

SUPREME COURT OF ILLINOIS

Springfield, Illinois, May 23, 2011

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

- No. 108785 - Speed District 802, etc., appellant, v. Rachel Warning et al., etc., appellees. Appeal, Appellate Court, First District.
Petition for rehearing denied.
Kilbride, C.J., dissenting upon denial of rehearing.

Freeman, J., dissenting upon denial of rehearing.

Dissents attached.
- No. 109413 - People State of Illinois, appellant, v. Ezekiel Phillips, appellee. Appeal, Appellate Court, First District.
Petition for rehearing denied.
Thomas, J., dissenting upon denial of rehearing.

Dissent attached.
- No. 109541 - Christopher Ries et al., appellants, v. The City of Chicago, etc., appellee. Appeal, Appellate Court, First District.
Petition for rehearing denied.
- No. 109954 - LaSalle Bank National Association, etc., appellant, v. Cypress Creek 1, LP, etc., et al. (Edon Construction Company, Inc., etc., et al., appellees). Appeal, Appellate Court, Third District.
Petitions for rehearing denied.
Freeman, J., dissenting upon denial of rehearing.

Dissent attached.
- Nos. 110199 - Nancy J. Howell et al. (Sherry D. Wendling et al.,
110200 etc., appellees, v. Southern Illinois Hospital
cons. Services, etc., et al., appellants). Appeal,
Appellate Court, Fifth District.
Petition for rehearing denied.
Kilbride, C.J., and Karmeier, J., took no part.

Docket No. 108785.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

SPEED DISTRICT 802, a/k/a Governing Board of Special Education
Joint Agreement District 802, Appellant, v. RACHEL WARNING *et*
al., Appellees.

Opinion filed February 25, 2011.

JUSTICE BURKE delivered the judgment of the court, with
opinion.

Justices Thomas, Garman, and Karneier concurred in the
judgment and opinion.

Chief Justice Kilbride dissented, with opinion.

Justice Freeman dissented, with opinion, joined by Justice Theis.

Chief Justice Kilbride dissented upon denial of rehearing, with
opinion.

Justice Freeman dissented upon denial of rehearing, with opinion.

Dissenting Opinions Upon Denial of Rehearing

CHIEF JUSTICE KILBRIDE, dissenting:

I would allow rehearing in this case for all the reasons stated in
Justice Freeman's dissent upon denial of rehearing. In addition, I
believe this court should allow rehearing to consider the appropriate
remedy for the unfair labor practice in this case.

The petitioners ask this court to address the appropriate remedy
for the unfair labor practice, contending that the Board's "make-
whole" remedy of reinstatement with acquisition of tenure should be
affirmed. I agree. As noted in my dissent (slip op. at 26 (Kilbride,
C.J., dissenting)), the Board has wide discretion in fashioning "make-

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whole” remedies in unfair labor practice cases. *Paxton-Buckley-Loda Education Ass’n*, 304 Ill. App. 3d at 353-54. The Board did not abuse its discretion in reinstating Warning’s teaching contract with the consequence that she receive tenure. I believe the appellate court properly confirmed the Board’s decision, including its remedy of reinstatement of Warning’s employment. I would allow rehearing to address the appropriate remedy for the unfair labor practice as well as the points identified in Justice Freeman’s dissent upon denial of rehearing.

JUSTICE FREEMAN, dissenting:

Warning and the Union petitioned for rehearing in this case. Petitioners request this court to reconsider its decision reversing the judgment of the appellate court and setting aside the decision of the Illinois Educational Labor Relations Board. I would allow rehearing. This decision was erroneous on multiple levels. This court overlooked dispositive legal principles, ignored undisputed facts, and misapplied the law to the facts. Further, this decision may have consequences that my colleagues in the majority surely could not have intended. Therefore, I dissent from the denial of the petition for rehearing.

I. The Collective-Bargaining Agreement

Petitioners claim that this court overlooked that, “[a]s a non-tenured teacher, Warning’s right to have a corrective deficiency plan arises solely out of the collective bargaining agreement.” I agree. My colleagues in the majority overlooked the legal centrality of the collective-bargaining agreement in this case. Lacking this focus, with corresponding analysis, this court reached a result that is contrary to settled labor law.

