BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration **between** **STATE OF ILLINOIS** **and** **AFSCME COUNCIL 31**	**CASE NO.:** Arb. Ref. 10.251 July 1, 2011 Increases

OPINION AND AWARD

APPEARANCES (on the Briefs)**:**

For the State:	Joseph M. Gagliardo, Esq. Thomas S. Bradley, Esq. Lawrence Jay Weiner, Esq. Heather R. M. Becker, Esq. Matthew P. Kellam, Esq.
For the Union:	Stephen A. Yokich, Esq.

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I. BACKGROUND AND FACTS

This is a dispute over the refusal by the State of Illinois ("State" or "Employer") to pay a 2% wage increase effective July 1, 2011.[1]

AFSCME Council 31 ("Union" or "AFSCME") represents employees employed by the State in a number of bargaining units working in the State's departments, boards, authorities and commissions. The parties' collective bargaining relationship spans over approximately 35 years and 19 multi-year collective bargaining agreements in various bargaining units.[2] The relationship and the parties' early collective bargaining agreements pre-date the passage of the Illinois Public Labor Relations Act, 5 ILCS 315/21 ("IPLRA").[3] The current collective bargaining agreement between the State and the Union is for the period September 5, 2008 through June 30, 2012 ("Agreement", "2008-2012 Agreement" or "CBA").[4]

As originally negotiated in 2008, the multi-year Agreement provided at Article XXXII, Section 6 for wage increases of 15.25% to be distributed as follows:[5]

Effective Date	Increase
1/1/09	1.50%
7/1/09	2.50%
1/1/10	2.00%
7/1/10	2.00%
1/1/11	2.00%
7/1/11	4.00%
1/1/12	1.25%

The contract language in Article XXXII, Section 6 of the Agreement for each of the periodic increases provides:[6]

> Effective [date], the pay rates for all bargaining unit classifications and steps shall be increased by [amount]%, which rates are set out in Schedule A.

Under the Agreement, covered employees also are entitled to step and longevity increases.[7]

The September 5, 2008 effective date of the Agreement is significant. At the time, the country and the State were experiencing a recession. However, within weeks after the par-

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1 As discussed *infra* at II, pursuant to a Scheduling Order dated July 7, 2011, the parties submitted briefs on certain issues along with offers of proof and exhibits. For clarity, although there are some duplicate exhibits, reference to both sets of exhibits is not always made.

2 Joint Exh. 1; Union Exhs. 1-18.

3 The IPLRA became effective July 1, 1984.

4 Joint Exh. 1.

5 *Id*.

6 *Id*.

7 *See e.g*., *id*. at Article XXXII, Sections 1, 4, 6(h)-(j), 7 and Schedule A.

ties completed their negotiations and the Agreement was ratified and signed, the stock market crashed and what was a recession became "The Great Recession" whose effects reared up and wreaked havoc on so many aspects of the economy.[8] Skyrocketing unemployment rates, mass layoffs, foreclosures, financial bailouts and, from the State's perspective, severe losses of revenue streams and resulting increased immense budget deficits soon followed.[9]

The Union responded to the State's fiscal crisis. Faced with the real prospect of layoffs of potentially thousands of employees covered by the Agreement, in 2010 the Union and the State entered into a series of concession agreements including a Mediated Resolution Memorandum and two Cost Savings Agreements (collectively referred to as the "Cost Savings Agreements" or "CSA").[10] While containing a number of cost savings items, relevant to the present dispute the Union agreed to defer certain wage increases negotiated in the 2008-2012 Agreement.[11] In exchange, the State guaranteed not to lay off employees through FY12.

As agreed by the parties, the total savings to the State as a result of the concessions agreed to by the Union exceeded $300,000,000 for FY11 and the parties sought to save the State an additional $100,000,000 in FY12.[12] Given the

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[8] On October 8, 2007, the Dow Jones Industrial Average ("DJI") stood at 14,093. On the effective date of the Agreement — September 5, 2008 — the DJI stood at 11,221. By October 10, 2008, the DJI dropped to 8,451 and by March 9, 2009, the DJI dropped to 6,547 — a decline of 42% in first six months of the Agreement and a 53% drop since the high point in October 2007.
See http://finance.yahoo.com/q?s=%5EDJI

[9] "… [T]he current recession has been characterized as the greatest recession experienced by this country since the Great Depression of 1929." Willis, "U.S. Recession Worst Since Great Depression, Revised Data Show", Bloomberg.com (August 1, 2009).
www.bloomberg.com/apps/news?pid=20601087&sid=aNivTjr852TI

[10] Union Exh. 19; Joint Exhs. 2(a), (b). The Mediated Resolution was signed on January 26, 2010. Union Exh. 19. The First Cost Savings Agreement was signed on September 24, 2010. Joint Exh. 2(a). The Second Cost Savings Agreement was signed by the Union on October 28, 2010 and by the State on November 3, 2010. Joint Exh. 2(b).

[11] *Id*. Other cost savings items included a voluntary furlough program, curbing overtime expenditures, reviewing personal service contracts and making changes in the State's health insurance program as well as the Union's agreeing to work with the State to find other areas for cost savings for the State. *Id*.

[12] The Second Cost Savings Agreement memorializes the savings to the State achieved by the concessions agreed to by
[footnote continued]

realities of The Great Recession and the State's fiscal crisis, had the Union not agreed to these concessions, there would have been massive layoffs of employees.[13]

[continuation of footnote]
the Union and provides (Joint Exh. 2(b) at 1):

> WHEREAS, the parties recognize the State of Illinois is faced with a significant and unprecedented fiscal deficit.
>
> WHEREAS, the parties entered into a mediated resolution of an outstanding grievance regarding planned layoffs on January 26, 2010, that saved jobs and saved the State over $300 million dollars in FY11.
>
> WHEREAS, the parties have continued to seek cost savings measures by entering into a Cost Savings Agreement that established a goal of saving the State of Illinois an additional $100 million dollars in FY12.
>
> * * *

[13] Some economists tell us that the recession commenced in December 2007. *See e.g.*, *The National Bureau of Economic Research* (September 2010). www.nber.org/cycles/sept2010.html

According to the Bureau of Labor Statistics and the Illinois Department of Employment Security, the unemployment rates at the national level and in Illinois in December 2007 (when the recession began), September 2008 (when the negotiations for the 2008-2012 Agreement were completed and the Agreement was signed), January 2010 (when the Mediated Resolution was signed) September 2010 (when the First Cost Savings Agreement was signed), November 2010 (when the Second Cost Savings Agreement was completely signed) and currently (as of May, 2011 as currently reported for the State and June 2011 as currently reported nationally) show the following:
www.bls.gov/news.release/archives/empsit_01042008.pdf

[footnote continued]

[continuation of footnote]
www.bls.gov/news.release/archives/empsit_10032008.pdf
www.bls.gov/news.release/archives/empsit_02052010.pdf
www.bls.gov/news.release/archives/empsit_10082010.pdf
www.bls.gov/news.release/archives/empsit_12032010.pdf
www.bls.gov/news.release/archives/empsit_07082011.pdf

See also, http://data.bls.gov/cgi-bin/surveymost?la+17 for Illinois rates (selecting Illinois not seasonally adjusted from the tables and retrieving data) and http://lmi.ides.state.il.us/download/LAUS_CURRENT_STATE.pdf

UNEMPLOYMENT RATES

Date	Event	National	Illinois
12/07	Recession begins	5.0%	5.4%
9/08	2008-20012 Agreement signed	6.1%	6.3%
1/10	Mediated Resolution signed	9.7%	12.1%
9/10	First Cost Savings Agreement signed	9.6%	9.3%
11/10	Second Cost Savings Agreement Completely signed	9.8%	9.1%
5/11	Current (5/11)	-	9.0%
6/11	Current (6/11)	9.2%	-

Some economists now say that The Great Recession is over. *See* The National Bureau of Economic Research, *supra* asserting that the recession ended as of June 2009 ("... a trough in business activity occurred in the U.S. economy in June 2009. The trough marks the end of the recession that began in December 2007 and the beginning of an expansion. The recession lasted 18 months, which makes it the longest of any recession since World War II."). However, the unemployment rates which have skyrocketed since the recession began and have remained at high levels tell a different story on the ground.

The point of all of this is that throughout 2010 when unemployment rates in Illinois were at remarkably high levels (as high as 12.1% on the dates the various Cost

[footnote continued]

Relevant to this specific dispute, as set forth above, the originally negotiated Agreement called for a 4% wage increase effective July 1, 2011. The concessions from the Cost Savings Agreements reduced that increase to 2% effective July 1, 2011 and deferred the remaining 2% to February 1, 2012.[14]

Although the Union agreed to defer 2% of the 4% wage increase due on July 1, 2011, on that date the State declined to implement the 2% increase in 14 departments, boards, authorities and commissions.[15] According to a July 1, 2011 memo from Central Management Services [emphasis in original]:[16]

> Pursuant to the Illinois Constitution, the General Assembly possesses the sole authority to make appropriations for all expenditures of public funds by the State. Additionally, the Illinois Public Labor Relations Act (5 ILCS 315/21) states, "[s]ubject to the appropriation power of the employer, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act.
>
> The Governor's proposed budget to the General Assembly sought to fully fund all collective bargaining contracts. However, the budget that was passed by the General Assembly and sent to the Governor **DOES NOT** contain appropriation authority to implement cost of living adjustments, longevity adjustments or step increases for employees covered by a collective bargaining agreement in the following fourteen (14) departments, boards, authorities and/or commissions:
>
> Criminal Justice Information Authority
> Corrections
> Deaf and Hard of Hearing Commission
> Guardianship & Advocacy Commission
> Historic Preservation
> Human Rights Commission
> Human Rights (Department of)
> Human Services
> Juvenile Justice
> Labor (Department of)
> Natural Resources
> Prisoner Review Board
> Public Health
> Revenue
>
> Accordingly, due to the absence of sufficient appropriations by the General Assembly, the above listed agencies cannot implement the FY12 increases.
>
> Agencies not listed above were granted sufficient appropriation authority by the General Assembly to implement the

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[continuation of footnote]
Savings Agreements were reached) and the State was facing an extraordinary fiscal crisis, the Union responded to the State's fiscal crisis and negotiated approximately $400,000,000 in concessions from the 2008-2012 Agreement, including deferral of wage increases as reflected in the Cost Savings Agreements. *See* Union Exh. 19; Joint Exhs. 2(a), (b) ($300,000,000 actual savings in FY11 and targeting an additional $100,000,000 in savings in FY12).

