answer to the first question is yes,"<sup>129</sup> ask "[i]s the matter also one of inherent managerial authority?"<sup>130</sup> If not, the inquiry ends "and the matter is a mandatory subject of bargaining."<sup>131</sup>

(3) If the answer to the second question is also yes, "the IELRB should balance the benefits that bargaining will have on the decisionmaking process with the burdens that bargaining imposes on the employer's authority."<sup>132</sup>

This test is unlike any prior ILLRB, ISLRB or IELRB test.<sup>133</sup> Moreover, the *Central City III* test arguably reduces the impact of the Section 4 "employers' rights" clause by overly simplifying a difficult step.<sup>134</sup> Instead of using the scope of bargaining language in Section 4 regarding employers' rights, the Illinois Supreme Court seemingly reduced those rights to matters of "inherent managerial policy."<sup>135</sup> Furthermore, the *Central City III* decision illustrates the Supreme Court's misunderstanding of the unique issues raised in public sector bargaining.<sup>136</sup> Under the

ing determinations.

127. *Central City*, 599 N.E.2d at 905.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. See *supra* note 11 and accompanying text for a discussion of IELRB, ISLRB and ILLRB tests used before the *Central City III* decision.

134. See *Central City Educ. Ass'n IEA-NEA v. IELRB*, 599 N.E.2d 892, 897 (Ill. 1992) (replacing the second part of the IELRB's and the Appellate Court's scope of bargaining analysis which used the complete wording of Section 4 with "whether the matter was one of inherent managerial authority"); *Board of Educ., LeRoy Community Unit School Dist. No. 2 v. IELRB*, 556 N.E.2d 857, 864 (Ill. App. Ct. 1990) (holding that the Fourth Illinois Appellate Court specifically uses the complete wording of Section 4 in its analysis); *Decatur Bd. of Educ. Dist. No. 61 v. IELRB*, 536 N.E.2d 743, 745 (Ill. App. Ct. 1989) (holding that the First Illinois Appellate Court specifically uses the complete wording of Section 4 in its analysis).

135. See *Central City*, 599 N.E.2d at 905 (holding that second part of test asks only if matter was of "inherent managerial authority" and failing to cite any prior IELRB, ILLRB or ISLRB decision which uses the complete wording of Section 4 in its scope of bargaining analysis).

136. *Id.* at 910. This point is personified by Justice Miller's concurrence and dissent. *Id.* Justice Miller noted the lack of recognition the majority gave to the differences between public and private sector bargaining. *Id.* at 912. However, Justice Miller believed that the *Central City III* test was practically identical to the *Decatur II* test and that the RIF issue should not be remanded to the IELRB for a rehearing using this "new" test. *Id.* However, if the *Central City III* test was identical to the *Decatur II* test, the IELRB should have found the same result. Compare *Central City Sch. Dist. 133*, 5 Pub. Employee Rep. Ill. (LRP) ¶ 1056, 118, 119

*Central City III* test, a simple argument that a matter concerns both wages, hours and terms and conditions of employment and inherent managerial policy, invokes a benefits/burdens analysis. By making the benefits/burdens analysis easy to attain, the *Central City III* test expands the scope of bargaining in the public sector. This expansion fails to consider the special political and economic characteristics of public sector bargaining. Moreover, this failure effectively usurps the voting public's traditional role in determining government policy. The Illinois Supreme Court remanded the *Central City III* RIF issue to the IELRB with directions to use this new test.<sup>137</sup>

#### D. Central City III on Remand

On remand in *Central City (Central City IV)*, the IELRB reversed its original *Central City I* holding.<sup>138</sup> Although the IELRB's *Central City I* decision sided with the majority of states in holding that RIF orders are not subject to mandatory bargaining, the IELRB had to readdress the RIF issue in *Central City IV* using the Illinois Supreme Court's *Central City III* test.<sup>139</sup> In applying the *Central City III* test, the IELRB held that a RIF is a mandatory subject of bargaining because the benefits of bargaining over the issue outweigh the burdens it puts on management.<sup>140</sup> The Supreme Court's test in *Central City III* is now used by the three public labor relations boards (IELRB, ISLRB and ILLRB) for all scope of bargaining issues.<sup>141</sup> The test is a dangerous precedent for the public sector to follow because it

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(IELRB 1989) (holding that RIF are not a mandatory subject of bargaining) with *Central City Sch. Dist. 133*, 9 Pub. Employee Rep. Ill. (LRP) ¶ 1051, 162, 166 (IELRB 1993) (reversing its *Central City I* decision in holding that RIF were a mandatory subject of bargaining). See *infra* notes 138-40 for a discussion of the IELRB's ruling after the remand of *Central City III*.

137. *Central City*, 599 N.E.2d at 910.

138. *Central City*, 9 Pub. Employee Rep. Ill. (LRP) ¶ 1051, at 168.

139. *Id.* at 165.

