

**BEFORE  
ARBITRATION PANEL  
EDWIN H. BENN  
ARBITRATOR  
(NEUTRAL CHAIR)**

**IN THE MATTER OF THE ARBITRATION**

**BETWEEN**

**STATE OF ILLINOIS**

**(“STATE”)**

**AND**

**AFSCME COUNCIL 31**

**(“UNION”)**

**CASE NOS.:** S-MA-22-121  
Arb. Ref.: 21.318  
(Vaccine Mandate  
Interest Arbitration)

**FINAL OPINION AND AWARD AFTER REMAND**

**APPEARANCES:**

For the State: Mark W. Bennett, Esq.  
Thomas S. Bradley, Esq.  
Alexandra M. McNicholas, Esq.

For the Union: Stephen A. Yokich, Esq.

**SYNOPSIS**

Because of the COVID-19 pandemic, the interest arbitration dispute before this Arbitration Panel has life and death consequences. Therefore, as the Chair of this Arbitration Panel, I ordered that time is of the essence to swiftly decide this case.

After a Scheduling Order dated November 12, 2021, briefs were filed on November 30, 2021 and hearings were held on December 4, 7, 15 and 17, 2021. By an Interim Award dated December 29, 2021 (Union Panel Arbitrator dissenting) (“*Interim Award*”), it was found that the State should mandate COVID-19 vaccinations for employees in the Departments of Corrections (“DOC”) and Juvenile Justice (“DJJ”) working in congregate settings (State Correctional Centers and Juvenile Justice

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facilities) and that the affected employees had to have their first COVID-19 vaccination to be taken no later than January 31, 2022. The *Interim Award* further provided that “... this matter is now remanded to the parties until January 7, 2022 to reach agreement on implementation of the appropriate COVID-19 procedures which shall include a vaccine mandate.”

During the remand period, the parties were able to reach agreements on a number of issues, but not on all. The *Interim Award* provided that if all of the issues were not resolved by the parties, the dispute shall be returned to this Panel to finally resolve the open issues. Again, given the life and death consequences of this case, if any unresolved issues were returned to this Panel, those issues would be decided because time is of the essence.

The *Interim Award* is posted at:

<https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-22-121.pdf>

The parties returned four issues to this Panel for resolution. Three disputed issues involved implementation provisions for benefits, documentation requirements and time-frames for the affected employees. Those issues are discussed in this Final Award.

The fourth disputed issue involved the Union’s position that visitors, vendors and other non-employees who have access to correctional facilities and come into contact with correctional personnel and inmates should also be vaccinated against COVID-19 as are the employees as a result of the *Interim Award*. That is the main issue discussed in this Final Award.

Two days before the last day of hearing in this matter for the remanded issues, the State filed an objection to that issue being decided by this Panel asserting that the issue is not a mandatory subject of bargaining. For purposes of this proceeding, it is found that the issue can be decided.

As in the *Interim Award*, the relevant statutory factors in Section 14(h) of the Illinois Public Labor Relations Act for resolution of a requirement for a vaccine mandate for visitors, vendors and other non-employees who have access to correctional facilities and come into contact with correctional personnel and inmates are the same:

1. The lawful authority of the employer (Section 14(h)(1));
2. Stipulations of the parties (Section 14(h)(2)); and
3. The interests and welfare of the public (Section 14(h)(3)).

The lawful authority of the State to be able to make such a vaccine mandate is supported by a very long line of court decisions dating back to 1905 which demonstrate that the State can mandate vaccinations.

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The stipulations of the parties and the information in the public domain (which information changes on a daily basis) now demonstrate that because of COVID-19 there have been:

- Over 66.7 million cases in the U.S.
- Over 850,000 deaths in the U.S.
- Over 2.68 million cases in Illinois
- Over 32,000 deaths in Illinois
- Since the *Interim Award* issued only 21 days ago:
  - Over 12.9 million more cases in the U.S.
  - Over 29,000 more deaths in the U.S.
  - Over 563,000 more cases in Illinois
  - Over 1,900 more deaths in Illinois
- In DOC and DJJ:
  - Over 8,300 staff infected
  - Over 1,300 staff currently infected
  - Over 17,000 individuals in custody infected
  - Over 4,100 individuals in custody currently infected

The evidence shows that COVID-19 is presently surging in Illinois and at DOC and DJJ facilities.

The interests and welfare of the public are best served with a vaccine mandate for visitors, vendors and other non-employees as proposed by the Union. Overwhelming scientific evidence shows that the vaccines are effective and safe and the best method to prevent infection. Given the highly contagious COVID Omicron variant, to not require vaccinations of visitors, vendors and other non-employees who have access to correctional facilities and come into contact with correctional personnel and inmates would leave a gaping hole in the preventative efforts now being used to defeat the spread of the virus and the disease that has caused so much destruction and death to the lives of so many.

Dated: January 19, 2022

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## **I. BACKGROUND**

By Interim Opinion and Award dated December 29, 2021 (with the Union Appointed Arbitrator filing a dissent on December 30, 2021) (“*Interim Award*”), this Interest Arbitration Panel answered “Yes” to the threshold question in this case for employees working at the State’s Department of Corrections (“DOC”) and Department of Juvenile Justice (“DJJ”) congregate facilities:

Should the State mandate Coronavirus [COVID-19] vaccinations for the employees covered by the relevant collective bargaining agreements in this case?

The *Interim Award* issued solely to answer the threshold question “[b]ecause of the COVID-19 pandemic, the dispute before this Arbitration Panel has life and death consequences ... [and t]herefore, time is of the essence.” *Interim Award* at 5.

The full *Interim Award* is posted at:

<https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-22-121.pdf>

In holding that the State should require a COVID-19 vaccine mandate for affected employees at the State’s DOC and DJJ facilities, the *Interim Award* found three statutory factors to be “applicable” under Section 14(h) of the Illinois Public Labor Relations Act, 5 ILCS 315/1, *et seq.* (“IPLRA”), specifically:

1. The lawful authority of the employer (Section 14(h)(1));
2. Stipulations of the parties (Section 14(h)(2)); and
3. The interests and welfare of the public (Section 14(h)(3)).

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As more fully set forth in the *Interim Award*, those three applicable factors all favored the State’s position to require a vaccine mandate for DOC and DJJ employees because:

The lawful authority of the State is supported by a very long line of court decisions dating back to 1905 which demonstrate that the State can mandate vaccinations.

The stipulations of the parties demonstrate through their arguments and evidence that because of COVID-19, in the U.S. there have been over 52.8 million cases of COVID-19 and over 816,000 people have died from the disease and that in Illinois there have been 2.1 million cases with 31,000 deaths. The evidence also shows that COVID-19 is presently surging in Illinois with increased cases and deaths.

The interests and welfare of the public are best served with a vaccine mandate as proposed by the State. Overwhelming scientific evidence offered by the State shows that the vaccines are effective and safe and the best method to prevent infection.

The Union’s position focuses much on testing which serves to *detect* the presence of the disease and isolating those who have the disease. The State’s proposal for a vaccine mandate focuses on *prevention* against getting the disease. To combat this disease, there must be a combination of detection *and* prevention. The preventative step given by the vaccination must therefore be included in the arsenal of tools to overcome the ravages being caused by COVID-19. The interests and welfare of the public are better served by having the vaccine mandate for employees working in DOC and DJJ congregate settings as part of that arsenal of tools.

As a result of the *Interim Award*, approximately 10,000 employees working in 46 DOC and 5 DJJ facilities directly affected by this dispute are now required to have their first COVID-19 vaccination to be taken no later than January 31, 2022. *Id.* at 50.

Under authority of Section 14(f) of the IPLRA and the November 12, 2021 Scheduling Order for this case, the *Interim Award* provided that “... this matter is

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now remanded to the parties until January 7, 2022 to reach agreement on implementation of the appropriate COVID-19 procedures which shall include a vaccine mandate.”<sup>1</sup>

By January 7, 2022, the parties reached agreement on a number of implementation issues and memorialized their agreements in a tentative Memorandum of Understanding (“MOU”). However, the parties were unable to reach agreement on all issues.

After completion of their discussions pursuant to the remand, the following issues remained in dispute between the parties:

- A. Whether visitors, vendors and other non-employees who have access to correctional facilities and who come into contact with correctional personnel and inmates should be vaccinated;
- B. Timeframes for receiving vaccinations if employee exemption requests from the vaccination mandate are denied;
- C. Documentation requirements for exemptions from the vaccination mandate; and
- D. Pay and time off for employees who are subject to COVID-related circumstances.

As provided in the *Interim Award*, on remand, “[i]f not resolved by the parties, the matter shall be returned to this Panel for final resolution – again, with the approach that time is of the essence.”<sup>2</sup> This Final Opinion and Award now resolves those disputes.

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<sup>1</sup> *Interim Award* at 50.