[14] The specific deferral of the 2% increase from the originally negotiated 4% increase in the 2008-2012 Agreement is found in the Second Cost Savings Agreement signed by the Union on October 28, 2010 and by the State on November 3, 2010. Joint Exh. 2(b) at p. 3, par. 1:

* * *

> 1. 2% of the July 1, 2011 general increase set forth in Article XXXII, Section 6(f) [of the Agreement] shall be deferred until February 1, 2012. ...

[15] Not all employees covered by the Agreement were affected.

[16] Union Exh. 26.

> FY12 increases and shall proceed to implement the FY12 increases.
>
> * * *

Approximately 30,000 employees represented by the Union were affected by the July 1, 2011 pay freeze. The cost of the 2% increase is estimated by the Union at $75,000,000.[17] According to the State, although the Governor originally submitted a budget to fund the 2% increases, based upon appropriations made by the General Assembly and notwithstanding existing deficits without the 2% increase, the budget deficits caused by the 2% increase for the 14 departments, boards, authorities and commissions were:[18]

Agency	Deficit Amount
Criminal Justice Information Authority	$50,140
Corrections	$56,586,700
Deaf and Hard of Hearing Commission	$26,800
Guardianship & Advocacy Commission	$684,600
Historic Preservation	$610,800
Human Rights Commission	$289,900
Human Rights (Department of)	$2,800,000
Human Services	$89,972,100
Juvenile Justice	$12,229,500
Labor (Department of)	$138,100
Natural Resources	$8,757,500
Prisoner Review Board	$131,300
Public Health	$1,050,217
Revenue (Department of)	$23,001,400

In the Cost Savings Agreements, the parties agreed that I have jurisdiction to resolve disputes which may arise.[19] On July 5, 2011, the Union invoked that jurisdiction and requested that I order the State to pay the 2% increase effective July 1, 2011 to those employees who did not receive the scheduled increase.[20]

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[17] Union Brief at 4.

[18] *See* State Brief at 9-10, 12, 16-27; State Exhs. 7, 8, 10.

The Union may not agree with the accuracy of the State's deficit numbers or may contend that allocations of existing funding could have been made on a different basis. In the end and because the State's obligation to pay the 2% increase effective July 1, 2011 has been found, any disagreement by the Union is not material to the outcome of the dispute before me. The amounts set forth above are just the State's contentions. I make no findings of fact concerning their accuracy.

[19] The parties agreed that I should retain jurisdiction over disputes arising out of the Mediated Resolution (Union Exh. 19 at pars. 8, 11); the First Cost Savings Agreement (Joint Exh. 2(a) and par. 6); and the Second Cost Savings Agreement (Joint Exh. 2(b) at p. 2, which incorporated the Second Cost Savings Agreement into the First Cost Savings Agreement).

[20] *See* State Exh. 1.

II. DISCUSSION

After conferring with parties on July 6, 2011, it was apparent to me that there are three issues involved in this dispute: (1) whether the State violated the 2008-2012 Agreement as amended by the Cost Savings Agreements when it did not pay the 2% increase for all bargaining unit classifications and steps effective July 1, 2011?; (2) whether Section 21 of the IPLRA permits the State to not pay the increase? and (3) whether the Constitution permits the State to not to pay the increase? By Scheduling Order dated July 7, 2011, I directed the parties to brief three questions:[21]

> A. Excluding those issues set forth in 1(B) and (C) below, under the strict terms of the Collective Bargaining Agreement (and modifications made through the Mediated Resolution and the Cost Savings Agreements), can the State decline to pay the increases called for effective July 1, 2011?
>
> B. What effect does Section 21 of the Illinois Public Labor Relations Act, 5 ILCS 315/21 ("Act") ("Subject to the appropriation power of the employer, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act") have on the dispute before me as stated in 1(A) above? In particular, the parties are to address *Ligenza v. Round Lake Beach*, 133 Ill.App.3d 286, 478 N.E.2d 1187, 88 Ill.Dec. 579 (2nd Dist., 1985); any legislative history for Section 21; and any court interpretations concerning Section 21 as they might be relevant to the dispute in this case. With respect to the legislative history for Section 21, when was Section 21 added to the Act?
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> C. The State has raised Constitutional issues concerning the propriety of its declining to pay the increases called for effective July 1, 2011. Can I consider those issues in this forum?

The parties have filed their briefs in response to those questions.

A. Did The State Violate The Agreement And The Cost Savings Agreements When It Declined To Pay The 2% Increase Effective July 1, 2011 For All Bargaining Unit Classifications And Steps?

As originally negotiated in September 2008, the 2008-2012 Agreement provided in Article XXXII, Section 6(f) that "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased by 4.00%, which rates are set out in Schedule A." After the concessions were negotiated in the Cost Savings Agreements, that language therefore read "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased

[21] July 7, 2011 Scheduling Order at par. 1(A).

by 2.00%, which rates are set out in Schedule A."

The words "... shall be increased by 2.00% ..." leave nothing to imagination. "[S]hall" is not discretionary. In simple dictionary terms, "shall" means "must; ... obliged to".[22] Under the mandatory, clear and simple terms of the negotiated language, the State must pay the 2% wage increase effective July 1, 2011. As a matter of contract, the State has no choice.

Article V, Section 2, Step 4(c) of the Agreement provides that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." Under the strict terms of the Agreement, I simply have no authority to find that the State can avoid paying the 2% increase to all the employees who were entitled to that increase effective July 1, 2011. For me to find that the State can avoid its obligation to pay that 2% increase, I would have to amend the language of the Agreement and change the words "*shall* be increased by 2.00%" to "*may* be increased by 2.00%" [emphasis added]. Or, if I were to accept the argument of the State that "... the Wage Increases can be paid only if there are sufficient appropriations by the General Assembly"[23], I would have to add that phrase to the Agreement. The parties agreed in Article V, Section 2, Step 4(c) of the Agreement that, as an arbitrator, I do not have that authority. As the parties agreed in that section, I simply cannot "... amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." And that is *precisely* what the State is asking me to do by allowing it not to pay the 2% increase effective July 1, 2011.[24]

In sum, the Agreement and the Cost Savings Agreements *require* that "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased by 2.00%, which rates are set out in Schedule A." The State therefore violated the Agreement and the Costs Savings Agreements when it did not pay the 2% increase effective

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[22] *The Random House Dictionary of the English Language* (2nd ed.).

[23] State Brief at 39.

[24] When parties to collective bargaining agreements agree that wage increases are contingent upon the existence of sufficient appropriations, they say so. There is no language here to that effect.

July 1, 2011 as required by those Agreements.[25]

B. What Effect Does Section 21 Of The IPLRA Have On This Dispute?

When the State refused to pay the 2% increase effective July 1, 2011 to the employees in the 14 departments, boards, authorities and commissions, the State specifically referenced Section 21 of the IPLRA:[26]

> ... Additionally, the Illinois Public Labor Relations Act (5 ILCS 315/21) states, "[s]ubject to the appropriation power of the employer, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act ...

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[25] According to the State, "... as a result of failure by the General Assembly to provide sufficient funding to the 14 Affected Agencies, CMS submitted an emergency Pay Plan on July 1, 2011 that eliminated payment of the Wage Increase in the 14 Affected Agencies." State Brief at 15. As pointed out by the Union, under Article XXXIV, Section 2 of the Agreement, the actions for an emergency Pay Plan do not change the State's obligation to pay the 2% increase. Union Brief at 5. Article XXXIV, Section 2 of the Agreement provides [emphasis added]:

> **ARTICLE XXXIV**
> **Authority of the Contract**
> * * *
> **Section 2. Effect of Department of Central Management Services Rules and Pay Plan**
>
> Unless specifically covered by this Agreement, the Rules of the Department of Central Management Services and its Pay Plan shall control. However, *the parties agree that the provisions of this Agreement shall supersede any provisions of the Rules and Pay Plan of the Director of Central Management Services relating to any subjects of collective bargaining contained herein when the provisions of such Rules or Pay Plan differ with this Agreement*. ...

Under Article XXXIV, Section 2 of the Agreement, the changing of the Pay Plan therefore does not allow the State to avoid its obligations to pay the 2% increase.

The Union also points out that in the past when the parties desired to make wage increases contingent upon the existence of revenues, they explicitly provided for that contingency in their collective bargaining agreements. Union Brief at 6, citing four separate 1977-1979, contracts in different bargaining units. Union Exhs. 3-6. The Union also points out that in the past the parties have negotiated wage re-openers for additional years beyond the first year of a contract. Union Brief at 6, citing two contracts from 1975-1977. Union Exhs. 1-2. *[footnote continued]*

[continuation of footnote]
The Union argues that neither re-openers or revenue contingency provisions were provided here and thus none can be implied. Union Brief at 6. The Union therefore relies upon bargaining history. However, bargaining history is irrelevant in the face of clear contract language. *See Elkouri and Elkouri, How Arbitration Works,* (BNA, 5th ed.), 501 ("Precontract negotiations frequently provide a valuable aid in the interpretation of ambiguous provisions"). There is nothing ambiguous or unclear about "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased by 2.00%." Results of bargaining in the past therefore do not add to this case.

The Union has also cited a number of arbitrations — one Illinois case in *Office of the Secretary of State and SEIU Local 73*, Grv. No. 91-37 (Feuille, 1992) — as well as awards from other jurisdictions. Union Brief at 7-8. These are disputes arising under different contracts and do not change the result that the clear language of *this* Agreement and the Cost Savings Agreements require the State to pay the 2% increase.

[26] Union Exh. 26 [emphasis in original].

Section 21 of the IPLRA provides:

> Sec. 21. Subject to the appropriation power of the employer, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act.

In the July 7, 2011 Scheduling Order and with respect to Section 21, I directed the parties to address "... *Ligenza v. Round Lake Beach*, ... 478 N.E.2d 1187 ...; any legislative history for Section 21; and any court interpretations concerning Section 21 as they might be relevant to the dispute in this case."[27] As I explained to the parties on July 6, 2011, my request that *Ligenza* be addressed was because prior to my becoming an arbitrator and when I was still an advocate, I was counsel of record in that case in the Second District Appellate Court and that case addressed the validity of public sector multi-year collective bargaining agreements that were negotiated prior to the passage of the IPLRA.