One of the fundamental policies of the NLRA and the IELRA is freedom of contract. Indeed, it is a “fundamental principle that a collective bargaining agreement constitutes a contract.” *Kozura v. Tulpehocken Area School District*, 791 A.2d 1169, 1174 (Pa. 2002). The United States Supreme Court has recognized that the “fundamental premise” of the NLRA is private bargaining without any official compulsion over the actual terms of the contract, but with

governmental supervision of only the bargaining procedure. *H.K. Porter Co. v. National Labor Relations Board*, 397 U.S. 99, 108 (1970).¹ Indeed, federal labor law is chiefly designed to promote the formation of the collective-bargaining agreement and the private settlement of disputes under it. *Mulvihill v. Top-Flite Golf Co.*, 335 F.3d 15, 24 (1st Cir. 2003); *United Telegraph Workers v. Western Union Corp.*, 771 F.2d 699, 704 (3d Cir. 1985).

Correspondingly, the Illinois General Assembly has declared that the public policy of this state is “to promote orderly and constructive relationships between all educational employees and their employers” and that this “overall policy may best be accomplished by *** requiring educational employers to negotiate and bargain with employee organizations representing educational employees and to enter into written agreements evidencing the result of such bargaining.” 115 ILCS 5/1 (West 2004). Section 10 of the Illinois Educational Labor Relations Act (IELRA) mandated that the District and the Union “confer in good faith with respect to wages, hours *and other terms and conditions of employment*, and to execute a written contract incorporating any agreement reached by such obligation.” (Emphasis added.) 115 ILCS 5/10 (West 2004).

When the District and the Union negotiated in good faith about subjects such as discharge and remediation procedures, and memorialized the bargain that they struck in the collective-bargaining agreement, they created a set of rules governing their future relations. See *Gratiot Community Hospital v. National Labor Relations Board*, 51 F.3d 1255, 1261 (6th Cir. 1995); slip op. at 35 (Freeman, J., dissenting, joined by Theis, J.). In creating the collective-bargaining agreement, the District and the Union deliberately bargained for certain adjustments and concessions. The agreement embodies mutual assent and, during the duration of the contract, either party should be able to rely on the provisions previously bargained for during negotiation of the agreement. See *Port Huron Education Ass’n v.*

¹This court overlooked the settled legal principle that federal interpretation of the National Labor Relations Act (NLRA) is persuasive authority in construing the Illinois Educational Labor Relations Act (IELRA). Slip op. at 35-36 (Freeman, J., dissenting, joined by Theis, J.) (collecting cases).

Port Huron Area School District, 550 N.W.2d 228, 239-40 (Mich. 1996). “Accordingly, any rights and remedies possessed by the union and the employer, as parties to the agreement, and by the employee, as a third-party beneficiary thereof, ultimately derive primarily from the language of the agreement itself.” *Kozura*, 791 A.2d at 1174.

Once the collective-bargaining agreement is made, its own provisions govern the procedures for resolving disputes which arise under its terms. *P.R. Mallory & Co. v. National Labor Relations Board*, 411 F.2d 948, 952 (7th Cir. 1969). Provided that the terms of a collective-bargaining agreement do not violate or conflict with a statute or other controlling law, the rights and remedies delineated by the parties in a specific agreement must be respected. *Kozura*, 791 A.2d at 1174; *In re White Mountain Regional School District*, 908 A.2d 790, 794 (N.H. 2006) (same; holding that school district violated collective-bargaining agreement regarding teacher evaluation procedures). Therefore, where “a collective bargaining agreement is in place, representation rights must be based upon, and may be limited by, that pact.” *Landers v. National R.R. Passenger Corp.*, 814 F.2d 41, 47 (1st Cir. 1987), *aff’d*, 485 U.S. 652 (1988).

The collective-bargaining agreement in this case, “as is true in any collective bargaining agreement, represents a series of trade-offs between an employer and employees reaching a mutually satisfying agreement. Courts should be loathe for a multitude of reasons to abrogate clauses in such contracts absent a pressing legal reason.” *Espinal v. Royal Caribbean Cruises, Ltd.*, 253 F.3d 629, 632 (11th Cir. 2001). Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of regulatory agencies or the courts to interfere with the parties’ choice. See *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. Federal Labor Relations Authority*, 962 F.2d 48, 57 (D.C. Cir. 1992). A court must enforce a collective-bargaining agreement as written so as to give effect to the intent of the contracting parties. A court may not “abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement.” *National Labor Relations Board v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993).

