SURVEY OF ILLINOIS LAW: THE EROSION OF AT-WILL EMPLOYMENT IN ILLINOIS SCHOOLS IN LIGHT OF THE ILLINOIS SUPREME COURT'S RULING IN *GRIGGSVILLE-PERRY V. IELRB*

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I. INTRODUCTION

For decades, Illinois school administrators and employing boards of education have relied upon a lack of legal continuing rights to employment (also known as tenure) and limited policies denoting employment as "at will." The fallacy of this assumption is that the policy itself defines the totality of the employment relationship, enabling the employer to terminate the employee with any cause that is not illegal, or without cause at all.

In fact, termination of the employment relationship, even with an "at will" employment policy is significantly more complicated, requiring analysis not only of the policy defining the global employment rights, but also the facts involved, including, but not limited to, contracts, hiring motions, practices of the school district, and other facts relevant to employment.[1] The lack of limitation on termination in "at-will" employment

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1. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), Bd. of Regents v. Roth, 408 U.S. 564 (1972), Doyle v. Holy Cross Hosp., 186 Ill. 2d 104, 708 N.E. 2d 1140 (1999); Griggsville-Perry Cmty. Unit Sch. Dist. No. 4 v. IELRB, 2013 IL 113721.

policies (though typically well written and beneficial for the employers) can be, without further examination, misleading to the operators of the schools.

With the 2013, Illinois Supreme Court's decision in the *Griggsville-Perry II* case, the Court made clear that even the limited cause required for proof of dismissal of an "at will" employment relationship does not excuse the employer from provision of appropriate procedure *and substantive* proof of sufficient cause for the dismissal of the employee lacking continued employment rights.[2]

II. HISTORY OF DUE PROCESS IN PUBLIC EMPLOYMENT

Despite an "at will" employment policy (or, analogously, an employment contract without a limitation on dismissal), an employer is not permitted to merely terminate an employee "on-spot" and without any cause. If an employee has an expectation of continued employment, the employer must terminate the employment in a way that respects the implications imposed by the United States Constitution,[3] the procedural requirements of the employer's employee handbook[4] and relevant collective bargaining agreement(s), and the substantive requirements that may be implied or assessed by an arbitrator, hearing officer, or state agency reviewing the employment.[5]

There are two types of employees regularly employed in Illinois schools—those with teaching certificates (typically referred to in collective bargaining agreements as "certified" or "licensed" staff) and those without teaching certification or licensure ("non-certified" staff).[6] For a certified employee, the typical employee has a reasonable expectation of employment on an annual basis, renewed each year if the employing board does not take action to dismiss forty-five calendar days before the end of each school year for the first three years.[7] During the fourth year, the employer must provide cause to the employee prior to terminating, and after forty-five calendar days preceding the end of the fourth year, the certified employee has achieved contractual continued service, known synonymously as "tenure," which means the employee has a continued expectation of employment.[8]

Unlike certified or licensed staff, a non-certified employee, also known as "educational support personnel," may be dismissed for economic reasons with a thirty-day notice at any point during the year, or may be dismissed

2. *Griggsville-Perry*, 2013 IL 113721.
3. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bd. of Regents v. Roth, 408 U.S. 564 (1972).
4. Doyle v. Holy Cross Hosp., 186 Ill. 2d 104, 708 N.E. 2d 1140 (1999).
5. *Griggsville-Perry*, 2013 IL 113721.
6. 105 ILL. COMP. STAT. 5/10-22.34 et seq (2010).
7. 105 ILL. COMP. STAT. 5/24-11 et seq (2010).
8. *Id*.

with cause at any point during the year.[9] However, unless the employee has a defined fixed-period employment relationship with the employer, absent legal dismissal process the employee remains employed by the employer; meaning the employee may, after a period of time, have a continued expectation of employment until either subject to a layoff or dismissal.[10]