<sup>2</sup> *Id.*

## **II. CURRENT STATUS OF COVID-19**

Based upon reports from the Centers for Disease Control and Prevention (“CDC”) and the Illinois Department of Public Health (“IDPH”) and forecasts, the *Interim Award* which issued December 29, 2021 found that although there have been significant spikes in COVID-19 cases and deaths, “[t]he worst is apparently yet to come.”<sup>3</sup>

Today is January 19, 2022. In the short 21-day period since issuance of the *Interim Award* on December 29, 2021 until today, the available data reported from the CDC (data as of January 18, 2022) reveal the following:

**U.S.**<sup>4</sup>

<b>Date</b>	<b>COVID Cases Total</b>	<b>COVID Deaths Total</b>
12/29/21	53,804,254	821,189
1/18/22	66,715,937	850,575
Increase	12,911,683	29,386

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<sup>3</sup> *Id.* at 13.

<sup>4</sup> [https://covid.cdc.gov/covid-data-tracker/- cases\\_totalcases](https://covid.cdc.gov/covid-data-tracker/- cases_totalcases)

The CDC COVID Data Tracker at the above website reveals much data but is cumbersome to navigate. The reported data change daily. To obtain the data for the dates indicated, the “COVID Cases Total” and “COVID Deaths Total” appear on the first page of the website. To obtain data for earlier dates, select “Cases Total” and a drop-down menu appears allowing selections for “The United States” and the individual states under “Select a state or territory”, along with selections for various filters. The data used come from the filter in “View(left axis)” to show “Cumulative Cases” and “Cumulative Deaths” which produces a chart. Moving your cursor along the chart reveals the specific dates and reported numbers of cases and deaths.



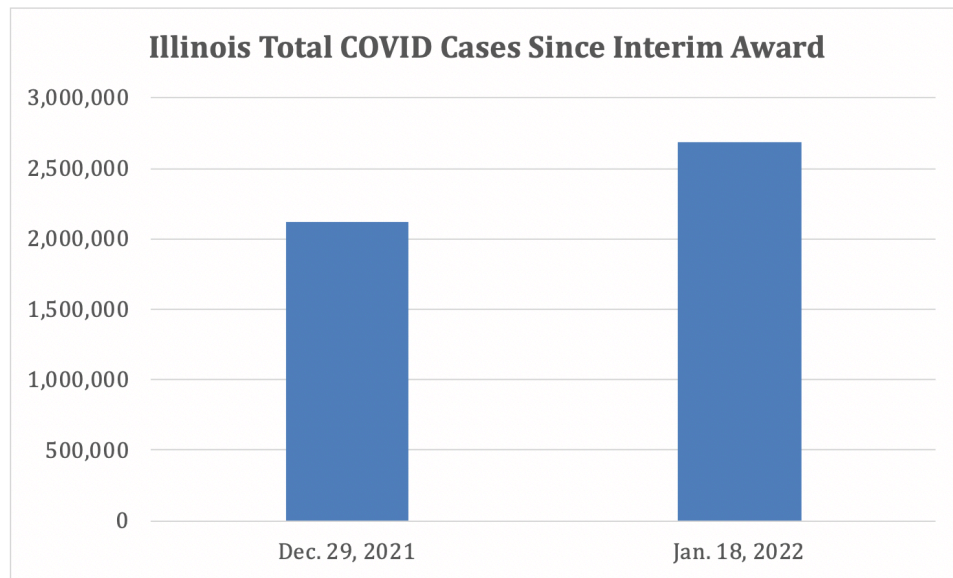
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**ILLINOIS**<sup>5</sup>

<b>Date</b>	<b>COVID Cases Total</b>	<b>COVID Deaths Total</b>
12/29/21	2,119,162	30,908
1/18/22	2,682,983	32,851
Increase	563,821	1,943

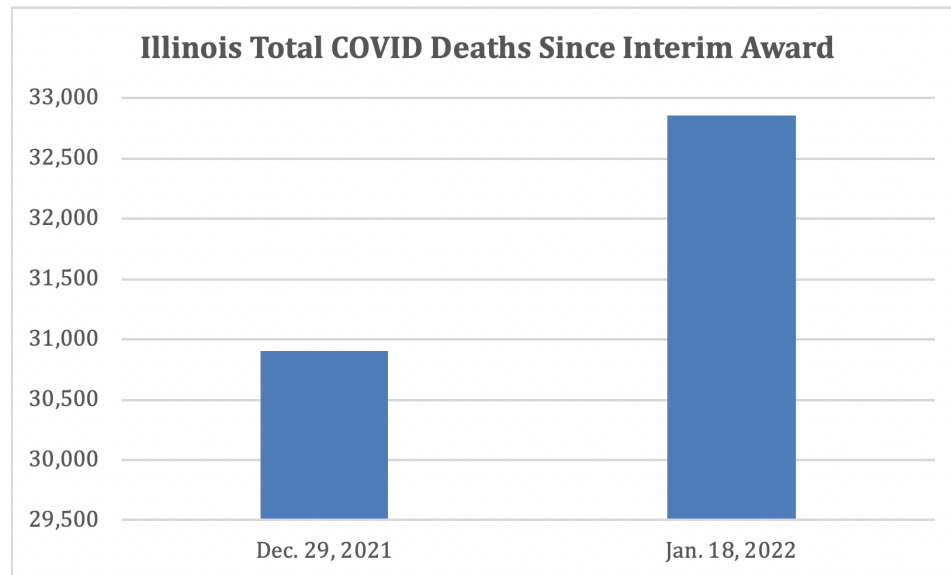
Therefore, since I issued the *Interim Award* on December 29, 2021 – only 21 days ago – the COVID statistics reported by the CDC (using January 18, 2022 data) show an increase of 12,911,683 cases nationally and 563,821 cases in Illinois, along with an increase of 29,386 deaths nationally and 1,943 deaths in Illinois.

For Illinois, those dramatic increases since issuance of the *Interim Award* graphically look like this:




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<sup>5</sup> *Id.* (selecting Illinois statistics) for 12/29/21 data. IDPH COVID-19 Statistics reported 1/18/22 for 1/18/22 data.  
<https://dph.illinois.gov/covid19/data.html>



And it apparently continues to get worse.

According to the Chicago Sun Times (January 12, 2022), in Illinois it's now this bad:<sup>6</sup>

**Help is on the way? Pritzker sends thousands of contract health care workers to hospitals swamped with unvaccinated patients**

More Illinoisans are testing positive for COVID-19 each day than ever before — an average of 32,501 per day over the last week — and “unfortunately, right now, today, the hospitals are bearing the brunt,” Illinois Public Health Director Dr. Ngozi Ezike said. The spike is also resulting in more deaths, with 144 on Wednesday alone, the worst daily toll in over a year.

More than 2,000 contract health care workers are being deployed to hospitals across Illinois as a critically understaffed system is being overwhelmed by a cascade of unvaccinated COVID-19 patients unlike any other seen throughout the pandemic.

<sup>6</sup>

<https://chicago.suntimes.com/coronavirus/2022/1/12/22880274/illinois-coronavirus-hospitalizations-health-care-workers-pritzker-covid-omicron-vaccine>

On the national level, the military is being sent in to help with overwhelmed hospitals (Reuters, January 13, 2022):<sup>7</sup>

**Biden to send more military medics to U.S. hospitals in COVID-19 hot spots**

President Joe Biden on Thursday said he would send more military health workers to hospitals in six U.S. states and provide free masks and more free tests to help Americans tackle the fast-spreading Omicron variant.

He announced the phased dispatch of 1,000 military health personnel beginning next week as U.S. COVID-19 hospitalizations hit a record high and health facilities faced a staffing crunch.

DOC and DJJ have been severely impacted by COVID-19.

According to information provided at the hearing on January 13, 2022 and the publicly reported data from DOC and DJJ, the impact of COVID-19 on staff, inmates and youth in custody is as follows:<sup>8</sup>

