Challenges to Arbitration Under Illinois Public Sector Labor Relations Statutes

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I. INTRODUCTION

Today, collective bargaining and labor arbitration are firmly embedded in employment relations; however, that was not always the case. In fact, early common law decisions used what now appears to be unusual and archaic doctrines in order to legitimize collective bargaining agreements even in the private sector. For example, some courts regarded the labor agreement as a codification of local customs or usages incorporated into an individual employee's hiring contract. Under this codification theory, the labor agreement itself was not regarded as a contract but had legal effect only as its terms were absorbed into the individual contract. Another theory used

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3. See Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S.W.2d 692 (1928). A discharged employee and officer of a local branch of the United Mine Workers Union filed suit against the owner and operator of a coal mining concern for damages resulting from breach of contract. See id. The employee complained that the owner wrongly discharged him during a lockout in the middle of a two year contract with the union. Id. The employee won reinstatement in arbitration after airing his grievance over the discharge as required pursuant to the employer/union contract. See id. at 464, 9 S.W.2d at 695. When the mine was reopened the employee was denied reinstatement for the same reasons asserted by the employer in the previous arbitration. Id. The court held that the employer discriminated against the employee due
early in the history of collective bargaining was that the contract was negotiated by the union as the agent for the employees who were the actual principals to the agreement. A third theory used to legitimize collective bargaining agreements was to regard the agreement as a third party beneficiary contract with the employer and the union as the mutual promisor and promisee, and the employees as the beneficiaries.

This Article will begin by tracing the historical origins of labor arbitration, distinguishing between the evolution of that process in the private and public sector. The Article will then focus particularly on issues relevant to challenges of arbitrability in the public sector. The Article will conclude with the Illinois experience as one

to union membership and therefore breached the contract prohibiting discrimination on account of union membership. Id. at 465, 9 S.W.2d at 696; see also Hudson v. Cincinnati, N.O. & Texas Pac. Ry., 152 Ky. 711, 154 S.W. 47 (1913). A union member who was discharged brought suit against his employer for prospective wages for the time period between employee's date of discharge and the end date of the union contract with the employer. Id. The court held that the union had not made an employment agreement for the employee and that the employee must make an employment agreement for himself. Id. at 712, 154 S.W. at 48.

4. See, e.g., Maisel v. Sigman, 123 Misc. 714, 205 N.Y.S. 807 (Sup. Ct. 1924). The plaintiff, a manufacturing jobber of ladies coats, sued the defendant, who was the president of the union, in order to set aside a labor contract, made by the parties, contending that the agreement was void for lack of mutuality because the contract was not made by union members directly. Id. The court held that the union acted as an agent for the employees in negotiating the contract; therefore, the agreement was valid as a mutual agreement of employment. Id. at 730, 205 N.Y.S. at 820.

5. See, e.g., Marranzano v. Riggs Nat'l Bank of Wash., 184 F.2d 349 (D.C. Cir. 1950). A union member and former employee of the defendant sued defendant's executors for wrongful discharge in violation of the collective bargaining agreement that restricted discharges for anything other than a "good and sufficient cause." Id. at 350. The union lost for failing to allege facts that would have established that the discharge had not been for "good and sufficient cause." Id. at 351. Additionally, the court held that an individual employee covered by a collective bargaining agreement may sue for damages suffered because of the employer's violation of the agreement when the contract's object was to define and protect the employee's right to job security, salary and working conditions. Id. at 350-51; see also Yazoo & Mississippi Valley R.R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931). The plaintiff, a nonunionized porter and brakeman on defendant's trains, sued defendant-employer in contract as a party not in privity to the contract seeking backpay. Id. The plaintiff claimed that his salary was lowered after the defendant realized that he was not covered by the collective bargaining agreement. Id. The court held that a third party may recover directly on a contract to which he is not a third party when three conditions are met:

(1) [w]hen the terms of the contract are expressly broad enough to include the third party either by name as one of a specified class, and (2) the said third party was evidently within the intent of the terms so used, . . . if (3) the promisee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract.

Id., at 6, 133 So. at 671; see also LABOR RELATIONS LAW, supra note 1, at 694.


7. See infra text accompanying notes 40-53.
of the newest public sector jurisdictions to join those states with labor regulatory statutes in the public sector. This Article will also consider whether the unique Illinois experience may represent an improvement in this area of the law.

II. HISTORIC ORIGINS OF LABOR ARBITRATION

In the private sector, the Wagner Act of 1935 represented the first serious effort by government to regulate the employment relationship as it related to labor relations. Specifically, the Act's thrust was to protect the rights of employees to organize into unions and to prohibit employer practices that infringed on that process. Significantly, the Wagner Act did not attempt to regulate union practices. In fact, unions were not regarded in most jurisdictions as legal entities; therefore, they could not be sued directly for their failure to honor whatever obligations they might have.

By the mid-1940's, following the massive and successful organizational drives of organized labor under the Wagner Act, the political climate had changed. As a result, Congress passed the Taft-Hartley Act of 1947 which, among other things, imposed restrictions on union practices. Taft-Hartley also amended the National Labor Relations Act to include section 301, which regulated suits by and against labor organizations through jurisdiction conferred upon federal courts to enforce collective bargaining agreements. In so doing, Congress attempted to maintain some degree of stability in labor relations by regulating the collective bargaining agreements between employers and unions.

One of the primary ways in which this regulation took place was through the role played by the federal courts under section 301 in

8. See infra text accompanying notes 54-209.
9. See infra text accompanying notes 54-209.
11. THE DEVELOPING LABOR LAW 30-34 (2d ed. 1983) (discussing in detail the Wagner Act and criticizing the Act as "one-sided legislation").
12. See id.
13. See id. at 32-35 (noting the irresponsible practices by unions and discussing how these problems eventually resulted in the passage of the Taft-Hartley Act in 1947).
14. Id. at 35-42.
16. THE DEVELOPING LABOR LAW, supra note 11, at 35-42 (discussing in detail the Taft-Hartley changes).
17. Taft-Hartley Act § 301(a), 29 U.S.C. § 185(a) (1982) (stating that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties.").
18. THE DEVELOPING LABOR LAW, supra note 11, at 877 (explaining this area).
labor arbitration. Section 301 placed the authority to enforce labor agreements in the federal courts in order to achieve the federal policy of stability in labor relations between employers and employees as represented by labor organizations. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Supreme Court considered an action brought under section 301 for specific enforcement of an agreement to arbitrate. The Supreme Court, in reviewing this matter, declared that the employer's agreement to arbitrate was a "quid pro quo" for the union's no-strike agreement and that industrial peace could best be obtained only through arbitration.

