

**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-22-12
Arb. Ref.: 21.318
(Vaccine Mandate
Interest Arbitration)

INTERIM OPINION AND AWARD

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 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.

This is an interest arbitration under Section 14 of the Illinois Public Labor Relations Act (“IPLRA”) concerning whether the State of Illinois can 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 facilities). The Union opposes an immediate vaccine mandate but

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advocates for vaccinations as an option coupled with better testing and increased mitigation steps (better masking, social distancing, ventilation and enhanced procedures to decrease the possibility that inmates, visitors and other non-employees will expose employees or inmates to the disease).

This Interim Award issues to answer the threshold question:

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

Upon answering that question, the matter is to be remanded to the parties to attempt to resolve any issues concerning implementation and compliance with the terms of the Interim Award. If the parties are unable to do so, the dispute returns to this Arbitration Panel for final resolution.

The relevant statutory factors in Section 14(h) of the IPLRA for resolution of the question for the Interim Award are:

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 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.

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Under the relevant factors in Section 14(h) of the IPLRA, the State's position requiring a vaccine mandate therefore prevails. 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.

If the parties are unable to reach agreement during the specified remand period, the dispute shall be returned to this Panel to finally resolve the matter. Again, given the life and death consequences of this case, if the dispute is returned to this Panel time will be of the essence.

The Union appointed Arbitrator on this Panel dissents from the result. The State appointed Arbitrator on this Panel concurs with the result.

Dated: December 29, 2021

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I. BACKGROUND

Because of the COVID-19 pandemic, the dispute before this Arbitration Panel has life and death consequences. Therefore, time is of the essence.

This is an interest arbitration conducted pursuant to the provisions of the Illinois Public Labor Relations Act, 5 ILCS 315/1, *et seq.* (“IPLRA”) concerning the State’s security personnel at State Correctional Centers and Juvenile Justice facilities in the Department of Corrections (“DOC”) and Department of Juvenile Justice (“DJJ”). This case has been heard by a tri-partite arbitration panel with State and Union appointed Arbitrators along with the undersigned Chair and Neutral Arbitrator as specified in Sections 14(b) and (c) of the IPLRA. The undersigned Neutral Chair of the Panel writes this Interim Award indicating resolution by majority vote of the Panel of the issue presently before us.¹

There are approximately 10,000 employees working in 46 DOC and 5 DJJ facilities directly affected by this dispute. These employees fall under the definition of “security employee” who, along with peace officers and fire fighters (collectively referred to as “Section 14 employees”) have interest arbitration rights under Section 14 of the IPLRA.²

¹ This Interim Award contains hyperlinks to various websites. If a link does not immediately bring the reader to the website, copy and paste the link into your web browser. Data reporting formats are shown as of the date of writing and are subject to change by the reporting agencies.

Citations to transcribed portions of the hearing record shall be “Tr. ___”. Citations to audio recorded portions of the hearing record shall be “Audio File ___ at ___”.

² Because the employees involved in this case are Section 14 employees and even though the dispute in this case arises mid-term in the parties’ collective bargaining agreements, interest arbitration for resolving this dispute exists. *State of Illinois v. Illinois State Labor Relations Board*, 869 N.E.2d 274, 283 (4th Dist. 2007) (“... the statutory dispute-resolution procedures of section 14, the only section detailing dispute-resolution procedures for section 14 employees, must cover midterm disputes as well as initial-successor disputes if said dispute-resolution procedures are to be alternate and equitable to the right to strike.”).

As of last public reporting, there were approximately 27,000 adult individuals in custody at DOC facilities.³ Further, there were approximately 450 juveniles under the jurisdiction of DJJ at facilities or aftercare sites.⁴

The dispute flows from the terms of Illinois Governor JB Pritzker’s Executive Order 2021-20 which requires COVID-19 vaccinations for the employees involved in this dispute.⁵ The Executive Order provides, in relevant part:⁶

* * *

Section 5: Vaccination Requirements at State-Owned or Operated Congregate Facilities.

a. Definitions.

- i. “State-owned or operated congregate facilities” means congregate facilities operated by the Illinois Department of Veterans’ Affairs, the Illinois Department of Human Services, the Illinois Department of Corrections, and the Illinois Department of Juvenile Justice.

* * *

- b. All State employees 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, subject to bargaining.

* * *

During the period August 9 through October 22, 2021, the parties engaged in negotiations over the State’s decision to mandate vaccines for all employees in State

³ Illinois Department of Corrections Fact Sheets Adult Population FY21 Adult Population Data <https://www2.illinois.gov/idoc/reportsandstatistics/Pages/FactSheets.aspx>

⁴ Illinois Department of Juvenile Justice Monthly Reports October 2021 <https://www2.illinois.gov/idjj/Pages/Data-and-Reports.aspx>

⁵ <https://www.illinois.gov/government/executive-orders/executive-order-executive-order-number-20.2021.html>

⁶ *Id.*

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owned and operated congregate facilities.⁷ While agreements were reached for a number of facilities, the parties reached impasse on the vaccine mandate issue for the correctional Section 14 employees at facilities in DOC and DJJ and the Union filed for interest arbitration with the Illinois Labor Relations Board.⁸

Given the nature of the dispute and the life and death consequences involved, I determined at the outset that this case had to be presented and decided in a swift fashion.

After I ruled that the case would be handled in that fashion and as set forth in the November 12, 2021 Scheduling Order, the parties agreed to a procedure for resolution of this dispute in DOC and DJJ, which included a briefing schedule, hearings and issuance of an Interim Award on the threshold question which the parties could not resolve in their negotiations. That threshold question is:⁹

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

⁷ O’Boyle Affidavit at 2-3, pars. 9-10; State Exhibit 53.

⁸ *Id.* at 5, pars. 29-30.

The State maintains that it is not obligated to bargain over its decision to mandate vaccinations for employees in congregate facilities because it is a policy decision intimately connected to its core duty of protecting the health of residents of the congregate facilities. State Brief at 3. However, the State asserts that on a non-precedent basis, it agreed to bargain with the Union over the decision provided that the bargaining took place promptly in recognition of the emergency health issues at stake and that the parties also bargain over the effects of the decision at the same time. *Id.*

⁹ Scheduling Order at par. 3.

Technically, “COVID-19 is a respiratory disease caused by SARS-CoV-2, a new coronavirus discovered in 2019.”

<https://www.cdc.gov/dotw/covid-19/index.html>

Throughout this Interim Award, references to COVID shall be to the disease caused by the Coronavirus.

The parties further agreed that upon issuance of the Interim Award, the dispute is to be remanded to the parties to attempt to resolve any issues concerning implementation and compliance with the terms of the Interim Award and, if not resolved by the parties within the time period to be designated by the Interim Award, the matter is to be returned to the Arbitration Panel for final resolution.¹⁰

Briefs and evidence were filed by the parties on November 30, 2021 and hearings and arguments were held on December 4, 7, 15 and 17, 2021.

II. DISCUSSION

A. The Nature Of This Dispute

As noted *supra* at I, this is an “interest” arbitration.

There are two basic kinds of arbitrations. “Grievance” arbitrations are disputes over whether the terms of a collective bargaining agreement have been violated. “Interest” arbitrations are disputes over what terms or conditions should be part of a collective bargaining agreement or a collective bargaining relationship.

The distinction between grievance arbitrations and interest arbitrations is important for determining the result in this case.

In a typical grievance arbitration where the question is whether there was a violation of a collective bargaining agreement, the burden on the grieving union to demonstrate a violation of the parties’ contract.¹¹ A union’s burden in a contract grievance arbitration concerning an employer’s implementation of a vaccine mandate against COVID would most likely be a high one. Barring any specific language in a

¹⁰ Scheduling Order at pars. 9-10.

¹¹ See *The Common Law of the Workplace* (BNA, 2nd ed.), 55 (“In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof”); *Tenneco Oil Co.*, 44 LA 1121, 1122 (Merrill, 1965) (in a contract case, “... [t]he Union has the burden of proof to establish the facts necessary to make out its claim.”).

collective bargaining agreement concerning imposition of mandatory vaccinations, the employer would likely rely upon its management rights such as the ability to set standards or to determine qualifications and fitness for employees to perform their jobs, which would make the dispute a management rights dispute.

In grievance arbitrations that are management rights disputes, the grieving union must show that the employer's decision was "arbitrary" – *i.e.*, that the employer's decision was "... without consideration and in disregard of facts and circumstances of a case, without rational basis, justification or excuse."¹² Thus, the standard of review by an arbitrator in a management rights dispute is limited. Simply stated, in a management rights dispute an employer has the "right" to be "wrong" – it just cannot be "arbitrary".

In the context of a case like this, if this was a grievance arbitration where a union is challenging an employer's imposition of a vaccine mandate and where the employer argues that it is exercising its managerial authority, the employer's reliance upon reliable scientific evidence to support its decision to impose such a mandate would result in a denial of the grievance so long as the employer's reliance had a "rational basis" or "justification" and therefore was not "arbitrary." In such a case, whether the employer was "right" in its decision is not the standard of review to be utilized by an arbitrator. The question in such a case would be whether the employer

¹² Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 660 ("Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the 'sole judge' of a matter, management's action must not be arbitrary, capricious, or taken in bad faith"); *South Central Bell Telephone Co.*, 52 LA 1104, 1109 (Platt, 1969) ("... action is arbitrary when it is without consideration and in disregard of facts and circumstances of a case, without rational basis, justification or excuse.").

was “arbitrary” – which is a more difficult burden for a union to meet.¹³

However, in an interest arbitration where the question is whether specific terms proposed by a party should be part of the parties’ collective bargaining agreement or relationship, statutory factors guide the arbitrator’s decision. As discussed *infra* at II(C) and (D), those factors are not whether the employer was “arbitrary” with the burden on the union to make that demonstration, but are factors found in Section 14(h) of the IPLRA which are “applicable” and govern the dispute.