The facts in *Ligenza* were similar to the facts in this case. The Village of Round Lake Beach negotiated a multi-year collective bargaining agreement with the Fraternal Order of Police which was executed on November 3, 1982 and was effective through April 30, 1984; the contract called for wage increases on May 1 and November 1, 1983 and the Village refused to pay the first wage increase.[28] Reversing the Circuit Court, the Second District held that [citations omitted]:[29]

> ... Under [Ill.Rev.Stat.1981, ch 24 par.] section 8-1-7 ... any contract made without a full prior appropriation is null and void. ... Section 8-1-7 (and its statutory predecessors) has consistently been construed as denying a municipality the power to contract, and thereby incur indebtedness, for a period longer than one year, at least in the absence of an enabling statute authorizing such a contract. ... Further, a party contracting with a city is presumed to know whether the city is prohibited from making a contract, and a contract made in violation of section 8-1-7 is void *ab initio* and cannot be enforced by estoppel or ratification. ...

Although the Second District's decision issued on May 21, 1985 — after the IPLRA became effective July 1, 1984 — the dispute involved events before the passage of the Act. Thus, according to the Second District in *Ligenza*, multi-year collective bargaining agreements were, in many cases, "void *ab initio*". Because multi-year collective bargaining agreements have been a major

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[27] July 7, 2011 Scheduling Order at par. 1(B).

[28] 478 N.E.2d at 1187-1188,

[29] 478 N.E.2d at 1189-1190.

component of stable collective bargaining relationships, the *Ligenza* litigation, as I explained to the parties on July 6, 2011 and as I recalled, was a concern of both management and labor as the IPLRA was being cobbled together. Given that so many multi-year collective bargaining agreements have been negotiated since the passage of the IPLRA (probably in the thousands state-wide and nine master multi-year agreements between the parties[30]), I asked the parties to brief the question of whether Section 21 of the IPLRA was designed to put to rest any questions concerning the validity of multi-year collective bargaining agreements.

In response to my question, according to the State:[31]

> The language of Section 21 is clear and unambiguous. The plain meaning of Section 21 confirms that provisions in the CBA/CSA that require State expenditures are subject to appropriation. ...
>
> * * *
>
> Under the Constitution, only the General Assembly has the authority to make appropriations for the expenditure of public funds, and expenditures made by the Executive Branch are contingent on the existence of corresponding appropriations established by the General Assembly. The clear and unambiguous language of Section 21 restates this Constitutional mandate, without embellishment, and further subjects all multi-year collective bargaining agreements entered into by the State to the same Constitutional appropriations restrictions. ...
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> * * *
>
> ... The only plausible interpretation of Section 21 is that expenditures contemplated by all multi-year collective bargaining agreements are subject to sufficient appropriations having been established by the General Assembly.
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> * * *
>
> ... There is only one conclusion, *i.e.*, that Wage Increases can be paid only if there are sufficient appropriations by the General Assembly.
>
> * * *
>
> *Ligenza* ... supports the proposition that expenditures under contracts entered into by government entities remain subject to appropriations established by the legislature. ....

In response to my question, according to the Union [emphasis in original, footnotes omitted]:[32]

> Section 21 of the act authorizes public employers and public employees to enter into multi-year contracts. This authority is "subject to the appropriations power of the employer." The best reading of this statutory language is that it was not intended to impact whatever appropriations authority exists under State and local law. In other words, where State or local law sets an annual appropriations cycle, the negotiation of a multi-year collective bargaining agreement would not, in and of itself, change that annual cycle.
>
> Section 21 does not say that collective bargaining agreements are subject to appropriations or that multi-

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30 Joint Exh. 1; Union Exhs. 11-18.

31 State Brief at 34-35, 39, 42.

32 Union Brief at 9-11.

> year agreements are invalid unless they are subject to appropriations. Nor does it say that State collective bargaining agreements are subject to the approval of the General Assembly. In fact, the Senate rejected an amendment offered by Senator Keats that would have added such approval into the IPLRA. ...
>
> It is much more likely that Section 21 was a response to court decisions which seemingly limited the right of employers to make multi-year contracts. [citing *Ligenza* and] *Libertyville Education Association v. Board of Education*, 56 Ill. App. 3d 503 (2d Dist. 1977) (upholding School Board's power to enter into multi-year collective bargaining agreement).
>
> The dispute in *Ligenza* arose in May 1983, as the General Assembly was considering Senate Bill 536. The Senate version of the Act, which was debated and passed out of the Senate on May 25, 1983, did not contain Section 21. Section 21 was part of comprehensive amendment proposed by Representative Greiman when the house debated the bill on June 23 and June 24, 1983. There was no separate discussion of the impact of Section 21. It is very likely, though, that the litigation in *Ligenza* was in "full swing" by that date and that Section 21 was added to respond to the claim of the Village in that litigation. ...

The parties agree that since the passage of the IPLRA in 1984, there have been no reported court cases addressing Section 21.[33]

I am an arbitrator whose authority flows strictly from the terms of the collective bargaining agreement. I am not a judge with authority to interpret statutory provisions. *See Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 53-54, 57 (1974) [quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), emphasis added]:

> [A]n arbitrator is *confined* to interpretation and application *of the collective bargaining agreement* ...
>
> * * *
>
> ... Thus the arbitrator has authority to resolve only questions of *contractual* rights ....
>
> * * *
>
> ... [T]he specialized competence of arbitrators pertains primarily to the law of the shop, *not* the law of the land .... *[T]he resolution of statutory* or constitutional *issues is a primary responsibility of courts* ....

Section 21 of the IPLRA is a *statutory* provision. The parties did not specifically make Section 21 part of the Agreement or the Cost Savings Agreements. As an arbitrator, I therefore have no authority to interpret that statutory provision. Statutory interpretations must be made by the courts and not by arbitrators.[34]

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[33] Union Brief at 11, note 6; State Brief at 35, note 7.

[34] The State's argument that "... the Arbitrator not only has the authority, he has the legal obligation to look beyond the 'four corners' of the CBA/CSA and consider external law ... in making his decision and rendering his award ..." (State Brief at 58) is wrong — particularly for this arbitrator. As I have consistently held over the past 25

[footnote continued]

The parties' completely different views of the meaning and intent of Section 21 of the IPLRA, the lack of any real specific legislative history cited and the lack of court decisions concerning Section 21 reinforce my view that the courts and not an arbitrator should interpret Section 21.

However, even if I could interpret Section 21, for me to do so in any fashion which changes the language of the Agreement and the Cost Savings Agreements to allow the State to avoid the mandatory requirement that "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased by 2.00%, which rates are set out in Schedule A" would again violate the limitations on my authority agreed to by the parties in Article V, Section 2, Step 4(c) of the Agreement which provides that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement."

As an arbitrator, I cannot address the State's Section 21 argument.

C. The State's Constitutional Arguments

The State makes a series of Constitutional arguments that although the Agreement and the Cost Savings Agreements provide for the 2% increase effective July 1, 2011, the Illinois Constitution requires an appropriation for all expenditures and because the July 1, 2011 increases were not appropriated by the General Assembly, the increases therefore cannot be paid.[35]

For similar reasons discussed at II(B) *supra*, I cannot consider the State's Constitutional arguments. Again, my authority is limited by agreement of the parties in Article V,

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[continuation of footnote]
plus years as an arbitrator, unless statutes are specifically incorporated into a collective bargaining agreement, my role as an arbitrator is to only interpret the contract. The courts address "external law".

The State's reliance upon *Keeley & Sons, Inc. v. Zurich American Insurance Company*, 409 Ill.App.3d 315 (5th Dist. 2011) (State Brief at 59) for support to the contrary is not persuasive. *Keeley* was a dispute under an insurance policy. The defendant insurance company moved to dismiss the complaint and compel arbitration, which the court denied, finding that there was no obligation to arbitrate the particular insurance policy dispute. *Keeley* did not involve a collective bargaining agreement. There was no language in *Keeley* such as that found in Article V, Section 2, Step 4(c) of the Agreement which provides that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." And there certainly was no authority such as that found in *Gardner-Denver* and *Enterprise Wheel & Car*, *supra*, which so clearly delineates the role of arbitrators to interpret contracts and the courts to interpret statutes.

[35] State Brief at 31-33, 39, 46, 60.

Section 2, Step 4(c) of the Agreement which provides that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." And as stated in *Alexander v. Gardner Denver, supra,* 415 U.S. at 53-54, 57, "... the arbitrator has authority to resolve only questions of *contractual* rights ... the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land .... *the resolution of* statutory or *constitutional* issues is a primary responsibility *of courts* ...." [emphasis added]. Like the State's statutory arguments, in my capacity as an arbitrator under the Agreement, the State's Constitutional arguments are therefore not for me to decide.

D. The State's Other Contractual Arguments

The State makes a series of contractual arguments citing portions of the Agreement which it contends support its position. I disagree.

First, the State relies upon Article XXXIV, Section 1 of the Agreement asserting that language "... incorporates the Constitutional and statutory mandates ... which demonstrate that without the General Assembly appropriating sufficient funds, the State cannot legally pay the Wage Increases set forth in the CBA/CSA."[36] That section provides:

> **ARTICLE XXXIV**
>
> **Authority of Contract**
>
> **Section 1. Partial Invalidity**
>
> Should any part of this Agreement or any provisions contained herein be Judicially determined to be contrary to law, such invalidation of such part or provision shall not invalidate the remaining portions hereof and they shall remain in full force and effect. The parties shall attempt to renegotiate the invalidated part or provisions. The parties recognize that the provisions of this contract cannot supersede law.

This provision is the standard "partial invalidity" or "savings" language found in most collective bargaining agreements. This type of language simply keeps other provisions of a collective bargaining agreement in force in the event a section is found to be unlawful. For example, under such a clause a judicial determination that a seniority provision for bidding on vacancies violates Title VII of the Civil Rights Act would not automatically invalidate employees' entitlements to vacation based on years of service found elsewhere in the contract.

In any event, in this case it has not been "*Judicially* determined"

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36 State Brief at 44.

that the 2% increase is "contrary to law". That is what the State is asking me to do. But I am not a judge. I am an arbitrator bound by the negotiated terms of the Agreement and the Cost Savings Agreements which require the State to pay the 2% increase and prohibit me as an arbitrator from changing that obligation.

Putting aside, however, that it has not been "Judicially determined" that the 2% wage increase is unlawful, the State's focus on the last sentence in Article XXXIV, Section 1 — "[t]he parties recognize that the provisions of this contract cannot supersede law" — is upon very general language. There is a fundamental rule of contract construction that specific language governs general language.[37] The *specific* language found in Article V, Section 2, Step 4(c) of the Agreement which provides that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement" governs the *general* language in Article XXXIV, Section 1 relied upon by the State.