Whenever a public employer is intervening to extinguish an expectation of continued employment, the due process clause of the U.S. Constitution is implicated.[11] "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[12]

Before deprivation of a property right, there must be a meaningful opportunity to be heard.[13] The type of hearing required is a function of the facts, which require a three-part analysis:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[14]

Absent a contractual or policy declaration of more formalized process,

> [T]he pretermination 'hearing,' though necessary, need not be elaborate. . . . 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action.[15]

So long as there is an appropriate opportunity for post-termination review of a dismissal (such as grievance and court hearing review), an initial check against mistaken decisions (which requires some causation basis for the hearing) is all that is required by the Constitution.[16] If the employer has a

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9. 105 ILL. COMP. STAT. 5/10-23.5 (2010); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
10. 105 ILL. COMP. STAT. 5/10-23.5.
11. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).
12. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (citing, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).
13. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting, Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
14. Baird v. Bd. of Educ., 389 F.3d 685, (7th Cir. 2004) (citing, Mathews v. Eldridge, 424 U.S. at 335).
15. *Loudermill*, 470 U.S. 532 (1985) (quoting, Boddie v. Connecticut, 401 U.S. 371, 378 (1971), and citing, Mathews v. Eldridge, 424 U.S., at 343).
16. Gilbert v. Homar, 520 U.S. 924 (1997) (citing, *Loudermill*, 470 U.S. 532).

safety emergency or other compelling need to immediately terminate the employee's presence in the District, the employer may prevent further aggravation by suspending the employee without pay, pending a pre-termination hearing.[17]

In other words, "some kind of a hearing" prior to the discharge of an employee is required to dismiss an employee who has a property interest in employment.[18] "Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker [sic] is likely to be before the termination takes effect."[19] While an employer may dismiss an employee when the employer sees fit, such dismissal must occur only after appropriate notice and an opportunity to be heard, and the cause upon which dismissal is predicated (presuming it is not economic, in which case the statutory procedure must be followed) must be either misconduct or incompetence sufficient to warrant dismissal as a reasonable consequence.

In recent years, however, Illinois courts and agencies have broadened their examination of the underlying facts beyond procedural compliance with contractual and policy directives to address the underlying substantive components of both the hearing and the appropriateness of the underlying cause resulting in employment termination.

III. JUST CAUSE VS. AT-WILL EMPLOYMENT

In an employment contract or policy, "just cause" means that discipline or dismissal of an employee must be predicated upon cause justified to warrant discipline or dismissal.[20] Such empowers an arbitrator or other third party to assess the reasonableness of the cause upon which discipline or dismissal is predicated. In other words, "just cause" removes from the employer the final decision on whether or not cause was sufficient to warrant dismissal, and places that power of evaluation in the hands of the arbitrator.[21]

In 1992, the Illinois Fourth District Appellate Court evaluated the dismissal of an employee from an extra duty.[22] The language of the collective bargaining agreement applicable to the employee's employment was that "due process under the Agreement shall be accorded each teacher, administrator, and the Board, and the rights of each teacher, administrator, and the Board of Education shall be honored as provided for in this

17. *Id*.
18. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).
19. *Loudermill*, 470 U.S. 532 (1985) (citing Goss v. Lopez, 419 U.S., 565, 583-584 (1975); Gagnon v. Scarpelli, 411 U.S. 778, 784-86 (1973).
20. Bd. of Educ. of Harrisburg Cmty. Unit Sch. Dist. No. 3 v. Ill. Educ. Labor Relations Bd., 227 Ill. App. 3d 208, 209, 591 N.E.2d 85, 89 (4th Dist. 1992).
21. *Id*. at 211-12, 591 N.E.2d at 90.
22. *Id*.

agreement."[23] The employer gave the employee: "(1) oral notice of the fact that he faced dismissal from the extracurricular assignment, (2) an opportunity to present his position to his employer, and (3) an explanation of the faults which his employer had expressed as to his work."[24]

