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The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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MULTI-YEAR COLLECTIVE BARGAINING AGREEMENTS AND THE AFSCME/ STATE OF ILLINOIS DISPUTE

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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent developments of interest to the public employment relations community. This issue focuses on developments under the collective bargaining statutes and the U.S. Constitution.

MULTI-YEAR COLLECTIVE BARGAINING AGREEMENTS AND THE AFSCME/ STATE OF ILLINOIS DISPUTE

By, Tamara Cummings and John H. Kelly

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Mr. Kelly acknowledges the assistance of his law clerk, Brian Gorka, a second year student at the John Marshall Law School in the research and preparation of this article.

I. INTRODUCTION

Public employers and unions representing public employees have negotiated multi-year collective bargaining agreements for decades. The legal status and viability of such agreements are at issue in pending litigation between AFSCME Council 31 and the State of Illinois. This article will discuss the developments leading to the litigation and what the outcome might mean for public employers, unions, and collective bargaining in general. After presenting a brief history of the

law governing multi-year collective bargaining agreements, we will provide background to the litigation and the union and the employer perspectives on the issues raised in those matters.

II. HISTORY OF MULTI-YEAR COLLECTIVE BARGAINING AGREEMENTS

Prior to the effective date of the Illinois Public Labor Relations Act,[1] multi-year collective bargaining agreements were considered null and void. The controlling case for this proposition was *Ligenza v. Round Lake Beach*.[2]

In *Ligenza*, the parties (the Fraternal Order of Police and the Village of Round Lake Beach) had entered into a collective bargaining agreement, executed on November 3, 1982 and effective through April 30, 1984. Under the agreement in question, covered officers were to receive a 5 percent wage increase on May 1, 1983, and another 5 percent increase on November 1, 1983. [3]

When the village failed to pay the May 1, 1983 wage increase, the union filed a grievance. After numerous requests by the union to abide by the agreement, village representatives finally notified the union that it did not consider itself bound by the agreement. The union sued to compel arbitration and to enforce the collective bargaining agreement.[4]

The court held that under Section 8-1-7 of the Illinois Municipal Code, the contract was null and void. Section 8-1-7 provides:

> No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, *unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality,* and no money belonging thereto shall be paid on account thereof.[5]

Specifically, the court stated:

> Under section 8-1-7...any contract made without a full prior appropriation is null and void...Section 8-1-7 (and its statutory predecessors) has consistently been construed as denying a municipality the power to contract, and thereby incur indebtedness, for a period longer than one year, at least in the absence of an enabling statute authorizing such a contract...Further, a party contracting with a city is presumed to know whether the city is prohibited from making a contract, and a contract made in violation of section 8-1-7 is void *ab initio* and cannot be enforced by estoppel or ratification . . . [6]

In July 1984, while *Ligenza* was pending before the court, the Illinois Legislature enacted the Illinois Public Labor Relations Act ("IPLRA").[7] Section 21 of the

IPLRA pertains to multi-year agreements and reads, in part: "Subject to the appropriation *power* of the employer, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act."[8] Section 14(h), providing for interest arbitration for police and firefighter contracts, lists, among the factors on which the arbitrator shall base the award, "The lawful authority of the employer."[9]

Although the *Ligenza* decision was issued on May 21, 1985, after the effective date of the IPLRA, the dispute involved events that occurred before the IPLRA's enactment. Since the passage of the Act, thousands of multi-year agreements have been negotiated or imposed through the interest arbitration process upon public sector employers and unions.[10]. This includes nineteen multi-year contracts between AFSCME and the State of Illinois.[11] However, since the passage of the IPLRA in 1984, there have been no reported cases addressing Section 21 and, more specifically, whether that Section was intended to address the validity of multi-year collective bargaining agreements.[12] Pending litigation between the State of Illinois and AFSCME Council 31 may have a serious impact on the future of multi-year agreements.

III. STATE OF ILLINOIS AND AFSCME LITIGATION

AFCSME's representation of State of Illinois employees pre-dates passage of the IPLRA, spanning over approximately thirty-five years and nineteen multi-year collective bargaining agreements in various bargaining units.[13]

A State of Illinois – AFSCME Master Agreement effective September 5, 2008 through June 30, 2012 provided for a total of 15.25 percent in wage increases.[14] Within weeks of the signing of the Master Agreement, the stock market crashed and the economy slid into what many refer to as the "Great Recession."[15]

In 2011, facing the prospect of massive layoffs, AFSCME entered into a series of agreements with the State, totaling approximately $400,000,000.00 in concessions.[16] The agreements, among other things, deferred certain wage increases in exchange for guarantees from the State that there would be no layoffs of AFSCME employees through June 30, 2012, and with limited exceptions, no facility closures prior to July 1, 2012.[17] Arbitrator Edwin Benn was given jurisdiction to resolve disputes that arose under the concession agreements. [18]