140. *Id.* The IELRB found that RIF orders are both a matter of wages, hours and terms and conditions of employment and a matter of inherent managerial policy so a balancing of the benefits that bargaining will have on the decision making process with the burdens that bargaining imposes on the employer's authority was done according to *Central City III*. *Id.* Upon balancing these factors the IELRB determined that the benefits of bargaining outweighed the burdens. *Id.* Therefore, RIF orders are mandatory subjects of bargaining. *Id.* at 168.

141. See, e.g., *Teamsters Local Union No. 714*, 9 Pub. Employee Rep. Ill. (LRP) ¶ 3019, 116, 119 (ILLRB 1993) (using *Central City III* test to determine that newly created investigator classification was not subject of mandatory bargaining); *International Ass'n of Firefighters*, 8 Pub. Employee Rep. Ill. (LRP) ¶ 2039, 213, 218 (ISLRB 1992) (using the *Central City III* test in holding no duty to bargain over the content, format or the method of administering a job examination or calculating a rating score).

fails to consider the unique aspects inherent in public sector bargaining.

### III. THE ANALYSIS OF PUBLIC VERSUS PRIVATE SECTOR LABOR RELATIONS: WHY *CENTRAL CITY III* WENT WRONG

Understanding the differences between public and private sector bargaining is vital in developing an appropriate test for determining the scope of mandatory bargaining in the public sector.<sup>142</sup> Although the NLRA and the Pennsylvania labor act were used as models for the IELRA and the IPLRA,<sup>143</sup> the *Central City III* court should not have simply adopted the benefits/burdens analysis used in those jurisdictions. A private sector analysis is not applicable to the public sector because of the unique economic and political characteristics of public sector bargaining. Moreover, the *Central City III* court's reliance on Pennsylvania precedent is unfounded. When Pennsylvania courts order bargaining, the employer must only "meet and discuss" with employee representatives. However, when Illinois courts order bargaining, they require the employer and employee representative to actually bargain in good faith, rather than merely "meet and discuss." This additional requirement in Illinois undermines the voting public's traditional authority to determine how the government should spend its tax dollars. In failing to consider the unique aspects of Illinois public sector bargaining, the *Central City III* court promulgated a risky precedent which significantly expands the Illinois public sector employee's ability to bargain over, and ultimately affect, decisions that are historically decided by the voting public.

First, this Part discusses why the *Central City III* court erred in following the private sector benefits/burdens test by examining the prevailing differences between private and public sector bargaining. Specifically, this Part analyzes the unique economic position of the public sector employee and how that position affects traditional voter rights. Next, this Part analyzes why the *Central City III* court's reliance on the Pennsylvania precedent is unjustified. Finally, this Part will illustrate how the failure of the *Central City III* test to consider these differences only disrupts the bargaining process and expands the scope of bargaining in the public sector; thus, matters of public policy are taken out of the taxpayers' hands and placed in the hands of public employees.

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142. William Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look via a Balancing Formula*, 40 MONT. L. REV. 231, 253 (1979).

143. *Central City Educ. Ass'n IEA-NEA v. IELRB*, 599 N.E.2d 892, 900-01 (Ill. 1992). See *supra* note 20 and accompanying text for discussion of how Illinois used Pennsylvania's labor statute as a model for its statute.

### A. *The Differences Between Private and Public Sector Bargaining*

Although the *Central City III* court realized that differences between public and private sector bargaining exist, it failed to account for them in formulating the *Central City III* test.<sup>144</sup> A scope of bargaining test should weigh the economically advantageous position of the public sector employee against the potential for their demands to affect public policy.<sup>145</sup> This section will discuss the economic and political factors involved in public sector bargaining and how these factors relate to the scope of bargaining.

#### 1. *The Economic Differences Between Public and Private Sector Bargaining*

Economic motive is one significant difference between public sector and private sector bargaining.<sup>146</sup> In the private sector, an employer's primary concerns are "bottom line" profits and costs because they relate directly to the very existence of the organization.<sup>147</sup> In the public sector, the existence of the organization directly relates to taxes.<sup>148</sup> Therefore, the public employer's primary focus is the quality of services rendered to the voting taxpayers.<sup>149</sup> The contrast of these focal economic considerations creates the significant differences between bargaining in the private and public sectors.<sup>150</sup> By failing to recognize this economic difference, the *Central City III* scope of bargaining test significantly strengthened the public sector employee's position at the bargaining table.

The market forces that affect a given business directly impacts private sector bargaining.<sup>151</sup> Private sector market forces include: industry position, current financial status and growth prospectus.<sup>152</sup> These forces create a threat of market-imposed

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144. See *Central City*, 599 N.E.2d at 902 (noting that NLRB decisions are persuasive, but not binding, when determining a guideline for the scope of bargaining in the private sector).

145. See *infra* note 204 for a discussion of other jurisdictions which have recognized the public's right to determine public policy in their scope of bargaining tests.