The arbitrator ruled that a more formal process was required, including explicit information as to time and place of the hearing, the subject matter of the hearing, specific information as to the complaints the school district had against the employee, and notification of the employee's right to speak and to be represented at the hearing.[25] The arbitrator, therefore, ruled that the employer had not offered sufficient due process in order to dismiss the employee.[26] The appellate court upheld this part of the arbitrator's decision.[27]

However, the arbitrator also implied "just cause" into the contract.[28] In doing so, the arbitrator noted, "'allowing [the employee's] removal [from the extra duty assignment] to stand' would have the effect of assuming 'that just cause for his dismissal [from extra-duty assignment] exists. . . .'"[29] In fact, the union had offered a proposal in which would have incorporated "just cause" into the contract in prior bargaining, but the proposal was rejected by the board of education and not included in the contract.[30] Therefore, the court held, such implication of a just cause standard was in error.[31] Overruling the Illinois Educational Labor Relations Board (from which appeal was taken), the court held that the error was not harmless.[32] The court held that the arbitrator would need to re-consider what remedy was appropriate *without* implying "just cause," acknowledging the remedy may be a new hearing and reimbursement for the employee's losses during the period between his discharge due to improper hearing and the proper hearing—but not requiring re-instatement predicated upon a lack of just cause for the dismissal.[33] In other words, unless "just cause" was required by contract or policy, the arbitrator did not have authority to review the substantive cause predicating dismissal.

The standard that may be implied into a contract with a due process provision was again revisited in 2013, this time by the Illinois Supreme Court.[34] The reasoning does not constitute a clear reversal of *Harrisburg*, but the effect may very well be the same.

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23. *Harrisburg*, 227 Ill. App. 3d 208, 211, 591 N.E.2d 85, 87 (4th Dist. 1992).
24. *Id*., 227 Ill. App. 3d at 208, 591 N.E.2d at 88.
25. *Id*., 227 Ill. App. 3d at 209, 591 N.E.2d at 89.
26. *Id.*
27. *Id.*
28. *Id*., 227 Ill. App .3d at 208, 591 N.E.2d at 88.
29. *Id*., 227 Ill. App. 3d at 207, 591 N.E.2d at 87.
30. *Id*., 227 Ill. App. 3d at 207-208, 591 N.E.2d at 87-88.
31. *Id.*
32. *Id.*
33. *Id*., 227 Ill. App. 3d at 210, 591 N.E.2d at 90.
34. *Id*.

IV. RECENT CASE LAW, AND A NEW DISTINCTION BETWEEN JUST CAUSE DISMISSAL AND DISMISSAL PREDICATED UPON NON-ARBITRARY CAUSE

A. *Griggsville Perry*

Whether or not an "at will" relationship exists between an employer and an employee is a fact question, which is, informed not only by a single policy, but also upon the entirety of the facts that underlies the employer-employee relationship.[35] In addition to policy, rules, regulations,[36] and employment contracts in which may reflect upon the relationship and the history between the parties will impact how the court reviews the relationship (and whether or not the employee, therefore, has a continuing expectation of employment).[37]

The Illinois Supreme Court, reviewing the Illinois Fourth District Appellate Court's reversal of an arbitrator (and the Illinois Educational Labor Relations Board) who implied a "meaningful standard" of review into a collective bargaining agreement, weighed in on the issue of appropriate cause in the dismissal of a noncertified employee.[38] In *Griggsville-Perry*, the Court held that an arbitrator's decision implying a requirement for a meaningful hearing (rather than bare process) into a collective bargaining agreement (even without a continued expectation of employment, *per se*) drew its essence from the collective bargaining agreement.[39]

The Court was examining the termination of employment of Angie Hires, a paraprofessional whose career began eleven years before her dismissal from employment.[40] Ms. Hires was a paraprofessional (and, thus, a non-certified employee) who had recently suffered marital trouble.[41] The Court noted that the arbitrator found compelling the District's evidence that a principal had spoken with Ms. Hires three times, noting that she smiled insufficiently and that she "lacked positivity" and "did not relate well to others."[42]