**Department of Corrections**

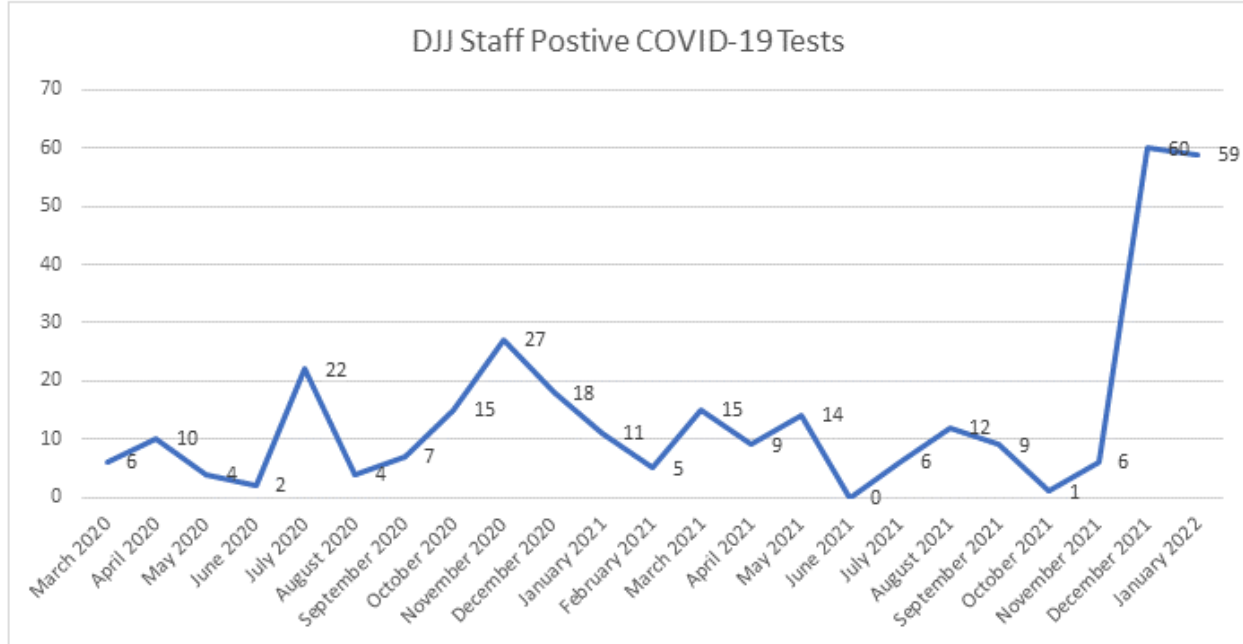
Overall Staff Positive	Staff Recovered	Staff Current Positive	Staff Deaths	Total Individuals In Custody Confirmed Positive	Total Individuals In Custody Recovered	Individuals In Custody Positive	Individuals in Custody Deaths
8,355	7,067	1,288	5	17,817	13,703	4,114	90

<sup>7</sup> <https://www.reuters.com/world/us/more-us-medical-teams-bolster-states-omicron-surges-2022-01-13/>

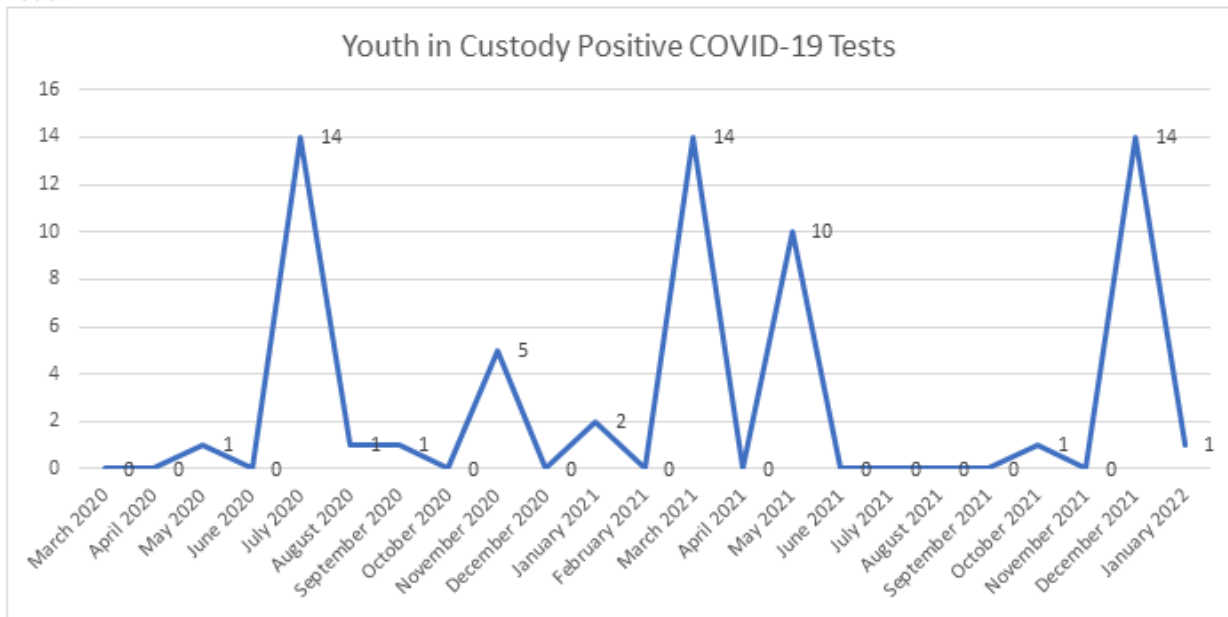
<sup>8</sup> <https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx>

### Department of Juvenile Justice

**Staff**



**Youth**



Information provided at the January 13, 2022 hearing shows five staff deaths at DOC and one staff death at DJJ from COVID-19.

Thus, since the COVID-19 pandemic began, there have been over 8,300 cases affecting DOC and DJJ staff. And presently, the total number of COVID infections for DOC and DJJ staff is high (over 1,300) and the spiking is evident.

Time remains “of the essence” to take preventative steps to stop this nightmare and serves to underscore the rulings that follow.

### **III. RESOLUTION OF THE ISSUES IN DISPUTE**

#### **A. The “Applicable” Factors**

The same IPLRA Section 14(h) factors that were found “applicable” to uphold the State’s position in the *Interim Award* that it should impose a vaccine mandate for employees shall be used to decide the remaining issues in dispute – *i.e.*, (1) the lawful authority of the employer (Section 14(h)(1)); stipulations of the parties (Section 14(h)(2)); and (3) the interests and welfare of the public (Section 14(h)(3)).

As in the *Interim Award*, the undersigned Neutral Chair of the Panel writes this Final Award indicating resolution by majority vote of the Panel of the issues presently before the Panel.

#### **B. The Specific Issues**

##### **1. Visitors, Vendors And Other Non-Employees**

The Union argues that visitors, vendors and other non-employees who have access to correctional facilities and come into contact with correctional personnel and inmates should be vaccinated. The Union seeks the following language to be added to the parties’ MOU:

No visitors or vendors may enter the premises of congregate facilities unless they provide proof of vaccination. The parties shall work together to establish a testing protocol for visitors and vendors.

According to the Union:

These third parties should be held to the same standards as employees, for exactly the same reasons. COVID-19 does not discriminate based on whether an individual is receiving a State paycheck.

The State argues:

The Employer recognizes the need for more stringent protocols for visitors. It is working to address that need, but it cannot implement a vaccine mandate for visitors. It would infringe upon the Constitutional rights of the incarcerated individuals by interfering with their visitation rights. It also would also likely conflict with the Americans with Disabilities Act (ADA), as many of the visitors are likely to request exemptions to this mandate. Finally, visitors are members of the public who are not subject to this agreement. The Department of Corrections has sole control over who has access to its facilities. That determination is based upon multiple factors, including safety and security, but must be balanced with the rights of those in its custody. Instead, the Employer is looking into alternatives, such as on-site testing or requiring proof of a negative test. There are many logistical hurdles to any of these plans and the Employer is diligently working with the Agency, the Governor's Office, and the Illinois Department of Public Health to create and implement a policy as quickly as possible.

**a. The State's Objection To The Consideration Of This Issue**

As noted, the *Interim Award* issued on December 29, 2021 with the Union Appointed Arbitrator filing a dissent on December 30, 2021. Addressing the threshold issue, the *Interim Award* held that the State should mandate COVID-19 vaccinations for the affected employees working at DOC and DJJ facilities and those employees not yet vaccinated shall receive their first COVID-19 vaccination to be taken no later than January 31, 2022.

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With the threshold issue resolved, the *Interim Award* remanded the dispute to the parties with the following order (*Interim Award* at 50):

Accordingly, this matter is now remanded to the parties until January 7, 2022 to reach agreement on implementation of the appropriate COVID-19 procedures which shall include a vaccine mandate. However, the affected employees shall receive their first COVID-19 vaccination to be taken no later than January 31, 2022.

The parties shall report on the status of their negotiations by January 10, 2022.

On January 10, 2022 (the designated status report date), the State gave notice that although reaching agreement on a number of issues on remand, there were several issues that the parties were unable to resolve. The State identified those unresolved issues and stated its positions concerning those issues. The Union likewise gave notice on January 10, 2022 of the outstanding issues and similarly stated its positions on those issues. One of the issues identified by the parties included the Union's position that no visitors or vendors may enter the premises of congregate facilities unless they provide proof of vaccination.

After receipt of the parties' communications on January 10, 2022 concerning their respective positions on the open issues, a conference call was held with the following summation subsequently issued by the undersigned on January 10, 2022:

Confirming our meeting this afternoon, the State shall have until close of business Wednesday, January 12, 2022 to respond to the Union's positions on open issues from the remand ordered by the *Interim Award*. The parties will present arguments on their respective positions on Thursday, January 13, 2022 at 2:30 p.m. ....

On January 12, 2022, the State filed its Objection of State of Illinois, Department of Central Management Services, to the Arbitration Panel’s Consideration of a Vaccine Mandate for Visitors and Vendors (“Objection”).