In 1960, the Supreme Court elaborated upon the "quid pro quo" doctrine in a series of three cases known as the *Steelworkers Trilogy*. In *American Manufacturing Co.*, the Supreme Court addressed the point at which judicial intervention was appropriate. The Court held that it was not the function of the courts to construe a collective bargaining agreement that was subject to arbitration because, in agreeing to arbitrate, the parties bargained for determination by an arbitrator, not by the courts. The Court further opined that the processing of even frivolous claims may have a therapeutic effect. In *Warrior & Gulf Navigation Co.*, the Court was faced with a question of substantive arbitrability and ruled that although substantive arbitrability was an issue to be determined by the Court, arbitrability was to be determined with deference to the central role of arbitration under the collective bargaining agreement. Because of a public policy favoring arbitration, the Court also announced a presumption of arbitrability stating "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; [d]oubt should be re-

19. *Id.*
21. *Id.* at 455.
23. 363 U.S. at 588 (stating that because the parties had agreed to an arbitrator's determination, "[t]he courts . . . have no business weighing the merits of the grievance.").
24. *Id.* at 567.
25. *Id.* at 567-68.
26. 363 U.S. at 582 (noting that Congressional policy in favor of the resolution of disputes through arbitration requires that judicial inquiry be limited to whether the parties agreed to arbitrate).
27. *Id.* at 582-83.
Challenges to Arbitration

solved in favor of coverage."

In the third trilogy case, *Enterprise Wheel*, the Court addressed the issue of judicial review of an arbitration award, expressing the view that, because the parties had contracted for the arbitrator's judgment, the court would not reject that judgment merely because it might have a different view of the issue. Moreover, the Court held that the "industrial common law—the practice of the industry and the shop—" was part of the collective bargaining agreement, and that the courts were not situated to determine and interpret those matters. Accordingly, the Court generally defines the limits of judicial review of an arbitrator's interpretation so that the arbitrator's award is deemed legitimate as long as the arbitrator's decision is based on the contractual agreement. Only when the arbitrator's words "manifest an infidelity to this obligation" are the courts to refuse enforcement of the award.

As a result of judicial recognition of labor arbitration in labor relations, and the deference accorded to the process, employers and unions have used and continue to use labor arbitration as an effective means of resolving employment disputes. The benefits of the arbitration process are now generally accepted. First, arbitration provides a relatively speedy and inexpensive means of settling disputes. Secondly, arbitration gives the employee the security of knowing that the ultimate recourse for the resolution of any grievance he or she may have lies with a neutral party, the arbitrator, and not with the employer. Thirdly, arbitration helps conserve judicial resources by providing a means to settle most disputes without court action. Fourth, and most importantly, arbitration serves the national labor policy as a mechanism for the maintenance of industrial peace pro-

28. *Id.*
32. *Id.*
34. See *Labor Relations Law*, supra note 1, at 710-11; see also Remarks of Edward B. Miller on 'The NLRB-Relevant to the Future', Daily Labor Reports (BNA) No. 188, at D-I (Sept. 29, 1989).
35. See *Labor Relations Law*, supra note 1, at 710-11 (discussing certain aspects of arbitration in detail).
36. *Id.*
37. *Id.*
38. *Id.*
viding an alternative to the strike in the resolution of day to day disputes. In fact, labor arbitration has been regarded as a substitute for industrial strength; the collective bargaining agreement has been regarded as a generalized code to govern conduct setting forth a system of industrial self-government. Therefore, the question is whether the arbitration process, readily embraced and used with dramatic success in the private sector, can and should be regarded as the same in the public sector.

III. Arbitration in the Public Sector

At first, one might readily conclude that there should be few reasons, if any, to restrict or prohibit the use of labor arbitration in the public sector. Arbitration in the public sector would be, in contrast to the private sector, less expensive, less time consuming, and an important method of resolving disputes. In fact, some have argued persuasively that many of the same factors motivating the use of arbitration in the private sector are equally true in the public sector.

However, there are circumstances present in the public sector that are not present in the private sector, or present in the private sector but to a lesser degree than in the public sector. For example, although private sector employment is obviously regulated by various statutes and ordinances at the local, state, and federal level, the regulation of public sector employment is more diverse. Diversity is demonstrated by the fact that public bodies and public employees as the agents of those bodies are governed not only with respect to their employment, but also with respect to the purpose for which their jobs exist through a myriad of laws and doctrines. For example, did a state legislature or a city council intend, by enacting a public employee bargaining law, that certain issues be subject to a grievance procedure, or should those issues be left to the unbridled discretion of the public employer?

39. Id.
40. Id.
41. See e.g., id. at 705-06 (quoting Report and Recommendations of the 20th Century Task Force on Labor Disputes in Public Employment Pickets at City Hall; 17-18 (1970)). The Task Force noted the impartiality of third party arbitrators, the wide scope of contractual grievance arbitration procedures as opposed to civil service laws, and the increasing use of arbitration in the public sector. See id.
43. See id. at 229-30.
44. Id. at 232-38.
45. Id. at 229-65.
effect and potential entanglement of long existing civil service laws must also be considered.\textsuperscript{46}

The remainder of this Article will identify some of the considerations that affect the applicability of labor arbitration in the public sector and which have been used as challenges to arbitrability in the public sector.\textsuperscript{47} After identifying those areas, this Article will describe how Illinois, one of the newest jurisdictions with a public employee bargaining statute, has dealt with these challenges.\textsuperscript{48}

\textbf{A. Origins Of Challenges To Public Sector Arbitration}

The two most basic challenges to arbitration in the public sector arise out of common law doctrines with origins that predate public and private sector collective bargaining by hundreds of years.

The first, referred to as the sovereignty doctrine, provides that, as government, the public employer is the equivalent of the sovereign, and that no private organization (such as a labor union) or individual (the arbitrator) can tell the sovereign what it can or cannot do.\textsuperscript{49} The sovereignty doctrine, in this context, may be said to stem from the ancient notion that "the king can do no wrong."

The second basic common law doctrine bearing on this issue is the nondelegability doctrine.\textsuperscript{50} This doctrine provides that only government can implement the public trust because government, through elected officials, is accountable to the people via the ballot box.\textsuperscript{51} Accordingly, to permit a private organization or individual, such as a labor union or arbitrator, to exercise governmental power is inappropriate because those organizations or individuals are not similarly accountable to the public trust.\textsuperscript{52}

Finally, the arbitration process, both in terms of the ultimate resolution and the procedure used, must be viewed in light of potential conflicts with other state laws because all authority for the conduct of public bodies derives from those laws.\textsuperscript{53}

\textsuperscript{46} Id. at 230.
\textsuperscript{47} See infra text accompanying notes 49-53.
\textsuperscript{48} See infra text accompanying notes 54-209.
\textsuperscript{50} See J. Grodin & J. Najita, supra note 42, at 232-38 (noting that "[c]ourts at common law disapproved the arbitration of public-sector labor grievances as an unlawful delegation of governmental power.").
\textsuperscript{51} See id.; see also Note, Legality and Propriety of Agreements, to Arbitrate Major and Minor Disputes in Public Employment, \textit{\
\textsuperscript{34}} CORNELL L. REV. 129, 129-35 (1968) (authored by James M. Ringer).
\textsuperscript{52} See J. Grodin & J. Najita, supra note 42, at 232-38.
\textsuperscript{53} Id. at 234-38 (noting that a number of courts "refused to enforce arbitration agree-
B. Challenges to Public Sector Arbitration in Illinois

Before 1984

In 1906, the Illinois Supreme Court held that school boards had been granted discretionary power to “conduct and manage common schools” and that such power could not be delegated to another authority. The principles underlying the 1906 nondelegability doctrine concern the fundamental question of how local government derives and exercises lawful power in Illinois society.