Because this is an interest arbitration, the “applicable” factors in Section 14(h) apply. Moreover, as discussed *infra* at II(C)(1) and (2), the burden is not on the Union to show that the State was “arbitrary”. Rather, the ultimate burden in this particular case is on *each* party to show that its position is the more reasonable.

B. COVID-19

As of this writing, the Centers for Disease Control and Prevention (“CDC”) report that there have been over 52.8 million cases of COVID-19 in the U.S. and that over 816,000 of those infected have died from the disease.¹⁴ The Illinois Department of Public Health (“IDPH”) reports 2.1 million cases of COVID-19 in Illinois with 31,000 deaths.¹⁵

¹³ Two grievance arbitration awards upheld the City of Chicago’s vaccine mandate with the arbitrator finding that the City exercised its management rights under the respective collective bargaining agreements to impose vaccine mandates. *City of Chicago and Coalition of Unionized Public Employees, et al.* (Roumell, December 15, 2021); *City of Chicago Fire Department and Chicago Fire Fighters Union Local No. 2* (Roumell, December 15, 2021). Those awards reference another grievance arbitration involving employees of the Chicago Transit Authority reaching a similar result. *Chicago Transit Authority and Amalgamated Transit Union Locals 241 and 308* (Bierig, September 10, 2021).

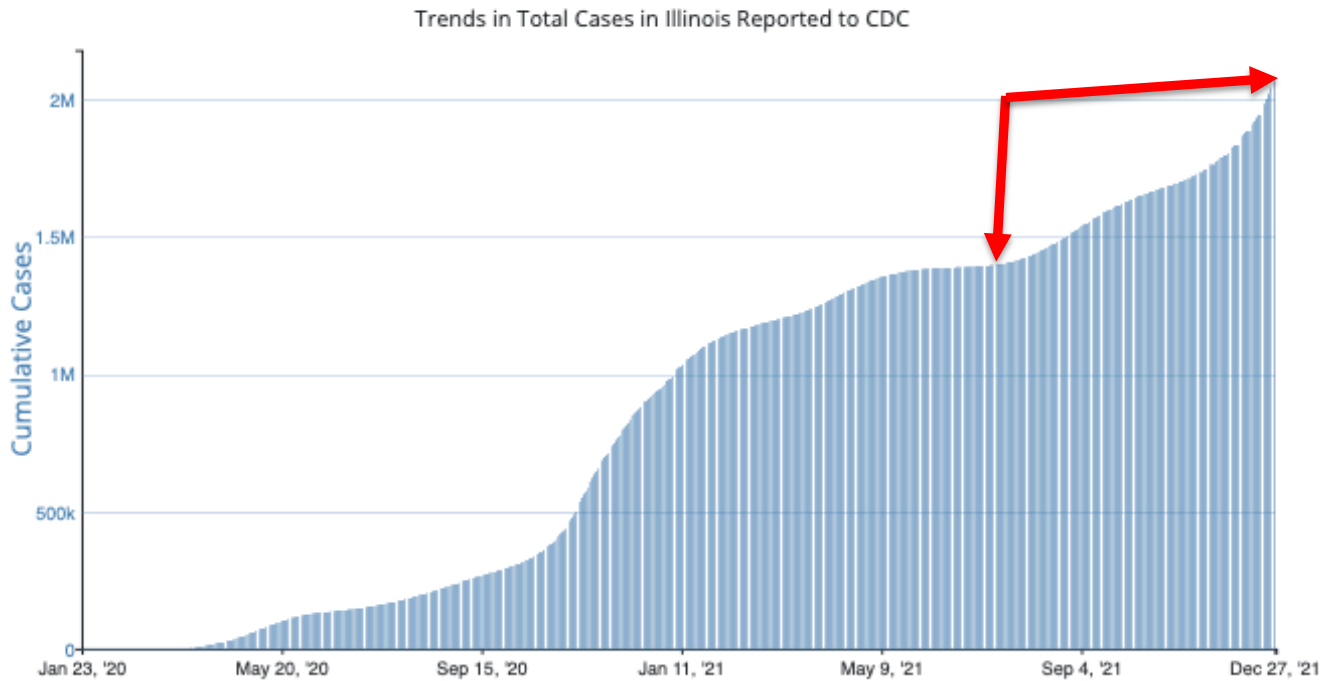
¹⁴ <https://covid.cdc.gov/covid-data-tracker/ - datatracker-home>

¹⁵ <https://dph.illinois.gov/covid19/data.html>

Illinois is in the midst of a surge in new COVID cases:¹⁶

Illinois sets record for daily coronavirus cases and passes 2 million infections since pandemic began

According to the CDC, as of December 27, 2021 the surge in cases from COVID-19 in Illinois looks like this:¹⁷

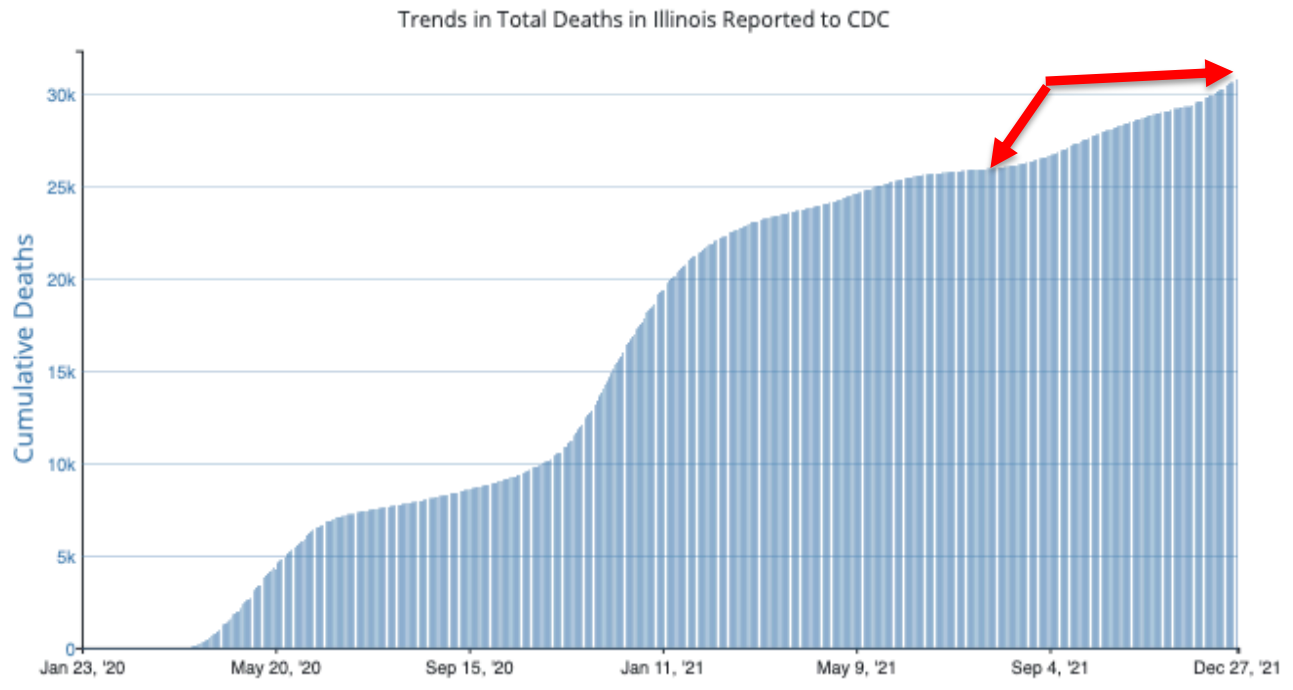


¹⁶ Chicago Tribune (December 22, 2021)

<https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-2-million-cases-20211222-vvpf73ezrzfbnpvisqdkun4l5u-story.html>

¹⁷ CDC COVID Data Tracker (select “Cases Total” in top left corner; “Illinois” and view selection options).
<https://covid.cdc.gov/covid-data-tracker/#datatracker-home>

The death rate from COVID-19 as of December 27, 2021 is also surging in Illinois:¹⁸



As explained by the CDC, the new variant – Omicron – is highly contagious and is predicted to have severe impacts on the health of individuals and the healthcare system.¹⁹

Potential Rapid Increase of Omicron Variant Infections in the United States

The Centers for Disease Control and Prevention (CDC) has identified the potential for a rapid increase in infections of the new variant of SARS-CoV-2, the Omicron variant, in the United States. Plausible scenarios include steep epidemic trajectories that would require expedient public health action to prevent

¹⁸ *Id.*

¹⁹ <https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html>

severe impacts on the health of individuals and the healthcare system.

The strain on the health care systems in the U.S. has been so taxing that some states are enlisting the National Guard to help with staffing shortages.²⁰ The hospital systems in Illinois have not been spared:²¹

Space in Illinois hospitals is at an all-time pandemic low, as patients flood in and workers burn out

Illinois hospitals are being flooded with patients more than at any other time of the pandemic, a Tribune analysis of state data has found, with fewer beds open than during the deadliest COVID-19 surge a year earlier.

* * *

The worst is apparently yet to come.