The State argued in its Objection that the issue of requiring a vaccine mandate for visitors and vendors is not a mandatory subject of bargaining and therefore cannot be considered by me in this interest arbitration.<sup>9</sup>

On January 13, 2022, the Union filed its Response to the State’s Objection (“Response”). The Union addressed the merits of the State’s arguments that requiring a vaccine mandate for visitors and vendors is not a mandatory subject of bargaining by pointing to authority that health and safety issues are mandatory subjects of bargaining.<sup>10</sup> The Union also argued that the State’s Objection should not be considered because the State’s Objection “is late”.<sup>11</sup>

The State relies upon Section 1230.90(k) of the Illinois Labor Relations Board (“ILRB”)’s Rules and Regulations [emphasis added]:<sup>12</sup>

**Section 1230.90 Conduct of the Interest Arbitration Panel**

\* \* \*

- k) Whenever one party has objected in good faith to the presence of an issue before the arbitration panel on the ground

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<sup>9</sup> A party cannot refuse to negotiate over a mandatory subject of bargaining. *Forest Preserve District of Cook County v. Illinois Labor Relations Board*, 861 N.E.2d 231 (1st Dist. 2006). Impasses over mandatory subjects of bargaining for those employees covered by Section 14 of the IPLRA are resolved through interest arbitration. *Town of Cicero v. Illinois Association of Firefighters*, 788 N.E.2d 286 (1st Dist. 2003); IPLRA, Section 14. Parties can voluntarily negotiate over permissive subjects of bargaining, but a party cannot insist on bargaining over a permissive subject of bargaining. See *Lid Electric, Inc. v. International Brotherhood of Electrical Workers, Local 134*, 362 F.3d 940 (2004); *Board of Trustees of the University of Illinois v. Illinois Educational Labor Relations Board*, 612 N.E.2d 1365 (4th Dist. 1993).

<sup>10</sup> Union Response at 3-6.

<sup>11</sup> *Id.* at 2-3.

<sup>12</sup> <https://www2.illinois.gov/ilrb/rules/Documents/RulesApril2021.pdf>



that the issue does not involve a subject over which the parties are required to bargain, *the arbitration panel's award shall not consider that issue*. However, except as provided in subsections (1) and (m) of this Section, the arbitration panel may consider and render an award on any issue that has been declared by the Board, or by the General Counsel pursuant to 80 Ill. Adm. Code 1200.143(b), to be a subject over which the parties are required to bargain.

In making its argument that the State's Objection is late, the Union points to Section 1200.143(b) of the ILRB's Rules and Regulations [emphasis added]:

**Section 1200.143 Declaratory Rulings**

Parties may petition the Board's General Counsel for a declaratory ruling, pursuant to Section 5-150 of the Illinois Administrative Procedure Act [5 ILCS 100/5-150], as follows:

\* \* \*

- (b) In protective service employee bargaining units covered by 80 Ill. Adm. Code 1230, Subpart B, if, after the commencement of negotiations and before reaching agreement, the exclusive representative and the employer have a good faith disagreement over whether the Act requires bargaining over a particular subject or particular subjects, they may jointly petition for a declaratory ruling concerning the status of the law. If a request for interest arbitration has been served in accordance with 80 Ill. Adm. Code 1230.70 and either the exclusive representative or the employer has requested the other party to join it in filing a declaratory ruling petition and the other party has refused the request, *the requesting party may file the petition on its own, provided that the petition is filed no later than the first day of the interest arbitration hearing.*

For purposes of the present dispute between the parties, the State's Objection cannot prevent my determination of whether there should be a vaccine mandate for visitors, vendors and other non-employees who have access to correctional facilities

and come into contact with correctional personnel and inmates as requested by the Union.

First, while the State is correct that under Section 1230.90(k) of the ILRB's Rules and Regulations, "[w]henver one party has objected in good faith to the presence of an issue before the arbitration panel on the ground that the issue does not involve a subject over which the parties are required to bargain, the arbitration panel's award shall not consider that issue", the Union is also correct that there is a specific procedure for determining whether I can decide the present dispute concerning whether visitors, vendors and other non-employees who have access to correctional facilities and come into contact with correctional personnel and inmates should be vaccinated. That procedure is addressed in Section 1200.143 of the ILRB's Rules and Regulations – the filing of a petition (either jointly or unilaterally) with the ILRB's General Counsel seeking a declaratory ruling on whether this issue is a mandatory subject of bargaining. That was not done. And given the provisions of Section 1200.143 of the ILRB's Rules and Regulations which require that "... the requesting party may file the petition on its own, provided that the petition is filed no later than the first day of the interest arbitration hearing", with the hearing having commenced on December 4, 2021, the time for such filing has passed and, if filed after the commencement of the hearing, under the terms of that section, the ILRB's General Counsel no longer would have the authority to issue a declaratory ruling.

Second, the State's not seeking a declaratory ruling could not have been an oversight – it must have been purposeful and tactical. Had the State filed a petition with the ILRB's General Counsel under Section 1200.143, the State ran the risk of receiving a ruling that the issue is, as argued by the Union, a mandatory subject of bargaining to be decided in this interest arbitration. Then the State would have been

stuck with that result unless or until the ILRB or the courts found otherwise – a decision potentially years away. Putting all of what happened in context, when the State approached the Union about how to deal with the devastating life and death consequences of the COVID-19 pandemic in the State’s congregate facilities in the Departments of Veterans Affairs (“DVA”), Human Services (“DHS”), DOC and DJJ, the State’s Deputy Director Labor Relations Erin O’Boyle very wisely in her letter of August 4, 2021 to the Union’s Executive Director Roberta Lynch offered to bargain with the Union over the decision and effects of mandating vaccinations “... on a non-precedent setting basis ....”<sup>13</sup> That action triggered comprehensive agreements in DVA and DHS covering a range of topics addressing the *real* issue – how to deal with the COVID-19 pandemic and prevent infections and death to those individuals working or residing in the State’s congregate facilities which included mandated vaccinations.<sup>14</sup> There were much bigger fish to fry in dealing with the devastation caused by the COVID-19 pandemic that absolutely needed to be discussed before the legal classification of whether the topics were mandatory or permissive subjects of bargaining could be resolved. The State finessed the issue and, in the end, the parties’ joint efforts no doubt prevented many employees from becoming infected and probably saved lives in DVA and DHS. That is simply sophisticated bargaining by both parties.

Third, the Union also could have filed a petition with the ILRB’s General Counsel seeking a declaratory ruling, but like the State, it chose not to do so. For reasons just discussed, the Union’s holding back was also a wise decision. Had the Union filed a petition, the Union may well have received a ruling that the issue was not a

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<sup>13</sup> State Exhibit 54.

<sup>14</sup> State Exhibit 72.

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mandatory subject of bargaining, which would have meant that I could not rule on it. As did the State, the Union thus wisely stayed away from the declaratory ruling process.<sup>15</sup>

Fourth, the State’s position that the issue of whether visitors, vendors and other non-employees who have access to correctional facilities and come into contact with correctional personnel and inmates should be vaccinated should not be decided in this interest arbitration runs directly contrary to the stated policy found in Section 2 of the IPLRA [emphasis added]:

**Sec. 2. Policy.**

\* \* \*

It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, *to protect the public health and safety of the citizens of Illinois*, and to provide peaceful and orderly procedures for protection of the rights of all. To prevent labor strife and *to protect the public health and safety of the citizens of Illinois, all collective bargaining disputes involving persons ... defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such disputes. It is the public policy of the State of Illinois that where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes* subject to approval procedures mandated by this Act. To

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<sup>15</sup> The issue raised by the Union whether visitors or vendors may enter the premises of DOC or DJJ congregate facilities unless they provide proof of vaccination was not new. According to the State, during bargaining prior to this interest arbitration for DHS, DVA, DOC and DJJ, “AFSCME’s last proposal also included a proposal that no visitors or vendors be allowed to enter the premises of the congregate facilities unless he or she provides proof of vaccination or negative test results ... a demand that dropped when it signed the MOU for DHS and DVA with respect to vaccine mandates in the congregate settings.” 12/4/21 Tr. at 23.

Further, five Union witnesses gave testimony on December 15 and 17, 2021 about visitors, vendors, or contractors coming into the facilities and the Union also addressed the issue in its closing arguments before issuance of the *Interim Award*.

There was ample opportunity for both sides to attempt to invoke the ILRB General Counsel’s declaratory ruling process – but neither party did so.

that end, the provisions for such awards shall be *liberally* construed.

It has been my long-held position that in deciding grievance arbitration disputes, arbitrators do not have the authority to interpret statutes, constitutional provisions, or decide public policy questions but are confined to the terms of the parties' collective bargaining agreements. See the Supreme Court's decision in *State of Illinois v. AFSCME*, 51 N.E.3d 738, 746 (2016) where I refused to consider the State's constitutional and public policy arguments and the Court ruled:

Finally, the arbitrator concluded that he was without authority to consider the State's constitutional and public policy arguments:

“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.”

We note that although an arbitrator must respect public policy concerns implicated by his remedy, “[q]uestions of public policy, of course, are ultimately left for resolution by the courts.” *AFSCME v. CMS*, 173 Ill.2d at 318, 219 Ill.Dec. 501, 671 N.E.2d 668.

Based on our review of the arbitration award, we conclude that the arbitrator acted within the scope of his authority, and that his award was guided by contract principles and not his own notions of fairness and justice. Accordingly, we reject the State's initial challenge to the arbitration award and hold, as a matter of law, that the award “drew its essence” from the CBA.