Nondelegability issues arise in two factual situations. The first raises the issue of whether a public body may delegate its own discretionary decision-making authority to an arbitrator. In the second, the validity of the terms of an agreement is questioned on the grounds that the local government could not legally limit by contract its own nondelegable discretionary authority. In *Lindblad*, the Illinois Supreme Court noted that the school board in question had the discretionary power vested by statute to employ teachers; the court stated that “such discretionary powers may not [be delegated by the municipality] to another.”

By the 1970’s, school boards could enter into valid and binding collective bargaining agreements with public employee unions as an exercise of the power to engage in activity necessary and proper for

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54. In 1984, Illinois passed the Illinois Educational Labor Relations Act (ILL. REV. STAT. ch. 48, para. 1701-1721 (1986)) and the Illinois Public Labor Relations Act (ILL. REV. STAT. ch. 48, para. 1601-1627 (1986)) creating a comprehensive regulatory scheme over public sector labor relations including the use of labor arbitration. These Acts are described below in greater detail. See *infra* text and accompanying notes 75-139 (discussing IELRA); see also *infra* text and accompanying notes 139-209 (discussing IPLRA). Before discussing the impact of those statutes, the prevailing state of the law regarding challenges to public sector arbitration before their passage must be considered. This section is devoted to that subject.


56. See *Norwalk Teachers’ Ass’n* v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951).

57. *Id.*

58. *Id.*

59. *Lindblad*, 221 Ill. at 271, 77 N.E. at 453 (citing J. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 154 (4th ed. 1890); *City of Chicago* v. *Trotter*, 136 Ill. 430, 26 N.E. 359 (1891)). The court’s concern in these cases is that public decision-making will be privatized. See *Lindblad*, 221 Ill. at 271, 77 N.E. at 453; *Trotter*, 136 Ill. at 430, 26 N.E. at 359; see also J. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* (5th ed. 1911). A municipal corporation possesses certain powers. *Id.* at 154. The limitations on delegation of power to a third party stem from the notion that governmental power at the local level is derived from narrow municipal corporate power and, once conferred on a specific unit of government, that entity has no right to confer its authority on another. *Id.*
the operation of schools. In *Classroom Teachers Association*, the court stated that such an agreement was a proper function of the school board so long as it does not involve a surrender of the school board’s legal discretion. In reviewing provisions of a collective bargaining agreement providing for procedures to be followed in cases of involuntary transfers against the standard, the court stated:

> The procedures in the agreement only serve to maintain a high standard of efficiency and professionalism in the school system. They do not inhibit the discretionary powers of the board and are entirely consistent with the modern concept of due process, and in fact when applied . . . are simply rules to supplement that statutory scheme of fair play.

However, when in a later case a union relied on *Classroom Teachers Association*, the court drew a distinction between the rights of non-tenured teachers and the rights afforded by statute to those teachers with tenure. The court stated that because the school code established and maintained numerous distinctions between tenured and non-tenured teachers, the collective bargaining agreement in that case imposed conditions at variance with state law. Accordingly, an agreement that was at variance with the rights afforded in the School Code involved an illegal surrender of the statutory duty of the school board.

Later, the Illinois Supreme Court held that where a school board complied with the School Code, but not with the agreement, its discharge of a probationary teacher was valid. The court, citing *Lindblad*, stated that the school board’s discretionary power conferred by the School Code was nondelegable and saw no need to explicate the matter further.

Essentially the same reasoning was utilized when a court held that a community college board could not delegate or dilute its statutory power concerning non-tenured teachers. The court stated that as long as evaluations had been conducted and the result of the

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61. *Id.* at 227, 304 N.E.2d at 519.
62. *Id.*
64. *Id.*
67. *Id.* at 129, 340 N.E.2d at 9.
evaluations were available to the board, the statute had been com-
piled with and any decision to discharge was "statutorily sound."69

Caselaw discussing those matters that are inarbitrable because they can not be delegated and the cases discussing the validity of arbitrators' awards are based on the same principles.70 For example, an arbitrator could not award sabbatical leave, despite a contractual guarantee of a minimum number of leaves, where a statute vested discretion on leaves in the school board.71 The subject matter of the contract was deemed illegal and unenforceable.72

However, the courts have stated that a unit of government can incorporate into an agreement a salary schedule set after bargain-
ing.73 If an arbitrator interprets the salary schedule terms within the contract in the grievance procedure, he or she will then only be en-
forcing the school board's decision.74

C. Challenges to Arbitration After 1984

1. Challenges Under the Illinois Educational Labor Relations Act.—The passage of the Illinois Educational Labor Relations Act (hereinafter "IELRA")75 in 1984 ultimately cast another light on these issues. Accordingly, the Illinois Educational Labor Relations Board and the courts of Illinois were called upon to decide cases involving the nondelegability doctrine and arbitration since the en-
actment of the IELRA.

On July 1, 1984, the Illinois General Assembly passed the Illi-
nos Educational Labor Relations Act, a comprehensive labor regula-
tory statute providing that employees have the right to organize into unions, to engage in union activity, to engage in collective bargaining through representatives of their own choosing, and to refuse to en-
gage in any of these acts free from any interference by employers or unions.76 The IELRA set forth certain prohibited conduct on the part of unions and employers, including the prohibition of bargaining in bad faith.77 The act also required compliance with arbitration

69. Id. at 225, 446 N.E.2d at 944.
71. Id. at 982, 372 N.E.2d at 900.
72. Id.
74. Id. at 294, 398 N.E.2d at 144.
75. ILL. REV. STAT. ch. 48, para. 1701-1721 (1986).
76. ILL. REV. STAT. ch. 48, para. 1703 (1986)(setting forth the rights of employees).
77. ILL. REV. STAT. ch. 48, para. 1714(a)(5), 1714(b)(3) (designating unfair labor prac-
tices to include violations of good faith collective bargaining).
awards by employers and unions. The statute establishes a duty to bargain in good faith on the part of both employers and unions. Moreover, the IELRA places a prohibition on any agreements by the parties that conflict with other Illinois statutes. The parties to the collective bargaining agreement may supplement any terms dealing with employee rights and wages, hours, and terms and conditions of employment in order to comply with statutes passed by the General Assembly of Illinois. Finally, the Act provided that all labor agreements shall have a no-strike and no-lockout clause, and all collective bargaining agreements shall have a grievance and arbitration procedure culminating in final and binding arbitration.