146. June Miller Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685, 697.

147. Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1116 (1969).

148. *Id.*

149. *Id.*

150. *Id.*

151. Corbett, *supra* note 142, at 254.

152. *Id.*



unemployment and work to restrain union demands.<sup>153</sup> If these market forces are favorable to business, the private sector unions are in a better position to demand additional benefits without the threat of unemployment.<sup>154</sup> However, any fluctuation in these market forces will drastically alter the demands and negotiations between private sector unions and their employers.<sup>155</sup>

On the other hand, the public sector employee is far less concerned with unemployment as it relates to the market.<sup>156</sup> Generally, the services a governmental unit produces do not relate to market price.<sup>157</sup> The relative monopoly by government of their services produces a lack of product competition and the non-existence of a lower wage labor pool; thus, the economic constraints on employees in public sector bargaining are less than in the private sector.<sup>158</sup>

The economic differences between public and private sector bargaining places the public employee at an advantage over his employer in bargaining situations.<sup>159</sup> Compared to private sector employees, public sector employees have relatively no market forces constraining them at the bargaining table.<sup>160</sup> As a result, the public sector employee has an advantage over the private sector employee in bargaining situations.<sup>161</sup> Therefore, a public sector scope of bargaining test must make allowances for the advantageous economic position of the public sector employee.<sup>162</sup>

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153. Wellington & Winter, *supra* note 147, at 1117.

154. *Id.* at 1121.

155. *Id.* at 1117.

156. See Corbett, *supra* note 142, at 254 (discussing how all employee demands in the private sector have an economic impact on the employer which constrain the bargaining process).

157. Cf. Wellington & Winter, *supra* note 147, at 1116.

158. *Id.* at 1117.

159. Corbett, *supra* note 142, at 255.

160. Weisberger, *supra* note 146, at 697. Professor Weisberger cites seven noted characteristics which distinguish the public sector from the private sector. *Id.* at 694-99. These differences include the belief that the private sector model is inappropriate for the public sector because of the public employers role as the sovereign, the special element of public interest involved in public sector bargaining, the statutory control over public sector bargaining, the lack of similar market controls on public sector bargaining, the effects of compulsory binding interest arbitration when the parties cannot reach an agreement through bargaining, the opportunity for the public employee to use the political process to mandate their demands and the large number of professionals engaged in public sector bargaining. *Id.*

161. See Corbett, *supra* note 142, at 256 (noting that the increased access and influence public employee organizations have over all other interest groups through collective bargaining results in a "disproportionate amount of power").

162. *Id.* at 257. Professor Corbett states that the different economic concerns which are prevalent in the public sector support the theory that "the private sector experience in determining the scope of bargaining is not applicable." *Id.* One of the reasons that the private sector experience is not very helpful is that "where economics [are] the operative constraint on bargaining, the scope of mandatory sub-

Not only did the *Central City III* court fail to appraise the economic advantage enjoyed by the public sector employee, it also failed to rationalize the potential political consequences of public sector bargaining.

## 2. *The Political Considerations Unique to Public Sector Bargaining*

The process of governmental decisionmaking shapes employee bargaining in the public sector.<sup>163</sup> Many times, public sector employees raise bargaining issues that are beyond their employers' bargaining authority.<sup>164</sup> No longer is the issue a collective bargaining concern between the union and its employer, but rather, the matter is a "political decision" for the voting public.<sup>165</sup> A scope of bargaining test must recognize that these "political decisions" require accountability from the public electoral body.<sup>166</sup> The *Central City III* court failed to accommodate the interests of the voting public when it broadened the scope of bargaining in the Illinois public sector through the implementation of the private sector's benefits/burdens test.<sup>167</sup>

In a democratic government many different interest groups use the political system to accomplish their goals.<sup>168</sup> Interest

jects of bargaining can be broadly defined." *Id.* at 254.

163. Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 671-72 (1975). Bargaining with public employees undeniably includes political decisions in three senses. *Id.* at 672. First, it involves policy choices which include the allocations of resources, the level of public services and the obligations of the government. *Id.* Second, these policy choices "are to be made by the political branches of government — by elected officials who are politically responsible to the voters." *Id.* Finally, public sector bargaining is intertwined with politics in the sense that the politically elected officials will cater to the desires of the voting public in order to maximize votes. *Id.* See generally *Developments, supra* note 18, at 1676-77 (noting political ramifications of public sector bargaining); Lee C. Shaw & R. Theodore Clark, Jr., *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 UCLA L. REV. 867, 1011-19 (1972) (discussing political aspects of public sector bargaining); Ralph Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 GOV'T UNION REV. 5, 11 (1980) (relating how political ramification of public sector bargaining diminishes public involvement in public issues); Neal M. Davis, Note, *Scope of Collective Bargaining in Public Education: Toward a Comprehensive Balancing Test*, 36 WASH. U. J. URB. & CONTEMP. L. 107, 109 (1989) (discussing political ramifications of public sector bargaining).