According to the CDC, “the number of newly reported COVID-19 deaths will likely increase over the next 4 weeks with 7,500 to 17,100 new deaths likely reported in the week ending January 22, 2022 ... [and] a total of 860,000 to 866,000 COVID - 19 deaths will be reported by this date.”²² Reported data from Johns Hopkins University reveal that as of December 26, 2021, the U.S. is now averaging 198,404 new COVID-19 cases each day (which is 47% higher than a week ago and the highest number since January 19, 2021) and is leading to predictions of half a million cases a day over the next week to 10 days; and with the week ending December 26, 2021,

²⁰ The New York Times (December 9, 2021)
<https://www.nytimes.com/live/2021/12/09/world/omicron-variant-covid>

²¹ Chicago Tribune (December 17, 2021)
<https://www.chicagotribune.com/coronavirus/ct-illinois-hospital-capacity-covid-surge-20211217-hnkjacf5vbbepbo3xyl7x24ymu-story.html>

²² <https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/forecasting-us.html>

an average of 1,408 Americans died from COVID-19 each day – a 17% increase from the prior week.²³

C. The Burden And The Standard

These cases are decided on burdens and standards – and that is the key to this case. Therefore, which party has the burden and what standard should be applied?

The Union argues that the State has the burden to demonstrate why a vaccine mandate should be imposed and that burden is a “heavy” one. The Union correctly states the standard and the burden for a party seeking to change the *status quo* in an interest arbitration. See my award in *Cook County Sheriff/County of Cook and AFSCME Council 31*, L-MA-1305-1308 (2016) at 5, quoting my award in *Village of Barrington and Illinois FOP Labor Council*, S-MA-13-167 (2015) at 5 (and awards cited therein):²⁴

... [I]nterest arbitration is a very conservative dispute resolution process which does not change a working condition unless the party seeking the change can show that the existing condition is broken ...:

In simple terms, the interest arbitration process is *very* conservative; frowns upon breakthroughs; and imposes a burden on the party seeking a change to show that the existing system is broken and therefore in need of change (which means that “good ideas” alone to make something work better are not good enough to meet this burden to show that an existing term or condition is broken). The rationale for this approach is that the parties should negotiate their own terms and conditions and the process of

²³ <https://www.cnn.com/2021/12/27/us/us-coronavirus-monday/index.html>

²⁴ *Cook County Sheriff* is found at: <https://www2.illinois.gov/ilrb/arbitration/Documents/L-MA-13-005arbaward.pdf>
Barrington is found at: <https://www2.illinois.gov/ilrb/arbitration/documents/s-ma-13-167.pdf>

interest arbitration – where an outsider imposes terms and conditions of employment on the parties – must be the *absolute* last resort. ...

The State argues that the burden and standard applicable to the positions in this case are much different from the “heavy one” sought to be applied by the Union on the State. According to the State, with respect to the burden and standard, the question to be answered is which position is the more “reasonable”?

1. The “More Reasonable” Standard And Burden

The problem here is that this is not a case where one party is seeking to change the *status quo*. Obviously, the State is seeking to add a vaccine mandate – a requirement that is new and changes the *status quo*.²⁵

However, the Union is also seeking to change the *status quo*. Specifically, the Union’s position seeks a “layered approach” making vaccination optional, but to add:

1. A rigorous weekly testing program for employees who decline to be vaccinated;
2. Better measures to ensure the use of masks and other forms of respiratory protection;
3. Better sanitation;
4. Better measures to enhance proper social distancing;
5. Better ventilation in correctional and juvenile justice facilities;

²⁵ See O’Boyle Affidavit at 5, par. 31; State Exhibit 53. Erin O’Boyle is the State’s Deputy Director of Labor Relations and was the Chief Spokesperson for the State in the negotiations with the Union concerning the vaccine mandate. *Id.* at pars. 3, 9. According to O’Boyle, after reaching impasse in their negotiations for the employees covered by this dispute in DOC and DJJ, the State “... maintained the status quo of regular testing.” *Id.* at par. 31. Maintaining the *status quo* during the pendency of interest arbitration proceedings as the State did is required by Section 14(l) of the IPLRA.

By seeking to add the mandated vaccine in this proceeding to “the status quo of regular testing”, the State is seeking to change the *status quo*.

6. Better measures to ensure that employees and non-employees who have been sick with or exposed to COVID-19 do not expose others to the disease; and
7. Enhanced procedures to decrease the possibility that inmates, visitors and other non-employees will not expose employees or inmates to the disease.

How to address COVID-19 in the workplace did not previously exist when the contracts were negotiated or prior to the start of the COVID-19 pandemic. Moreover, both parties are seeking to add conditions to the present protocols for addressing COVID-19. Therefore, *both* parties are seeking to change the *status quo*.

Where both parties seek to change the *status quo*, the burden and standard are closer to that as urged by the State – each party has the burden to show that its position is the more reasonable. *See* my award in *Village of Oak Lawn and Oak Lawn Firefighters Local 3405*, S-MA-13-033 (2014) at 66:²⁶

... When both parties seek to change the *status quo*, the standards are far different from circumstances where one party seeks to make that change but the other party seeks to maintain the *status quo*. Where both parties seek to change the *status quo*, the arbitrator has to sort out which is the more reasonable position in accord with the applicable statutory factors. Where one party seeks to change the *status quo*, the burden is on that party seeking to make the change to show that the existing system is broken and in need of repair. ...

See also, *City of Rockford and City Fire Fighters Local 413, IAFF*, S-MA-12-108 (Goldstein, 2013) at 60-63:²⁷

What jumps out to be is that as I see the parties' offers, each of the parties has proposed to change the language of Section 4.1, each pulling in the opposite direction of the other. ...

²⁶ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-13-033.pdf>

²⁷ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-12-108.pdf>

* * *

... In any case, preserving the status quo is not a possibility here
....

* * *

... In this case, neither party should bear a clear distinct burden to prove the change is necessary or the status quo is to be maintained. Rather, each party here shall be to bear the same burden to show me that its proposal is the more reasonable in the context of the Section 14(h) factors

Therefore, as the State correctly argues, since both parties seek to change the *status quo* – the State through adding mandated vaccinations and the Union through seeking a “layered approach” with optional vaccination and more “rigorous”, “better”, “better”, “better”, etc. mitigation strategies improving upon procedures currently utilized by the State – each party bears the burden to show that its position is the more reasonable.

2. Using The Union’s “Breakthrough” Analysis – The “Heavy Burden”

The Union strongly argues that the “breakthrough” analysis should be used and that the State should have a “heavy burden” to justify its position for a vaccine mandate – *i.e.*, that as I have previously found “[i]n simple terms, the interest arbitration process is *very* conservative; frowns upon breakthroughs; and imposes a burden on the party seeking a change to show that the existing system is broken and therefore in need of change (which means that ‘good ideas’ alone to make something work better are not good enough to meet this burden to show that an existing term or condition is broken).” *See Cook County Sheriff/County of Cook, supra* at 5; *Village of Barrington, supra* at 5 and awards cited quoted above.²⁸

²⁸ <https://www2.illinois.gov/ilrb/arbitration/Documents/L-MA-13-005arbaward.pdf>
<https://www2.illinois.gov/ilrb/arbitration/documents/s-ma-13-167.pdf>

Giving the Union the benefit of the doubt, even if the Union’s stricter breakthrough analysis is used, the existing procedures in the DOC and DJJ congregate facilities for addressing COVID-19 in those workplaces – the *status quo* – are broken and in need of a change. As discussed throughout this Interim Award, like in the U.S., COVID-19 is running rampant in Illinois and whatever prior steps that were being used to combat that spread in DOC and DJJ facilities which can constitute the *status quo* are just not working to prevent the spread of this disease. The vaccine mandate proposed by the State will address and improve that broken system.

Therefore, even under the Union’s breakthrough analysis, the State’s position to impose a vaccine mandate would prevail.

D. The “Applicable” Section 14(h) Factors

In an interest arbitration, the question is whether specific terms proposed by a party should be part of the parties’ collective bargaining agreement or relationship. Statutory factors in Section 14(h) of the IPLRA guide the arbitrator’s decision.

Section 14(h) of the IPLRA provides that an interest arbitrator/arbitration panel “base its findings, opinions and order upon the following factors, as applicable”.²⁹ All of the factors in Section 14(h) do not have to be applied. Only those factors

²⁹ Section 14 of the IPLRA lists the following factors for consideration in interest arbitrations:

(h) Where there is no agreement between the parties ... the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

- (1) The lawful authority of the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (A) In public employment in comparable communities.
 - (B) In private employment in comparable communities.

[footnote continued on next page]

“as applicable” are to be applied. If it were intended that all Section 14(h) factors be considered in every case, the words “as applicable” would not appear in Section 14(h).

The relevant factors “as applicable” in Section 14(h) for this case are:

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)).

1. The Lawful Authority Of The Employer

Section 14(h)(1) of the IPLRA identifies “[t]he lawful authority of the employer” as an applicable factor. This factor favors the State’s position that vaccinations should be mandated.

It is long and well-established that governmental entities can mandate vacations.

In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905),³⁰ the City of Cambridge adopted an ordinance consistent with state law that required residents to be vaccinated against smallpox. The Supreme Court upheld the validity of that ordinance observing that based on the state’s police powers (197 U.S. at 26-27):

[continuation of footnote]

- (5) The average consumer prices for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
- (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

³⁰ https://scholar.google.com/scholar_case?case=16169198038706839183&q=197+U.S.+11&hl=en&as_sdt=400006

... But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

* * *

... [A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted, smallpox, according to the recitals in the regulation adopted by the Board of Health, was prevalent to some extent in the city of Cambridge and the disease was increasing.