Therefore, it appeared clear that labor arbitration and collective bargaining in public education in Illinois was firmly ensconced. However, challenges to arbitration both to prevent arbitration of a claim and to gain review of a claim that had been arbitrated continue, often raising the same issues and common law defenses relied on by employers prior to passage of the Act. Because of the unfair labor practice provisions, making it an unfair labor practice to bargain in bad faith and to fail to comply with a binding arbitration award, many of these issues were reviewed by the Illinois Educational Labor Relations Board (hereinafter “IELRB”).

In River Grove School District No. 85½, the Board was faced with the question of whether the failure to arbitrate was an unfair labor practice under the Act. Relying on the statutory language mandating grievance and arbitration clauses in collective bargaining agreements that end in final and binding arbitration, the Board held that the failure to arbitrate could be an unfair labor practice within the meaning of section 14(a)(5), which prohibits bargaining in bad faith. The Board went on to rule, however, that such conduct was a violation of section 14(a)(5) only when the employer had contractually agreed to arbitrate the claim and where the arbitration award

78. ILL. REV. STAT. ch. 48, para. 1714(a)(8), 1714 (b)(6)(designating failure to comply with binding arbitration awards to be an unfair labor practice).
79. See ILL. REV. STAT. ch. 48, para. 1710.
80. ILL. REV. STAT. ch. 48, para. 1710(b).
81. Id.
82. Id. at 1710(c).
86. Id. at VII-56, 57.
does not conflict with other laws as prohibited in section 10(b) of the Act.\textsuperscript{87} In that case, the subject of the grievance clearly fell within the grievance procedure and definition of grievances contained in the collective bargaining agreement.\textsuperscript{88} However, the employer argued that in the event the arbitrator ordered a remedy providing for the reinstatement of an employee, such a remedy would contravene the school code and common law powers of the employer, which provided that the power to employ individuals resided solely in a school board.\textsuperscript{89} The IELRB decided, however, that this argument as to remedy was premature because the Board had no idea whether the arbitrator would sustain the grievance and if so what remedy would be ordered.\textsuperscript{90}

On appeal the Fourth District Appellate Court adopted the doctrine that the failure to arbitrate violated the Act.\textsuperscript{91} However, the court found that the violation is not one of bargaining in bad faith, but rather is a violation of section 14(a)(1) which prohibits employees from interfering with, restraining or coercing employees in the exercise of their rights as guaranteed by the Act.\textsuperscript{92} As noted above, challenges to arbitrability in Illinois have also been raised, notwithstanding the provisions of the statute once the arbitration has been held and the award has been tendered.\textsuperscript{93} Again the challenge has often been that the award conflicts with statutory powers residing in the employer.

In *Board of Education v. IELRB*,\textsuperscript{94} the IELRB was faced for the first time with the argument that an employer's failure to comply with an arbitration award was excused because the award was unenforceable.\textsuperscript{95} The IELRB found that the award was enforceable.\textsuperscript{96}

More importantly, however, an employer, in *Chicago Board of Education v. Chicago Teachers Union*, argued that this role of reviewing the award for enforceability resides solely in the circuit courts under the Uniform Arbitration Act.\textsuperscript{97} The circuit court stayed
the proceedings, and the First District Appellate Court rejected the employer's argument and reversed the decision. The First District found that, because the sister statute of the IELRA, the Illinois Public Employees Labor Relations Act (hereinafter "IPLRA"), contains no provisions prohibiting the failure to comply with an arbitration award, and because the IELRA expressly recognizes the difference in educational employment, the Board's assertion of jurisdiction in this matter essentially divests the circuit court's jurisdiction of labor arbitration awards in public educational employment.

The court also relied upon the fact that the IELRA, unlike the IPLRA, does not refer to the continuing jurisdiction of the Uniform Arbitration Act, and that the judicial review of IELRB cases was placed in any judicial district in which the Board maintains an office. In the court's view, this manifested an intent on the part of the legislature that there be uniformity in this area which can be obtained only by centering jurisdiction in the IELRB as reviewed by the Fourth District Appellate Court.

The Fourth District Appellate Court was faced with the same question in Board of Education v. Compton, and the Fourth District came to the same conclusion as the First District, relying essentially on the very same rationale. However, because the Second District Appellate Court and another panel of the First District Appellate Court found that jurisdiction would still lie in the circuit courts notwithstanding the passage of the IELRA, the Illinois Supreme Court accepted an appeal in Compton.

In Compton an employee was employed by the school district as a non-tenured teacher and represented by a labor organization. At the conclusion of the school year the District terminated the employee's employment, and the labor organization subsequently filed a

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98. Id.
99. Id. (referring to ILL. REV. STAT. ch. 48, para. 1601-1627 (1985)).
100. Id.
101. Id. at 529, 491 N.E.2d at 1261-62.
102. Id. This subsequent magnification to the appellate jurisdiction in the statute appears not to have had any impact on these line of cases.
108. Id. at 217, 526 N.E.2d at 150 (discussing the unreported circuit court case).
grievance alleging that the termination violated the collective bargaining agreement.\textsuperscript{109} The Union specifically alleged that certain procedures for the evaluation and termination of teachers were violated and, after processing the grievance through the entire grievance procedure, the labor organization attempted to submit the grievance to binding arbitration as provided in the labor agreement.\textsuperscript{110} In so doing the labor organization sought the reinstatement of the teacher in question with full back wages and other benefits.\textsuperscript{111} The matter went to arbitration, and the arbitrator ultimately ruled in favor of the employee and the union.\textsuperscript{112} Subsequently, the District filed a petition in circuit court to vacate the arbitrator’s award at which time the IELRB intervened to claim that jurisdiction to review the failure to comply with an arbitration award lay with the IELRB under section 14(a)(8) of the Act.\textsuperscript{113}

The Illinois Supreme Court began its consideration of this jurisdictional dispute with the stunning pronouncement that the Act “revolutionizes Illinois school labor law.”\textsuperscript{114} The court further stated that, because the General Assembly in promulgating the Act declared that educational labor disputes were “injurious to the public” and determined that “adequate means must be established for minimizing them and providing for their resolution,” the General Assembly set forth in the Act a comprehensive labor regulatory scheme including a requirement that collective bargaining agreements between educational employers and labor organizations contain a binding grievance and arbitration clause.\textsuperscript{115} With this strong emphasis on the use of grievance arbitration as a means of minimizing labor disputes in educational employment, and the establishment of the IELRB with the expertise to pass on questions arising under the statute, the court decided that jurisdiction in the circuit courts was divested in favor of the IELRB.\textsuperscript{116}

In addition, the court relied on various other bases for its decision. For example, the court relied on the fact that all decisions of
the Board were appealable in the Fourth District Court, revealing a legislative intent for uniformity in this substantive area of the law. The court also compared the IELRA to its sister statute, the IPLRA, and relied on the fact that the IPLRA, unlike the IELRA, still provided for the review of arbitration awards in the circuit courts under the Uniform Arbitration Act.

In conclusion, the court left open the question whether certain types of arbitration decisions could be reviewed at all because it is not possible to refuse to comply with those awards (e.g. a case where the grievance is denied and the employer complies with the award by continuing its conduct permitted by the arbitrator). The court simply stated that it was an "interesting and troubling argument" not presented by the facts of that case.