164. See Shaw & Clark, *supra* note 163, at 1012-13.

165. *Id.* at 1012.

166. Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1164 (1974).

167. See *Developments, supra* note 18, at 1681 (stating that "[w]hether the NLRA model is emulated or rejected, however, the [public sector's] preoccupation with the private sector system is unfortunate").

168. Corbett, *supra* note 142, at 255.

groups effectuate their goals by manipulating government resources.<sup>169</sup> They utilize these resources through the opportunities afforded to them by the political process, including voting, lobbying and finding representatives to hear their concerns.<sup>170</sup> Public employees represent only one of the innumerable interest groups in the political process, and the strength afforded to their concerns depends on their ability to utilize the political process.<sup>171</sup> Thus, even without collective bargaining, public employees, as members of the voting public, are given the ability to adequately influence the terms and conditions of their employment.<sup>172</sup>

However, the public employees' political influence becomes foreboding because of their additional ability to demand collective bargaining.<sup>173</sup> In effect, with collective bargaining, public employees can shape their terms and conditions of employment in two ways.<sup>174</sup> First, as tax payers, public employees can effectuate change through the traditional political means of voting and lobbying. Furthermore, under the current *Central City III* test, these same public employees can also achieve their demands by merely claiming that an issue affects the terms and conditions of their employment.<sup>175</sup>

Sometimes, public employees' bargaining demands regarding the terms and conditions of their employment reach a level which warrants the concerns of the voting public.<sup>176</sup> Matters which concern both the employees' working conditions and the public's interest include the allocation of monetary resources and concerns for police, fire, sanitation and medical services, as they relate to public health and safety.<sup>177</sup> Without an appropriate scope of bargaining test, the introduction of collective bargaining in the public sector will allow the demands of public employees to trump the voting public's right to determine important community interests.<sup>178</sup>

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169. *Id.*

170. *Id.* Before collective bargaining was introduced into the public sector, governmental decision making was a multilateral process involving many different citizens and interest groups. *Id.*

171. Summers, *supra* note 166, at 1163.

172. *Id.* at 1160. Public employee groups can and normally do participate in determining the terms and conditions of their employment through the political process. *Id.* These groups can effectuate their goals by voting, supporting candidates, "organiz[ing] pressure groups, and present[ing] arguments in the public forum." *Id.*

173. *Id.* at 1164.

174. *Id.*

175. See 5 ILCS 315/7 (setting forth the duty to bargain under the IPLRA); 115 ILCS 5/10 (setting forth the duty to bargain under the IELRA).

176. *Developments, supra* note 18, at 1681; Shaw & Clark, *supra* note 163, at 1012.

177. Shaw & Clark, *supra* note 163, at 1012-13.

178. See Corbett, *supra* note 142, at 257 (stating that "when a state [Public Em-

In public sector collective bargaining, the government has a dual role as an employer and a representative of the public interest.<sup>179</sup> As a result, the government literally brings its policies to the bargaining table.<sup>180</sup> By hiding under the guise "terms and conditions of employment," public employees at the bargaining table can affect decisions which are traditionally matters of public concern.<sup>181</sup> When public employees demand, and receive, mandatory bargaining over issues which are arguably both public concerns and related to the employees' terms and conditions of employment, the voting public is deprived of their right to determine important government policy.<sup>182</sup>

A scope of bargaining test that is too broad allows public employees to demand bargaining over issues which usurp public rights.<sup>183</sup> These bargaining discussions, in the form of collective bargaining agreements, are essentially taken directly to the legislature with little opportunity for the public to express its concerns.<sup>184</sup> If the bargaining agreement is subject to legislative approval, the political process may still represent the public's interest.<sup>185</sup> However, public employee bargaining agreements command considerable deference in the legislative process.<sup>186</sup> Therefore, collective bargaining agreements which concern public issues divest the public of their right to determine those issues.<sup>187</sup>

Although collective bargaining in the public sector has the potential to deprive the voting public of their right to determine public policy, it is not entirely without justification.<sup>188</sup> Public

ployee Relation Boards] or court weighs competing employee or employer interests in a particular bargaining topic, it should do so in light of the unique effect collective bargaining has on public sector decision making").

179. *Id.* at 254-55. The government, in its role as a public policy maker, must consider all groups interests in the community. *Id.* at 255. Thus, when the government enters the bargaining process it must not only act in its capacity of an employer-manager, but also as a public policy maker. *Id.* Ultimately, the strength of the government is not measured on how successfully it can accommodate a particular interest group, but, rather, if "it can successfully accommodate the interests of the entire community. . . ." *Id.*

180. Summers, *supra* note 163, at 670. In public sector bargaining, the employer is the government. *Id.* Therefore, "the employer's decisionmaking process becomes of central concern in both legal and political terms." *Id.*

181. *Id.* at 671.