In *Zucht v. King*, 260 U.S. 174 (1922),³¹ the City of San Antonio, Texas required children attending public school to present proof of vaccinations. The Supreme Court citing *Jacobson* upheld the vaccination requirement finding (260 U.S. at 176-177 [citations omitted]):

Long before this suit was instituted *Jacobson v. Massachusetts*, had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. A long line of decisions by this Court had also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not

³¹ https://scholar.google.com/scholar_case?case=17474784919803032884&q=260+U.S.+174&hl=en&as_sdt=400006

violative of the equal protection clause merely because it is not all-embracing. In view of these decisions we find in the record no question as to the validity of the ordinance

With that backdrop of the long-held ability of a state to mandate vaccinations, the current mandates for vaccinations against COVID-19 are now addressed.

In *Klaassen et al., v. Trustees v. Trustees of Indiana University*, 7 F.4th 592 (7th Cir., 2021),³² all students at Indiana University were required to be vaccinated against COVID-19 unless they were exempted for religious or medical reasons. Denying an injunction pending appeal, the Seventh Circuit found (7 F.4th at 593 [citations omitted]):

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. ... [V]accination requirements, like other public-health measures, have been common in this nation.

* * *

Indiana does not require every adult member of the public to be vaccinated, as Massachusetts did in *Jacobson*. Vaccination is instead a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere. Many universities require vaccination against SARSCoV-2, but many others do not. Plaintiffs have ample educational opportunities.

... Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education. Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable.

* * *

If conditions of higher education may include surrendering property and following instructions about what to read and write, it is

³² https://scholar.google.com/scholar_case?case=6115646719468333465&q=Ryan+Klaassen+v.+Trustees+of+Indiana&hl=en&as_sdt=400003

hard to see a greater problem with medical conditions that help all students remain safe when learning. A university will have trouble operating when each student fears that everyone else may be spreading disease.

In *Troogstad et al., v. The City of Chicago and Governor Jay Robert Pritzker*, No. 21 C 5600 (N.D. Ill., November 24, 2021),³³ the court denied a motion for a temporary restraining order against Governor Pritzker’s Executive Order 2021-22 along with the City of Chicago’s mandatory vaccination policy finding (slip op. at 9-11, 15-17 [some citations omitted]):

Plaintiffs next argue that *Klaassen*, which addressed a vaccination requirement for university students, ought not apply to vaccination requirements for public employees because “the determination to terminate or not to renew a public employment contract cannot be premised upon the employee's protected activities.” But this argument misinterprets *Klaassen*. *Klaassen* did not hold that *Jacobson* permitted the university to violate the fundamental right of students not to be vaccinated. Instead, *Klaassen* held that no such substantive due process right exists in the first instance.

* * *

... Plaintiffs have not shown that the vaccine and testing orders in question implicate their fundamental right to bodily autonomy.

* * *

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. ...

* * *

³³ https://scholar.google.com/scholar_case?case=10118093584777964958&q=Troogstad&hl=en&as_sdt=400006

... [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. ...

Numerous courts have come to the same conclusion for substantially similar reasons. See *Does 1-6 v. Mills*, 16 F.4th 20, 32 (1st Cir. 2021) (a state vaccine mandate “easily” passed rational basis review), *application for injunctive relief denied sub nom.* *Does 1-3 v. Mills*, ___ S. Ct. ___, 2021 WL 502177 (mem.) (Oct. 29, 2021); *We The Patriots*, 2021 WL 5121983, at *15 (same); *Norris v. Stanley*, ___ F. Supp. 3d ___, 2021 WL 4738827, at *3-4 (W.D. Mich. Oct. 8, 2021) (holding that, in response to a similar argument that Michigan State University failed to consider natural immunity in imposing a vaccine mandate, “even if there is vigorous ongoing discussion about the effectiveness of natural immunity, it is rational for MSU to rely on present federal and state guidance in creating its vaccine mandate,” *id.* at *3); *Kheriaty v. Regents of Univ. of Cal.*, No. SACV 21-01367 JVS (KESx), 2021 WL 4714664, at *8 (C.D. Cal. Sept. 29, 2021) (rejecting claim that university's choice not to exempt previously infected students from vaccine mandate lacked a rational basis because “merely drawing different conclusions based on consideration of scientific evidence does not render the Vaccine Policy arbitrary and irrational”).

The U.S. Supreme Court has denied efforts to block lower court decisions refusing to enjoin vaccine mandates in *We The Patriots USA v. Hochul*, 21A125 (December 13, 2021); *Together Employees v. Mass General Brigham*, 21-1909 (November 23, 2021); *John Does 1-3 v. Mills*, 21A90, (October 29, 2021); *Klaassen v. Trustees of Indiana University*, 21A15 (August 12, 2021).

Given the cited case law, the State has the lawful authority to impose a vaccination mandate.³⁴

For support of its position that vaccines should be mandated for the employees involved in this case, the State relied upon federal and state public health

³⁴ The Union cites to *BST Holdings, LLC v. Occupational Safety and Health Administration*, No. 21-60845, 17 F.4th 604 (5th Cir. 2021) for authority. Union Brief at 13. *BST* is found at: https://scholar.google.com/scholar_case?case=13455362359911823000&q=BST+Holdings+v.+OSHA&hl=en&as_sdt=400006

BST is distinguishable. In that case, the Fifth Circuit Court of Appeals stayed OSHA’s mandate which required employers having 100 or more employees to develop, implement and enforce a mandatory COVID-19 vaccination policy and for those workers who remain unvaccinated, to undergo weekly COVID-19 testing and wear a face covering at work in lieu of vaccination. The court found [emphasis in original]:

We next consider the necessity of the Mandate. The Mandate is staggeringly overbroad. Applying to 2 out of 3 private-sector employees in America, in workplaces as diverse as the country itself, the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to *some* employees than to *other* employees. All else equal, a 28 year-old trucker spending the bulk of his workday in the solitude of his cab is simply less vulnerable to COVID-19 than a 62 year-old prison janitor.

...

As the State argues in this case, given the nature of the work of the employees in congregate DOC and DJJ facilities placing them in close contact with each other and individuals living in the facilities, the employees in this case fall more in line with the prison employee referenced in *BST* than the employee spending the bulk of his or her workday in the solitude of a truck.

Further, the court in *BST Holdings* recognizes cites *Zucht v. King* and *Jacobson v. Massachusetts*, *supra* for the proposition that “... precedent had long ‘settled that it is within the police power of a state to provide for compulsory vaccination’ ...”. With the State’s position that it can impose the vaccination mandate, that is this case.

In any event, the Fifth Circuit’s stay of OSHA’s action was dissolved by the Sixth Circuit on December 17, 2021 (the last day of the hearing in this matter). *In Re MCP No. 165, Occupational Safety and Health Administration Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 62402, Nos. 21-7000 *et al.* (6th Cir. December 17, 2021).

The Sixth Circuit was able to take that action because the case in the Fifth Circuit was transferred to the Sixth Circuit pursuant to a lottery procedure used for multidistrict litigation to consolidate pending cases in different circuits with the same issues to be decided by a single circuit. Slip op. at 8-9 citing 28 U.S.C. § 2112(a)(3)-(4).

<https://int.nyt.com/data/documenttools/sixth-circuit-osh-ruling/86fd0c47a33a99ba/full.pdf>

Applications to the Supreme Court for an emergency stay of the Sixth Circuit’s ruling pending review on the merits were filed with the Supreme Court. On December 22, 2021, the Court scheduled oral argument to be heard on January 7, 2022. Supreme Court Docket Nos. 21A240, 21A241.

In *Fraternal Order of Police Chicago Lodge No. 7, et al., v. City of Chicago*, 2021 CH 5276 (Cir. Ct. Cook County, November 1, 2021), the City of Chicago’s December 31, 2021 vaccination requirement was stayed “until such time as their grievances can be arbitrated.” That case is not applicable in this matter because the underlying dispute in this case – *i.e.*, whether the State should impose a vaccine mandate – *is* being arbitrated.

recommendations, credible academic sources, and the expertise of its own health officials. That is sufficient to meet the lawful authority of the employer factor in Section 14(h)(1) of the IPLRA. By overwhelming precedent, the State therefore has the lawful authority to mandate vaccinations of employees as proposed in DOC and DJJ facilities.

2. Stipulations Of The Parties

Section 14(h)(2) of the IPLRA identifies “[s]tipulations of the parties” as an applicable factor. This factor favors the State’s position that it must take steps to prevent COVID infections through a vaccine mandate.

There is one stipulation that is relevant and the Union articulates the underlying facts:³⁵

The Union does not deny the tremendous toll the pandemic has taken on the Nation and the State since March of 2020. Nor does it deny that COVID-19 is a very contagious disease, one that can cause extreme sickness and death. The disease is literally transmitted by breathing, which means infected individuals can infect others in close indoor environments. Governmental bodies have taken extraordinary measures to combat the spread of the disease.

The State agrees:³⁶

* * *

12. Since the start of 2020, the novel coronavirus COVID-19 has spread invisibly and indiscriminately throughout the world. On January 30, 2020, the World Health Organization (“WHO”) declared a public health emergency of international concern over the global outbreak of COVID-19. On March 11, 2020, the WHO elevated COVID-19 to a pandemic. As of November 1, 2021, the

³⁵ Union Brief at 1-2.

³⁶ See Affidavit of Dr. Susan Casey Bleasdale at 3-4 [citations omitted]; State Exhibit 14.

WHO reported over 246 million confirmed cases of COVID-19 and 4,995,412 confirmed deaths across the world.

13. As of November 10, 2021, the Centers for Disease Control and Prevention (“CDC”) reported more than 46 million confirmed cases of COVID-19 in the United States and more than 753,000 confirmed deaths, by far the most COVID-19 cases and deaths of any country.