Second, the State relies upon Article II, Section 2 of the Agreement, arguing that language incorporates the requirement of a legislative appropriation for the July 1, 2011 increases into the Agreement.[38] Again, I disagree.

Article II, Section 2 provides:

> **ARTICLE II**
>
> **Management Rights**
>
> * * *
>
> **Section 2. Statutory Obligations**
>
> Nothing in this Agreement shall be construed to modify, eliminate or detract from the statutory responsibilities and obligations of the Employer except that the exercise of its rights in the furtherance of such statutory obligations shall not be in conflict with the provisions of this Agreement.

If anything, Article II, Section 2 of the Agreement works *against* the State's position. The key phrase is "... the exercise of its [the State's] rights in the furtherance of such statutory obligations shall not be in conflict with the provisions of this Agreement."

According to the State, "[o]n February 16, 2011, the Governor submitted a budget to the General Assembly that requested sufficient appropriations for each of the 14 Affected Agencies to pay the FY12

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[37] *How Arbitration Works*, *supra* at 498 ("Where two contract clauses bear on the same subject, the more specific should be given precedence.").

[38] State Brief at 44-45.

Wage Increases provided for in the CBA/CSA ...[a]nd within a few days after the Governor presented his proposed budget, legislation was introduced into the General Assembly that requested sufficient appropriations for each of the 14 Affected Agencies to pay the Wage Increases."[39] However, according to the State, "[i]n May 2011, the General Assembly passed a series of pieces of legislation that did not make a sufficient appropriation from the GRF for any of the 14 Affected Agencies to pay the Wage Increases in FY12."[40] Further, according to the State, while "[t]he original Pay Plan provided for Wage Increases for all of the AFSCME employees ... as a result of failure by the General Assembly to provide sufficient funding to the 14 Affected Agencies, CMS submitted an emergency Pay Plan on July 1, 2011 that eliminated payment of the Wage Increases in the 14 Affected Agencies."[41]

Thus, according to the State, the Governor sent a budget to the General Assembly sufficient to fund the increases, but in the exercise of its rights, the General Assembly did not appropriate funds for the increases. But Article II, Section 2 of the Agreement provides that "... the exercise of its [the State's] rights in the furtherance of such statutory obligations *shall not be in conflict with the provisions of this Agreement*" [emphasis added]. As I read that provision of the Agreement, by not funding the 2% increases specifically required by the Agreement and the Cost Savings Agreements, the State clearly violated Article II, Section 2 of the Agreement. Simply put, the State exercised a right (*i.e.*, to appropriate) which was "in conflict with" the requirement in the Agreement and the Cost Savings Agreements that "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased by 2.00%, which rates are set out in Schedule A." Article II, Section 2 of the Agreement clearly prohibits the State from doing so.

E. The State's Other Arguments

The State advances other arguments which also do not change the result.

Citing *American Federation of State, County and Municipal Employees, AFL-CIO v. Department of*

[39] State Brief at 9-10.

[40] State Brief at 12.

[41] State Brief at 11, 15.

Central Management Services, 173 Ill.2d 299, 219 Ill. Dec. 501, 671 N.E.2d 668 (1996), the State argues that if I do not agree with its position concerning the Constitution and statutes, my award violates public policy.[42] *Central Management Services*, supports my finding that I cannot address the external law issues concerning interpreting Section 21 and the Constitution which the State wants me to consider.

I was the arbitrator in *Central Management Services*. Because the language of the collective bargaining agreement required that "[d]iscipline shall be imposed as soon as possible after the Employer is aware of the event or action giving rise to the discipline", I was compelled to reinstate a discharged employee because the State took approximately one year to discipline that employee and because other arbitration awards under that contract (which were final and binding) interpreting the "as soon as possible" language found that waiting 99, 71, or 124 days to discipline an employee was too long.

The Illinois Supreme Court noted that my contractual interpretation was not contested. "... DCFS does not dispute the arbitrator's contractual *interpretation* and even concedes that it violated the agreement's time provision" [emphasis in original].[43] The remedy of reinstatement was, however, set aside by the Court on public policy grounds. But in doing so, the Court noted that "[q]uestions of public policy, of course, are ultimately left for resolution *by the courts* ... [and e]ven if the arbitrator had considered issues of public policy, 'we may not abdicate to him our responsibility to protect the public interest at stake'" [emphasis added].[44] It is therefore clear that "[q]uestions of public policy, of course, are ultimately left for resolution *by the courts"* [emphasis added].[45]

Therefore, as an arbitrator, I do not decide public policy issues.

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[42] State Brief at 63-64.

[43] 671 N.E.2d at 673.

[44] 671 N.E.2d at 678.

[45] *Id*. In holding that public policy decisions are for the courts and not for arbitrators, the Illinois Supreme Court (671 N.E. 2d at 678) cited *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) ("... the question of public policy is ultimately one for resolution by the courts") and stated that (671 N.E.2d at 674) "[t]he seminal case involving the [public policy] exception is *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 ... (1987)" which also held that "the question of public policy is ultimately one for resolution by the courts." 484 U.S. at 43.

Questions of public policy — like statutory and Constitutional interpretations — are for the courts and not arbitrators. And that makes sense. As an arbitrator, I am a private citizen who holds no elected or appointed authority by the citizens of this state. Our elected and appointed officials including lawmakers, administrators and judges — and not me — should make public policy decisions.[46]

The State makes other arguments which I just have no authority to decide or are not relevant to this dispute. Specifically, the State argues that the judicial branch cannot order the State to expend funds absent an appropriation by the General Assembly[47]; the State did not impair the Agreement[48]; the nonpayment of the wage increase does not violate the Equal Protection Clause of the United States or Illinois Constitution[49]; and any unspent appropriations from the FY11 cannot be used to pay for the wage increases.[50] Those are just not issues for an arbitrator to decide or are not relevant to this contractual dispute before me.

F. The Remedy

I have found that the State violated the Agreement and the Cost Savings Agreements when it failed to pay the 2% increase for all bargaining unit classifications and steps effective July 1, 2011 as required by those Agreements. A remedy is therefore required.

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46 *Central Management Services, supra,* was a discipline case involving reinstatement of a public employee who may have engaged in serious misconduct but was an individual I had to reinstate because of the clear procedural contract violation concerning untimely discipline — again, a finding which was not contested. 671 N.E.2d at 673. The holding in *Central Management Services* is that in discipline cases, before an arbitrator can reinstate a public employees who engages in misconduct, the arbitrator must make a rational finding that the employee can be trusted to not engage in similar misconduct in the future (671 N.E.2d at 680):

> ... [A]s long as the arbitrator makes a rational finding that the employee can be trusted to refrain from the offending conduct, the arbitrator may reinstate the employee to his or her former job, and we would be obliged to affirm the award.

This is not a discipline case but is a contract dispute. I therefore do not have to make that "rational finding". But the importance of this part of the discussion is that notwithstanding the State's efforts to get me to decide external law questions — here, public policy questions — it is well and long-established that arbitrators do not perform that function. That function is for the courts.

47 State Brief at 46.

48 State Brief at 47-54.

49 State Brief at 55-57.

50 State Brief at 65-66.

It has long been held that arbitrators have a broad degree of discretion in the formulation of remedies.[51] Further, the purpose of a remedy is to restore the *status quo ante* and make whole those who have been harmed by a demonstrated contract violation.[52]

In the exercise of my remedial discretion and to restore the *status quo ante* and make the adversely impacted employees whole for the State's clear violation of the Agreement and the Cost Savings Agreements, the State is directed to pay the 2% increase to all bargaining unit classifications and steps and continue to pay that increase and, within 30 days from the date of this award, to make whole those employees who did not receive those increases effective July 1, 2011.

III. CONCLUSION

I am cognizant of the enormity of this dispute and the attention it has received. However, one must stand back and objectively look at what is going on and what the ramifications will be.

The State is in serious financial straits. Given its financial prob-

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51 *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra*. 363 U.S. at 597:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

See also, Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc., 514 F.2d 1235, 1237, *reh. denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 and cases cited therein:

> In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility.

Additionally, *see Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62, 67 (2000) [citations omitted]:

> ... [C]ourts will set aside the arbitrator's interpretation of what their agreement means only in rare instances. ....
>
> * * *
>
> ... [B]oth employer and union have agreed to entrust this remedial decision to an arbitrator. ....

Finally, *see* Hill and Sinicropi, *Remedies in Arbitration* (BNA, 2nd ed.), 62 ("... [M]ost arbitrators take the view that broad remedy power is implied ....").

52 *See e.g., Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867)]:

> The general rule is, that when a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. ...

lems, the State therefore felt it had to do something to lessen the impact of those conditions on the taxpayers. What the State did was to unilaterally freeze a 2% wage increase which, according to the negotiated Agreement and Cost Savings Agreements, was to take effect July 1, 2011.

However, as they have been doing since 1975, the parties negotiated a multi-year collective bargaining agreement for 2008-2012 and came to terms literally weeks before what was a recession turned into "The Great Recession". Recognizing the serious financial circumstances facing the State and in order to avoid layoffs of potentially thousands of employees, the Union responded to the State's fiscal problems and agreed to concessions from the 2008-2012 Agreement — one of which was to defer 2% of a 4% increase due July 1, 2011. The total concessions agreed to by the Union were in the vicinity of $400,000,000. Now, with respect to the negotiated reduced increase due July 1, 2011 of 2%, the State argues that it does not have to pay that reduced amount effective July 1, 2011 even though it agreed to pay that reduced amount in the Cost Savings Agreements.

As discussed in this award, under the Agreement and the Cost Savings Agreements and as a matter *of contract*, the State's position that it is not obligated to pay the reduced negotiated increase is clearly incorrect. The contractual requirement that "[e]ffective July 1, 2011, the pay rates for *all* bargaining unit classifications and steps *shall* be increased by 2.00% …" [emphasis added] is, as a matter of contract, mandatory, clear and simple. Under Article V, Section 2, Step 4(c) of the Agreement, the parties agreed that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." As an arbitrator, I therefore have absolutely no authority to change the State's obligation to pay the 2% increase effective July 1, 2011 for all bargaining unit classifications and steps. The State must therefore pay that increase and make whole those employees who did not receive those increases.