182. *Id.*

183. *Developments, supra* note 18, at 1683. When the scope of bargaining is expanded in public sector bargaining, it "alters the balance of political power and arguably skews policymaking by favoring public employee unions in the allocation of public resources." *Id.*

184. Summers, *supra* note 166, at 1159.

185. *Id.* at 1158.

186. *Id.* at 1164-65.

187. Corbett, *supra* note 142, at 256.

188. Summers, *supra* note 166, at 1167-68. Without collective bargaining in the

employees must face the concerns of every other competing interest group vying for the same tax dollars.<sup>189</sup> Moreover, the voting public always wants increased services and lower tax rates.<sup>190</sup> Collective bargaining in the public sector also facilitates the need for a stable and dependable labor source in a monopolistic market which supplies essential services to the public.<sup>191</sup> However, the allowance for unique aspects of public sector bargaining should not permit employee demands to reach matters traditionally left to the voting public.

### 3. *How the Economic and Political Aspects of the Public Sector Work Together*

The unique political and economic characteristics involved in public sector bargaining demand great consideration when setting up guidelines for defining the scope of bargaining.<sup>192</sup> The public sector needs the process of collective bargaining because it facilitates labor relations in a monopolistic market.<sup>193</sup> However, the lack of economic restraining forces in public sector bargaining puts the public sector employee at a bargaining advantage.<sup>194</sup> The employees' economic advantages must be weighed along with their ability to affect matters historically left to the voting public. The Illinois Supreme Court, by ignoring these considerations in developing the *Central City III* test, significantly broadened the scope of public sector bargaining.<sup>195</sup> The employees' expansive bargaining power over the manner and means of governmental services enables them to, in effect, change the very nature of a

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public sector, public employees are at a unique disadvantage in the political bargaining process. *Id.* at 1167. The absence of collective bargaining in the public sector "leaves public employees unable to protect their interests adequately against those whose interests are opposed." *Id.* at 1168.

189. *Id.* at 1166. In public sector collective bargaining, the public sector employees "are not simply one group among many bargaining on the same basis." *Id.* Rather, public sector employees' demands "run directly against the demands of each others interest group." *Id.*

190. *Id.*

191. *Id.* at 1167. The opposite of this affect, however, is that with a collective bargaining procedure, when a powerful employee group bargains for and receives benefits, that agreement becomes, in practice, a pattern for smaller bargaining groups. *Id.* at 1174.

192. See Murray L. Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C. L. REV. 155, 158 (1977) (discussing the differences between the private and public sector and how those differences affect public sector bargaining).

193. See *supra* notes 188-91 and accompanying text for a discussion on the justification of public sector bargaining.

194. Corbett, *supra* note 142, at 255.

195. See Summers, *supra* note 166, at 1177-83 (discussing implications of the political perspective with regard to specific subjects of bargaining).

governmental service to fit their demands and strip the public of its right to make these basic policy decisions.<sup>196</sup>

Herein lies the danger of the *Central City III* test. By making a relatively simple argument that a matter concerns both the terms and conditions of employment and involves matters of inherent managerial policy, the *Central City III* test expands the scope of bargaining, by way of a benefits/burdens analysis, and allows public sector employees' demands to usurp the rights of the public to determine public issues.<sup>197</sup> This precedent allows public sector employees' demands to take issues traditionally decided through the political process, including the allocation of government resources and matters concerning public health and safety, out of the voting public's hands and places them onto the bargaining table.

### B. Why Reliance on Pennsylvania Precedent is Unjustified

The Illinois Supreme Court unjustifiedly relied on the Pennsylvania Supreme Court's adoption of a similar benefits/burdens test to justify its creation of the *Central City III* test.<sup>198</sup> Illinois fashioned its public sector labor acts after the Pennsylvania model; however, the parameters that define mandatory bargaining in Illinois are different from Pennsylvania. If a matter is subject to bargaining in Pennsylvania, the public sector labor act only requires the government to "meet and discuss"<sup>199</sup> with employee representatives.<sup>200</sup> However, if a matter is subject to bargaining

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196. See *Developments*, *supra* note 18, at 1683; see also Summers, *supra* note 166, at 1177-83.

197. See *Developments*, *supra* note 18, at 1683 (discussing how the expansion of bargaining in the public sector allows public employees to affect public issues). In Illinois, this point is personified by the *Central City* RIF issue. The IELRB initially held that economically motivated RIF orders are not mandatory subjects of bargaining. See *supra* note 112 and accompanying text for a discussion on how the *Central City III* decision "comports with the overwhelming weight of authority under the public sector labor laws." However, on remand, using the *Central City III* test, the IELRB held that economically motivated RIF orders were mandatory subjects of bargaining. *Central City Sch. Dist. 133*, 9 Pub. Employee Rep. Ill. (LRP) ¶ 1051, 162, 166 (IELRB 1993). See *infra* note 216 and accompanying text for a discussion of other Board decisions that have reached the third step of the *Central City III* test.