14. In Illinois, more than 1,722,000 people have contracted COVID-19, and more than 26,000 people have died.

15. COVID-19 is spread primarily through respiratory droplets such as those emitted when a person coughs, sneezes, sings, or talks.

16. People can acquire and spread COVID-19 without themselves experiencing any symptoms of the disease.

17. Even in people who do develop symptoms, the highest levels of virus occur prior to the onset of symptoms. This means that even symptomatic people are most contagious before they show signs of the disease, and possibly before they have any reason to know they may be infected.

18. COVID-19 is spread far more readily indoors than outdoors. Data suggests indoor risk is 18.7 times higher than outdoor risk.

19. The longer an individual is in close contact with an infected person, the more likely he or she is to acquire the virus. ...

* * *

3. The Interests And Welfare Of The Public

Section 14(h)(3) of the IPLRA identifies “[t]he interests and welfare of the public” as an applicable factor. This factor also favors the State’s position that it should mandate vaccinations.

(a). The State’s Evidence

The State cites to the evidence offered by Dr. Susan Casey Bleasdale as support for its position requiring a vaccine mandate.

Dr. Bleasdale is the Chief Quality Officer and Medical Director of Infection Prevention & Antimicrobial Stewardship at University of Illinois Hospital and Assistant Vice Chancellor for Quality & Patient Safety, and Associate Professor of Clinical Medicine in the College of Medicine at University of Illinois at Chicago and is board certified in medicine and infectious disease who serves as a consultant to the Illinois Department of Public Health to advise on the response to COVID-19, investigates outbreaks and reviews mitigation strategies. Dr. Bleasdale has also treated individuals in custody who have become hospitalized due to COVID-19 infections since the onset of the pandemic in March 2020. Dr. Bleasdale is a specialist in infectious disease focusing not only on the health of individuals, but of populations as a whole, which means understanding infectious diseases and how to prevent and minimize their spread. According to Dr. Bleasdale, “I have training and experience to manage both treatment of COVID-19 at the individual level and prevention measures at a community and population level.”³⁷ Dr. Bleasdale is an expert in infectious diseases and public health.³⁸

With supporting scientific studies and references, Dr. Bleasdale makes the following points:³⁹

Generally

1. The three COVID-19 vaccines which became available in Illinois in 2021 are safe and effective at preventing COVID-19, especially severe illness and death, with the risk of severe allergic reactions, blood clotting and myocarditis (inflammation of the heart muscle) extremely low.

³⁷ Dr. Bleasdale’s Affidavit at pars. 1-11; State Exhibit 14 at 1-2.

³⁸ See also, Dr. Bleasdale’s Curriculum Vitae; State Exhibit 15.

³⁹ Dr. Bleasdale’s Affidavit at pars. 19-46; State Exhibit 14 at 4-12.

2. The overall risk of adverse side effects from vaccination remains extremely low whereas the risk of adverse side effects from COVID-19 infection, including serious illness, hospitalization, or death, is much higher.
3. While vaccinated people can still acquire and spread COVID-19, they acquire COVID-19 at 3 times lower risk than unvaccinated people.
4. Vaccinated people have 2 times lower risk of severe infections or hospitalizations than unvaccinated people.
5. Vaccinated people have 7 times lower risk of death than unvaccinated people.
6. Illinois is still in the midst of COVID-19 pandemic due to the fact that a substantial portion of the population is not fully vaccinated.
7. The Delta variant is more aggressive and more contagious than previously circulating strains of the virus resulting in a high transmission rate.
8. The Delta variant may cause more severe disease than prior strains of the virus.
9. The Delta variant now accounts for more than 98% of all coronavirus infections in the U.S. since the end of August 2021.
10. The recently identified Omicron variant reinforces the need for vaccination and likely evolved due to lack of vaccination and ongoing transmission. The Omicron variant was first identified in a geographic area where there is a lower vaccination rate against COVID-19.
11. Because every time a new person is infected with COVID-19, the virus is given a chance to mutate and vaccination therefore helps prevent further mutations from developing.

Data to support vaccinations at DJJ facilities

12. Child hospitalizations for COVID-19 increased five-fold from June to August 2021.
13. During the period July through September 2021, the case rate for those under 20 years of age increased from 17 per 100,000 to 197 per 100,000 (down from a high of 304).

14. The Illinois Department of Public Health has determined that the Delta variant is the most dominant strain of COVID-19 in Illinois and has spread quickly among unvaccinated people of all ages in Illinois.

Vaccination and Immunity

15. The immunity conferred by vaccines represents an effective method of controlling the spread of the virus.
16. The immunity conferred from vaccines has been shown to afford greater protection against COVID-19 than immunity from being previously infected.
17. Immunity conferred solely from infection is inconsistent and unreliable.
18. Vaccines have been shown to improve immunity of those who were previously infected (with one study showing that being unvaccinated was associated with 2.34 times the odds of reinfection compared with being fully vaccinated).
19. Immunity from previous infection decreases over time and while immunity from vaccinations will possibly also decrease over a period of time, that decrease may be prevented through taking a booster shot.
20. Booster shots which maintain immunity as a result of prior shots are becoming more readily available.
21. Data suggest that vaccines reduce the chances that a person with COVID-19 will transmit the virus to others.
22. Vaccinated individuals are less likely to become infected with COVID-19 than unvaccinated people and therefore less likely to transmit COVID-19 to others which “is a reason why vaccination is a critical piece in preventing transmission of COVID-19.”

Correctional Facilities

23. Older adults are at a high risk for infection by respiratory viruses and other pathogens such as coronavirus and therefore are at high risk for severe infection and death from infection.

24. The CDC recognizes the importance of achieving high vaccination rates in places such as hospitals and clinics, prisons and schools.
25. Almost one-third of the COVID-19 related deaths in the U.S. have occurred at long term care facilities and outbreaks have occurred in facilities where residents were highly vaccinated, but transmission occurred through unvaccinated staff members.
26. The concerns of unvaccinated staff members transmitting the virus to vaccinated residents can occur rampantly based how individuals in custody are housed, communal eating, command recreation, the open air environment between cells and floor and limited space for quarantine.
27. Her visit to a DOC correctional facility showed the facility to be spaces with increased risk of transmission; most of those in custody are housed in open air areas; they have significant interaction with security staff; the mitigation measures in place do not overcome the congregate residential setting's risk for transmission of COVID-19 for staff and individuals in custody; the wings for isolation or quarantine are separate from other housing units are still open air spaces which increases the risk of transmission even with staff wearing proper personal protective equipment in those areas.

Dr. Bleasdale makes the following conclusions supporting the State's position that a vaccine mandate should be imposed:⁴⁰

- ... Vaccination is a critical measure because of the inherent risks of the congregate living setting.
- Unvaccinated individuals who work in the field of corrections and have regular interaction with the general public and with individuals in custody should be vaccinated in an effort to help prevent the transmission of the virus to other members of the public or bring the virus into their work locations, or to locations where there are vulnerable populations. Many of the DOC facilities have vulnerable

⁴⁰ Dr. Bleasdale's Affidavit at pars. 46-54; State Exhibit 14 at 12-14.

populations of individuals in custody, for example elderly individuals or individuals with other comorbidities such as chronic illnesses, and vaccination of security staff interacting with this population would help reduce the risk of transmission of COVID-19 to those individuals.

- A vaccine mandate is not just about the staff working in correctional facilities themselves — it is about the nature of their job, their consistent interaction with vulnerable populations, and their subsequent contacts in the community, which are all opportunities for transmission, infection, hospitalization and death. While testing is another mitigation measure, it is not a substitute for vaccination in terms of infection prevention because it does not itself prevent serious illness, hospitalization, or death, in comparison to vaccination.
- Vaccination is a more effective infection prevention measure than testing because if you decrease the risk of acquiring COVID-19, you are decreasing the overall risk of transmission and negative health outcomes. With testing, a person who is infected with COVID-19 may not get their test results until after working an entire shift and exposing many other people. And a negative test only provides some assurance that the person is not infected at a moment in time; but that person could develop COVID-19 shortly thereafter, and the tests do not always accurately tell whether a person is infected or not.
- Unvaccinated individuals pose a substantially larger public health risk of spreading the deadly virus that causes COVID-19 to other workers, individuals in custody, and the broader community than vaccinated individuals.
- Vaccination is particularly important for occupations that are at high risk of contracting and spreading COVID-19, such as Department of Corrections staff, to protect both their co-workers and those in their custody, as well as themselves. For example, in the Illinois Department of Corrections, current data on outbreaks of COVID-19 in facilities have been traced and confirmed to staff at the facilities bringing COVID-19 into the work location, and secondary transmission to other co-workers and individuals in custody. This most recently occurred at the Centralia Correctional Facility, where approximately 127 staff and

individuals in custody became infected and it was traced back to one unvaccinated staff member. This outbreak demonstrates why vaccination is a more effective infection prevention measure than testing. In the Illinois Department of Juvenile Justice setting, transmission risk is increased because the residents live in groups of five people. If one resident is positive for COVID-19, all residents in that group must quarantine, isolating those residents from school, substance abuse counseling, and mental health services and programs, which can further impact the residents social, mental, and emotional health and wellbeing.

- It is her medical opinion that there is significant risk to having unvaccinated staff interacting with individuals in custody because it is a vulnerable population and a setting where transmission can spread rampantly.
- Further, it is her medical opinion that a staff member is likelier to have better health outcomes if vaccinated and becomes infected with COVID-19 than if the staff member is unvaccinated and becomes infected with COVID-19. A significant benefit of vaccination is helping to stop transmission of COVID-19, and also in decreasing the risk of serious diseases, hospitalization, and death for those who become infected.