In the present case, this court's only reference to the dispositive significance of the collective-bargaining agreement is found near the end of the majority opinion, where the court erroneously concludes: "Warning's proof that she engaged in a protected union activity is lacking because she has provided no evidence that she was entitled, either by law or contract, to union representation at remediation meetings." Slip op. at 24. Without express analysis, the court appears to concede that the collective-bargaining agreement could have entitled Warning to union representation at the 2004-05 meetings. However, this court relies on only one portion of one section of the collective-bargaining agreement. The court reasons:

"The collective-bargaining agreement here does not explicitly give employees the right to union representation at remediation meetings. Rather, our reading of the contract indicates to us that the right to union representation does not attach to postobservation conferences and remediation, where the possible 'disciplinary action' the employee faces is performance based. We reach this conclusion based on section 3-8(F) of the collective-bargaining agreement, which specifically provides, 'Evaluative conclusions and remediation decisions are made in the sole discretion of the evaluating supervisor and are non-grievable and non-arbitrable.' This being so, a union representative would have no official role to play at postobservation conferences and remediation meetings." Slip op. at 24.

This court did not consider the relevant provisions of the collective-bargaining agreement.

In my dissent, I referenced several sections of the collective-bargaining agreement that indisputably granted Warning the right to union representation at the meetings during the 2004-05 school year. See slip op. at 29-30 (Freeman, J., dissenting, joined by Theis, J.). Significantly, the majority cited only part of section 3-8F of the collective-bargaining agreement. That *entire* section reads as follows, with the part *omitted* from the majority opinion italicized: "*Evaluative procedures, contained herein, are subject to the grievance procedure.* Evaluative conclusions and remediation decisions are made in the sole discretion of the evaluating supervisor and are non-grievable and non-arbitrable." (Emphasis added.) Further, my colleagues in the

majority *omit entirely* section 7H of the employee handbook, which supplements the collective-bargaining agreement as follows: “Evaluative procedures, contained herein, *including those pertaining to employee remediation*, are subject to the grievance procedure.” (Emphasis added.) Also, section 3–10A provides that a teacher is entitled to union representation for disciplinary matters. These provisions supplied the context and justification for Warning’s actions.

When the relevant sections of the collective-bargaining agreement are viewed in their entirety, it is clear to see where the court goes off track. Rehearing should be granted in order to allow this court to apply fundamental principles of labor law to the fairly-bargained-for agreement in this case.²

II. Protected Union Activity

Petitioners ask this court to reconsider its conclusion that Warning failed to prove that she was engaged in protected union activity because she failed to prove that she was entitled to union representation at the 2004-05 meetings. Petitioners contend that this court failed to consider numerous areas of protected activity in which Warning was engaged. Petitioners suggest that had this court considered these areas, the court would have concluded that the District discharged Warning for engaging in the protected union activity. These points are well-taken.

This court did not consider the actions that petitioners took in reliance on the collective-bargaining agreement, and its conclusion that the record contains no evidence of Warning’s collective-bargaining rights is alarming. Indeed, the record before us contains *undisputed* facts that entitled Warning to union representation.

It is undisputed that Dr. Clasberry’s December 8, 2004, letter

²Indeed, another small example of the court’s oversight is found in the court’s erroneous citation to section 34–84 of the School Code (105 ILCS 5/34–84 (West 2004)). Slip op. at 6 n.2; slip op. at 28 n.6 (Freeman, J., dissenting, joined by Theis, J.). In the petition for rehearing, petitioners note: “All parties agree that [section 24–11] is the applicable School Code provision.” Rehearing provides an opportunity to correct this.

involved a *disciplinary* matter, which entitled Warning to union representation, and that the letter directed Warning to meet with Dr. Clasberry and Runyan to discuss her progress regarding that disciplinary matter. See slip op. at 32-33 (Freeman, J., dissenting, joined by Theis, J.). Also, at the March 1, 2005, meeting with Principal Runyan, Warning and Wierzbicki questioned the *procedure* that Runyan employed to evaluate Warning. At the meeting, Warning and Wierzbicki contended that Runyan used the wrong format. Warning brought the employee handbook to the meeting. She and Wierzbicki pointed to the prescribed evaluation format that Runyan should have used. These facts are found in paragraph 15 of the parties' "Joint Statement of *Uncontested Facts*" (emphasis added) and the *uncontested* testimony of Warning and Wierzbicki.