All of the cases cited above arose in the context of reviewing an arbitrator's award after the grievance had been heard. There remained for some the question of jurisdiction and the role of the circuit courts in this process when there was an attempt to enjoin arbitration from taking place. In Board of Education v. Warren Township High School, the Illinois Supreme Court was faced with this question, and relying on its rationale in Compton, ruled that the circuit courts were similarly divested of jurisdiction prior to arbitration as well as after the issuance of the award.

With jurisdiction firmly placed with the IELRB, the Board then determined what would be the standard of review once the award is issued. In Chicago Board of Education, the Board held that under section 14(a)(8) it would look to see whether there was a binding award rendered in accordance with the grievance procedure, whether the proceedings were fair and impartial, whether the proceeding or award was repugnant to the purposes and policies of the Act, whether there was any basic challenge to the award's legitimacy (e.g. improper influences) and finally, whether the award conflicts with any other statutes as prohibited in section 10(b). To date, all

117. Id.
118. Id.
119. In a subsequent case raising this very question, the Board has ruled that adherence to an arbitrator's award denying the grievance, and permitting continued conduct by the employer which allegedly violates some state statute, violates section 14(a)(5) of the Act prohibiting bargaining in bad faith by an employer. Southern Illinois University, 5 P.E.R.I. (LRP) (IELRB Opinion and Order, October 5, 1989).
120. 128 Ill. 2d 155, 538 N.E.2d 524 (1989).
121. Id. at 156-57, 538 N.E.2d at 525-26.
123. Id. at VII-256.
challenges to labor arbitration awards in public educational employment have turned on the last factor. In fact, the argument has, in most cases, been an attempt by employers to resurrect the nondelegability doctrine as a conflict with other statutes. In ruling on these cases, the IELRB has taken what can best be characterized as a narrow approach. That is to say, the Board has ruled that the award must conflict with a "specific statutory directive," and that the mere fact that a subject matter that is a subject of a labor arbitration award is mentioned in another statute will not be sufficient to set aside the award.

In Dundee Community Unit School District No. 300, the Board was faced squarely with a claim that the nondelegability doctrine excused the failure of an educational employer to comply with an arbitration award which required the reinstatement and payment of back pay to a head custodian. Specifically, the District relied on that portion of the School Code which granted school boards the exclusive "power to 'employ . . . noncertified employees . . .'." The Board began its analysis by pointing out that the Act imposed a legal duty on employers to bargain in good faith and to comply with arbitration awards, obligations which were not present in the past. It then, in contrast, explored various earlier holdings of Illinois courts which provided that, although an educational employer could agree to a collective bargaining agreement, any such agreement or the enforcement thereof, could not undermine the exclusive powers of the school board. The Board then pointed out that as recently as 1981, at least one justice of the Illinois Supreme Court bemoaned the fact that such circumstances, where a public agency is allowed to repudiate its contract, can only lead to instability and frustration

124. Compare Dundee Community Unit School Dist. No. 300, 5 P.E.R.I. (LRP) ¶ 1070, at IX-158 (1989) (wherein the Board held that the arbitration award would be binding under the Act because it was not in conflict with the Illinois School Code under section 10(b) of the Act) with Township High School District No. 205, 4 P.E.R.I. (LRP) ¶ 1040, at 153 (1988) (wherein the Board held that an arbitration award was not binding because implementation of an article in the collective bargaining agreement would be in violation of the Illinois School Code within the meaning of section 10(b)).

125. See, e.g., Dundee, 5 P.E.R.I. (LRP) ¶ 1070; Township High School, 4 P.E.R.I. (LRP) ¶ 1040.

126. See, e.g., Dundee, 5 P.E.R.I. (LRP) ¶ 1070, at IX-158; Township High School, 4 P.E.R.I. (LRP) ¶ 1040, at X-153 (citing Board of Governors, 3 P.E.R.I. (LRP) ¶ 1075 (1987)).


128. Id. at IX-155.

129. Id. at IX-158.

130. Id. at IX-156.

131. Id.
such that "[t]he ultimate loser is the public. . . ." In the Board's view, those very circumstances led to the passage of the IELRA. The Board then looked to the same provisions relied upon by the Compton court and concluded that those provisions, particularly those requiring binding arbitration and imposing a duty to bargain in good faith on educational employers and labor organizations, clearly eliminated the legal basis upon which the nondelegability doctrine was grounded. Therefore, a board of education's powers could be subordinated to the terms of a collective bargaining agreement only to the extent that section 10(b) of the Act permits.

Accordingly, the Board then said that the proper basis for reviewing any conflict between the powers and authorities of educational employers and collective bargaining agreements or arbitration awards was to determine whether the collective bargaining agreement by its express terms, or through the operation of an arbitration award, created a conflict to the extent that the agreement or award should be ignored. To resolve the alleged conflict, the Board then examined the School Code to determine if any provision therein prohibited the agreement of a school board with a labor organization to limit discipline and discharge to just cause; in those cases where just cause was not demonstrated there should be reinstatement and back pay. The Board concluded that statutory provisions providing for

132. *Dundee*, 5 P.E.R.I (LRP) ¶ 1070, at IX-156 (quoting Board of Educ. v. Chicago Teachers' Union, 88 Ill. 2d 63, 430 N.E.2d 1111 (1981)).
134. *Id.*
135. *Ill. Rev. Stat.* ch. 48, para. 1710 (b) (1985) states in pertinent part that: The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois. The parties to the collective bargaining process may effect or implement a provision in a collective bargaining agreement if the implementation of that provision has the effect of supplementing any provision in any statute or statutes enacted by the General Assembly of Illinois pertaining to wages, hours, or other conditions of employment; provided however, no provision in a collective bargaining agreement may be effected or implemented if such provision has the effect of negating, abrogating, replacing, reducing, diminishing, or limiting in any way any employee rights, guarantees or privileges pertaining to wages, hours or other conditions of employment provided in such statutes. Any provision in a collective bargaining agreement which has the effect of negating, abrogating, replacing, reducing, diminishing or limiting in any way any employee rights, guarantees or privileges provided in an Illinois statute or statutes shall be void and unenforceable, but shall not affect the validity, enforceability and implementation of other permissible provisions of the collective bargaining agreement.
137. *Id.*
authority in school boards to employ personnel and defining their employment duties do not prohibit just cause in a grievance and arbitration provision.\textsuperscript{138} The Board so ruled because the agreement to limit discharge and discipline to just cause and to place under review, via the grievance arbitration, did not violate a "specific statutory directive,"\textsuperscript{139} but rather touched on a subject also dealt with in the School Code. In the eyes of the Board, such overlap or congruity of subject matters does not constitute a conflict prohibited by section 10(b).

From the foregoing, it is clear that the Illinois General Assembly devised a comprehensive regulatory scheme over collective bargaining in public education with the IELRA. This scheme, as interpreted by the IELRB and the Illinois courts, places jurisdiction over the review and enforcement of arbitration proceedings and awards in the IELRB subject to judicial review. However, because public employees who are not employed by public schools are under the jurisdiction of another statute, the Illinois Public Labor Relations Act, a review of challenges to arbitration under that statute is in order.