Because I am an arbitrator functioning solely under the terms of the Agreement and the Cost Savings Agreement, I have not considered the State's statutory or Constitutional arguments. However, if the State is correct in its statutory or Constitutional arguments that al-

though it has negotiated multi-year collective bargaining agreements with the Union since 1975 (and, I note, has also long negotiated multi-year collective bargaining agreements with other unions), it now does not have to pay negotiated and agreed-upon wage increases in those multi-year collective bargaining agreements because wage increases agreed to by the State in those agreements are, in effect, unenforceable or are contingent upon sufficient appropriations from the General Assembly and that such positions find support in Section 21 of the IPLRA and the Constitution, then a major foundation of the collective bargaining process — the multi-year collective bargaining agreement — has been upended.

Multi-year collective bargaining agreements bring stability to the parties and the public. Multi-year collective bargaining agreements set forth the parties' obligations and responsibilities over a period of years. It is mostly employers who seek multi-year collective bargaining agreements (typically longer agreements than those sought by unions) so that the employers can have a clear idea of costs associated with labor and so that they can plan and budget accordingly. Because employers in the public sector basically provide services to the public, labor costs (wages and benefits) constitute most of the costs public employers incur.

If the State is correct that negotiated wage increases in multi-year collective bargaining agreements are unenforceable or are contingent upon action by the General Assembly (or, for other public entities, the various county, city, village, district councils, boards of trustees, etc.), it is quite likely that very few unions, if any, will now ever agree to multi-year collective bargaining agreements. If the State is correct in its position, I highly doubt that any interest arbitrator setting terms and conditions of collective bargaining agreements in security employee, peace officer and fire fighter disputes under Section 14 of the IPLRA will choose to impose anything more than a contract for one year's duration because final economic offers made by a public sector employer will, for all purposes, be illusory if those offers are contingent upon subsequent appropriations being passed by the public employer.

If the State is correct in its statutory and Constitutional arguments, the result will be that public sector employers and unions will have to

negotiate collective bargaining agreements *every year* instead of having mufti-year agreements (typically three to five years and sometimes longer) which bring labor peace and stability. Some public sector contracts in this state have taken years to negotiate or settle through the interest arbitration process under Section 14 of the IPLRA.[53] Having been involved in the collective bargaining process as a mediator and interest arbitrator for over 25 years, I estimate that *thousands* of multi-year collective bargaining agreements have been settled in this state. If the State is correct that economic provisions of multi-year collective bargaining agreements are not enforceable or are contingent upon subsequent appropriations for the out years of the agreements, then the collective bargaining process will be, to say the least, severely undermined. If the State is correct, the result will be most chaotic and costly as public sector employers and unions will now have to drudge through the often laborious, time-consuming and costly collective bargaining process on a yearly basis. Unions will do that. Public sector employers will be loathe to have to engage in that costly and time consuming endeavor on a yearly basis. If the State is correct in its statutory and Constitutional arguments, the multi-year collective bargaining agreement is, for all purposes, probably dead.[54]

"'A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'"[55] But "[t]he collective bargaining agreement states the rights and duties of the parties ... [i]t is *more* than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate ... [t]he collective bargaining agree-

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53 *See e.g.*, the interest arbitration awards cited at the Illinois State Labor Relations Board's interest arbitration website, www.state.il.us/ilrb/subsections/arbitration/IntArbAwardSummary.htm

54 This is a very serious dispute with profound ramifications on the collective bargaining process in this state. But sometimes lyrics to music succinctly express a condition. That is the case here with respect to multi-year agreements should the State prevail in its statutory and Constitutional arguments. Bruce Springsteen, "With Every Wish" (Human Touch, Columbia, 1992):

> Before you choose your wish you better think first. With every wish there comes a curse.

55 Calamari and Perillo, Contracts (West, 3rd ed. 1987), § 1-1 at p. 1-2 [quoting 1. Williston, Contracts § 1 (3rd ed. 1957) and Restatement, Contracts § 1 (1932)].

ment covers the whole employment relationship" [emphasis added].[56]

After the State has entered into many similar multi-year agreements with the Union since 1975, for the State to now argue that economic provisions of multi-year collective bargaining agreements are somehow unenforceable or contingent upon appropriations actions by the General Assembly, the "promise" the State made — even after the Union gave concessions to reduce the State's 4% "promise" to a 2% "promise" — will certainly have the effect of severely undermining something that "... is more than a contract ... [but] is a generalized code to govern a myriad of cases ... [and] covers the whole employment relationship." As an arbitrator, I have no authority under the Agreement to allow the State to avoid its promise.

Under the 2008-2012 Agreement and the Cost Savings Agreements, as a matter of contract, I find the State cannot avoid its obligations to pay the 2% increase required effective July 1, 2011. As a matter of contract, the only way the State can avoid that "promise" to pay that 2% increase for all bargaining unit classifications and steps is to return to the bargaining table with the Union to see if there is a way that it can further modify that promise.[57] However, as a matter of contract, the State cannot simply refuse to pay the increase. If the State cannot obtain an agreement to modify its promise to pay the increase, then it may well be forced to take other actions that are not inconsistent with the Agreement and the Cost Savings Agreements. Whether the courts will allow the State to avoid its promise to pay the 2% increase for all bargaining unit classifications and steps effective July 1, 2011 on a statutory or Constitutional basis is up to the courts and not me.

The July 7, 2011 Scheduling Order provides at paragraph 4:

> 4. If, after reading the parties' briefs, I determine that evidentiary hearings, further briefs and/or argument are necessary, I will notify the parties and those will be scheduled on an expedited basis.

Given that I have found that based upon what has been presented in the parties' submissions

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[56] *United Steelworkers of America v. Warrior & Gulf, Co.*, 363 U.S. 574, 578-579 (1960) [citing Schulman, Reason, Contract, and the Law in Labor Relations, 68 Harv.L.Rev. 999, 1004-1005].

[57] Should the parties desire to meet to attempt further modifications and as I have done before, I will make myself available to the parties to mediate those attempts.

and that the contract issue is dispositive in the Union's favor and that I cannot reach the State's statutory and Constitutional arguments, no further proceedings are necessary before me on the merits of this dispute. The Union's position has merit and will therefore be sustained.[58]

In sum, and notwithstanding all of the arguments presented, this is a *very* simple case with a *very* simple bottom line. In the 2008-2012 Agreement, the State promised to pay a 4% increase for all bargaining unit classifications and steps effective July 1, 2011. In the Cost Savings Agreements and because of the financial condition of the State, the Union agreed to reduce that payment obligation to 2% effective July 1, 2011. The State did not pay the 2% increase effective July 1, 2011. These are hard fiscal times for the State — no doubt. However, when the State did not pay the increase effective July 1, 2011 for all bargaining unit classifications and steps (*i.e.*, to the employees in the 14 departments, boards, authorities and commissions), the State did not keep its promise. The State must now keep its promise.

IV. AWARD

The State violated the 2008-2012 Collective Bargaining Agreement and the Cost Savings Agreements between the State and AFSCME when, effective July 1, 2011, the State did not pay the 2% increase for all bargaining unit classifications and steps. As a remedy, the State is directed to immediately pay that 2% increase for all bargaining unit classifications and steps and continue to pay that increase. Within 30 days from the date of this award, the State shall make whole those employees who did not receive the increases effective July 1, 2011.[59]

Edwin H. Benn
Arbitrator

Dated: July 19, 2011

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[58] Offers of proofs have been made by the parties concerning facts supportive of various arguments. To the extent those offers have not been considered or given weight as part of the discussion in this matter, those offers are rejected as not being material to the issues to resolve this particular dispute under the 2008-2012 Agreement and the Cost Savings Agreements. The parties' complete submissions, however, remain part of this record.

[59] Pursuant to Article V, Section 2, Step 4(c) of the Agreement ("[t]he expenses and fees of the arbitrator shall be paid by the losing party ..."), arbitral fees have been assessed against the State.

BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration **between** **STATE OF ILLINOIS** **and** **AFSCME COUNCIL 31**	**CASE NO.:** Arb. Ref. 10.251 July 1, 2011 Increases

SUPPLEMENTAL OPINION AND AWARD

APPEARANCES:

For the State: Joseph M. Gagliardo, Esq.
Thomas S. Bradley, Esq.

For the Union: Stephen A. Yokich, Esq.

Dated: July 16, 2012

CONTENTS

I. BACKGROUND

By award dated July 19, 2011, I found that the State of Illinois ("State") violated the collective bargaining agreement ("Agreement" or "CBA") and concession agreements ("Cost Savings Agreements" or "CSAs") to that Agreement between the State and the AFSCME Council 31 ("Union") when the State failed to pay approximately 30,000 employees a 2% wage increase which was to be effective July 1, 2011 as required by those agreements ("*July 2011 Wage Increase Award*"). As a remedy, I required the State to pay the employees the 2% wage increase retroactive to July 1, 2011, with interest.[1]

The concessions granted by the Union to the State from the Agreement as established in the CSAs amounted to approximately $400,000,000.[2] The cost of the July 1, 2011, 2% increase (which was reduced by the Union in the CSAs from 4% called for in the Agreement) and which was withheld by the State for the employees is estimated by the Union at $75,000,000.[3]

I issued another award on October 3, 2011 barring the State from closing certain facilities prior to June 30, 2012 and laying off employees as a result of those closures because of promises made in the CSAs that, in exchange for the concessions granted by the Union to the Agreement, the State would not close facilities or lay off employees prior to June 30, 2012 ("*Facilities Closure Award*").

The State filed suits in the Circuit Court of Cook County seeking to vacate both awards, with the Union seeking to have both awards confirmed.

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1 *July 2011 Wage Increase Award* at 19-20.

2 *July 2011 Wage Increase Award* at 5-6 (note 13), 21.

3 *July 2011 Wage Increase Award* at 7.

State of Illinois (Central Management Services) v. American Federation of State, County and Municipal Employees, Council 31, 11 CH 25352 and 11 CH 31591. Those two cases were consolidated before Cook County Circuit Court Judge Richard J. Billik, Jr.

By Order dated July 9, 2012 ("*Order*"), Judge Billik remanded the dispute covered by the *July 2011 Wage Increase Award* to me for further proceedings.[4] This Supplemental Opinion and Award issues in response to Judge Billik's *Order*.[5]

II. DISCUSSION

A. The Court Remand

In the *Order*, Judge Billik held:[6]

> ... [A]fter giving consideration to the positions of both parties on this matter, it has been shown there is a well-defined and dominant public policy that can be identified under the circumstances in this case, and that is plaintiff [the State] cannot spend public funds for the Wage Increases without sufficient appropriation by the General Assembly to do so, pursuant to section 21 of the IPLRA. Plaintiff has thus identified a public policy which supersedes the policy defendant is advocating that favors collective bargaining and the enforcement of the payment obligations of the parties' agreements resulting therefrom.
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> * * *
>
> ... The [*July 2011 Wage Increase*] Award did not determine the merits of plaintiff's public policy argument, but this court has addressed it and found that plaintiff has shown that there is a public policy that can be identified. Plaintiff has

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4 *Order* at 29-33.