At a board meeting held in February 2008, school administrators of recommended that the board of education dismiss Ms. Hires from

35. Griggsville-Perry Cmty. Unit Sch. Dist. No. 4 v. Ill. Educ. Labor Relations Board, 2011 IL App (4th) 110210 [hereinafter referred to as *Griggsville-Perry I*] *rev'd*, Griggsville-Perry Community Unit School District No. 4 v. Ill. Educ. Labor Relations Board, 2013 IL 113721 [hereinafter referred to as *Griggsville-Parry II*].
36. Doyle v. Holy Cross Hosp., 186 Ill. 2d 104, 708 N.E. 2d 1140 (1999).
37. *Griggsville-Perry I*, 2011 IL App (4th) 110210, ¶ 18.
38. *Id*.
39. *Griggsville-Perry II*, 2013 IL 113721, ¶ 27.
40. *Id*. at ¶ 3.
41. *Id*. at ¶¶ 4-5.
42. *Id*. at ¶¶ 5-7.

employment.[43] The employee was notified of a right to appear before the board to contest the charges, should she so desire, and informed her that her dismissal from employment would be recommended at the March 2008 board meeting.[44] Ms. Hires did appear at the board meeting to respond to administration's charges regarding her employment, and, following the meeting, Ms. Hires's employment was terminated at the March 2008 board meeting.[45]

Ms. Hires's union representatives filed a grievance on her behalf, and the case proceeded to arbitration.[46] The collective bargaining agreement contained the following statement:

> 2.6 When a member of the bargaining unit is required to appear before the Board of Education concerning a disciplinary matter, the staff member shall be given reasonable prior notice of the reasons for such meeting and shall be entitled to have a personal representative at said meeting, if so requested by employee.[47]

The arbitrator ruled that the due process contained in the collective bargaining agreement was meaningless, unless the arbitrator evaluated the substance of the hearing.[48]

In fact, the authority of an outside party to review the substantive cause for an employee's dismissal came up during bargaining for the employment contract.[49] During collective bargaining, the union representative proposed to add just cause to the contract.[50] The board of education counter-proposed a provision that would require "a hearing procedure available only to employees of more than five years' service, and a provision allowing dismissal of those with fewer years of service for any reason in the discretion of the District."[51] Both proposals were dropped, and neither provision was incorporated into the collective bargaining agreement.[52]

The arbitrator found that, due to bargaining history, "just cause" could not be inferred into the agreement.[53] However, the arbitrator also held that the hearing must have some importance, and that it cannot be meaningless formality, rejecting the employer's argument that the employee was necessarily "at-will" as a function of the lack of limitation on the substantive

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43. *Id*. at ¶ 8.
44. *Id*. at ¶ 9
45. *Id*. at ¶¶ 9-11.
46. *Id*. at ¶ 12.
47. *Id*. at ¶ 21 (emphasis added).
48. *Griggsville-Perry I*, 2011 IL App (4th) 110210, ¶ 17.
49. *Id*. at ¶ 18.
50. *Griggsville-Perry II*, 2013 IL 113721, ¶ 24.
51. *Id*. at ¶ 24.
52. *Id*.
53. *Id*. at ¶ 25.

cause for dismissal.[54] Despite a lack of definition of standard, the arbitrator applied a "standard of arbitrariness," holding that:

> At a minimum, [Hires] was entitled to the specifics of the factual allegations giving rise to the generalized conclusion she was confronted with the names, dates, and circumstances of the allegations, precisely what *facts* were reported of her and by whom, and, where the facts are contested, to confront her accusers and adduce any evidence in her defense.[55]

The arbitrator ruled the employee should be reinstated to her prior position, evaluating the cause proffered by the board of education as too arbitrary, and therefore insufficient to warrant termination of the employee's employment.[56]