The concession agreements deferred until February 1, 2012, 2 percent of a 4 percent wage increase that, under the Master Agreement, was due on July 1, 2011. The other 2 percent increase remained due on July 1, 2011.[19] However,

although the Governor originally submitted a budget to fund the 2 percent increases, the General Assembly did not appropriate sufficient funds, [20] and the State failed to pay approximately 30,000 employees the increase due on July 1, 2011.[21]

AFSCME grieved and in an award dated July 19, 2011, Arbitrator Benn ordered the State to pay the 2 percent wage increase. Arbitrator Benn stated:

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

Arbitrator Benn declined to consider the State's arguments that, under Section 21 of the IPLRA and the Illinois Constitution, it was not obligated to pay because the General Assembly did not appropriate sufficient money to fund the wage increases. Deferring those arguments to the courts, Arbitrator Benn quoted from the U. S. Supreme Court's decision in *Alexander v. Gardner-Denver Co.*:

> [A]n arbitrator is *confined* to interpretation and application of the *collective bargaining agreement* . . . Thus the arbitrator has authority to resolve only questions of *contractual* rights . . .
>
> [T]he specialized competence of arbitrators pertains primarily to the law of the shop, *not* the law of the land . . . [T]*he resolution of statutory or constitutional* issues is a *primary responsibility* of courts . . .[23]
>
> Arbitrator Benn concluded:
>
> Section 21 of the IPLRA is a *statutory* provision. The parties did not specifically make Section 21 part of the Agreement or the Cost Savings Agreements. As an arbitrator, I therefore have no authority to interpret that statutory provision. Statutory interpretations must be made by the courts and not by arbitrators.[24]

With respect to the State's constitutional argument, Arbitrator Benn reached a similar conclusion. He wrote, "Like the State's statutory arguments, in my capacity as an arbitrator under the Agreement, the State's Constitutional arguments are therefore not for me to decide." [25]

Notwithstanding the no layoff/no facility closure commitments in the concession agreements, on September 8, 2011, the State announced that because of insufficient appropriations by the General Assembly, it would close seven mental health and correctional facilities and, prior to July 1, 2012, lay off approximately

2,000 employees, of whom 1,680 were covered by AFSCME contracts.[26] Arbitrator Benn heard this matter as well and in an award dated October 4, 2011, he blocked the layoffs and facility closures prior to July 1, 2012.[27] Arbitrator Benn stated:

> In Cost Savings Agreements effective September 24, 2010 and November 3, 2010, the State agreed that employees represented by the Union would not be laid off through June 30, 2012, nor would facilities be closed prior to July 1, 2012. The State is now laying off employees and closing facilities prior to those dates. The State therefore did not live up to its contractual promises. Pure and simple and as a matter of contract, the State violated its no layoff/no facility closure promises found in the Cost Savings Agreements.[28]

Arbitrator Benn's remedy included:

1. Should adversely impacted employees represented by the Union lose their insurance or incur medical expenses which would otherwise have been paid for or covered by insurance (for themselves or covered family members, dependents or beneficiaries, including life insurance benefits) had they not been laid off, as part of the make whole remedy, those employees shall be further compensated by the State for those losses in addition to reinstatement and lost wages and benefits.

2. Should adversely impacted employees represented by the Union lose their homes, cars or are forced to move from their residences as a result of the State's clear violations of the Cost Savings Agreements which place those employees in positions of being unable to make timely payments on those items, or should those employees suffer any other related losses due to the State's violation of the Cost Savings Agreements caused by the improper layoffs, then as part of the make whole remedy, in addition to reinstatement and lost wages and benefits, those employees shall be compensated by the State for those additional losses. [29]

As in the Wage Increases decision, Arbitrator Benn rejected the State's Section 21 and Constitutional arguments because he considered them outside of his contractual jurisdiction.[30] Multiple court actions are pending, in state[31] and federal courts.[32]

Bilateral negotiations are the cornerstone of collective bargaining. These cases raise several issues, and theoutcome of the litigation may seriously impact the way public employers and unions handle multi-year collective bargaining agreements

in negotiations. The next sections will discuss these issues, first from a union and then from a public employer perspective.

IV. UNION PERSPECTIVES

A. The State Did Not Violate The Labor Agreements When The General Assembly Did Not Appropriate Funds for Those Labor Agreements

As ruled by the Arbitrator, the State of Illinois violated the clear and unequivocal language set forth in the parties' agreements when it failed to pay the 2 percent wage increase due on July 1, 2011, and ordered the closure of State facilities prior to July 1, 2012. Nothing in those agreements made the State's obligations contingent upon legislative appropriations or upon the State receiving a certain sum in revenue. The State's defense relies on the IPLRA and the Illinois Constitution, urging that its contractual obligations did not arise because the General Assembly did not appropriate sufficient funds.