Dr. Bleasdale testified at the hearing and made the following conclusions [emphasis added]:⁴¹

- A. 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.*

* * *

⁴¹ 12/721 Tr. at 149-150, 160-161.

I would say I do support mandates for certain settings, within the healthcare setting, *within congregate settings*.

These are areas where *it is critical that those that are in this group are vaccinated as an extra measure of protection to protect those within it and those workers as well with vaccination*.

Dr. Bleasdale further testified as follows about her recommendation to the State to have a vaccine mandate [emphasis added]:⁴²

A. I made a recommendation from the standpoint of congregate settings at large, that the requirement for vaccination due to the high risk setting in not just Department of Corrections but congregate living settings and in general that congregate settings are high risk because of what we have seen related to transmission and mortality throughout the pandemic in these groups.

Q. *And specifically what was that recommendation?*

A. *To require vaccination*. I felt that the risk benefit of their requirement for these high risk settings and congregate settings would be beneficial.

Q. Now, are you familiar with the policy that came out from the Governor's office?

A. Yes.

Q. *Would you say that the policy was consistent with your recommendation?*

A. *I would say yes. I would say it's consistent.*

In simple terms, according to Dr. Bleasdale, 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.

⁴² 12/7/21 Tr. at 166-167.

Dr. Bleasdale’s conclusion that “vaccination is our only tool to prevent disease, hospitalization and death” is consistent with the position taken by the CDC. According to the CDC “... vaccination is the *best* protection against COVID-19” [emphasis added].⁴³

This evidence favors the State’s position that mandated vaccinations are in the interests and welfare of the public.

(b). The Union’s Position

The Union’s position is a “layered approach” which initially makes vaccination optional, but adds rigorous weekly testing program for employees who decline to be vaccinated; better measures to ensure the use of masks and other forms of respiratory protection; better sanitation; better measures to enhance proper social distancing; better ventilation in correctional and juvenile justice facilities; better measures to ensure that employees and non-employees who have been sick with or exposed to COVID-19 do not expose others to the disease; and enhanced procedures to decrease the possibility that inmates, visitors and other non-employees will not expose employees or inmates to the disease. The Union stresses use of tools such as the University of Illinois’ saliva test for testing. These are very good ideas to help combat the spread of the disease.

The Union’s position emphasizes vaccination as an option with improved testing and mitigating strategies, but strongly focuses on testing – better and more testing. Indeed, in testimony offered at the hearing, the Union demonstrated how the way tests have been regularly scheduled at certain facilities made it possible for employees to not be tested for substantial periods of time depending on their schedules not having them present on days when tests were administered. The Union also

⁴³ <https://www.cdc.gov/media/releases/2021/s1029-Vaccination-Offers-Higher-Protection.html>

demonstrated that deficiencies in enforcing masking requirements in the facilities for those in custody, vendors, and non-security employees allowed potentially infected individuals to freely move about and infect others. The Union also showed that contact tracing has not been effectively administered.⁴⁴

All of that obviously has to be improved. This is especially important given the emerging science concerning breakthrough infections caused by the Delta and Omicron variants.

Testing is a tool for *detection* of those infected. However, vaccination is the primary tool for *preventing* infection. It is more in the interests and welfare of the public to maximize the preventive tool as the main weapon against spread of the virus – even for those who may have immunities as a result of previously being ill from COVID, but remain unvaccinated.

According to the CDC (October 29, 2021):⁴⁵

**New CDC Study: Vaccination Offers Higher Protection
than Previous COVID-19 Infection**

Study participants were over 5 times more likely to have COVID-19 if they were unvaccinated and had a prior infection

Given the movement of individuals in, out and within the various DOC and DJJ facilities, to best serve the interests and welfare of the public, maximization of the best tool for prevention must be used. And that tool is to require vaccination.

The Union also argues that there will be an exodus of employees who will quit or retire rather than submit to a mandated vaccination requirement, thus causing

⁴⁴ Employees' testimony offered on December 15 and 17, 2021.

⁴⁵ <https://www.cdc.gov/media/releases/2021/s1029-Vaccination-Offers-Higher-Protection.html>

staffing shortages and harming the interests and welfare of the public.⁴⁶ In support, the Union submitted a polling study from the Kaiser Family Foundation (“KFF”) which concluded:⁴⁷

More Than A Third Of Unvaccinated Workers Say They Would Leave Their Job If Their Employer Required Vaccination Or Testing, Rising To Seven In Ten If No Testing Option Was Available

* * *

About six in ten unvaccinated workers (59%) say they would be likely to apply for an exemption if their employer required them to get the COVID-19 vaccine, including 44% who say they would be “very likely” to do so. Nearly four in ten (38%) say they would be either “very” or “somewhat” unlikely to apply for an exemption. When asked what type of exemption they would apply for, about one in four unvaccinated workers (27%) say they would apply for a religious exemption, one in six (16%) say they would apply for a medical exemption, while the remainder say they would apply for some other kind of exemption, multiple types, or they are unsure.

Despite numerous reports of employees leaving their jobs due to employer-imposed vaccination requirements, only 5% of unvaccinated adults say they have left a job because an employer required them to get vaccinated, accounting for 1% of adults nationwide. A larger share (24%) of all adults say they know someone who has left a job due to an employer vaccination requirement, with Republicans more than twice as likely as Democrats to say they know someone who has done so (32% vs. 14%).

Typically, that type of argument of adverse impact of an awarded benefit or condition comes up when a union makes a proposal in an interest arbitration that it seeks to be adopted, but the employer argues that the benefit is onerous or too costly.

⁴⁶ Union Brief at 15; Testimony of employees given on December 15 and 17, 2021.

⁴⁷ Union Exhibit 33 (currently at Figure 10).

<https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-october-2021/>

That type of argument is routinely rejected because the statutory factors in Section 14(h) require the result. *See e.g.*, my award in *City of Highland Park and Teamsters Local 700*, S-MA-09-273, (2013) at 9:⁴⁸

Interest arbitrators follow statutory factors deemed applicable which are found in Section 14(h) of the IPLRA. Interest arbitrators do not make political decisions concerning the impact of their decisions – that is appropriately left to elected officials and appointed administrators. If application of the statutory factors by an interest arbitrator results in requiring payment of a benefit which proves to be too costly (here, for example, the maintenance of certain benefits), how the City reacts to having to meet its financial obligations for payment of that benefit either in terms of budgeting funds, maintaining staff levels, delivering services, etc., is not for an interest arbitrator to decide. Those kinds of decisions are for the City’s elected officials and administrators. Putting it bluntly, if maintenance of a benefit which cannot be changed through the interest arbitration process proves too costly to continue at current levels, then layoffs or leaving positions unfilled which are vacated through attrition – the “virtual” layoff – could result (either in a bargaining unit involved in the interest arbitration or in some other group of employees, represented or unrepresented) or diminished services delivered. Or, revenues may have to be increased, depending upon the importance of the service to be delivered. The dynamics of the tugging of the entitlements of the employees against the reality of what could happen if benefits prove to be too costly but are maintained and factoring in the need for providing services to the public and the costs which the taxpayers must ultimately bear, is the brew that forces realities through the collective bargaining process. Those decisions are simply not for an interest arbitrator to make.

A similar argument was rejected in my award in *City of Streator and FOP*, S-MA-17-142 (2018) at 31-34.⁴⁹

⁴⁸ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-09-273.pdf>

⁴⁹ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-17-142ArbAward.pdf>

However, in this case, the State is not making the argument that employees may leave rather than submit to vaccination as a condition of employment and therefore it will suffer serious staffing shortages. Rather, the Union is making that argument in opposition to the State’s position seeking mandated vaccinations. The State is obviously going into requesting a vaccination mandate with eyes wide open that there are employees who will not submit to being vaccinated and will leave – either through retirement or quitting. I must assume that the State has made the risk/benefit analysis for that possibility and is prepared to take the risk of some employees leaving as a result of a vaccine mandate as not outweighing the benefits of having a vaccine mandate. However, the consequences of employees leaving rather than being vaccinated (and that result is really speculative), falls on the State and the Union’s raising the possibility of employees leaving as a result of a vaccine mandate cannot change the result.

4. Internal Comparability Is Not An “Applicable” Factor

Section 14(h)(4) of the IPLRA identifies “[c]omparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services ...” as a potential “applicable” factor. This factor does not favor the State’s position that it can mandate vaccinations.

The State has negotiated memoranda of understandings (“MOUs”) that have vaccine mandates with other bargaining units – including bargaining units represented by the Union.⁵⁰ While there are a number of such MOUs with other bargaining units and unions, the State focuses on the MOUs negotiated with the Union at the Department of Human Services (“DHS”) and Department of Veterans’ Affairs

⁵⁰ 12/4/21 Tr. at 39-40.