5 The underlying dispute covered by the *Facilities Closure Award* (*i.e.*, the facility closures and layoffs) appears to have become moot after the Illinois General Assembly enacted legislation to reallocate appropriations enabling the various agencies where the closures were announced to operate without closures or layoffs prior to June 30, 2012. *Order* at 14, note 1.

6 *Order* at 24, 30-33.

> demonstrated that the Arbitrator did not consider its public policy defense before determining liability under the terms of the CBA/CSA. ... A finding of plaintiff's liability under the CBA/CSA requires a determination first on the factual basis being advanced by plaintiff for the application of the public policy defense to excuse plaintiff's compliance with the contractual obligation to pay the Wage Increases. Simply stated, it is plaintiff's burden, in effect, to establish its defense of a lack of "sufficient" appropriated funds to pay the Wage Increases under the CBA/CSA to defendant's members in the remaining 10 Agencies.
>
> * * *
>
> ... Plaintiff has shown that it can assert an identifiable public policy that if established is a defense to plaintiff's compliance with that contractual obligation to pay the Wage Increases. The factual premise of that asserted public policy defense is that there are insufficient appropriated funds to allow plaintiff to pay any Wage Increases to defendant's members in any of the remaining 10 Agencies. The matter is remanded to arbitration for a further proceeding to allow plaintiff to establish its public policy defense. ...

Thus, because Judge Billik found that there is a public policy that the State "... cannot spend public funds for the Wage Increases without sufficient appropriation by the General Assembly to do so ...", he remanded the case to me "... for a further proceeding to allow plaintiff to establish its public policy defense."

Judge Billik issued a very thoughtful and thorough decision. After several conferences with the parties concerning the *Order* — and with all due respect to the Court — I cannot accept the Court's remand. The decision Judge Billik seeks from me concerns public policy which is a decision that must be made by the Court and not by an arbitrator. Therefore — and over the Union's objection — this dispute must be returned to Judge Billik for any further proceedings he deems necessary to finally resolve whether my arbitration award

requiring that the State pay the employees the 2% wage increase effective July 1, 2011 should be vacated or confirmed.[7]

The basis for Judge Billik's ruling is premised on his finding of the existence of a public policy that would allow the State to avoid the clear terms of its agreed-upon contractual obligation to pay the 2% wage increase to the employees effective July 1, 2011. Public policy questions are issues for the courts to decide. Public policy questions are not for arbitrators to decide because arbitrators are confined to the terms of the parties' negotiated contract language.

In the *July 2011 Wage Increase Award*, I outlined the limited scope of an arbitrator's authority and the respective roles played by arbitrators and the courts:[8]

> I am an arbitrator whose authority flows strictly from the terms of the collective bargaining agreement. I am not a judge with authority to interpret statutory provisions. *See Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 53-54, 57 (1974) [quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), emphasis added]:
>
> > [A]n arbitrator is *confined* to interpretation and application *of the collective bargaining agreement* ...
> >
> > * * *
>
> ... Thus the arbitrator has authority to resolve only questions of *contractual* rights ....
>
> * * *

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7 The Union suggested to the Court that any further proceedings be conducted before me. *Order* at 29 ("... Defendant [the Union] suggested at the hearing and also suggests in it submissions that if 'further proceedings are necessary, the case should be remanded to the ... arbitrat[or] to conduct them.'" The Court found that it "... does not necessarily disagree with that suggestion ...." *Id.* Even so, for reasons explained in this Supplemental Award, I cannot accept the remand.

8 *July 2011 Wage Increase Award* at 13 [emphasis in original].

> ... [T]he specialized competence of arbitrators pertains primarily to the law of the shop, *not* the law of the land .... *[T]he resolution of statutory* or constitutional *issues is a primary responsibility of courts* ....

In the *July 2011 Wage Increase Award*, I also pointed out that the parties had agreed that my authority is confined *only* to interpretation of the terms of the parties' negotiated contract language, which required that I had to find that the State violated the Agreement and the Cost Savings Agreements when it failed to pay the 2% increase effective July 1, 2011.[9]

> The words "... shall be increased by 2.00% ..." leave nothing to imagination. "[S]hall" is not discretionary. In simple dictionary terms, "shall" means "must; ... obliged to". Under the mandatory, clear and simple terms of the negotiated language, the State must pay the 2% wage increase effective July 1, 2011. As a matter of contract, the State has no choice.
>
> Article V, Section 2, Step 4(c) of the Agreement provides that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." Under the strict terms of the Agreement, I simply have no authority to find that the State can avoid paying the 2% increase to all the employees who were entitled to that increase effective July 1, 2011. For me to find that the State can avoid its obligation to pay that 2% increase, I would have to amend the language of the Agreement and change the words "*shall* be increased by 2.00%" to "*may* be increased by 2.00%" [emphasis added]. Or, if I were to accept the argument of the State that "... the Wage Increases can be paid only if there are sufficient appropriations by the General Assembly", I would have to add that phrase to the Agreement. The parties agreed in Article V, Section 2, Step 4(c) of the Agreement that, as an arbitrator, I do not have that authority. As the parties agreed in that section, I simply cannot "... amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." And that is *precisely* what the

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[9] *July 2011 Wage Increase Award* at 9-10 [footnotes omitted].

> State is asking me to do by allowing it not to pay the 2% increase effective July 1, 2011.
>
> In sum, the Agreement and the Cost Savings Agreements *require* that "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased by 2.00%, which rates are set out in Schedule A." The State therefore violated the Agreement and the Costs Savings Agreements when it did not pay the 2% increase effective July 1, 2011 as required by those Agreements.

In an effort to avoid having to pay the wage increase required by the Agreement and the CSAs, the State made a series of statutory, Constitutional and public policy arguments to me. However, because my authority as an arbitrator is limited to *only* interpret the parties' negotiated contract language, I declined to consider those arguments, finding that those arguments were for the courts to decide — and not for an arbitrator.[10]

One specific non-contractual argument which the State made to me addressed public policy, which, for reasons stated above, as an arbitrator I could not consider:[11]

> ... [A]s an arbitrator, I do not decide public policy issues. Questions of public policy — like statutory and Constitutional interpretations — are for the courts and not arbitrators. And that makes sense. As an arbitrator, I am a private citizen who holds no elected or appointed authority by the citizens of this state. Our elected and appointed officials including lawmakers, administrators and judges — and not me — should make public policy decisions.

As further discussed in the *July 2011 Wage Increase Award*, aside from the clear contract language agreed to by the parties which limited my authority to only interpret the parties' negotiated words, the courts have been very clear

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[10] *July 2011 Wage Increase Award* at 13-19.

[11] *July 2011 Wage Increase Award* at 18-19.

that questions of public policy are to be resolved by the courts and *not* by arbitrators:[12]

> Citing *American Federation of State, County and Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill.2d 299, 219 Ill. Dec. 501, 671 N.E.2d 668 (1996) ["*Central Management Services*"], the State argues that if I do not agree with its position concerning the Constitution and statutes, my award violates public policy. *Central Management Services*, supports my finding that I cannot address the external law issues ....
>
> I was the arbitrator in *Central Management Services*. Because the language of the collective bargaining agreement required that "[d]iscipline shall be imposed as soon as possible after the Employer is aware of the event or action giving rise to the discipline", I was compelled to reinstate a discharged employee because the State took approximately one year to discipline that employee and because other arbitration awards under that contract (which were final and binding) interpreting the "as soon as possible" language found that waiting 99, 71, or 124 days to discipline an employee was too long.
>
> The Illinois Supreme Court noted that my contractual interpretation was not contested. "... DCFS does not dispute the arbitrator's contractual *interpretation* and even concedes that it violated the agreement's time provision" [671 N.E.2d at 673, emphasis in original]. The remedy of reinstatement was, however, set aside by the Court on public policy grounds. But in doing so, the Court noted that "[q]uestions of public policy, of course, are ultimately left for resolution *by the courts* ... [and e]ven if the arbitrator had considered issues of public policy, 'we may not abdicate to him our responsibility to protect the public interest at stake'" [671 N.E.2d at 678, emphasis added]. It is therefore clear that "[q]uestions of public policy, of course, are ultimately left for resolution *by the courts*" [emphasis added].

Thus, aside from the contractual prohibition placed on me by the parties to not consider matters outside the four corners of the documents constituting

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[12] *July 2011 Wage Increase Award* at 17-18 [footnotes omitted].

the parties' negotiated language, the Illinois Supreme Court made it *very* clear that questions of public policy are *for the courts* — and *not* for arbitrators. Again, the Illinois Supreme Court could not have been more clear in its demarcation of the role of arbitrators and the courts (*Central Management Services*, 671 N.E.2d at 678):

> ... Questions of public policy, of course, are ultimately left for resolution by the courts. *Board of Trustees*, 74 Ill.2d at 424, 24 Ill.Dec. 843, 386 N.E.2d 47; see also *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. at 2183, 76 L.Ed.2d at 307. Even if the arbitrator had considered issues of public policy, "we may not abdicate to him our responsibility to protect the public interest at stake." *Board of Trustees*, 74 Ill.2d at 424, 24 Ill.Dec. 843, 386 N.E.2d 47. ...

The clear demarcation requiring arbitrators to not decide public policy questions and leaving those decisions for the courts comes from long-established precedent. *July 2011 Wage Increase Award* at 18, note 45 [discussing *Central Management Services*]:

> ... In holding that public policy decisions are for the courts and not for arbitrators, the Illinois Supreme Court (671 N.E. 2d at 678) cited *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) ("... the question of public policy is ultimately one for resolution by the courts") and stated that (671 N.E.2d at 674) "[t]he seminal case involving the [public policy] exception is *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 ... (1987)" which also held that "the question of public policy is ultimately one for resolution by the courts." 484 U.S. at 43.