2. \textit{Challenges Under the IPLRA—A Different Statute Achieving Similar Purposes}.—Drafted during the same legislative session in 1984, the IELRA and the Illinois Public Labor Relations Act (hereinafter "IPLRA") together were intended to provide "a comprehensive regulatory scheme for public sector bargaining in Illinois."\textsuperscript{140} However, these "sister" statutes took dramatically different approaches to the role that the newly created Labor Relations Boards would take in the grievance arbitration process. Due to this difference in approach, disputes concerning grievance arbitration in the Illinois public schools are now adjudicated under a very different process than similar disputes arising in the remaining segment of the Illinois public sector.

The IELRA, effective January 1, 1984, covered all public school districts, colleges and universities in the state.\textsuperscript{141} In enacting the IELRA, the General Assembly recognized "that substantial differences exist between educational employees and other public employees. . . ."\textsuperscript{142}

In contrast to the IELRA’s approach, the IPLRA, effective July 1, 1984, did not divest the Illinois courts of their traditional jurisdic-

\begin{thebibliography}{99}
\bibitem{} Id.
\bibitem{} Township High School, 4 P.E.R.I. (LRP) ¶ 1040, at IX-153.
\bibitem{} See Board of Educ. v. Compton, 123 Ill. 2d 216, 219, 526 N.E.2d 149, 152 (1988).
\bibitem{} ILL. REV. STAT. ch. 48, para. 1701 (1985).
\bibitem{} Id.
\end{thebibliography}
tion over issues concerning grievance arbitration. The specific provisions of the IPLRA pertaining to the grievance procedure and arbitration are quite different than those found in the IELRA. Under the IPLRA, parties to a collective bargaining agreement may mutually agree that their agreement will contain a grievance procedure culminating in binding arbitration. However, unlike the IELRA, they may also agree otherwise. Any agreement that does contain an arbitration provision must also contain a provision prohibiting strikes during the duration of the agreement. Unlike the IELRA, there is no provision of the IPLRA providing that it is an unfair labor practice to refuse to comply with a binding arbitration award.

The interplay between other state statutes and the collective bargaining process is dealt with similarly under the IELRA and the IPLRA. The IPLRA provides, as does section 10(b) of the IELRA, that parties may bargain over matters concerning wages, hours and other terms and conditions of employment that are not specifically in violation of other state law. The IPLRA also allows parties to enter into agreements that supplement, implement, or relate to the effect of such provisions in other laws. Once a collective bargaining agreement has been reached, its provisions will supersede any contrary statutes, charters, ordinances, rules and regulations related to wages, hours and conditions of employment.

Finally, the IPLRA vests jurisdiction to compel or stay arbitration, or to vacate, modify or correct an arbitration award in the circuit courts, rather than in the two labor relations boards created under the statute. The statute provides that the grievance and ar-

143. ILL. REV. STAT. ch. 48, para. 1601 (1985).
144. ILL. REV. STAT. ch. 48, para. 1608 (1985) which provides that the “grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois Uniform Arbitration Act.”
146. Id.
147. Id.
151. Id.
152. ILL. REV. STAT. ch. 48, para. 1615(b) (1986).
153. See ILL. REV. STAT. ch. 48, para. 1605(a) (1986) (stating that the Illinois State Labor Relations Board has jurisdiction over the state of Illinois and units of local government with a population not exceeding one million persons); ILL. REV. STAT. ch. 48, para. 1605(b) (1986) (stating that the Illinois Local Labor Relations Board has jurisdiction over units of local government, Chicago and Cook County, with populations in excess of one million
bitration provisions of any collective bargaining agreement shall be subject to the Illinois Uniform Arbitration Act (hereinafter "UAA").

Under the UAA, proceedings to compel or stay arbitration are properly held in the circuit court. However, the Arbitration Act specifically states that it does not apply to "vacating, modifying, or correcting" any award entered as a result of an arbitration proceeding which is part or pursuant to a collective bargaining agreement. The statute provides that the "grounds for vacating, modifying or correcting such an award shall be those which existed prior to the enactment of this act." The courts have, therefore, held both before and after the IPLRA's effective date that a court must look to the common law which existed prior to the enactment of the UAA when considering vacating an arbitration award that was rendered pursuant to a collective bargaining agreement. Presumably, then, any of the common law defenses to arbitration or compliance with an award that could have been asserted prior to enactment of the IPLRA have survived the Act's effective date. Furthermore, after having taken the unique, perhaps even "revolutionary" step of vesting jurisdiction over arbitration issues in the educational sector in the Educational Labor Relations Board, the legislature took a far more traditional approach in the IPLRA, leaving jurisdiction over the rest of the public sector in the courts. It will, therefore, be for the courts, rather than the IPLRA's two labor relations boards, to interpret the statute and fashion the law concerning arbitration disputes in the remainder of Illinois' public sector.

3. Arbitration Issues Under the IPLRA.—
   a. Was There an Agreement to Arbitrate?— Even prior to the enactment of the IPLRA, the Illinois courts had looked to the U.S. Supreme Courts' Steelworkers Trilogy, discussed earlier in

155. ILL. REV. STAT. ch. 10, para. 102 (1975).
156. ILL. REV. STAT. ch. 10, para. 112(e) (1975).
157. Id.
159. The nondelegability doctrine, which was only sporadically applied to public employers other than school districts, has probably not survived due to the operation of section 7 of the IPLRA.
this Article, for guidance. The state supreme court noted in Board of Trustees v. Cook County College Teachers Union,161 that the Illinois legislature had adopted the UAA only one year after the Steelworkers Trilogy cases were decided and that the legislature had thereby “endorsed the policy of treating arbitration in collective bargaining cases as a unique agency.”162 Citing the Steelworkers Trilogy, the court explained that the nature and extent of an arbitrator's power will depend upon what the parties have agreed to submit to arbitration, and that an arbitrator will have exceeded the scope of his authority when he decides matters that were not submitted for his resolution.163

The Court went on to endorse the other basic principles of the Steelworkers Trilogy that: (1) it is the arbitrator's construction of the contract that has been bargained for; (2) the courts should not impose their own interpretation of the contract when it is different than the arbitrator's interpretation; and (3) a court's inquiry into the merits of an arbitrator's award should be limited only to a determination of whether the award drew its essence from the collective bargaining agreement.164

With the Illinois Supreme Court's early endorsement of the Steelworkers Trilogy principles, it would be expected that the lower courts then could have been expected not only to show great deference to awards once rendered, but also to broadly construe the arbitration clauses found in public sector collective bargaining agreements. Nonetheless, public sector employers have enjoyed some success in convincing Illinois appellate courts that their disputes with labor unions are not subject to their contractual grievance and arbitration clauses in the first instance as described below.