The difference here is that this is an interest arbitration and not a grievance arbitration and Section 14(h)(1) of the IPLRA which is relevant for deciding this dispute specifically provides that I consider “[t]he lawful authority of the employer.”

That being the case and as I did in the *Interim Award*, case law concerning constitutional issues and police powers of states or other governing bodies had to be considered. For the same reason, Section 2 of the IPLRA has specific policy statements quoted above which can be considered.

This dispute addresses life and death issues caused by the COVID-19 pandemic. The issue presented by the Union concerning a vaccine mandate for visitors, vendors and other non-employees at DOC and DJJ congregate facilities goes to the heart of prevention of the spread of the disease and its deadly consequences. Doctor Susan Bleasdale – the State’s expert witness whose testimony and evidence were so heavily relied upon in the *Interim Award’s* holding that there should be a vaccine mandate for employees in the DOC and DJJ facilities – said it best [emphasis added]:<sup>16</sup>

- A. ... [C]ongregate settings are high risk areas for ongoing transmission and severe illness related to COVID-19.

\* \* \*

I would say feasibly you want to test as often as you feasibly can because without vaccination you really aren't preventing cases. You're just trying to identify earlier, so you really need to test very frequently and frequently as you can, even to the point of daily testing.

But vaccination is really not a choice of either or. I think the testing is an adjunct of vaccination and *vaccination is our only tool to prevent disease, hospitalization and death.*

\* \* \*

The State’s position that I should not decide the issue of whether “our only tool to prevent disease, hospitalization and death” as testified by Dr. Bleasdale is simply

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<sup>16</sup> 12/7/21 Tr. at 137, 149-150.

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inconsistent with the policy stated in Section 2 of the IPLRA which, through use of the procedures under the IPLRA, are statutorily designed to “... protect the public health and safety of the citizens of Illinois ...” and which policy specifies that “... bargaining disputes involving persons ... defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such dispute” with the further policy that there should be an “... *expeditious*, equitable and *effective* procedure for the resolution of labor disputes” where “the provisions for such awards shall be *liberally* construed” [emphasis added].

The State’s position that I should not address the question whether there should be a vaccine mandate for visitors, vendors and other non-employees at DOC and DJJ congregate facilities will cause untold delay as the ILRB and the courts thrash out the mandatory versus permissible subject issue. Due to the sickness, spread and deaths caused by COVID-19, this proceeding has been progressed with a “time is of the essence” approach. Given that the ILRB General Counsel’s declaratory ruling procedure was not invoked by either party – for whatever reasons – and with no proceeding in progress before the ILRB to obtain that determination (much less to do so with any immediacy), I cannot just now sit back and wait while a gaping hole in the State’s COVID-19 prevention policy is allowed to remain without addressing the question of whether, like the employees of DOC and DJJ, there must also be a vaccine mandate for visitors, vendors and other non-employees. Without clear guidance from the ILRB or the courts *now*, I have no intention of waiting while, as reflected in the statistics cited *supra* at II, the numbers of infections and deaths – particularly in Illinois and DOC and DJJ congregate facilities which are subject to this proceeding – are so high and just keep rising. My determination to move forward is consistent with the IPLRA’s stated policy in Section 2 to utilize this statutory

procedure “... to protect the public health and safety of the citizens of Illinois ... to afford an ... expeditious ... procedure for the resolution of labor disputes ... [which t]o that end, the provisions for such awards shall be liberally construed.”

Fifth, the State cites *Skokie Firefighters Union, Local 3033 v. Illinois Labor Relations Board*, 74 N.E.3d 1023 (1st Dist. 2016) in support of its position.<sup>17</sup> That case is factually quite different from this matter and actually supports the determination to decide this issue.

In *Skokie Firefighters*, the facts concerned whether the interest arbitration process could consider firefighter promotions. That dispute in that case over calculating and determining firefighter promotions obviously did not involve the life and death issues in this case concerning preventing the spread of COVID-19.

In *Skokie Firefighters*, the court concluded that in that interest arbitration the issue addressing firefighter promotions was not a mandatory subject of bargaining and therefore was “... a nonarbitrable issue ...” 74 N.E.3d at 1031. And that is really how the State’s argument that I should not address the vaccine mandate for visitors, vendors and other non-employees at DOC and DJJ congregate facilities should be considered – *i.e.*, whether that dispute is “a nonarbitrable issue” in this interest arbitration. Indeed, as the State views the issue, it argues that “... whether visitors and vendors must be vaccinated falls outside of the *jurisdiction* of the Arbitrator since it is not a mandatory subject of bargaining nor is it an effect or impact of any mandatory subject of bargaining” [emphasis added].<sup>18</sup>

“Jurisdiction” of an arbitrator to decide a dispute and the concept of “arbitrability” are the same. *See The Common Law Of The Workplace* (BNA, 2d ed.) at 95-96

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<sup>17</sup> State Objection at 2. *Skokie Firefighters* is found at: [https://scholar.google.com/scholar\\_case?case=13487942561403620635&q=74+N.E.3d+1023&hl=en&as\\_sdt=400006](https://scholar.google.com/scholar_case?case=13487942561403620635&q=74+N.E.3d+1023&hl=en&as_sdt=400006)

<sup>18</sup> State Objection at 6-7.



(discussing substantive arbitrability as the equivalent of subject matter jurisdiction). The question is, does an arbitrator have authority to decide a particular dispute? The court in *Skokie Firefighters* similarly viewed the question of mandatory versus permissive subjects to be heard in interest arbitration as a question of “jurisdiction” (74 N.E.3d at 1027, 1030, 1031) and whether the issue in that case was a “nonarbitrable issue” (74 N.E.3d at 1031).

The State here argues that the issue is a question of “jurisdiction” – “whether visitors and vendors must be vaccinated falls outside of the *jurisdiction* of the Arbitrator since it is not a mandatory subject of bargaining ...” [emphasis added].<sup>19</sup> Understandably, given the very recent events and parties having to address the labor relations issues caused by the COVID pandemic, I have no definitive authority from the ILRB or the courts on the specific issue of mandated vaccinations for visitors, vendors and other non-employees as being mandatory or permissive subjects of bargaining. But I do have a pandemic raging which is infecting and taking the lives of so many people which is also having the same impact in DOC and DJJ – for employees working in the facilities as well as for individuals compelled to be in those facilities. I just can’t sit here and wait for some agency or court to tell me whether I definitively have “jurisdiction” to decide this dispute or whether the dispute is “arbitrable” – particularly given that no proceeding is even pending that would give me that answer.

The expertise of the ILRB’s General Counsel was not brought into this proceeding because neither party sought to implement the declaratory ruling process in Section 1200.143 of the ILRB’s Rules and Regulations. And as the Union points out, because Section 1200.143 requires the process to be instituted “no later than the first day of the interest arbitration hearing” and the hearing in this matter was practically

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<sup>19</sup> *Id.* at 5-6.

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over when the State filed its Objection on January 12, 2022 (hearings were previously held on December 4, 7, 15 and 17, 2021), that process cannot even be used.

Therefore, if the State can so belatedly raise its Objection as it did here (two days before the final arguments in this matter), the parties, the employees, the public and all those who would be susceptible to being infected by the virus by those who are not vaccinated would be left in limbo and there would be a potential gaping hole in the State's efforts to prevent the spread of the disease by a method the State's expert witness Dr. Bleasdale called "... our only tool to prevent disease, hospitalization and death" – vaccination.

Under these remarkably unique circumstances, as an interest arbitrator I do not definitively decide whether this issue is a mandatory or permissive subject of bargaining. Instead, I will be guided by the court's view of these kinds of disputes as it looked at the dispute in *Skokie Firefighters, supra*, 74 N.E.3d at 1031 – *i.e.*, whether the dispute is over "a nonarbitrable issue".

It has long been held that access to arbitration to resolve labor disputes should not be denied "... unless it may be said with positive assurance ..." that the dispute is not to be heard and that "[d]oubts should be resolved in favor of coverage." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960). *See also, Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 377-378 (1974) quoting *Warrior & Gulf's* requirement that arbitration of a dispute should not be denied "... unless it may be said with positive assurance that the arbitration clause [here the analogous interest arbitration process] is not susceptible of an interpretation that covers the dispute ... [and that d]oubts should be resolved in favor of coverage." Illinois follows the same standard. *See Jupiter Mechanical Industries, Inc. v. Sprinkler Fitters and Apprentices Local Union No. 281*, 666 N.E.2d 781, 785 (1st Dist. 1996), appeal denied,

671 N.E.2d 732 (1996) applying the “positive assurance” requirement in order to deny access to arbitration and concluding “... we have no ‘positive assurance’” that the dispute was not covered to deny arbitration.