Simply put then, arbitrators interpret collective bargaining agreements and courts interpret statutes, the Constitution and public policy. But here, the Court is remanding the case to me on a public policy question ("... Plaintiff has shown that it can assert *an identifiable public policy* that if established is a defense to plaintiff's compliance with that contractual obligation to pay the Wage

Increases ... [t]he factual premise of that asserted *public policy defense* is that there are insufficient appropriated funds to allow plaintiff to pay any Wage Increases to defendant's members in any of the remaining 10 Agencies ... *[t]he matter is remanded to arbitration for a further proceeding to allow plaintiff to establish its public policy defense*" [emphasis added]).[13]

Whether the narrow question remanded is a factual one or not, it remains a question going to application of public policy to this dispute, which I have found irrelevant to my limited role of deciding the contractual question — *i.e.*, after accepting the concessions granted by the Union from the 2008-2012 Agreement as specified in the CSAs, the State agreed to pay a 2% wage increase on July 1, 2011 (instead of a 4% increase as called for by the Agreement) and then failed to make that 2% payment to all employees. That is a contract violation as I found. If there is a public policy defense to be made by the State, that is for the court to decide. And if the court needs facts to determine the legitimacy of the State's public policy defense, those factual determinations must be made by the Court. I have already found that there can be no further proceedings before me as an arbitrator:[14]

> Given that I have found that based upon what has been presented in the parties' submissions and that the contract issue is dispositive in the Union's favor and that I cannot reach the State's statutory and Constitutional arguments, no further proceedings are necessary before me on the merits of this dispute. The Union's position has merit and will therefore be sustained.

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[13] *Order* at 32-33.

[14] *July 2011 Wage Increase Award* at 24-25 [footnote omitted].

The Court's remand to me to determine facts for the State's public policy defense appears to be premised upon the fact that the Cost Savings Agreements designated me as the arbitrator for disputes under those agreements:[15]

> ... Defendant [the Union] suggested at the hearing and also suggests in it submissions that if "further proceedings are necessary, the case should be remanded to the ... arbitrat[or] to conduct them." ... This court does not necessarily disagree with that suggestion, especially with the clear language in the CBA/CSA providing for arbitration and, particularly, even providing for a designated arbitrator named in the First CSA to be retained to decide "any disputes relative" to the CSAs, which would include the dispute over the Wage Increases. The nature of the asserted public policy defense based upon the insufficiency of available appropriated funds would appear to involve a factual review and determination. ...

The parties clearly gave me final and binding authority under the Cost Savings Agreements to resolve disputes. However, that specific grant of authority was that "Arbitrator Benn shall be retained to decide any disputes *relative to this agreement*" with the further proviso that "[h]is decisions shall be final and binding on both parties" [emphasis added].[16] As the arbitrator under

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[15] *Order* at 29.

[16] *See Facilities Closure Award* at 16-17 [footnotes omitted]:

> ... Aside from the 2008-2012 Agreement which provides at Article V, Section 2, Step 4(c) that "[t]he decision and award of the arbitrator shall be final and binding on the Employer, the Union, and the employee or employees involved", the State and the Union gave me that broad authority in the Cost Savings Agreements. In the Cost Savings Agreement effective September 24, 2010, the parties agreed:
>
> * * *
>
> 6. Arbitrator Benn shall be retained to decide any disputes relative to this agreement. His decisions shall be final and binding on both parties. ....
>
> The same broad authority is also found in the Cost Savings Agreement effective November 3, 2010:
>
> * * *
>
> This Agreement is incorporated into the September 24, 2010 Cost Savings Agreement including the dispute resolution mechanism outlined in paragraph 6 of that Agreement.

those agreements, I interpret the language "Arbitrator Benn shall be retained to decide any disputes relative to this agreement" to mean that I have jurisdiction to decide *only* disputes related to the *contractual* provisions agreed to by the parties (which I have done). I do *not* interpret that language to mean that I have the authority to decide factual disputes concerning a public policy defense as raised by the State and remanded to me by the Court.

Because my interpretation of this contract language concerning my jurisdiction to resolve disputes "... shall be final and binding on both parties", there is no basis for the language to be interpreted by the Court in a fashion to require me (or any other arbitrator) to decide a public policy defense — even if it means determining facts for that public policy defense. That conclusion is buttressed by the fact that I have twice found in these disputes (both in the *July 2011 Wage Increase Award* and the *Facilities Closure Award*) that, as an arbitrator, I do not determine public policy.[17] Determining facts for a public policy defense is no different than determining the public policy defense itself. Public policy is simply outside of my authority. That interpretation of the parties' contract language precludes any arbitral determination of the public policy question in this dispute.[18]

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[17] In addition to specifically rejecting the State's public policy argument in the *July 2011 Wage Increase Award*, in the *Facilities Closure Award*, I also similarly rejected the arguments made by the State which focused on external law — *i.e.*, matters outside the negotiated contract language of the Agreement and the CSAs which would include public policy arguments as made here. *Facilities Closure Award* at 26-31.

[18] *Facilities Closure Award* at 34-35, note 68:

* * *

> And the decision by me as the arbitrator in this dispute concerning what the material facts are, what the contract language means and what the procedures shall be require great deference. *See American Federation of State, County and Municipal Employees, AFL-CIO v. Department of Central Management Services, et al.*, 671 N.E.2d 668, 672 (1996) where the Illinois Supreme Court found [citations omitted]:

[footnote continued]

The public policy issue must therefore go back to Judge Billik for determination.

The Court has remanded this matter to me and I have now returned it to the Court. This is not ping-pong. This is an extremely delicate jurisdictional question that has to be resolved in this most important dispute.

Again, with all due respect to the Court, I must decline the remand.[19]

[continuation of footnote]

> This court has consistently recognized that the judicial review of an arbitral award is extremely limited. ... [A] court is duty bound to enforce a labor-arbitration award if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective-bargaining agreement. ...
>
> To this end, any question regarding the interpretation of a collective-bargaining agreement is to be answered by the arbitrator. Because the parties have contracted to have their disputes settled by an arbitrator, rather than by a judge, it is the arbitrator's view of the meaning of the contract that the parties have agreed to accept. We will not overrule that construction merely because our own interpretation differs from that of the arbitrator. ...

See also, Water Pipe Extension, Bureau of Engineering Laborers' Local 1092 v. City of Chicago, 741 N.E.2d 1093, 1103 (1st Dist., 2000) ("While the Union disagrees with arbitrator Benn's interpretation of the agreement, it is his interpretation for which they bargained, not that of a court ... Thus, the parties must live with the arbitrator's interpretation even if it is incorrect so long as it can be said to derive its essence from the agreement" [citation omitted]).

Finally, *see Ladish Co., Inc. v. Machinists District No. 10*, 966 F.2d 250 (7th Cir. 1992):

> ... Indeed, the Supreme Court has stated plainly that because the arbitrator's award is a direct result of collective bargaining, reviewing courts should respect the intention of the parties to have arbitration resolve their dispute: "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987).
>
> With the reasons underlying our deference to arbitration understood, we note that our review of an arbitrator's award necessarily is narrow. Indeed our review is "close to nonexistent" if the arbitrator "interprets" rather than "revises" the collective bargaining agreement. ...

[19] The State has asserted that, as an arbitrator, I have previously entertained public policy arguments. That is not quite correct. *See July 2011 Wage Increase Award* at 19, note 46:

> *Central Management Services, supra*, was a discipline case involving reinstatement of a public employee who may have engaged in serious misconduct but was an individual I had to reinstate because of the clear procedural contract violation concerning untimely discipline — again, a finding which was not contested. 671 N.E.2d at 673. The holding in *Central Management Services* is that in discipline cases, before an arbitrator can reinstate a public employee ... who engages in misconduct, the ar-

[footnote continued]

B. What Happens Next?

This public policy question found relevant by the Court must be decided by the Court and not by me. After issuance of the *Order* and during conferences with the parties concerning the Court's remand, the parties have represented to me that they will be working cooperatively to expeditiously develop a sufficient record (be it through stipulations, depositions and/or further evidentiary proceedings before the Court) to enable the Court to make its decision and to further allow the parties to preserve their positions for appeal, if any.

[continuation of footnote]

bitrator must make a rational finding that the employee can be trusted to not engage in similar misconduct in the future (671 N.E.2d at 680):

> ... [A]s long as the arbitrator makes a rational finding that the employee can be trusted to refrain from the offending conduct, the arbitrator may reinstate the employee to his or her former job, and we would be obliged to affirm the award.

Since *Central Management Services* issued in 1996 and when determining that a discharged public employee may be entitled to reinstatement, my inquiry has been consistent with the Supreme Court's requirement — *i.e.*, to discuss whether "... the employee can be trusted to refrain from the offending conduct ...." If the employee is deserving of reinstatement and that finding can be made, the employee is reinstated. If the employee cannot be trusted to refrain from the offending conduct in the future, the employee is not reinstated. My arbitration awards over the years since *Central Management Services* have strictly followed that limited inquiry. Those findings are not public policy determinations. Those findings merely look at the employee, the employee's conduct, and whether the employee will likely engage in the offending conduct in the future. *See e.g., Chicago Fire Fighters Union Local No. 2 v. City of Chicago*, 323 Ill. App. 3d 168, 172-173, 256 Ill. Dec. 332, 751 N.E.2d 1169,1172-1174 (1st Dist., 2001) where the First District Appellate Court quotes from my award in that case as I applied the *Central Management Services* standards:

> "As I view the evidence before me, I am satisfied, and I find, that the public can be assured that the alleged misconduct will not be repeated by Grievants and that steps have been or can be taken to ensure that result.
>
> * * *
>
> In sum then, I am satisfied - and I find - that Grievants are capable of rehabilitation; that the conduct allegedly engaged in by Grievants will not reoccur; and that steps have been taken and can be taken to assure the public of that result."

That is not an arbitrator considering public policy. That is an arbitrator following the requirements as imposed by the Illinois Supreme Court's *Central Management Services* decision to address the likelihood of the employees' future conduct and entitlement to reinstatement.

In *Central Management Services*, the Supreme Court has made it very clear that, in the end "... [q]uestions of public policy, of course, are ultimately left for resolution by the courts ... [and e]ven if the arbitrator had considered issues of public policy, "we may not abdicate to him our responsibility to protect the public interest at stake." 671 N.E.2d at 678. Public policy questions are thus clearly for the courts to decide — not arbitrators.

C. The Ramifications Of The Court's Order

The monetary impact of this dispute and the 2% wage increase are quite significant — approximately $75,000,000 as estimated by the Union.[20] There are some 30,000 employees involved and this matter comes to a head at a time the State is in very difficult financial straits. Whether the employes receive the wage increase and whether the State is obligated to pay that increase are obviously important to the parties directly involved with this dispute. But this dispute has other ramifications of immense importance beyond this case and impacts the collective bargaining process in this State.