In a leading case, Croom v. City of DeKalb,165 the Illinois Appellate Court specifically rejected the employer's contention that “for an issue to be arbitrable it must be 'stated in the contract between the parties in crystal clear language unextended and unenlarged either by construction or by implication.'”166 Such a standard was appropriate in the context of commercial litigation but not in the realm of collective bargaining. The court cited both Board of Trustees and

22 and accompanying text.
161. 74 Ill. 2d 412, 386 N.E.2d 47 (1979).
162. Id. at 419, 386 N.E.2d at 50.
163. Id.
164. Id. at 420, 386 N.E.2d at 51 (citing Enterprise Wheel & Car Corp., 363 U.S. at 599).
166. Id. at 375, 389 N.E.2d at 651.
the Steelworkers Trilogy cases and concluded, citing the United Steelworkers of America v. Warrior & Gulf Navigation Co. decision that the arbitrator may consider “the industrial common law,” that arbitration was “a means of solving the unforeseeable,” a method for giving meaning and content to the agreement. The Court cited the Supreme Court's decision in Warrior & Gulf, giving an admonition that “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” Nonetheless, the court then proceeded to find the grievance before it inarbitrable. The court found that although the parties’ agreement broadly defined what constituted a grievance, it had limited application to grievances that involved “the interpretation or application of the express provisions of the agreement.” The court concluded that not all grievances arising under the contract in dispute were arbitrable.

The Croom court then found that there was no express contractual provision pertaining to the union’s grievance which concerned the issue of additional pay for firefighters assigned duties of acting officers. The court then rejected the union’s argument that the contract's general provisions concerning wages was sufficient to render the instant dispute arbitrable. Apparently forgotten were any notions concerning the “industrial common law” and “solving the unforeseeable.” It seems safe to say that any doubts concerning the meaning of the arbitration clause in Croom were not resolved in favor of coverage.

A similar result was reached in Lodge No. 822 International Association of Machinists v. City of Quincy. Citing both the Board of Trustees case and the Steelworkers Trilogy, the Appellate Court found a dispute concerning the union’s allegation that the employer was hiring temporary workers to fill full-time positions inarbitrable.

167. Id. at 375, 389 N.E.2d at 650 (quoting Warrior & Gulf Navigation Co., 363 U.S. 581-82).
168. Id. at 373, 389 N.E.2d at 650 (quoting Warrior & Gulf Navigation Co., 363 U.S. at 582-83).
169. Id. at 376, 389 N.E.2d at 652.
170. Id. at 375, 389 N.E.2d at 651.
171. Id.
172. Id. at 376, 389 N.E.2d at 652.
173. Id. at 375, 389 N.E.2d at 651.
174. Id.
175. See id.
The employer contended that the temporary workers were not subject to the collective bargaining agreement. The court found the dispute inarbitrable because it could not locate any nexus between the dispute and the terms of the parties' agreement despite the agreement's coverage of full-time employees.

A dissenting justice suggested that while an arbitrator might reach the same conclusions in regard to the merits of the grievance, a sufficient nexus rendering the dispute arbitrable had been established due to the contract's stated coverage of full-time employees. It would seem that the courts have, in the guise of deciding upon arbitrability, been all too willing to decide the merits of the issues that unions have sought to submit to an arbitrator.

Since the enactment of the IPLRA, the Illinois Supreme Court has held that in the statute itself the legislature has again expressed a strong preference for arbitration. It remains to be seen to what...

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177. *Id.* at 431, 484 N.E.2d at 468.
178. *Id.* at 427, 484 N.E.2d at 466.
179. *Id.* at 431, 484 N.E.2d at 468.
180. *See id.* at 431-32, 484 N.E.2d at 468-69 (Green, J., dissenting).
181. *Id.* at 431, 484 N.E.2d at 468.
182. *See* Toole, *Judicial Activism in Public Sector Grievance Arbitration: A Study of Recent Development*, 33 ARB. J. 6 (1978) (suggesting that many state courts have been willing to interfere with the public sector arbitration process at all stages).
183. *See* City of Decatur v. AFSCME Local 268, 122 Ill. 2d 353, 522 N.E.2d 1219 (1988). In *Decatur*, the court relied upon section 8 of the IPLRA. *Id.* (relying on ILL. REV. STAT. ch. 48, para. 1608 (1988)). Nonetheless, in *Village of Creve Coeur v. Fletcher*, the Appellate Court held that a police officer's suspension was not subject to the collective bargaining agreement's grievance procedure where the suspension had already been considered by the Village's Board of Commissioners pursuant to the Fire and Police Commission Act. 187 Ill. App. 3d 116, 543 N.E.2d 323 (App. Ct. 3d Dist. 1989) (resting on ILL. REV. STAT. ch. 24, para. 10-2.1 et. seq. (1985)). While expressly acknowledging that a contractual interpretation that would allow disciplinary actions to be processed through the contractual grievance procedure was plausible, the court concluded that such a result would be "irrational." *Id.* at 117, 543 N.E.2d at 324. The court hypothesized that if a disciplinary action was subject both to the Fire and Police Commission Act and the collective bargaining agreement's grievance procedure, that potentially a police officers immediate supervising sergeant could reach a decision, under the grievance procedure, that was contrary to the decision of the Board of Commissioners. *Id.* The court did not consider the applicability of the IPLRA in reaching its decision. *See id.* Nor did the court distinguish its decision from the Fourth Appellate District's decision in Board of Governors v. IELRB, 170 Ill. App. 3d 463, 524 N.E.2d 758 (App. Ct. 4th Dist. 1988), in which the court held that the procedures established under an Act to create the State Universities Civil Service system "were not the exclusive method of reviewing an employee discharge where a concurrent applicable grievance procedure existed." *Id.* at 470, 524 N.E.2d at 766 (referring to ILL. REV. STAT. ch. 24½, para. 38(b)(3)(11) (1985)). In this case the court held that the availability of the Civil Service hearing process and appellate review through the courts, did not preclude arbitration of a discharge pursuant to the collective bar-
extent the lower courts will take this preference to heart.

b. Nondelegation Under the IPLRA.—The "nondelegability doctrine" has rarely been applied to cases that did not involve school districts. However, the Illinois Appellate Court did hold prior to the IPLRA that the doctrine did apply to the remainder of the public sector. As discussed earlier, the "nondelegability doctrine" in theory prohibited public employers from delegating their powers to decide basic matters concerning their operations to any third party, including an arbitrator. The doctrine was generally invoked upon an employer's assertion that a particular power was vested in it alone pursuant to state statute. Therefore, the crux of the employer's argument hinged upon a contention that a subject was covered by a state statute and that arbitration concerning this subject matter was therefore precluded even if it had been bargained.

With the enactment of the IPLRA, it is likely that any such contentions will now be made in the context of whether a given topic is a mandatory subject of bargaining in the first instance. Employers are likely to contend, as they have in other jurisdictions, that a matter is outside the mandatory scope of bargaining and should therefore become inarbitrable even if covered under the terms of the parties' agreement. However, any such contentions will most likely be resolved under section 7 of the IPLRA, which approximates section 10 of the IELRA.