The case arrived at the Illinois Supreme Court after the Board of Education refused to comply with the arbitrator's ruling, which resulted in a charge of violation of the Illinois Educational Labor Relations Act (which is enforced by the Illinois Educational Labor Relations Board ("IELRB")).[57] After remanding the case for the arbitrator to address the Illinois Supreme Court's decision in *Harrisburg,* IELRB upheld the decision of the arbitrator.[58] The appellate court, reviewing the decision, held the arbitrator's decision did not draw its essence from the collective bargaining agreement, and that the arbitrator had instead issued his "own brand of industrial justice."[59]

In reviewing the appellate court's ruling, the Illinois Supreme Court held that the arbitrator's decision (and, thus, IELRB's decision) could only be overturned if it could be shown that "there is no 'interpretative route to the award, so a noncontractual basis can be inferred and the award set aside.'"[60] In reinstating the award, the Court held that the arbitrator's standard ("a standard of arbitrariness") was reasonable and sufficiently distinct from just cause.[61]

The import of this case cannot be understated. While *Harrisburg* has arguably prevented arbitrators from reviewing the sufficiency of cause underlying the dismissal of an employee when there is no statutory or contractual basis ("just cause" language) upon which the arbitrator's authority may be predicated, *Griggsville-Perry II* permits an arbitrator to imply into a contract a standard of evidence and, therefore, ensure substantive

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54. *Id.*
55. *Id.* at ¶ 21 (emphasis in original).
56. *Id.* at ¶ 26.
57. *Id.* at ¶¶ 13-14.
58. *Id.*
59. *Griggsville-Perry I*, 2011 IL App (4th) 110210, ¶ 17.
60. *Griggsville-Perry II*, 2013 IL 113721, ¶¶ 32-33.
61. *Id.*

due process for the dismissal of an employee, presumably so long as there is contract language requiring *procedural* due process prior to dismissal.[62] It has long been true that some *process* is necessary to protect against *substantive* error.[63] However, with authority granted an arbitrator to imply jurisdiction over substantive cause, there exists a now-validated avenue to challenge the cause (and validity thereof) predicating dismissal of an employee.

It is also important that the Court expressly upheld *Harrisburg*, noting that the dismissal cannot be predicated upon just cause if such a standard was expressly rejected in bargaining. The "standard of arbitrariness" implied by the arbitrator in *Griggsville-Perry I* and *II* (and subsequently upheld by the Illinois Supreme Court) is a lower standard of evidence required in the dismissal of an employee than the standard evaluated in *Harrisburg* (just cause). A collective bargaining agreement containing a process for dismissal but no just cause requirement predicating the dismissal retains the argument that the arbitrator's authority should be limited to a lower standard of evidence than "just cause." In other words, the arbitrator should only be able to determine whether the dismissal was arbitrary (requiring reinstatement), or whether the dismissal was predicated upon *some* cause. Therefore, upholding the decision to terminate employment.

V. OTHER QUESTIONS

The case leaves open several important concerns. First, the concurrence of Justice Karmeier suggests that the outcome may have been different had the employer challenged whether the employee's choice to request a hearing was distinct from the contractual hearing rights when an employee was *required* to appear before the board of education.[64] Second, if an employee is required to have the right to confront his or her accusers, a case involving students potentially requires the employer to require the testimony of students against an employee (who may be motivated to retaliate against a child testifying against the staff member). Finally, broad jurisdiction of an arbitrator to determine the arbitrability of a dispute[65] (after a dispute arrives before the arbitrator, not before) remains a significant impediment to the employer's argument that they are not required to participate in post-termination litigation and, therefore, requires employers to engage thoughtful and thorough review of an employee's record and behavior prior to dismissal.