The State relies upon the three-prong test set forth in *Central City Educational Association v. Illinois Educational Labor Relations Board*, 599 N.E.2d 892, 898 (1992) for its argument that mandated vaccinations for visitors, vendors and other non-employees is not a mandatory subject of bargaining, but is a permissive subject.<sup>20</sup> The *Central City* test to determine whether a subject is a mandatory or permissive is quoted by the State as follows:<sup>21</sup>

The first prong is whether the matter is one of “wages, hours and terms and conditions of employment.” If the answer is no, then the State has no duty to bargain over the matter with the bargaining representative. If the answer is yes, then the second step of the inquiry asks whether the matter is also one of “inherent managerial authority.” If the answer to this question is no, the inquiry ends and the subject is not considered a mandatory subject of bargaining. Finally, the third prong, which is only reached if the answers to prong one and two are yes, weighs whether the benefits that bargaining will have on the decision-making process against the burdens that bargaining imposes on the employer's authority.

According to the State by applying the *Central City* three-prong test:<sup>22</sup>

Here, the issue of whether vendors and visitors to prisons or juvenile facilities should be vaccinated against COVID-19 is not an issue concerning the wages that the members of CU-500 and RC-6 bargaining units receive, the hours that they work, or the terms or conditions of their employment with the State, and instead concern the inherent managerial authority of the State to contract

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<sup>20</sup> State Objection at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 3-4.

with vendors and control entrance and egress by visitors. Thus, under the first and second prongs of the *Central City* test the State has no duty to bargain over the issue with the Union. Further, there would be no benefit to bargaining with AFSCME over the State's contracts with its vendors or its policies with the visitors to the correctional and juvenile facilities, and such bargaining would impose a substantial burden on the State's exercise of its core statutory functions.

This conclusion is consistent with prior Court and Board decisions holding a public employer's relations with its vendors do not involve mandatory subjects of bargaining. For example, in the *Matter of: American Federation of State, County and Municipal Employees, Local 3506, AFL-CIO, Complainant, and Community College District 508* (City Colleges of Chicago), Respondent, 1997 IL ERB LEXIS 61 at \*56 the Labor Board held a Community College's decision to shut down a series of educational sites due to insufficient enrollment was held not to be a mandatory subject of bargaining. In *the Matter of: Illini Bluffs Support Staff, Local 4554, IFT/AFT, AFL-CIO, Complainant, and Illini Bluffs Community Unit District No. 327, Respondent.*, 14 PERI P1009, 1997 IL ERB LEXIS 30 \* a school district's decision to subcontract the transport of a special needs student was held not a mandatory subject of bargaining because, as a this was a matter of inherent managerial policy. In *Glenview Prof'l Firefighters, Local 41286, Int'l Ass'n of Fire Fighters, and Vill. of Glenview*, 31 PERI ¶ 79 (ILRB GC 2014) an employer's decision to eliminate ambulance services was held not a mandatory subject of bargaining due to the burden bargaining would place on the employer's ability to implement its core function – i.e., “to weigh costs and determine the level of service to offer its citizens.” As in these cases, the State's decisions concerning its vendors is not a mandatory subject of bargaining. Likewise, a public employer's decisions related to non-employees has been held not to involve a mandatory subject of bargaining. *Elgin Fire Ass'n of Fire Fighters, Local 439, Int'l Ass'n of Firefighters, and City of Elgin*, 31 PERI ¶ 164 (ILRB GC 2013) (The union's proposal for filling shift mechanic assignments with volunteers was a non-mandatory subject of bargaining).

Arguing that the topic is a mandatory subject of bargaining, the Union counters with the following:<sup>23</sup>

It is well established that health and safety is a mandatory subject of bargaining. *NLRB v. Gulf Power*, 384 F. 2d 822 (5th Cir. 1967)(“it is inescapable that in a public utility generating and transmission company, the workers, through their chosen representative, should have the right to bargain with the Company in reference to safe work practices”); *Voith Industrial Services*, 363 NLRB No. 109 (2016)(Employer that implemented new rule requiring employees to load rail cars during the night, which forced employees to feel their way around metal cars in the dark, concerned “work conditions related to safety” and gave “rise to obligation to bargain”). See *American National Can*, 293 NLRB 901 (1989), enforced, *NLRB v. American Nat’l Can*, 925 F.2d 518 (4th Cir. 1990)(union was entitled to access to the plant to monitor excessive heat in the workplace); *Oil Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983)(union was entitled to receive a wide range of information because employees were exposed to potential hazards in employment and had legitimate concerns over their health and safety); *Castle Hill Health Care Center*, 355 NLRB No. 196 (2010)(“workplace safety is a mandatory subject of bargaining.”). An Administrative Law Judge at the Illinois Labor Relations Board, relying on the precedent cited above, has reached the same conclusion. *Forest Preserve District of Cook County*, 34 PERI ¶106 (ALJD, 2017)(“Health and safety matters regarding the unit employees’ workplaces are of vital interest to the employees.”).

The IELRB considered this issue in several cases decided in the COVID-19 surges in the Fall of 2020 and the Winter of 2021. It held that the decision to require university faculty to teach in-person during a pandemic is a mandatory subject of bargaining. *Western Illinois University*, \_\_\_ PERI \_\_\_, Case No. 2021-CA-0009-C (IELRB Opinion, September 17, 2020). In several cases decided after the *Western Illinois* case, the IELRB held that “[e]mployee safety is a mandatory subject of bargaining.” *Cicero School District No. 99*, \_\_\_PERI\_\_\_, Case No. 2021-CA-0051 (IELRB Opinion, January 21, 2021). *Accord: Proviso Township*

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<sup>23</sup> Union Response at 4-5.

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*High School Dist. 209*, \_\_\_ PERI \_\_\_, Case No. 2021-CA-0041-C (IELRB Opinion, November 5, 2020); *Chicago Board of Education*, \_\_\_ PERI \_\_\_, Case No. 2021-CA-0014 (IELRB Opinion, September 17, 2020).

Standing back from all of this, with the State’s Objection claiming the issue is not a mandatory subject of bargaining as the State invokes Section 1230.90(k) of the ILRB’s Rules and Regulations that just because it filed its Objection “... the arbitration panel’s award shall not consider that issue”, I have nowhere to go and no legally authoritative body to give me an answer. I am left with a life and death issue in the midst of a raging pandemic that the State is telling me that I cannot decide when the State (and the Union) did not invoke the very declaratory ruling procedure that would have determined whether I could decide this dispute – Section 1200.143 of the ILRB’s Rules and Regulations – which cannot now be used because Section 1200.143 requires the process to be instituted “no later than the first day of the interest arbitration hearing” and the State’s Objection came two days before the last of the five days of hearing in this case.

But under the extraordinary circumstances of this case, this has to go somewhere.

Giving the State the benefit of the doubt and looking at this question as an arbitrability dispute as the court did in *Skokie Firefighters* relied upon by the State, at best, considering the parties’ legal positions on whether the subject is mandatory or permissive, there is one inescapable conclusion. At best, there are “doubts” as to whether the dispute should be heard because of the question of whether the topic is a mandatory subject of bargaining. Whether there should be vaccination mandates for visitors, vendors and other non-employees where those individuals if not vaccinated could infect employees covered by this dispute may well be a policy decision

as argued by the State, but it certainly can be viewed as a safety issue for the employees as argued by the Union.

Given what appear to be compelling legal arguments on both sides of the issue, there are still “doubts”. That being the case, I can decide this dispute because it cannot be said “with positive assurance ...” that the dispute is not to be heard and “[d]oubts should be resolved in favor of coverage.” *Warrior & Gulf; Gateway Coal, Jupiter Mechanical Industries, supra*.

And when it comes time that the mandatory or permissive question can be sorted out (*e.g.*, when the parties are negotiating a new contract), my determination to move forward in this case at this time in no way prevents the State or the Union from utilizing the declaratory ruling procedure in Section 1200.143 of the ILRB’s Rules and Regulations or other traditional forms of litigation through the ILRB and the courts for a final determination on the issue – *i.e.*, the filing of an unfair labor practice by the Union if the State refuses to bargain over the issue or likewise by the State if the Union insists on bargaining over the issue. As the court stated in *Skokie Firefighters, supra*, “... the fact that a permissive subject is included in one contract does not make negotiations over that subject mandatory during the next negotiations.” 74 N.E.3d at 1031. And those were the facts in *Skokie Firefighters*. In that case, the union had previously agreed to something different than what was required by the Fire Department Promotion Act, 50 ILCS 742/1 *et seq.* but then in the interest arbitration for a later contract sought to have the statutory provisions apply. 74 N.E.3d at 1026 (“[t]his time, the Union insisted on its statutory rights ...”). The court ultimately found that the union could do so and the arbitrator could not consider the village’s objection to that action because that would involve the arbitrator deciding a non-mandatory subject of bargaining.