198. *Central City Educ. Ass'n IEA-NEA v. IELRB*, 599 N.E.2d 892, 900 (Ill. 1992) (stating that "the legislature used the Pennsylvania experience as a model in creating the [IELRA], and the Pennsylvania courts' interpretation of the statute is relevant to any analysis of the [IELRA]").

199. See *supra* note 20 and accompanying text for a discussion on the ramifications of the term "meet and discuss."

200. *Central City*, 599 N.E.2d at 900. In *Central City III*, even the Illinois Supreme Court recognized that the Pennsylvania statute only required that an employer "meet and discuss" with the employee representatives, while in Illinois the parties must "bargain." *Id.*

in Illinois, it requires mandatory good faith bargaining.<sup>201</sup> Accordingly, if an Illinois employee group successfully argues that a matter of public concern is subject to mandatory bargaining, that group may impact decisions traditionally left to the voting public.<sup>202</sup> In light of these meeting requirement differences, Illinois should not look to Pennsylvania precedent. Rather, in developing a scope of bargaining test, Illinois should look to other jurisdictions which employ a similar "good faith bargaining" standard in the public sector.

### C. *How Central City Went Wrong*

The *Central City III* Court erroneously rationalized its adoption of a benefits/burdens test as a guideline to determine the scope of bargaining in the Illinois public sector. As this Note explains, the adoption of the private sector benefits/burdens test expands the scope of bargaining in Illinois and bolsters the already advantageous economic position of public sector employees. In turn, this makes it easier for the public employee to demand bargaining over subjects which should be decided through the political process. Additionally, the Illinois Supreme Court erroneously based its decision on Pennsylvania precedent which uses a "meet and discuss" standard for bargaining. Therefore, Illinois must look to other jurisdictions for solutions in defining the scope of bargaining.

## IV. INCORPORATION OF THE UNIQUE PUBLIC SECTOR FACTORS INTO A UNIFIED TEST

Many scholars and courts have proposed public sector scope of bargaining solutions.<sup>203</sup> Unlike the *Central City III* decision,

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201. See *supra* note 46 for a discussion of good faith bargaining.

202. See *supra* note 20 and accompanying text for a discussion of how the Pennsylvania statute differs from Illinois. In Pennsylvania, if a matter is subject to mandatory bargaining the public sector employer is merely required to sit down and talk about the ramifications of their actions with an employee representative. However, in Illinois, the requirement of "bargaining" requires a collective bargaining agreement. See 5 ILCS 315/7 (setting forth the duty to bargain under the IPLRA); 115 ILCS 5/10 (setting forth the duty to bargain under the IELRA). The agreement, has an inside track to the legislature and, therefore, has the potential to take away from the voting public's right to determine public policy. See *supra* notes 183-87 and accompanying text for a discussion of how collective bargaining in the public sector takes away the voting public's right to decide public policy.

203. See, e.g., Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1234 (1985) (noting the need to recognize the public's interest in determining public issues when deciding public sector scope of bargaining issues); Jim Bowles, *Defining the Scope of Bargaining for Teacher Negotiations: A Study of Judicial Approaches*, 29 LAB. L.J. 649, 655 (1978) (noting that public interest must be considered when developing a scope of bargaining

other courts facing the scope of bargaining dilemma recognize and address the unique problems that arise in the public sector bargaining process.<sup>204</sup> The basic intention behind ratifying the IPLRA and the IELRA was to minimize employer-employee disruptions.<sup>205</sup> However, the failure to set forth an appropriate structure for the resolution of scope of bargaining problems "only increases these disruptions."<sup>206</sup> This Part examines relevant authority for developing scope of bargaining guidelines in Illinois. Additionally, this Part discusses possible alternatives which will protect the public's interest in determining public policy, while still promoting equitable labor relations.

There are two ways by which Illinois could incorporate public interest considerations into the *Central City III* test: (1) the implementation of a "laundry list" statute, or (2) the revision of the current *Central City III* test.

#### A. "Laundry List" Statutes

Illinois can protect bargaining over matters of public policy which are traditionally decided through the political process by systematically delineating these specific subjects into Section 4. This enactment would automatically render specific matters as per se non-bargainable and would send a clear signal to the Illi-

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test); Corbett, *supra* note 142, at 267 (suggesting that "the weight of the public interest, together with any separate management interest of the public employer, must be balanced against the interest of the employees to determine whether the topic is mandatory or non-mandatory"); Davis, *supra* note 163, at 135 (suggesting that adoption of a comprehensive balancing approach for the resolution of scope of bargaining disputes which "weigh[s] the competing interests [in public sector bargaining] while avoiding unnecessary limitations to the scope of bargaining"); Gerry Kaufman, Note, *Scope of Negotiations and Teachers/School District Contracts After Rapid City Education Association v. Rapid City Area School District No. 51-4*, 32 S.D. L. REV. 126, 126 (1987) (condoning adoption of the balancing test promulgated by the New Jersey Supreme Court in *In re Local 195, IFPTE, AFL-CIO*, 443 A.2d 187 (N.J. 1982)).