Applying the relevant provisions of the collective-bargaining agreement to the undisputed facts of record, Warning was clearly entitled to union representation at the meetings during the 2004-05 school year. The collective-bargaining agreement entitled Warning to union assistance insofar as she: (1) questioned her evaluative procedure; (2) responded to the December 2004 disciplinary matter; and (3) was reasonably confused by Runyan's express intermingling of remediation and disciplinary issues. See slip op. at 42-43 (Freeman, J., dissenting, joined by Theis, J.). Rehearing is necessary in order to provide an analysis that takes into account these undisputed facts.

III. Pejorative Remarks

Petitioners claim that this court overlooked that, at the March 1, 2005, meeting with Principal Runyan, Warning's and Wierzbicki's request that Runyan use the correct format to evaluate Warning "arose solely out of the collective bargaining agreement and was an exercise of union activity." I agree. Rather than openly applying the clear provisions of the collective-bargaining agreement to the undisputed facts, my colleagues in the majority cast aspersions on Warning.

In its recitation of the facts, the court disparaged Warning's and Wierzbicki's actions at the March 1, 2005, meeting as follows: "Rather than discuss the evaluation, Warning and Beth took this

opportunity *to argue* with Runyan about the evaluation form, itself.” (Emphasis added.) Slip op. at 10. In concluding their analysis, my colleagues again decried Warning as follows:

“And if Warning did not have a right to union representation, then Warning and the Association failed to prove that Warning was engaged in union activity when she insisted on having union representation at her evaluation conference and remediation meetings *and when she chose to follow her representative’s lead in taking an assertive and confrontational stance with regard to her evaluation and the administration’s attempts to provide corrective instruction.*” (Emphasis added.) Slip op. at 24.

Knowing the central importance of the relevant and fairly-bargained-for provisions of the collective-bargaining agreement, and knowing what Warning sought pursuant to that pact, this court’s denouncement of Warning in its misapplication of the law to the facts seems inappropriate to me. The Board has recognized that “give and take *** may occur at a post-observation conference.” See slip op. at 40 (Freeman, J., dissenting, joined by Theis, J.). This court surely could not have intended to suppress this vital, Board-recognized dialogue between teachers under remediation and their employers.

Further, the court’s apparent message was that Warning should not have stood up for herself, or should not have “talked back” to Runyan, but rather should have “minded her place.” However, such a message is itself circumstantial evidence of employment discrimination. See, *e.g.*, *Coburn v. PN II, Inc.*, 372 F. App’x 796, 801 (9th Cir. 2010) (unpublished opinion) (employer’s comment to employee “you don’t talk back”); *Jones v. Forrest City Grocery Inc.*, No. 4:06cv00944, 2008 U.S. Dist. LEXIS 48193 (E.D. Ark. June 23, 2008) (other employees “talked back” to supervisor, while plaintiff-employee fired for “insubordination”); *Fulmore v. Home Depot, U.S.A., Inc.*, No. 1:03-cv-0797-DFH-VSS, 2006 U.S. Dist. LEXIS 22909 (S.D. Ind. Mar. 30, 2006) (same). This court surely could not have intended to condone potentially discriminatory conduct.

Regrettably, my colleagues in the majority publicly deprecated Warning for exercising her legal right to question her evaluative procedure, and expressly chastised her for exercising her right. I believe that rehearing is warranted to remedy this.

IV. Conclusion

Litigants expect a court to fairly construe and apply a collective-bargaining agreement as any other contract. In the present case, however, this court did not fulfill these obligations. To the contrary, a public school teacher's livelihood and reputation were harmed because she exercised her legal, fairly-bargained-for right to union representation.³

For the foregoing reasons, I dissent from the court's denial of the petition for rehearing.

³Petitioners contend that the Board's award of tenure to Warning was the appropriate remedy. However, I continue to believe that the appropriate remedy would have been to restore Warning to a final probationary year.

Docket No. 109413.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v.
EZEKIEL PHILLIPS, Appellee.

Opinion filed March 24, 2011.

JUSTICE THEIS delivered the judgment of the court, with opinion.

Chief Justice Kilbride and Justices Freeman and Burke concurred in the judgment and opinion.

Justice Thomas dissented, with opinion, joined by Justices Garman and Karmeier.

Justice Thomas dissented upon denial of rehearing, with opinion, joined by Justices Garman and Karmeier.