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The final legal determination over whether vaccination mandates for visitors, vendors and other non-employees must be left for another day. For this dispute presently before me that so needs to be decided and with the Objection filed by the State so very late in the process, I can do so. The Union accurately observes “[t]he State’s action threatens to derail this entire proceeding.”<sup>24</sup> In this case, I therefore agree with the Union’s position that no matter how tactically planned the State’s Objection might have been, “it is late” and should not stop this proceeding in its tracks.<sup>25</sup>

The question of whether mandated vaccinations for visitors, vendors and other non-employees must be handled under the court’s rationale in *Skokie Firefighters, supra*, 74 N.E.3d at 1031 – viewing the question as whether the dispute was about “... a nonarbitrable issue ...” Applying that rationale, given the authority cited by the parties concerning whether the issue is a mandatory or permissive subject of bargaining, I can decide this dispute because it cannot be said “with positive assurance ...” that the dispute cannot to be heard and “[d]oubts should be resolved in favor of coverage.” *Warrior & Gulf, supra*, 363 U.S. at 582-583. Viewing this dispute in a light favorable to the State, nevertheless there are, at best, “doubts” as to whether mandated vaccinations for visitors, vendors and other non-employees is not a mandatory subject of bargaining. With those “doubts” and the raging pandemic and its impact, this issue *must* be decided.

Any challenge to that determination at this time will just be a message to employees who are hesitant to become vaccinated (or simply presently refusing) that they may as well not become vaccinated because the gaping hole in the protective shield in the workplace will remain open as visitors, vendors and other non-employees

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<sup>24</sup> Union Response at 3.

<sup>25</sup> *Id.* at 1.



who are not vaccinated can come into the facilities unprotected through vaccination and infect them with the virus and the Union was unable to even utilize this process in an effort to protect the employees from just that.

This dispute over whether visitors, vendors and other non-employees must be vaccinated before entering a DOC or DJJ facility can therefore be decided.

### **b. The Merits Of The Parties' Positions**

The applicable Section 14(h) factors support the Union's position.

#### **1. Lawful Authority Of The Employer**

The lawful authority of the State to require vaccinations for visitors, vendors and other non-employees who have access to correctional facilities and who come into contact with correctional personnel and inmates before they are allowed entry into DOC and DJJ congregate facilities is clear. The cases set forth in the *Interim Award* at 18-23 establish that it is within the State's police power to mandate vaccinations and to delegate such authority. See e.g., *Zucht v. King*, 260 U.S. 174, 176-177 (1922) (“*Jacobson v. Massachusetts*, 197 U.S. 11, had settled that it is within the police power of a State to provide for compulsory vaccination”);<sup>26</sup> *Klaassen et al., v. Trustees v. Trustees of Indiana University*, 7 F.4th 592, 593 (7th Cir., 2021) (“Given *Jacobson v. Massachusetts*, which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2. ... vaccination requirements, like other public-health measures, have been common in this nation”);<sup>27</sup> *Troogstad et al., v. The City of Chicago*

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<sup>26</sup> [https://scholar.google.com/scholar\\_case?case=17474784919803032884&q=260+U.S.+174&hl=en&as\\_sdt=400006](https://scholar.google.com/scholar_case?case=17474784919803032884&q=260+U.S.+174&hl=en&as_sdt=400006)

<sup>27</sup> [https://scholar.google.com/scholar\\_case?case=6115646719468333465&q=Ryan+Klaassen+v.+Trustees+of+Indiana&hl=en&as\\_sdt=400003](https://scholar.google.com/scholar_case?case=6115646719468333465&q=Ryan+Klaassen+v.+Trustees+of+Indiana&hl=en&as_sdt=400003)

*and Governor Jay Robert Pritzker*, No. 21 C 5600 (N.D. Ill., November 24, 2021), (slip op. at 15-16 [citations omitted]):<sup>28</sup>

... [T]he government need only show that its rationale is supported by a “reasonably conceivable state of facts.” ... This is a low bar. ... And, in relying on federal and state public health recommendations, credible academic sources, and the expertise of its own health officials, Defendants have met this burden, even if there might be some scientific disagreement on the issue. ...

Simply put, the State has the clear authority to determine the conditions under which these individuals may enter DOC and DJJ congregate facilities. Requiring those individuals to be vaccinated against COVID-19 easily falls squarely within the lawful authority of the State to require COVID-19 vaccinations for anyone before being allowed entry into DOC and DJJ congregate facilities.

The State’s argument that it cannot implement a vaccine mandate for visitors because it would infringe upon the Constitutional rights of the incarcerated individuals by interfering with their visitation rights is not persuasive.

I note that in its initial response to COVID-19, the Department of Corrections previously banned in-person visits on March 14, 2020:<sup>29</sup>

### **Visitation**

To prevent the potential for COVID-19 exposure, the Illinois Department of Corrections, after consultation with the Illinois Department of Public Health, temporarily suspended visitation on March 14, 2020. With declining COVID-19 cases within IDOC facilities, and the availability of the vaccine, the Department is taking steps to resume normal operations. The Department worked closely with IDPH to develop a plan to provide in-person visits in the safest manner possible. ...

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<sup>28</sup> [https://scholar.google.com/scholar\\_case?case=10118093584777964958&q=Troogstad&hl=en&as\\_sdt=400006](https://scholar.google.com/scholar_case?case=10118093584777964958&q=Troogstad&hl=en&as_sdt=400006)

<sup>29</sup> <https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx>

It wasn't until spring 2021, that DOC began to phase in the return of in-person visits, but conditioned such visits that visitors and those incarcerated are already fully vaccinated [emphasis added]:<sup>30</sup>

### **Visitation Rules & Information**

The Illinois Department of Corrections is implementing a multi-phase plan to resume in-person visits as safely as possible. The number of visitors per two-hour time slot are limited to ensure social distancing measures are closely followed Phase Two which takes effect June 2021, loosens restrictions for visitors and incarcerated people *who are fully vaccinated*.

Scheduling visits according to vaccination status permits vaccinated people in IDOC custody and their families (if all participants are vaccinated) to visit with fewer restrictions. *Both the incarcerated person and all visitors (including minors) must be fully vaccinated* to schedule a vaccinated visiting slot. ...

Thus, in response to COVID-19, DOC has previously limited in-person visitations – for over a year – and has limited such visitations to individuals (visitors and those incarcerated) who are fully vaccinated.

Given the rampant spread of COVID-19 that we are now experiencing and further given that DOC has previously acted in the same fashion to protect those incarcerated, DOC can require all visitors to be fully vaccinated so as to protect those incarcerated as well as the employees in the facilities.

However, focusing on the presumed rights of those incarcerated misplaces where the real focus should be. Those *visitors* who refuse to be vaccinated are hindering the ability of those incarcerated to have personal visitations. The refusal of certain visitors to become vaccinated cannot defeat the ability of employees covered by this Award and who are vaccinated to be given the best protection available

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<sup>30</sup> <https://www2.illinois.gov/idoc/facilities/Pages/VisitationRules-backup.aspx>

against COVID-19 – *i.e.*, being vaccinated, having their co-workers vaccinated and also having those entering DOC and DJJ facilities such as visitors, vendors and other non-employees who have access to correctional facilities vaccinated along with other protections that the Union may be able to negotiate on the employees’ behalf.

But even assuming there are some claimed Constitutional rights existing here be they for those incarcerated or those who desire to visit (which have not been demonstrated through cited case authority), the answer is simple – the exercise of those rights is not absolute so as harm others as it would here. *See Troogstad, supra*, slip op. at 11:<sup>31</sup>

The core flaw with Plaintiffs’ claim that refusing vaccination is a fundamental right, then, is not that there is no privacy interest implicated when someone is required or coerced to take a vaccine that they do not want. There certainly is. Rather, the problem is that, when a person’s decision to refuse a vaccine creates negative consequences (even life-threatening at times) for other people, that interest is not absolute. ...

If visitors desire to exercise their “right” to not be vaccinated, that exercise cannot prevent the State, DOC and DJJ from nevertheless requiring that if visitors desire entry into a DOC or DJJ facility, they must be vaccinated and subject to other conditions negotiated by the Union on behalf of the employees. The State has the lawful authority to so require. There are alternate accommodations that can be made through video visitations and the like (as the State did in the past for over a year when it stopped in-person visitations). The “rights” of visitors to refuse vaccines do not give them the ability to exercise that “right” so as to potentially infect employees

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<sup>31</sup> [https://scholar.google.com/scholar\\_case?case=10118093584777964958&q=Troogstad&hl=en&as\\_sdt=400006](https://scholar.google.com/scholar_case?case=10118093584777964958&q=Troogstad&hl=en&as_sdt=400006)

who are now required to be vaccinated and to trump further negotiated protections that may be obtained by the Union on behalf of the employees.

The State’s argument that requiring vaccinations of visitors also would likely conflict with the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 328 (1990), as many of the visitors are likely to request exemptions to this mandate is similarly not persuasive. Reasonable accommodations can be made for those who refuse vaccinations – they can visit inmates by video.

And the State’s argument that visitors are members of the public and are not subject to this Agreement also cannot change the result. The requirement for vaccination of members of the public and any other protections negotiated by the Union on behalf of the employees before those individuals enter DOC or DJJ facilities is to provide to the best extent possible that the *employees* are protected from exposure to COVID-19.