204. See, e.g., *Local 195*, 443 A.2d at 191-93 (holding that federal precedents concerning scope of bargaining in the private sector are of little value in determining the permissible scope of negotiability in the public sector); Pennsylvania Lab. Relations Bd. v. State College Area Sch. Dist., 337 A.2d 262, 264-65 (Pa. 1975) (holding that Public Employee Relations Act (PERA) should not be strictly interpreted in light of NLRB decisions because the PERA concerns public employees while the NLRA concerns private employees); West Bend Educ. Ass'n v. Wisconsin Employment Relations Comm'n, 357 N.W.2d 534, 538 (Wis. 1984) (using balancing test which incorporates the public's interest in the political process without relying on private sector decisions).

205. See 5 ILCS 315/2 (stating that the purpose of the IPLRA is to provide peaceful and orderly procedures for the citizens of Illinois); see also 115 ILCS 5/1 (stating that the purpose of the IELRA is to promote orderly and constructive relationships between all educational employers and employees).

206. Corbett, *supra* note 142, at 253.



nois Supreme Court that the legislature does not agree with the *Central City III* test. "Laundry list" statutes enjoy moderate success in a number of states.<sup>207</sup>

The Illinois legislature has already considered a bill, which supplements Section 4 of the IELRA, to make RIF orders per se non-bargainable.<sup>208</sup> In fact, the Illinois legislature recently approved legislation that will make RIF orders per se non-bargainable in cities in excess of 500,000.<sup>209</sup> However, systematically supplementing non-bargainable subjects into the Illinois public sector labor acts will draw out the political process. Moreover, "laundry list" statutes ostensibly nullify the collaborative efforts inherent to collective bargaining by making certain subjects per se non-bargainable.<sup>210</sup>

### B. Revision and Adoption of a New Test

A practical way to incorporate the unique political and economic factors of public sector bargaining is to revise the *Central City III* test. A number of other jurisdictions recognized these distinct public sector characteristics and incorporated them into their scope of bargaining tests.<sup>211</sup> In *In re Local 195, IFPTE*,

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207. Davis, *supra* note 163, at 112 n.27. California, Kansas, Iowa, Nevada and Oregon have all adopted statutes which specifically list mandatory subjects of bargaining in public sector employment. Davis, *supra* note 163, at 112 n.27. However, in *San Mateo v. Public Employment Rel. Bd.*, 663 P.2d 523 (Cal. 1983), the California Supreme Court interpreted their statute to allow bargaining over certain unenumerated items. Davis, *supra* note 163, at 112 n.27. Moreover, the Kansas Supreme Court, in *Unified Sch. Dist. No. 501 v. Secretary of Kan. Dept. of Human Resources*, 685 P.2d 874 (Kan. 1984), also held that subjects "within the purview" of its enumerated list statute were capable of being subject to mandatory bargaining. Davis, *supra* note 163, at 115.

208. See, e.g., 1993 Ill. H.B. 3517, 88th Cong. (1994).

209. 1995 ILL. LEGIS SERV. P.A. 89-15 (H.B. 206) (West). Essentially, this amendment only applies to the Chicago public school system and the Cook County Community College.

210. See Bowles, *supra* note 203, at 653 (noting the inflexibility of list statutes that give courts limited discretion to evolve the scope of bargaining along with the changes in the work place).

211. See, e.g., *San Mateo City Sch. Dist.*, 663 P.2d at 528 (applying a three-part test which allows bargaining so long as the proposal does not "significantly abridge the employers managerial prerogatives and fundamental policy decisions"); *In re Local 195, IFPTE, AFL-CIO*, 443 A.2d 187, 191 (N.J. 1982) (applying three-part test which holds that "matters of public policy are properly decided, not by negotiation and arbitration, but by the political process"); *Rapid City Educ. Ass'n v. Rapid City Area Sch. Dist. No. 51-4*, 376 N.W.2d 562, 564 (S.D. 1985) (citing the New Jersey *In re Local 195* three-part test in holding subjects to be negotiable "if it does not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy"); *West Bend Educ. Ass'n v. Wisconsin Employment Relations Comm'n*, 357 N.W.2d 534, 538 (Wis. 1984) (applying statutory balancing test which considers the dual role of the public sector employee as being in charge of "personnel and operations of a governmental unit,

*AFL-CIO*,<sup>212</sup> the New Jersey Supreme Court set forth an excellent example and frequently cited scope of bargaining test which incorporates the distinct characteristics of public sector bargaining.<sup>213</sup> This three-part test provides:

First, a subject is negotiable only if it intimately and directly affect[s] the work and welfare of public employees. . . .