“DVA”) which contain vaccine mandates – specifically that “[a]ll employees who work in congregate settings in those agencies outlined above [DHS and DVA] must present proof of having received their first shot of a two-shot vaccine or one shot of a one-shot vaccine by October 26, 2021.”⁵¹ The State then argues that “DHS and DVA are comparable to DOC and DJJ in that they, like DOC and DJJ, have represented employees at congregate care facilities that are subject to the Governor’s Executive Order 2021-20”⁵²

The Union counters with the testimony of Union Deputy Director Mike Newman. Newman explained why the Union agreed to the mandated vaccinations in DHS and DVA. According to Newman, the Union’s position for all of its bargaining units was “vaccine or test”, but the Union made an assessment after the parties were well into bargaining that because of potential federal vaccination mandates for entities receiving Medicare or Medicaid funds, a federal vaccination mandate was inevitable in the congregate facilities operated by DHS and DVA and would supersede any agreements reached by the parties. With that coming federal vaccination mandate, the Union made the assessment to agree to the mandate for DHS and DVA in an effort to get more concessions and protections in return from the State during the bargaining process. According to Newman, the same conclusion could not be made for the DOC and DJJ facilities because there would be no coverage of those facilities by a potential federal order mandating vaccinations.⁵³

That agreement by the Union to accept vaccination mandates in DHS and DVA should not be used against the Union. Newman’s explanation just shows distinctions

⁵¹ State Brief at 15; O’Boyle Affidavit at par. 18; State Exhibit 58.

⁵² State Brief at 15.

⁵³ Newman testimony 12/17/21; Audio File 19 at 01:28-04:36.

between the work locations of employees in DHS and DVA compared to those in DOC and DJJ and was a good bargaining strategy by the Union (agreeing to a vaccine mandate in DHS and DVA and attempting to gain more for its members because the mandate was inevitable for employees in DHS and DVA congregate facilities and could not be avoided) and, from the Union’s standpoint, rationally distinguishes its agreements for mandatory vaccinations in DHS and DVA while opposing such mandates in DOC and DJJ.

In any event, Section 14(h)(4) of the IPLRA does not look to *where* employees work, but looks at *what* employees *do* – *i.e.*, “[c]omparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees *performing similar services ...*” [emphasis added]. For internal comparability to be considered, the statutory requirement that employees of an employer must be engaged in “similar services” has been the rationale in interest arbitration proceedings to give weight to what other Section 14 employees receive to the exclusion of non-Section 14 employees. *See e.g.*, my award in *Village of Flossmoor and FOP*, S-MA-17-193 (2019) at 33 [quoting *City of Streator, supra*]:⁵⁴

The FOP is correct – there are no real internal comparables. *See Streator, supra* at 30 that even when there were other represented employee groups [footnotes omitted]:

... [E]xisting employees in the Public Works Department under the City’s contract with AFSCME and other clerical employees under the City’s contract with the Laborers are not similar to the police

⁵⁴ *Flossmoor* is found at:
<https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-17-193ArbAward.pdf>
Streator is found at:
<https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-17-142ArbAward.pdf>

officers under this Agreement so as to cause the City's offer to be chosen. The similar group of employees to police officers would appear to be firefighters – and there is no current contract for that group for comparison purposes. ...

The MOUs relied upon by the State that include vaccine mandates are for non-Section 14 employees.⁵⁵ Those MOUs are not from relevant internal comparables for this case for Section 14 employees having interest arbitration rights. The duties and skills needed for the services performed by DOC employees working with incarcerated individuals and DJJ employees working with juveniles under DJJ authority are far different than those services performed by DHS and DVA employees with respect to the individuals residing in DHS and DVA congregate facilities.

To hold otherwise would result in a slippery slope and would allow the more common wages, benefits and working conditions interest arbitrations for police, fire and correctional employees under Section 14 who do not have the right to strike but have interest arbitration rights, to be compared to other groups of employees who have the right to strike, but do not have interest arbitration rights (unless the employees are deemed essential under the IPLRA).

To give consideration as the State argues to where employees work (congregate settings) as opposed to what employees do as specified in Section 14(h)(4) (“performing similar services”), would result in a double-edged sword. For example, in an interest arbitration for Corrections employees where wages or benefits are in issue, in an effort to obtain a lower economic offer than one sought by the Union, the State could propose to compare higher paid Corrections employees with lower paid unskilled employees (e.g., janitors) just because those two groups work in the same

⁵⁵ 12/4/21 Tr. at 42-49.

congregate setting – DOJ correctional facilities. But that logic would backfire because the Union would then seek to compare Corrections employees with higher paid skilled trades employees who work in the same facility.

Therefore, for internal comparability purposes, what the employees do is critical and where they work is not. Section 14 and non-Section 14 employees often mix and work in the same location even in congregate settings. There can be corrections employees, building trades employees, laborers, nurses, medical staff and teachers all working in the same facility. The statute does not provide for such comparisons based on where the employees work.

For interest arbitration purposes, although the Section 14 employees in this case work in different facilities that are considered “congregate” facilities as do some DVA and DHS employees, the employees involved in this case working at DOC and DJJ are not “performing similar services” to those employees working in DHS and DVA as required by Section 14(h)(4) and cannot be compared.

Internal comparability is therefore not an “applicable factor” in this case.

5. External Comparability Is Not An “Applicable” Factor

Section 14(h)(4)(A) of the IPLRA also identifies “[c]omparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees ... with other employees generally in public employment in comparable communities”, which is commonly referred to as “external comparability.”

In this case, the Union argues that I should compare Illinois with a number of external units of government (other states, counties or jurisdictions).⁵⁶

⁵⁶ 12/4/21 Tr. at 56-57, 158-159.

My view on use of external comparability is well-known and long held. As a result of having issued over 100 interest arbitration awards since 1989, I have come to the conclusion that external comparability with the heavy weight that factor has been given by other arbitrators and advocates is just not an “applicable” factor that can realistically be used in interest arbitrations.⁵⁷ I have not read external comparability out of the IPLRA. I have followed Section 14(h) of the IPLRA and determined as Section 14(h) allows that external comparability is just not an “applicable” factor to decide these cases. *See e.g.*, my award in *Village of River Forest and Fraternal Order of Police*, S-MA-19-132 (2021) at 13:⁵⁸

... For years I have been trying to point out to parties in these proceedings that external comparability (Section 14(h)(4)(A) of the IPLRA) should not be considered in interest arbitrations or in contract negotiations. *See e.g.*, *Cook County Sheriff/County of Cook and AFSCME*, L-MA-13-005-008 (2016) at 38-52;⁵⁹ *Village of Swansea and FOP*, S-MA-16-213 (2018) at 19-21;⁶⁰ *Village of Flossmoor and FOP*, S-MA-17-193 (2019) at 4-15;⁶¹ *City of Streator, supra* at 4-17;⁶² and cases cited in those awards.

While *River Forest* and the cited cases in that award go into depth explaining the reasons why I view that external comparability is not an “applicable” factor, simply put, the main rationales for my no longer using that factor are that there is no definition of comparable communities in Section 14; no guidance on how to pick

⁵⁷ Interest arbitration awards are collected at the Illinois Labor Relations Board’s website:
<https://www2.illinois.gov/ilrb/arbitration/Pages/default.aspx>

⁵⁸ https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-132_arb_award.pdf
The footnotes have been renumbered to allow for internet access to the original decisions.

⁵⁹ <https://www2.illinois.gov/ilrb/arbitration/Documents/L-MA-13-005arbaward.pdf>

⁶⁰ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-16-213ArbAward.pdf>

⁶¹ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-17-193ArbAward.pdf>

⁶² <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-17-142ArbAward.pdf>

them; no guidance how to use them; the methodologies that can be used are not relevant because of differing wage and benefit scales, differing contract expiration periods and methodologies and reasons for settling contracts cannot be taken into account, effectively resulting in apples to oranges comparisons. *River Forest* at 13-18. Among the important practicable reasons for my not using external comparability are that (*id.* at 15 [emphasis in original]):

* * *

7. Parties in the comparable communities settle contracts for different reasons. ...

* * *

10. And *most* important, because they were not at the bargaining table when the comparable communities negotiated their contracts, the parties negotiating a contract or who are in interest arbitration for a new contract had absolutely *no* input into what went in the contracts in the comparable communities. And yet, the results of other negotiations or interest arbitration proceedings are *forced* upon parties trying to put together their contract that instead should be tailored to their specific needs and not some other communities' needs.

For external comparability purposes, interest arbitrators should, in theory, be looking for communities to allow “apples to apples” comparisons – but realistically, they don’t exist. I recognized this problem early on. See my award in *Village of Streamwood and Laborers International Union of North America*, S-MA-89-89 (1989) at 21:⁶³

... The concept of a true “comparable” is often times elusive to the fact finder. Differences due to geography, population, department size, budgetary constraints, future financial well-being, and a

⁶³ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-89-89.pdf>

myriad of other factors often lead to the conclusion that true reliable comparables cannot be found. The notion that two municipalities can be so similar (or dissimilar) in all respects that definitive conclusions can be drawn tilts more towards hope than reality. ...

*See also, my award in County of Lee/Lee County Sheriff and FOP, S-MA-03-142 (2004) at 14-15:*⁶⁴

The problem here is obvious. I am not satisfied that an “apples to apples” comparison can be made in this case. The FOP focuses on rankings, while the Employer focuses on averages. Further, the wage plans for the different counties are not the same as the ones under the Agreement and the impact of the wage proposals on the individual employees who fall within the various steps of the plans vary widely. Additionally, the time periods when the comparisons are made are not always similar to give a valid basis for comparisons, particularly when we are looking into future years when those other counties may be in negotiations for represented employees and it is just not known what the product of those negotiations will yield for the future years. Making these kinds of comparisons and trying to realistically look at the future and extrapolating valid wage comparisons is often as difficult as trying to catch a greased pig.

In the past when I have tried to dig into the external comparability comparisons urged by parties in interest arbitrations, I have had to become a pretzel to make comparisons in the disputes before me. For making decisions, if you have to become a pretzel in the analysis to reach the end result, the analysis is wrong. It just cannot be done for typical wage and benefits interest arbitrations – and it cannot be done for this case.

How other states, counties, or jurisdictions have handled vaccine mandates just cannot determine how Illinois should handle vaccine mandates.