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62. *Id.*
63. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bd. of Regents v. Roth, 408 U.S. 564 (1972).
64. *Griggsville-Perry II*, 2013 IL 113721, ¶¶ 40-41.
65. Orland Park Sch. Dist. No. 135/Southwest Suburban Fed'n of Teachers, Local 943, IFT/AFT, AFL-CIO, 29 PERI 96, Case No. 2012-CB-0015-C (IELRB Opinion and Order, November 15, 2012).

A. Mandatory v. Permissive Process

Justice Karmeier's brief concurring opinion in *Griggsville-Perry II* noted that had the school district challenged the employee's appearance before the board as "voluntary" rather than required, the outcome of the case might have been different.[66] Justice Karmeier explained that, although the collective bargaining agreement permitted the employee an opportunity to be heard at a pre-termination hearing, nothing required the hearing to be held.[67] Because the applicability of the section of the contract *permitting* pre-termination process (rather than *requiring* it) was not contested by the board of education, the narrow scope of arbitration prohibited the arbitrator from considering whether the fully voluntary request of the employee required the board to provide substantive cause.[68]

In fact, Justice Karmeier's concurrence is well supported by prior case law. Even when a hearing is required, such a hearing need not be a full-evidentiary hearing.[69] In fact, where not otherwise defined, a hearing in which is a voluntary "right to be heard," rather than a mandatory pre-termination requirement, has been held not to require a full-evidentiary provision and, instead, only requires a pre-termination check against mistaken decisions by providing the employee an opportunity to point out why they believe they should not be subject to the deprivation.[70]

Because the issue at the center of *Griggsville-Perry II* was whether the arbitrator could imply substantive evidentiary basis into the hearing rather than whether the hearing was required (and, thus, whether the school district was required to put on evidence at all), the case leaves open the question of whether the availability of a procedure for challenging dismissal mandates the employer's proof of substantive cause.

B. Confronting Accusers

In requiring a loftier standard of evidentiary proof to dismiss an employee (by requiring meaning in dismissal process, rather than mere technical procedural compliance), the courts and the Illinois Educational Labor Relations Board (IELRB) have elevated the minimum standard of proof, and, therefore, the constitutional protections of due process afforded an accused employee.

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66. *Griggsville-Perry II*, 2013 IL 113721, ¶ 40.
67. *Id.*
68. *Id.* at ¶ 41.
69. *Loudermill*, 470 U.S. 532 (1985) (quoting, Boddie v. Connecticut, 401 U.S., 371, 378 (1971), and citing, Mathews v. Eldridge, 424 U.S. 319, 343 (1976)).
70. Swanson v. Bd. of Educ. of Foreman Cmty. Unit Sch. Dist. No. 124, Mason Cnty., 135 Ill. App. 3d 466, 481 N.E. 2d 1248, (4th Dist. 1985).

The Illinois Educational Labor Relations Board weighed in on such Constitutional protections in 2012.[71] In July 2012, IELRB ruled that the Board of Education for the City of Chicago had breached its duty to bargain in good faith when it withholds records from the union representing an employee who was dismissed after being found by the Board of Education to have engaged without appropriate justification in a physical altercation with two students.[72] The union asserted that, to appropriately defend the employee in the subsequent grievance and arbitration, the union needed to see the student disciplinary records for the students involved in the altercation.[73] The union charged that the students had violent histories, and at least one of the students was subsequently expelled from school by the school district.[74]

The arbitrator issued a subpoena compelling the Board of Education to turn over the students' records to the school district.[75] The union in arguing it would accept records redacted of the students' names, suggested the Illinois School Student Records Act ("ISSRA") was inapplicable to the dispute, because, with the names redacted, the student records therefore did not contain "identifying information."[76]

Upon that assertion, the union did not seek a court order commanding the Board of Education to comply with the subpoena, but instead filed a complaint with IELRB arguing that the Board of Education violated its duty under the Illinois Educational Labor Relations Act ("IELRA") to "collectively bargain in good faith" with the exclusive bargaining representative, in violation of § 14(a)(5) of the IELRA.[77]