Second, an item is not negotiable if it has been preempted by statute or regulation. . . .

Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. . . .<sup>214</sup>

Although this test invariably considers the affects on an employees wages, hours and terms and conditions of employment, it also recognizes government policy considerations.<sup>215</sup> The *In re Local 159* test mandates that if the subject overtly affects the government's prerogative to determine policy, the matter is not subject to mandatory bargaining, even if it intimately concerns employees' working conditions.<sup>216</sup>

### C. A Proposal for Illinois

A combination of the *In re Local 159* test with the IELRB's previous *Decatur I* test and the Supreme Court's *Central City III* test would result in a test that recognizes the unique political and economic characteristics of public sector bargaining. The proposed test would provide:

First, ask whether the matter is one of wages, hours and terms and conditions of employment as set forth in Section 10. If not, the inquiry ends and the employer is under no duty to bargain.

Second, if the answer to the first question is yes, ask if the matter is also one of managerial authority as set forth in Section 4. If not, the inquiry ends and the matter is a mandatory subject of bargaining.

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which is a political entity responsible for determining public policy and implementing the will of the people"). Even the Pennsylvania Supreme Court recognized that "the paramount concern must be the public interest in providing for an effective and efficient performance of the public service in question," when it promulgated its balancing test. *Pennsylvania Lab. Relations Bd. v. State College*, 337 A.2d 262, 268 (Pa. 1975).

212. 443 A.2d 187 (N.J. 1982).

213. *Id.* at 191-92. See generally *Davis*, *supra* note 163, at 127 (discussing aspects of New Jersey test); Kaufman, *supra* note 203, at 129 (discussing South Dakota's adoption of the New Jersey test).

214. *Local 195*, 443 A.2d at 191-92 (emphasis added).

215. *Id.*

216. *Id.* at 193.

Third, if the answer to the first two questions is yes, ask *whether the matter would significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy*. If not, then the matter is subject to mandatory bargaining.

This test replaces the relatively useless benefits/burdens analysis with a step that considers the unique role of the government as an employer.<sup>217</sup> Although this test will somewhat limit the scope of bargaining in Illinois, it justifiably counters the public sector employees' bargaining advantage by allowing the boards to determine what subjects are simply non-bargainable. This test allows the boards to properly identify those non-bargainable matters that traditionally fall within the purview of the voting public.<sup>218</sup> Ultimately, this test effectuates the goal of collective bargaining, which is to resolve disputes by allowing the parties to voice their arguments.

#### CONCLUSION

Economic differences and political ramifications make public sector bargaining distinct from private sector bargaining. Whether Illinois uses the private sector or the Pennsylvania labor act as a model for its public labor acts, the adoption of the private sector benefits/burdens scope of bargaining test is ill-fated.<sup>219</sup> The private sector bargaining test used in the public sector fails to account for the economic advantages the public sector employee

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217. Board decisions using the *Central City III* test illustrate how useless the third step benefits/burdens analysis is. Almost every time an employee's demand is successfully argued to the third-step of the analysis the benefits of bargaining are determined to outweigh the burdens bargaining will impose on management. See, e.g., Licensed Practical Nurses Ass'n of Ill., Div. 1, 10 Pub. Employee Rep. Ill. (LRP) ¶ 3009, 35, 39 (ILLRB 1994) (applying third part of *Central City III* test to determine that drug testing is subject to mandatory bargaining); Oak Park Firefighters Ass'n, 9 Pub. Employee Rep. Ill. (LRP) ¶ 2019, 92, 97 (ISLRB 1992) (applying third step of *Central City III* test to determine that the benefits of bargaining over the proposed qualification changes on the conditions of employment outweighs the burdens bargaining would impose on management); International Ass'n of Firefighters, Local 1526, 8 Pub. Employee Rep. Ill. (LRP) ¶ 2039, 213, 215 (ISLRB 1992) (using the third step of the *Central City III* test to determine that the benefits of bargaining over examination evaluations of the firefighters outweighed the burdens bargaining imposed on management), *aff'd sub. nom.*, Village of Franklin Park v. ISLRB, 638 N.E.2d 1144 (Ill. App. Ct. 1994). Thus, no matter how much a matter is of public concern, if an employee demand is successfully argued as concerning both a term and condition of employment and an inherent managerial policy, the matter will be subject to mandatory bargaining. See *supra* note 140 for a discussion of how the benefits/burdens analysis affected the *Central City* RIF issue.

218. *In re Local 195, IFPTE, AFL-CIO*, 443 A.2d 187, 191 (N.J. 1982).

219. *Developments, supra* note 18, at 1654.

enjoys and the adverse political ramifications collective bargaining imposes on the public sector. The allowance for the unique aspects of public sector bargaining into a working test will fulfill the goal of collective bargaining, while still maintaining a proper balance of influence among competing interest groups as to political issues.

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