1. The IPLRA

Section 7 of the IPLRA imposes a duty to bargain on AFSCME and the State of Illinois. It provides:

> A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.... "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process . . . . [33]

AFSCME and the State entered into a Master Agreement. The requirement that the parties meet in advance of the budget-making process ensures that they produce an agreement consistent with any budgetary constraints. Thus, when the State became aware of budgetary shortfalls, the parties met again and entered into concession agreements that saved the State hundreds of millions of dollars and prevented layoffs and facility closures.

Section 7 further provides, "The duty 'to bargain collectively' shall also mean that no party to a collective bargaining contract shall terminate or modify such contract, unless [specific actions are taken]."[34] It does not allow for the unilateral termination or modification of the terms of an agreement, which is exactly what the State did when it ignored its obligations under the concession agreements. The detailed negotiation process envisioned in Section 7 would be meaningless if, after the parties have met and negotiated a binding contract, the State could single handedly renege on its obligations simply because the legislative body chooses not to appropriate sufficient funds.

The State's actions also run afoul of Section 3(o) of the IPLRA. Section 3(o) defines public employer to include "the State of Illinois . . . and any person acting within the scope of his or her authority, express or implied, on behalf of those entities in dealing with its employees," but to "not mean and shall not include the General Assembly of the State of Illinois . . . ."[35]

The State of Illinois is the public employer and the Governor is its agent. The collective bargaining agreements entered into by agents acting on behalf of employers are binding on those employers, even when they require an expenditure of funds.[36] An employer who accepts the benefits of a collective bargaining agreement ratifies the agreement and makes it binding.[37]

AFSCME and the State, acting through the Governor, entered into agreements that included wage increases and other terms in exchange for hundreds of millions of dollars in concessions. These agreements are binding on the State which includes both the Governor and the General Assembly. The State accepted the benefits of those agreements and employees continued to work under the terms of the agreements, and under Section 7, the State may not unilaterally modify or terminate them. Its failure to pay the wage increases and its going forward with layoffs and facility closures clearly violated the agreements. Because Section 3(o) expressly excludes the General Assembly from the definition of public employer, the actions of the General Assembly are not binding upon the parties and cannot serve as a basis for releasing the State of its contractual obligations.

The State's reliance on Section 21 of the IPLRA is contrary to the provision's plain language. The provision refers to the appropriations *power* of the Employer, not the actual appropriations bills enacted annually. In other words, the language means multi-year collective bargaining agreements are not intended to impact whatever appropriations authority exists under state or local law.

Section 21 does not say that multi-year collective bargaining agreements are invalid unless they are subject to appropriations. It also does not say that multi-year agreements must be approved by the General Assembly.

The State's interpretation of Section 21 is illogical in light of the legislative history of the IPLRA. The dispute in *Ligenza v. Village of Round Lake Beach* over the validity of multi-year collective bargaining agreements arose in May 1983, as the General Assembly was considering Senate Bill 536, a precursor to the IPLRA.[38] The Senate version of the Act was debated and passed out of the Senate on May 25, 1983 and did not contain Section 21.[39] Section 21 was proposed by Representative Greiman when the House debated the bill on June 23 and 24,

1983.[40] While there was no discussion of Section 21, given the status of the *Ligenza* case at that time, it is probable that Section 21 was added in direct response to the Village's claim that multi-year areements were null and void.[41]

Section 15 of the IPLRA provides:

(a) In case of any conflict between the provisions of this Act and any other law . . . executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control . . .

(b) Except as provided in subsection (a) above, any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents . . .

(c) It is the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution, that the provisions of this Act are the exclusive exercise by the State of powers and functions which might otherwise be exercised concurrently by home rule units. Such powers and functions may not be exercised concurrently, either directly or indirectly, by any unit of local government, including any home rule unit, except as otherwise authorized by this act.

To the extent that the Illinois General Assembly passed an appropriations bill inconsistent with the Agreements entered into by the parties, or the State promulgated rules negating the agreements, under Section 15, the agreements and not the bill or rules should control.

Multi-year agreements ensure certainty and labor stability and thousands of multi-year contracts have been adopted since the enactment of the IPLRA, including contracts with the State of Illinois. The General Assembly is not a public employer and therefore not a party to the agreements. Thus, the General Assembly does not have to act for a contract to be binding upon the State. It may not accept or reject the terms of an agreement. To suggest that the General Assembly has the power to obliterate an agreement simply by failing to appropriate funds after a binding contract has been established defies the entire scheme of the IPLRA as well as its goal of labor peace.