⁶⁴ <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-03-142.pdf>

The purpose of a preamble “... is to supply reasons and explanations for the legislative enactments.” *Illinois Independent Telephone Association v. Illinois Commerce Commission, et al.*, 539 N.E.2d 717, 726 (4th Dist., 1988).

The Preamble to Governor Pritzker’s Executive Order 2021-20 which mandates vaccines shows an order based on science and public health reasons:⁶⁵

WHEREAS, since early March 2020, Illinois has faced a pandemic that has caused extraordinary sickness and loss of life, infecting over 1,490,000, and taking the lives of more than 23,800 residents; and,

WHEREAS, at all times but especially during a public health crisis, protecting the health and safety of Illinoisans is among the most important functions of State government; and,

WHEREAS, the Illinois Department of Public Health (IDPH) has determined that the Delta variant is the most dominant strain of COVID-19 in Illinois and has spread quickly among unvaccinated people of all ages in Illinois; and,

WHEREAS, the Delta variant of the coronavirus is more aggressive and more transmissible than previously circulating strains, and poses significant new risks in the ongoing effort to stop and slow spread of the virus; and,

WHEREAS, the Delta variant also may cause more severe disease than prior strains of the virus; and,

WHEREAS, the Centers for Disease Control and Prevention (CDC) estimates that the Delta variant now accounts for more than 90 percent of all sequenced coronavirus cases in the U.S.; and,

WHEREAS, the CDC has issued guidance recommending wearing a mask indoors in public in most circumstances, even for fully vaccinated people, as well as where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance; and,

⁶⁵ <https://www.illinois.gov/government/executive-orders/executive-order-executive-order-number-20.2021.html>

WHEREAS, every region in the State is experiencing increased numbers of COVID-19 cases and increased numbers of hospital beds and ICU beds utilized by COVID-19 patients; and,

WHEREAS, there are parts of the country in which there are few if any available ICU beds as a result of the Delta variant, and in many parts of Illinois, the number of available ICU beds is decreasing as a result of the Delta variant; and,

WHEREAS, the CDC continues to advise that cloth face coverings or masks protect persons who are not fully vaccinated from COVID-19; and,

WHEREAS, social distancing, face coverings, and other public health precautions have proved to be critical in slowing and stopping the spread of COVID-19; and,

WHEREAS, COVID-19 cases for 5 to 11-year-olds and 12 to 17-year-olds went up dramatically over the past month; and,

WHEREAS, the CDC has recognized vaccination as the leading public health prevention strategy to end the COVID-19 pandemic and recommends that all teachers, staff, and eligible students be vaccinated as soon as possible; and,

WHEREAS, COVID-19 vaccines are safe, effective, and widely available free of cost to any Illinois resident 12 years of age and older; and,

WHEREAS, while over 6.7 million Illinoisans have been fully vaccinated against COVID-19, in order to protect against the rapid spread of the Delta variant, additional steps are necessary to ensure that the number of vaccinated residents continues to increase and includes individuals working in certain settings of concern, including those who work around children under the age of 12; and,

WHEREAS, increasing vaccination rates in schools is the strongest protective measure against COVID-19 available and, together with masking and regular testing, is vital to providing in-person instruction in as safe a manner as possible; and,

WHEREAS, health care workers, and particularly those involved in direct patient care, face an increased risk of exposure to COVID-19; and,

WHEREAS, stopping the spread of COVID-19 in health care settings is critically important because of the concentration of people

in many of these settings and the presence of people with underlying conditions or compromised immune systems; and,

WHEREAS, requiring individuals in health care settings to receive a COVID-19 vaccine or undergo regular testing can help prevent outbreaks and reduce transmission to vulnerable individuals who may be at a higher risk of severe disease; and,

WHEREAS, statewide measures are necessary to protect particularly vulnerable individuals, as well as employees, in high-risk health care settings; and,

WHEREAS, it is the duty of every employer to protect the health and safety of employees by establishing and maintaining a healthy and safe work environment and requiring employees to comply with health and safety measures; and, ...

Again, “[p]arties in the comparable communities settle contracts for different reasons” *River Forest, supra* at 14.⁶⁶ And it should not be that “... the results of other negotiations or interest arbitration proceedings are *forced* upon parties trying to put together their contract that instead should be tailored to their specific needs and not some other communities’ needs.” *Id.* at 15 [emphasis in original]. The dispute in Illinois should be resolved based upon considerations relevant to the parties involved in *this* dispute in Illinois and *not* by the parties in other states, counties, or jurisdictions.

As I have been trying for years to get the point across, parties in what are brought up as comparable communities settle their disputes for different reasons. Illinois had no input into the decisions in other states, counties, or jurisdictions on what their vaccine mandate policies should or should not be. Likewise, those other states, counties, or jurisdictions should have *no* input into what the policy in Illinois should be.

⁶⁶ https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-19-132_arb_award.pdf

Through Governor Pritzker’s Executive Order, Illinois has made its decision based on science and public health reasons. Whatever drove other states, counties, or jurisdictions to do different is just something that cannot cause the results in those states, counties, or jurisdictions to drive the public health policy in Illinois as reflected in Governor Pritzker’s Executive Order 2021-20 which contains the vaccine mandate at issue in this case.

External comparability is therefore not an “applicable factor” for resolution of this dispute.

6. Conclusion On Application Of The Applicable Factors

Applying the relevant “applicable” factors in Section 14(h):

First, as discussed *supra* at II(D)(1), as shown by the court cases dating back to 1905, the State has the lawful authority to impose vaccine mandates (Section 14(h)(1)).

Second, as discussed *supra* at II(D)(2), the parties have effectively stipulated (Section 14(h)(2)) that COVID-19 has taken a tremendous toll on the Nation and is highly contagious causing massive numbers of infections and deaths and there is no dispute that the numbers are increasing on a daily basis and surging in Illinois.

Third, as discussed *supra* at II(D)(3), the interests and welfare of the public (Section 14(h)(3)) favor imposition of a vaccine mandate. While the Union’s arguments for increased testing and other mitigation strategies will help, steps such as increased testing protocols as urged by the Union will only serve to better *detect* those who are infected. However, not only is better *detection* needed, but more aggressive steps at *prevention* must be imposed. A vaccine mandate adds that strong layer of prevention.

On balance, the above applicable factors under Section 14(h) support the State’s position concerning the vaccine mandate. To answer the question in this part of the proceeding, “[s]hould the State mandate Coronavirus [COVID-19] vaccinations for the employees covered by the relevant collective bargaining agreements in this case?”, the answer is “Yes”.

III. REMAND AND FURTHER PROCEEDINGS

Section 14(f) of the IPLRA provides that “[a]t any time before the rendering of an award, the chairman of the arbitration panel, if he is of the opinion that it would be useful or beneficial to do so, may remand the dispute to the parties for further collective bargaining for a period not to exceed 2 weeks.” The Scheduling Order provides a remand consistent with that requirement.⁶⁷ If 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.

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.

IV. CONCLUSION

The question in this part of the proceeding is:

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

⁶⁷ Scheduling Order at pars. 9-10.

The relevant IPLRA Section 14(h) factors in this case are:

1. The lawful authority of the employer;
2. Stipulations of the parties; and
3. The interests and welfare of the public.

All three of those factors favor the State's proposal to implement a vaccine mandate. The answer to the question is therefore "Yes".

This matter is now remanded to the parties until January 7, 2022 to implement the appropriate COVID-19 procedures which shall include a vaccine mandate.

While the State has prevailed in this part of the proceeding, the Union's evidence shows that the parties must address the kinds of problems raised by the Union which can include better measures to ensure the use of masks and other forms of respiratory protection; better sanitation; better measures to enhance proper social distancing; better ventilation in Correctional and Juvenile Justice facilities; better measures to ensure that employees and non-employees who have been sick with or exposed to COVID-19 do not expose others to the disease; and enhanced procedures to decrease the possibility that inmates, visitors and other non-employees will expose employees or inmates to the disease. The Union's points are very good ideas to help combat the spread of the disease. While not sufficient to prevail on the issue of mandated vaccinations discussed in this Interim Award, the Union presented compelling evidence of serious shortcomings at a number of the facilities and a need for improvement in those areas. The parties are now tasked to address those issues.

In accord with the Scheduling Order, should the parties not come to agreement during the limited remand period, the matter will be returned to this Panel for final resolution.⁶⁸ Should that happen, it is within my authority as the Chair to require the parties to make final offers with this Panel choosing what it believes to be the more reasonable offer.⁶⁹ If utilized, that final offer option forces the parties to make reasonable proposals in their negotiations knowing that an unreasonable proposal will not be accepted by this Arbitration Panel. That option is something that I may need to exercise.

V. INTERIM AWARD

The question is:

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

The answer is:

Yes.

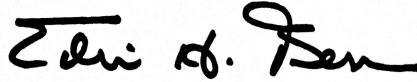
This matter is now remanded to the parties until January 7, 2022 to reach agreement on implementation of the appropriate COVID-19 procedures which shall include a vaccine mandate. However, the affected employees shall receive their first COVID-19 vaccination to be taken no later than January 31, 2022.

⁶⁸ Scheduling Order at pars. 9-10.

⁶⁹ *Id.* at par. 10.

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The parties shall report on the status of this matter by January 10, 2022.



Edwin H. Benn
Arbitrator
Neutral Chair

State Appointed Arbitrator: I concur with the result.

Union Appointed Arbitrator: I dissent from the result.

The Panel Arbitrators reserve the right to file written concurring or dissenting opinions which, if filed, will be appended to this Interim Award.

Dated: December 29, 2021