Dissenting Opinion Upon Denial of Rehearing

JUSTICE THOMAS, dissenting:

In its petition for rehearing, the State appropriately takes issue with the majority's conclusion that written admonishments alone can never satisfy the requirements of section 113-4(e). See slip op. at 8-9. Indeed, the majority's categorical rejection of written admonishments is both unnecessary to the disposition of this cause and unsupported by the statutory language, which states only that the court shall "advise" the defendant. Obviously, a court may "advise" a defendant

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either orally or in writing,¹ and section 113-4(e) expresses no preference one way or the other. Consequently, there is no statutory basis for the majority's unilateral elevation of one form over the other.

For this reason, and for the reasons set forth in my initial dissent, I would grant the State's petition for rehearing in this case.

JUSTICES GARMAN and KARMEIER join in this dissent.

¹See, e.g., 720 ILCS 5/12-3.2(d) (West Supp. 2009) ("the court shall advise the defendant orally or in writing"); 720 ILCS 5/12-3.3(c) (West Supp. 2009) (same).

Docket No. 109954.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

LaSALLE BANK NATIONAL ASSOCIATION, Appellant, v.
CYPRESS CREEK 1, LP (Edon Construction *et al.*, Appellees).

Opinion filed February 25, 2011.

JUSTICE GARMAN delivered the judgment of the court, with opinion.

Chief Justice Kilbride and Justices Thomas, Karmeier, and Theis concurred in the judgment and opinion.

Justice Freeman dissented, with opinion, joined by Justice Burke.

Justice Freeman dissented upon denial of rehearing, with opinion, joined by Justice Burke.

Dissenting Opinion Upon Denial of Rehearing

JUSTICE FREEMAN, dissenting:

In my original dissent I warned that the court's decision will cause confusion to Illinois mechanics lien law, an area of practice that is both "technical and complex." Slip op. at 22 (Freeman, J., dissenting, joined by Burke, J.). The court made no attempt to address the legal concerns raised in that dissent concerning its unsupportable interpretation of section 16 of the Mechanics Lien Act. And, because it did not do so, both contractors, Eagle Concrete and Edon Construction, now seek rehearing, in large part because the decision

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has consequences that they believe the court may have inadvertently overlooked or, perhaps, could not foresee.

For example, Eagle notes that the court's construction of the statutory phrase "at the time of the making of the contract" will have an adverse impact on subcontractor's liens, which have, until now, related back to the date of the original contractor. Eagle also asks, in light of the court's holding, "what happens to the value given to a project by a contractor which was neither paid nor for whom a lien was filed?" Eagle explains that this question is a direct result of the court's interpretation of section 16. Eagle further asserts that in the wake of the court's opinion, there will be "only two possible ways for a contractor to ensure payment of its work. It will either need to require the lender to prepay for the next segment of work or require the owner to post a payment bond." Eagle asserts that it is "rare" in the construction industry for there to be such bonds.

Edon, for its part, points out that, in the wake of the court's opinion, "trial courts will be confronted with the virtually impossible task of determining the exact components of a building which are subject to claims of lien creditors," which is the result of the court's novel interpretation of section 16.

The points raised by these contractors demonstrate that the court's opinion, apart from contradicting existing case law, will unnecessarily disrupt existing commercial practices and cause a ripple effect on the marketplace. For these reasons, the contractors' contentions should be addressed. As Edon aptly observes:

"If the Court fails to reconsider its decision and the Majority Opinion stands, *** mechanic's lien[s] will no longer provide protection to contractors. The inevitable result will be chaos in the construction industry. Contractors will [no] longer be able to rely upon the protection of the Act and will have to require payment in advance, which will increase the risk assumed by owners and developers, delay completion of troubled projects, and interfere with economic recovery."

The court's resolution of this case unfairly gives a financial advantage to the banking industry at the expense of the construction industry in the area of mechanics liens. This is not merely unfair, it contradicts the express intent of the General Assembly in enacting the Mechanics

Liens Act. Historically, this court has consistently viewed the Act's purpose to "protect" those who increase or improve, by the furnishing of labor and materials, the "value or condition of the property," that is, contractors like Eagle and Edon. *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 164 (1998); see also *Weather-Tite v. University of St. Francis, Inc.*, 233 Ill. 2d 385, 391 (2009) (same). Apparently, that is no more.

Rehearing is appropriate where the reviewing court has overlooked or misapprehended a point. Ill. S. Ct. R. 367 (eff. Sept. 1, 2006). Rehearing is warranted under these circumstances, and I dissent from the court's denial.

JUSTICE BURKE joins in this dissent.