The Illinois Supreme Court has already shown that it is unlikely to be sympathetic to such an argument. In City of Decatur v. gaining agreement. See id. at 474, 524 N.E.2d at 770.

184. See County of Will v. Local 1028 Will County Employees Union, 790 Ill. App. 3d 290, 398 N.E.2d 139 (App. Ct. 1979) (finding that the fixing of the county employees' salaries was the sole nondelegable duty of the County Board, which derives its authority and duty from the legislative mandate which establishes that the county adopt a budget).

185. See supra text accompanying notes 55-74 (discussing non-delegability doctrine issues and challenges).

186. See id.

187. Id.

188. See, e.g., Minneapolis Fed'n of Teachers v. Minneapolis School Dist. No. 1, 258 N.W.2d 802 (Minn. 1977) (holding that although the school's transfer policy was not a mandatory subject of collective bargaining, the transfers were still subject to binding arbitration in order to determine if they conformed to the criteria established by the School District); Susquehanna Valley Central School Dist. v. Susquehanna Valley Teachers Ass'n, 37 N.Y.2d 614, 376 N.Y.S.2d 427 (1975) (rejecting the School District's argument that it should not be forced to arbitrate a grievance regarding the size of its staff where the collective bargaining agreement provided for additional staffing and stating that the District was free under N.Y.'s Taylor Law to bargain voluntarily, as well as voluntarily submit disputes to arbitration).

189. ILL. REV. STAT. ch. 48, para. 1710 (1986).

190. ILL. REV. STAT. ch. 48, para. 1607 (1986).
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AFSCME, the Court held:

As the language of Section 7 indicates, the mere existence of a statute on a subject does not, without more, remove that subject from the scope of the bargaining duty. For example, one type of statute that would not relieve an employer of the duty to bargain over an otherwise mandatory subject of bargaining would be a provision establishing a minimum level of benefit, such as a minimum wage law or minimum salary law. In that case, wages would remain a mandatory subject of bargaining, and the employees' bargaining representative would be free to insist on a level higher—but not lower—than that required by law.

Thus, it would seem, especially in light of the Court's recognition of the IPLRA's preference for arbitration, that the court would hold that once a subject has been bargained, and an agreement to arbitrate a dispute is reached, the agreement to arbitrate will be enforceable and any award rendered will be binding. It was the IPLRA itself that gave public employers the authority to enter into such agreements and the obligation to abide by an arbitrator's decision.

c. Vacating an Arbitration Award Because it Violates Public Policy.—In Illinois, there is no precise definition of public policy. However, in AFSCME v. State, the Illinois Supreme Court enunciated the standards that it would follow concerning public policy questions raised under the IPLRA, and most probably the IELRA as well.

In determining public policy, Illinois courts may look to the Constitution, statutes, or, when these are silent, to judicial decisions. While noting that it was not bound by federal decisions because Illinois has a different arbitration statute, the Illinois Supreme Court cited both W.R. Grace & Co. v. Local Union and United Paperworkers International Union v. Misco, Inc. with approval for the proposition that a violation of public policy must be clearly shown and public policy exceptions should be extremely nar-

192. Id. at 364, 522 N.E.2d at 1224 (citations omitted).
194. See id. at 262, 529 N.E.2d at 541 (holding that a state's concern over the quality of care received by its mental patients must be weighed against the policy of fostering relationships between employers and employees, and the finality of arbitration awards).
195. Id. at 262, 529 N.E.2d at 540.
In the instant case, the grievants had been authorized to leave a mental health institution to shop for a barbecue. Instead of returning promptly, they spent another hour and fifteen minutes on unauthorized personal business. During their absence, a resident in the wing, who was not the grievants' responsibility, died while left unattended. The grievants were then discharged.

The arbitrator found that although the grievants had left the worksite while it was short staffed, there was otherwise "no direct link between their unauthorized absence and the resident's death." In addition, the employees had exemplary records prior to this incident. Taking these and other mitigating factors into account, the arbitrator concluded that the grievants' behavior did not constitute "just cause" for their discharge and ordered them reinstated, reducing the disciplinary action to four-month suspensions.

In considering the employer's argument that the arbitrator's award violated public policy, the court stated that it recognized that Illinois had a commitment to compassionate care for the mentally disabled. However, the court also found that "[t]his case . . . involved the public policy of promoting constructive relationships between public employees and the public policy which requires finality in arbitration awards." The arbitration award in this case did not violate any explicit public policy, and the court refused to vacate it.

It would thus seem unlikely that a public policy defense would prevail except under the most extreme circumstances. It should be noted that an award that sanctions violations of law will be vacated. However, even this exception will most likely be limited to

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199. **AFSCME**, id. at 250, 529 N.E.2d at 536.
200. Id. at 251, 529 N.E.2d at 536.
201. Id.
202. Id.
203. Id.
204. Id.
205. Id.
206. Id. at 262, 529 N.E.2d at 541.
207. Id.
208. Id. at 265, 529 N.E.2d at 542.
209. See Board of Trustees 508 v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979) (vacating an arbitration award which gave priority in assignment of extra work to a union member who had participated in a pre-IELRA illegal strike as repugnant to public policy); see also City of DeKalb v. Local 1236, 182 Ill. App. 3d 367, 538 N.E.2d 867 (App. Ct. 2d Dist. 1989). In *DeKalb*, a clause in the collective bargaining agree-
instances in which the award is repugnant to, or inconsistent with, the specific provisions of a statute.

IV. CONCLUSIONS

Even prior to the enactment of the IELRA and IPLRA, the Illinois courts consistently found that there was a presumption in favor of arbitrability which extended to public sector contract disputes. However, prior to the collective bargaining statutes, this presumption, particularly in the educational area, was too often eroded by employers' invocation of the "nondelegability doctrine" to avoid their agreement to arbitrate.

Although we are reluctant to say that the nondelegability doctrine is dead, we believe it is safe to say it has been wounded, and that its wounds are tended to by section 10(b) of the IELRA, the IELRB and section 7 of the IPLRA. Those provisions reasonably accommodate public employer needs, legislation, and doctrinal law. This doctrinal law grants employees their rights to enforce collective bargaining agreements which are negotiated by their own exclusive representatives.

As to Illinois' unique statutory framework, which vests jurisdiction over arbitration in public education in the IELRB while retaining traditional court jurisdiction under the IPLRA, one must resist the temptation to draw any overbroad conclusions. Yet, it seems safe to conclude that by vesting jurisdiction in one labor board rather than in the multiple districts of the courts, unions and employers have been ensured of a uniformity of decisionmaking that could not have otherwise been expected. In the future, we shall see to what extent the IELRB and the courts travel a common path.

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ment which provided for payment to disabled firefighters of the difference between a firefighter's regular pay and state disability pension benefits was void as against public policy. *Id.* The contractual provision was held to be in conflict with Illinois the statute that provided for uniform pension benefits for disabled firemen. See *id.* However, the court also held that the IPLRA was inapplicable because firefighters had not been included in the statute's coverage at the time material to the dispute. *Id.*