With respect to vendors and other non-employees who will be required to be vaccinated, the State certainly has the ability to police who can enter DOC and DJJ facilities. Again, this all falls under the State’s ability to exercise its police power to prevent someone who is not vaccinated and shedding virus to enter DOC or DJJ facilities to infect employees working in those facilities.<sup>32</sup>

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<sup>32</sup> There is a reality that employees of vendors and contractors doing business with the State must face. If those individuals refuse to be vaccinated and as a result are denied access to DOC or DJJ facilities, those employees are considered “*persona non-grata*” [a person who is not welcome] and may well be discharged from their employment with the outside entities because they can no longer perform their jobs as their entry to DOC or DJJ premises has been denied. *See e.g., Harris Trucking Co.*, 80 LA 496 (Gentile, 1983); *Corley Distributing Co., Inc.*, 68 LA 513 (Ipavec, 1977); *Granny Goose Foods*, 42 LA 497 (Koven, 1964).

Refusing to take a required vaccine to enter DOC or DJJ facilities to perform work for a vendor or contractor employer may even make that vendor or contractor along with their employees “not welcome” to the customer (the State) and could be a basis to justify termination of the vendor or contractor’s relationship with the State.

This factor favors the Union's position.<sup>33</sup>

## **2. Stipulations Of The Parties**

With respect to the stipulations of the parties factor, as noted in the *Interim Award* at 25-26, the parties are in agreement that COVID-19 has taken a tremendous toll on the Nation and the State. This factor also favors the Union's position that the State must require vaccinations for visitors, vendors and other non-employees who have access to correctional facilities and who come into contact with correctional personnel and inmates and that other protections can be negotiated. Because of the COVID-19 pandemic, the employees involved in this matter will be better protected against potential infection by adopting the Union's position.

This factor favors the Union's position.

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<sup>33</sup>

I note that Governor Pritzker's Executive Order 2021-20 already requires in Section 5(c) that contractors and vendors at congregate facilities to be vaccinated, which is consistent with the Union's position concerning those individuals. Section 5(c) of the Executive Order provides:

All contractors and vendors who work at State-owned or operated congregate facilities must have both doses of a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine by no later than October 4, 2021. This does not include any person who is present at a State-owned or operated congregate facility for only a short period of time and whose moments of close physical proximity to others on site are fleeting, as determined by the facility (e.g., contractors making deliveries to a site where they remain physically distanced from others or briefly enter a site to pick up a shipment).

<https://www.illinois.gov/government/executive-orders/executive-order-executive-order-number-20.2021.html>

With respect to the exception carved out for those who are only present at a facility for a short period of time, I also note that that particular Executive Order was addressing the situation on the ground having to deal with the Delta variant – which is mentioned eight times in the preamble to the Executive Order. We are now dealing with the more highly contagious Omicron variant, which, according to the CDC, “[t]he rapid growth rate in Omicron infections is believed to result from a combination of increased transmissibility and the ability to evade immunity conferred by past infection or vaccination (i.e., immune evasion)”.

<https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html>

Because the Union's position (which is being adopted) is not clear on how the Union believes the vendors and other non-employees who have access to correctional facilities but that access is on a “fleeting” basis, should this be an issue, the treatment of those individuals must be left to the parties in the first instance.

### **3. The Interests And Welfare Of The Public**

With respect to the interests and welfare of the public factor, for reasons discussed in detail in the *Interim Award* at 26-34, just as it was found that “... because of the effectiveness of the vaccines to prevent the spread of COVID-19, it is in the interests and welfare of the public to mandate vaccinations for employees in DOC and DJJ covered by this dispute” (*id.* at 33), to help prevent the spread of COVID-19 to those working, incarcerated or living in DOC and DJJ facilities, the same logic must apply to require vaccinations for visitors, vendors and other non-employees who have access to correctional facilities and who come into contact with correctional personnel and inmates before they can be allowed entry into DOC and DJJ congregate facilities.

This factor also favors the Union’s position.

### **4. Conclusion**

The Union’s requested language requiring that no visitors or vendors may enter the premises of congregate facilities unless they provide proof of vaccination (along with working with the State to develop a testing protocol) is adopted. Specifically, the MOU shall have the following language:

No visitors or vendors may enter the premises of congregate facilities unless they provide proof of vaccination. The parties shall work together to establish a testing protocol for visitors and vendors.

To hold otherwise would seriously undercut (if not eliminate) the reason for requiring vaccinations of employees as found by the *Interim Award*. If vaccinations for visitors, vendors and other non-employees are not required, then the employees are at risk. Given the high transmission capabilities of the virus (particularly the present Omicron variant), the vaccine mandate required by the *Interim Award* will

likely have little real effect unless all employees *as well as* visitors, vendors and other non-employees are required to comply with a vaccine mandate.

## **2. Timeframes For Receiving Vaccinations After Exemption Requests Are Denied**

Upon consideration of the parties' positions, the MOU resulting from these proceedings shall contain the following language:

12. Affected employees may be exempted from the COVID-19 vaccination policy if they present documentation of a medical contraindication for receiving the vaccine from a medical provider or maintain sincerely held religious beliefs, practices, or observances that prohibit vaccination. This does not include exemption for personal or philosophical reasons. Employees claiming a medical or religious exemption shall be responsible for submitting a completed exemption form and any related documentation to their employing agency. All such documentation shall be subject to the review and approval of CMS and must be submitted at least prior to January 31, 2022. Upon denial of the exemption and any subsequent appeal to CMS, the employee must present proof of having received the first shot of a two-shot vaccine or one shot of a one-shot vaccine within twenty-one (21) days, and the employee must present proof of receipt of the second shot of a two-shot vaccine no later than 35 days thereafter.

## **3. Documentation Requirements For Exemptions**

Upon consideration of the parties' positions, the MOU resulting from these proceedings shall contain the following language:

13. Affected employees may receive a temporary exemption if the claim is supported by the required medical documentation from their medical provider. Examples of temporary medical exemptions are:



- a. Those employees who have previously contracted COVID within 90-days of January 31, 2022;
- b. Those employees who have received an antigen infusion;
- c. Those employees who are pregnant, breastfeeding, or undergoing fertility treatments in an attempt to become pregnant and;
- d. Those employees whose immune system is compromised.

**4. Pay And Time Off For COVID-Related Circumstances**

Upon consideration of the parties' positions, the MOU resulting from these proceedings shall contain the following language:

18. Effective upon implementation of this agreement, vaccinated employees or those employees with an approved medical or religious exemption shall be eligible to receive an additional fifteen (15) work days of approved time off with pay at their current rate for time off for a documented COVID quarantine and/or COVID-19 positive where the employee is unable to work. Such time off with pay may be extended for those employees who are hospitalized due to a documented COVID-19 diagnosis for up to a total of thirty (30) workdays. This provision includes documented absences of an employee who lives with and is caring for an individual who is under an official quarantine for COVID-19 diagnosis/positive test or isolation order consistent with the latest CDC and public health guidance or who has a dependent child that is experiencing side effects from vaccination, or is excluded from school or day care for COVID 19 related reasons and supporting documentation from the school or daycare has been submitted.

\* \* \*

20. Additionally, employees shall be granted additional approved time off with pay at their current rate for time off when they are directed by the employer to stay home from work as a result of an exposure at the workplace. Employees shall not be required to use any benefit time, including

the additional 15 work days off provided above, to cover such absences unless there is clear indication that the employee was exposed elsewhere, e.g. the employee has just returned from vacation or a leave of absence.

#### **IV. SUMMARY AND CONCLUDING MATTERS**

The following is a summary of the disputes decided and actions taken in this case:

First, as found by the *Interim Award*, the State should mandate Coronavirus [COVID-19] vaccinations for the employees working at DOC and DJJ facilities covered by the relevant collective bargaining agreements in this case.

Second, as found by the *Interim Award*, the affected employees shall receive their first COVID-19 vaccination to be taken no later than January 31, 2022.

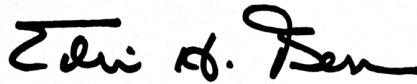
Third, the *Interim Award* is incorporated into this Final Award.

Fourth, the *Interim Award* included an ordered remand to the parties to reach agreement on implementation of the appropriate COVID-19 procedures which shall include a vaccine mandate. With the exception of the issues discussed in *supra* at III(B), the parties complied with that order and the terms of a Memorandum of Understanding (“MOU”) consistent with that remand order resulted. The terms of that MOU (as modified by the language discussed *supra* at III(B)) are incorporated into this Final Award.

Fifth, for purposes of MOUs reached in other bargaining units (including those not represented by the Union), the terms and conditions set forth in this Final Award (including the provisions of the MOU incorporated by this Final Award) have not been “negotiated”. All terms and conditions discussed in this Award with its incorporated provisions have been “ordered” through the interest arbitration process.

Sixth, the parties are now directed to complete any drafting of language consistent with the terms of this Final Award. With the consent of the parties, the Arbitration Panel shall retain jurisdiction over any language disputes which may arise.

Seventh, any issue decided adverse to a party's position is dissented to by that party's Panel Arbitrator. Similarly, any issue decided consistent with a party's position is concurred in by that party's Panel Arbitrator. The Panel Arbitrators reserve the right to file written concurring or dissenting opinions which, if filed, will be appended to this Final Award.



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Edwin H. Benn  
Arbitrator  
Neutral Chair

Dated: January 19, 2022