The Illinois Educational Labor Relations Board ruled in favor of the union, holding that although the employer had a legitimate interest in keeping the documents confidential, the union's acceptance of documents that were redacted sufficiently protected the school district's interests while allowing the union to adequately represent its member.[78] IELRB found that the school district violated the IELRA, and demanded the school district turn over the redacted student records.[79]

On appeal, the school district argued the IELRA and ISSRA are not incongruent and, therefore, it was unnecessary for IELRB to find that the IELRA was superior to ISSRA.[80] The Illinois Educational Labor Relations

71. Chicago Bd. of Educ./Chicago Teachers Union, Case No. 2011-CA-0088-C (IELRB Opinion and Order, December 20, 2012) (rev'd on appeal).
72. *Id*.
73. The Bd. of Educ. of the City of Chicago v. Ill. Educ. Labor Relations Bd., 2013 WL 6699469 ¶¶ 3-5 (1st Dist. 2013).
74. *Id*.
75. *Id*. at ¶ 5.
76. *Id*. at ¶¶ 5-8.
77. *Id*. at ¶¶ 6-8, 115 ILL. COMP. STAT. 5/14(a)(5) (2010).
78. *City of Chicago*, 2013 WL 6699469, ¶ 8.
79. *Id*.
80. *Id*. at ¶¶ 23-24.

Act gives its enforcing agency superior authority in the event of a conflict between laws IELRB enforces and other laws, to wit: "In case of any conflict between the provisions of this Act and any other law, executive order or administrative regulation, the provisions of this Act shall prevail and control."[81] ISSRA requires protection of school student records, which is defined by ISSRA as "any writing or other recorded information concerning a student and by which a student may be individually identified, maintained by a school or at its direction or by an employee of a school, regardless of how or where the information is stored,"[82] unless there is a specific exception permitting their disclosure.[83] Among the exceptions permitting disclosure are:

> To any person for the purpose of research statistical reporting, or planning, provided that such research, statistical reporting, or planning is permissible under and undertaken in accordance with the federal Family Educational Rights and Privacy Act (20 U.S.C. 1232(g)).[84]
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> Pursuant to a court order, provided that the parent shall be given prompt written notice upon receipt of such order of the terms of the order, the nature and substance of the information proposed to be released in compliance with such order and an opportunity to inspect and copy the school student records and to challenge their contents. . . .[85]

Examining the authority of the arbitrator, the Illinois reviewing court also looked at section 7(a) of the Uniform Arbitration Act, which reads:

> (a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in civil cases.[86]

The union, which filed an *amicus curiae* brief in the matter, argued that the arbitrator's order was tantamount to a court order for purposes of ISSRA.[87] The IELRB, respondent in the appeal, argued that ISSRA and

81. 115 ILL. COMP. STAT. 5/17 (2010).
82. 105 ILL. COMP. STAT. 10/2(d) (2010).
83. *Id.* at § 6.
84. *Id.* at § 6(a)(4).
85. *Id.* at § 6(a)(5) (emphasis added).
86. 710 ILL. COMP. STAT. 5/7(a) (2010) (emphasis added).
87. *City of Chicago*, 2013 WL 6699469, ¶ 28.

IELRA were incongruent and, according to the IELRA, which IELRB is required to uphold, in any conflict between the IELRA and another law, the IELRA is superior.[88]

The Illinois First District Appellate Court disagreed with IELRB and the union, holding that the school district complied with the law by insisting upon a legitimate court order prior to disclosure of student records.[89] The court reasoned that had the legislature intended that a school district rely upon the subpoena of an arbitrator, it would have said so, and would not have included the limiting language "in the manner provided by law for the service and enforcement of subpoenas in civil cases."[90] Moreover, the court held that the IELRA and ISSRA are not incongruent, and the correct process would have been for the union to file with a court of competent jurisdiction to seek a court order.[91] The court held that not being able to identify which student information was received on would defeat the purpose of the request and, therefore, even redaction of the names was insufficient to comply with ISSRA, as the students would continue to be identifiable when the records were turned over.[92] Finally, the court held that statutory rights of parents[93] under the Student Records Act could not be abrogated by the parties to an arbitration proceeding reaching agreement on terms and procedures for the disclosure of such records.[94]