As I observed in the *July 2011 Wage Increase Award* at 21-23 [emphasis in original, footnote omitted]:

> Because I am an arbitrator functioning solely under the terms of the Agreement and the Cost Savings Agreement, I have not considered the State's statutory or Constitutional arguments. However, if the State is correct in its statutory or Constitutional arguments that although it has negotiated multi-year collective bargaining agreements with the Union since 1975 (and, I note, has also long negotiated multi-year collective bargaining agreements with other unions), it now does not have to pay negotiated and agreed-upon wage increases in those multi-year collective bargaining agreements because wage increases agreed to by the State in those agreements are, in effect, unenforceable or are contingent upon sufficient appropriations from the General Assembly and that such positions find support in Section 21 of the IPLRA and the Constitution, then a major foundation of the collective bargaining process — the multi-year collective bargaining agreement — has been upended.
>
> Multi-year collective bargaining agreements bring stability to the parties and the public. Multi-year collective bargaining agreements set forth the parties' obligations and responsibilities over a period of years. It is mostly employers who

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[20] *July 2011 Wage Increase Award* at 7.

seek multi-year collective bargaining agreements (typically longer agreements than those sought by unions) so that the employers can have a clear idea of costs associated with labor and so that they can plan and budget accordingly. Because employers in the public sector basically provide services to the public, labor costs (wages and benefits) constitute most of the costs public employers incur.

If the State is correct that negotiated wage increases in multi-year collective bargaining agreements are unenforceable or are contingent upon action by the General Assembly (or, for other public entities, the various county, city, village, district councils, boards of trustees, etc.), it is quite likely that very few unions, if any, will now ever agree to multi-year collective bargaining agreements. If the State is correct in its position, I highly doubt that any interest arbitrator setting terms and conditions of collective bargaining agreements in security employee, peace officer and fire fighter disputes under Section 14 of the IPLRA will choose to impose anything more than a contract for one year's duration because final economic offers made by a public sector employer will, for all purposes, be illusory if those offers are contingent upon subsequent appropriations being passed by the public employer.

If the State is correct in its statutory and Constitutional arguments, the result will be that public sector employers and unions will have to negotiate collective bargaining agreements *every year* instead of having mufti-year agreements (typically three to five years and sometimes longer) which bring labor peace and stability. Some public sector contracts in this state have taken years to negotiate or settle through the interest arbitration process under Section 14 of the IPLRA. Having been involved in the collective bargaining process as a mediator and interest arbitrator for over 25 years, I estimate that *thousands* of multi-year collective bargaining agreements have been settled in this state. If the State is correct that economic provisions of multi-year collective bargaining agreements are not enforceable or are contingent upon subsequent appropriations for the out years of the agreements, then the collective bargaining process will be, to say the least, severely undermined. If the State is correct, the result will be most chaotic and costly as public sector employers and unions will now have to drudge through the often laborious, time-consuming and costly collective bargaining process on a yearly basis. Unions will do that. Public sector employers will be loathe to have to engage in that costly and time consuming endeavor on a yearly basis. If the State is correct in its statutory and Constitutional argu-

> ments, the multi-year collective bargaining agreement is, for all purposes, probably dead.

The Court has now found that "... after giving consideration to the positions of both parties on this matter, it has been shown there is a well-defined and dominant public policy that can be identified under the circumstances in this case, and that is plaintiff [the State] cannot spend public funds for the Wage Increases without sufficient appropriation by the General Assembly to do so, pursuant to section 21 of the IPLRA ... [and the State] has shown that it can assert an identifiable public policy that if established is a defense to plaintiff's compliance with that contractual obligation to pay the Wage Increases."[21]

Prior to the Court's *Order*, the possibility that for the first time since the passage of the IPLRA and the negotiation of thousands of multi-year collective bargaining agreements between public employers and unions in this State, an employer could avoid the clear terms of a payment obligation under a collective bargaining agreement is something that few involved in the collective bargaining process would have anticipated. Not that I find the Court's conclusion is wrong. That is not for me to decide and I express no opinion on the merits of the public policy issue decided by the Court. Indeed, if that is the correct interpretation of the law and that a public employer can negotiate a multi-year collective bargaining agreement and, as here, take massive concessions and then not comply with that contract as downsized, so be it. Speaking as an arbitrator who is often called upon to establish terms of collective bargaining agreements as an interest arbitrator, I do not care what the rules are — I just want to know what the rules are so that I can apply them.

---

[21] *Order* at 24, 32.

Given the ramifications of the Court's *Order* on the collective bargaining process, this case has become one of the most important collective bargaining cases in many years. Many major contracts throughout the State have recently expired and are in the process of being renegotiated (*e.g.*, this very State-AFSCME Agreement) or will be heading to interest arbitration for an arbitrator to establish the terms and conditions of those contracts. Contracts for smaller public employers are in the same position. What are the parties to do if they cannot have assurances that multi-year collective bargaining agreements are enforceable as negotiated? How are the parties to negotiate these contracts that cover hundreds of thousands of public employees if there are no real guarantees that promises originally made in good faith will be kept and not be subject to a subsequent appropriation question? Where public employees cannot legally strike (*e.g.*, police and firefighters), should public employers who desire multi-year contracts for stability purposes now be required to post bonds or submit other forms of surety to guarantee payment for contracts which exceed one year (which most public employers cannot afford, especially in this economy)? Or, for public employees who are legally allowed to strike, should they be allowed to engage in strikes mid-term during a collective bargaining agreement if the public employer does not appropriate money for an out year of a multi-year contract? Should public employers be denied the ability to budget and plan for more than one year because unions may not agree to multi-year agreements because they have no real assurances that the economics of the out years of those agreements will be honored?

The multi-year collective bargaining agreement is the bedrock of the collective bargaining process — it provides stability to very often volatile relation-

ships. With the Court's *Order* in this case, that most stabilizing element has, for now, disappeared.

The current situation is therefore now quite chaotic and unstable. I stress that the result is not the Court's fault. From reading the *Order*, Judge Billik gave this case much attention and thought and came to what he believed to be the correct decision. But now, the issue has exploded and *has* to be quickly decided with finality — up or down. This matter must now be expedited and allowed to move up the appellate chain so that the all involved in the process (the parties to this dispute and all others involved in the collective bargaining process in this State) can know the rules and act accordingly.

III. CONCLUSION AND SUPPLEMENTAL AWARD

With all due respect to the Court, the remand as set forth in the Court's Order of July 9, 2012 is declined. Because arbitrators only interpret language in collective bargaining agreements and courts interpret public policy, if there are any other proceedings to be had in this dispute concerning the State's public policy argument to justify its non-payment of the contractually required 2% wage increase of July 1, 2011, those proceedings must be before the Court and not before this arbitrator or any other arbitrator.

Edwin H. Benn
Arbitrator

Dated: July 16, 2012

Dunne, Michael

From: Post, Jerald
Sent: Wednesday, July 18, 2012 2:23 PM
To: Tarver, Elaine L.; Bell, Eileen; Owen, Michelle; Kazanjian, Philip; Hamburg-Gal, Anna; Alabi, Christina; Dekok, Hans; Dunne, Michael; Allen, Thomas; Provines, Michael
Subject: FW: Pay raise case.
Attachments: Arb. Suppl. Op. & Award (wage increase case).pdf

Yesterday's Capitolfax had a blog on a development in the circuit court's review of an arbitration award concerning failure to implement wage increases called for in a collective bargaining agreement which is not only interesting in a general sense, but interesting in figuring out the nature of arbitration. In short, the circuit court remanded the case to an arbitrator to make additional findings, action the arbitrator found beyond his role. The blurb from Capitolfax is set out below, and the arbitrator's supplemental opinion is attached.
Jerry

From: Post, Jerald
Sent: Tuesday, July 17, 2012 6:13 PM
To: Kehoe, Martin
Subject: Pay raise case.

Martin, Did you see this on Capitolfax.com?

Pay raise case in a legal dodgeball

Tuesday, Jul 17, 2012

*** Cook County Judge Richard Billik Jr. ruled last month that an arbitrator that had ruled in favor of AFSCME over Gov. Pat Quinn's refusal to grant pay raises needed to consider whether the $75 million needed to fund the raises wasn't appropriated by the General Assembly. According to AFSCME, the arbitrator declined and has kicked the case back to the judge...**

Arbitrator Ed Benn has declined a Cook County judge's remand of the case regarding Gov. Quinn's refusal to pay negotiated wage increases, stating that the issues involved are beyond the purview of an arbitrator.

In late June, Cook County Circuit Court Judge Richard Billik referred the case regarding Quinn's refusal to pay negotiated wage increases to Arbitrator Ed Benn for fact-finding. The judge said that he wanted the Quinn Administration to have the opportunity to establish its public policy defense and directed the arbitrator to make a determination regarding the Administration's claim that there are "insufficient appropriated funds" to allow payment of the wage increases.

On Monday, July 16 Arbitrator Benn issued a decision in which he declined to accept the case. Benn wrote that unanswered questions in the case are matters of law that must be considered by the court. "[A]rbitrators interpret collective bargaining agreements and courts interpret statutes, the Constitution and public policy," he wrote.

Consequently, Benn stated, he is returning the case to Judge Billik.

The arbitrator also underscored the gravity of the state's claim that it is not bound by a contract should the legislature fail to appropriate what the executive branch deems are sufficient funds.

"[T]his dispute has other ramifications of immense importance beyond this case and impacts the collective bargaining process in this State," Benn wrote.

Benn had previously determined that Quinn's pay freeze was a clear violation of the AFSCME collective bargaining agreement and ordered the governor to pay the wage increases. The case has been tied up in court for over a year after the governor refused to comply and instead filed suit to vacate Benn's award.

In his decision, Benn emphasized the significant previous sacrifices made by state employees to help balance the budget, and Governor Quinn's failure to keep his end of the agreement. "The concessions granted by the Union to the State ... in the CSAs [Cost Savings Agreements] amounted to approximately $400,000,000. ... [A]fter accepting the concessions ... the State agreed to pay a 2% wage increase on July 1, 2011 ... and then failed to make that 2% payment to all employees. That is a contract violation as I found."

*** AFSCME's statement...**

Governor Quinn has broken his word to the men and women who provide vital public services, he is directly violating a collective bargaining agreement, and now it is clear that he has provoked a legal challenge to the very bedrock of the collective bargaining rights of workers in Illinois. It is shameful that a governor who pays lip service to the best interests of working people has put in motion this litigious assault on the basic tenets of good labor relations. We shouldn't have to win a court battle to make the governor respect workers, honor their contract and comply with the law, but we will do whatever it takes to uphold our collective bargaining agreement and protect workers' rights.

Some background here and here.

- Posted by Rich Miller