Although the appellate court ultimately ruled in favor of the school district's method, the Constitutional requirements compelled by the request for student records in advance of dismissal continue to be protected by IELRB. In other words, despite the school district's compliance with the law, the costs of litigation incurred and IELRB's pronouncement of the employee's right to receive records relevant to his or her defense even when those records are protected from disclosure under the law, emphasizes the IELRB's view (and the court's continuing support of that view) that the employee's right to substantive due process prior to deprivation of employment property rights is paramount.

C. Arbitrability of Dispute

In *Orland Park*, the school district alleged the union committed a violation of the Illinois Educational Labor Relations Act (115 ILCS 5/14(b)(3)) when it compelled he school district to arbitrate a grievance

88. *Id.* at ¶¶ 28-29.
89. *Id.* at ¶¶ 26-31.
90. *Id.* at ¶¶ 25-26.
91. *Id.* at ¶¶ 27-31.
92. *Id.* at ¶ 27.
93. 105 ILL. COMP. STAT. 10/6(a)(5) (2010).
94. *City of Chicago*, 2013 WL 6699469, ¶¶ 27-29.

which was substantively inarbitrable.[95] In an opinion and order issued by IELRB in late 2012, IELRB again refused to reverse its long-standing precedent that it is the arbitrator, *not* the parties that have the authority to determine the arbitrability of disputes.[96] The Illinois Educational Labor Relations Board was not persuaded by the argument that submitting the question of arbitrability to an arbitrator resulted in needless expense or litigation, or that doing so undermined the concept of inarbitrability (that is, by arbitrating the arbitrability of a dispute).[97] Instead, IELRB held, vesting the arbitrator with authority to decide whether the arbitrator possesses the authority to decide the underlying dispute permits an efficient way to challenge the jurisdiction of the arbitrator without needless litigation—the arbitration itself can cease immediately upon the arbitrator's determination that the issue is inarbitrable.[98]

The effect of the precedent is that in order to challenge whether or not a dispute may be disputed by way of arbitration, the challenger must challenge the dispute in arbitration. The processing of such arbitration may be shorter if the matter is found to be inarbitrable—but the dispute must still be submitted to arbitration for a determination on arbitrability.

VI. CONCLUSION

The Illinois Supreme Court's decision in *Griggsville-Perry II* reinstating the Illinois Educational Labor Relations Board's determination that an arbitrator is free to imply a standard requiring substantive proof of misbehavior and sufficient cause for dismissal signals the Court's toughening views on the rights afforded employees who have otherwise limited statutory and contractual protections. The Court has broadened its requirements from mere process to substantive protections, balancing the length of an employee's service with the substantive basis for their termination. However, there remain several substantial open inquires: What meets the standard of arbitrariness and, how is it distinct from a standard of just cause predicating dismissal from employment? Is the substantive cause underlying a dismissal relevant in a case where voluntary procedure is all that is required by the employment contract?

The costs of litigation together with the broad authority of arbitrators to compel document production and to determine their own jurisdiction should serve to encourage employers to carefully weigh the balance of an

95. Orland Park School District No. 135/Southwest Suburban Federation of Teachers, Local 943, IFT/AFT, AFL-CIO, 29 PERI 96, Case No. 2012-CB-0015-C (IELRB Opinion and Order, November 15, 2012).

96. *Id*.

97. *Id.*

98. *Id*.

employee's career against the documentation necessary to prove that the "cause" upon which dismissal is predicated is not arbitrary.