2. The Illinois Constitution

The Illinois Constitution provides:

> Article II, §1: "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."[42]
>
> Article VIII, §1(b): "[t]he State…shall…incur obligations for payment or make payments from public funds only as authorized by law . . "[43]
>
> Article VIII, §2(a): "[t]he Governor shall prepare and submit to the General Assembly…a State budget for the ensuing fiscal year…Proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget."[44]
>
> Article VIII, §2(b): '[t]he General Assembly by law shall make appropriations for all expenditures of public funds by the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year."[45]

Article II of the Constitution describes the separation of powers among the three branches of government. Article VIII, Sections 2(a) and 2(b) describe the obligations of the Governor and the General Assembly with respect to the budgetary process. These provisions contemplate the two branches working together to produce a balanced budget. Under Section 2(a), the Governor must submit to the General Assembly a balanced budget, with proposed expenditures not to exceed projected revenues. Similarly, according to Section 2(b), the General Assembly must enact a budget where the actual appropriations do not exceed estimated revenues. The State contends that the Governor, exceeded his constitutional powers when he incurred financial obligations even though the legislature did not appropriate sufficient funds to fulfill those obligations, violating Article VIII, Sections 2(a) and 2(b). However, when the parties negotiated concession agreements, they were cognizant of these constitutional limitations and the agreements saved the State approximately $400,000.000.00 — $300,000,000.00 in FY 2011 and an additional $100,000,000.00 in FY 2012.[46]

Contrary to the State's claims, abiding by these agreements will not violate the separation of powers clause or Article VIII, Sections 2(a) and 2(b). Under Section 2(a), the Governor must submit a balanced budget to the General Assembly. There

has been no assertion that the Governor submitted a budget that exceeded his limitations under this section.[47] On the contrary, the State conceded that the Governor requested sufficient appropriations to allow it to honor the agreements and even stated in a July 2011 Department of Central Management Services' memo:

> The Governor's proposed budget to the General Assembly sought to fully fund all collective bargaining contracts. However, the budget that was passed by the General Assembly and sent to the Governor does not contain appropriation authority . . . .[48]

Similarly, Section 2(b) requires that the General Assembly's appropriations for expenditures not to exceed the funds available. As with Section 2(a), the State did not take the position that honoring the agreements would cause expenditures to exceed revenues for the 2012 fiscal year.[49] The State conceded that at the time the Governor signed the budget bills passed by the General Assembly, he exercised his constitutional authority to make reductions and line item vetoes of $376 million contained in those bills.[50] The amendatory vetoes and reductions created enough space in the budget for the State to meet the agreement's obligations and the State did not argue that the award would require the General Assembly's appropriations to exceed estimated revenue.[51] In other words, the agreements did not require the State to spend money it did not have; they only required the State to spend or appropriate the money differently.

The State has asserted that abiding by the agreements would require it to incur an obligation for which legislative appropriation is insufficient and therefore would violate Article VIII, Section 1(b) because the obligation is not "authorized by law."[52] However, during the litigation, the State never argued that the appropriations for the 2012 fiscal year were insufficient to satisfy its obligations.[53] Even if the State did not appropriate sufficient funds to certain departments to satisfy the agreements, nothing prevented the Governor and the General Assembly from working together to ensure that the State would meet its contractual obligations as contemplated by the Illinois Constitution.[54] This occurs every year through the enactment of supplemental appropriations bills.[55] To the extent that the General Assembly did not make sufficient appropriations to satisfy the terms of the agreements, it was incumbent upon them to work together on a supplemental appropriations bill to ensure that the State satisfied its contractual obligations.

3. The Equal Protection and Contracts Clauses

The U.S. District Court for the Northern District of Illinois and the Seventh Circuit have rejected AFSCME's arguments that the State violated the Equal Protection

Clause and Contracts Clause of the U. S. Constitution. Therefore, this Section will briefly address the courts' rulings on these issues.

In an amended complaint filed in the U.S. District Court on July 20, 2011, AFSCME alleged that the State was liable under 42 U.S.C. Section 1983 because it impaired a contract in violation of Article I of the Constitution and violated AFSCME-represented employees' Fourteenth Amendment right to equal protection.[56] AFSCME also asserted equal protection and breach of contract violations under Illinois law[57]. The District Court denied AFSCME's motion for injunctive relief and granted the State's motion to dismiss and AFSCME appealed.[58]

The Seventh Circuit affirmed the court's denial of injunctive relief and upheld the District Court's holding that the State's Eleventh Amendment Sovereign Immunity barred AFSCME from obtaining relief under its Contracts Clause claim.[59] The Seventh Circuit further held that AFSCME failed to state a cognizable Contracts Clause claim.[60]

The Contracts Clause of the U. S. Constitution, provides, "No [s]tate shall….pass "any… [l]aw impairing the Obligation of Contracts. . . . "[61] The Seventh Circuit explained that to prevail on a Contracts Clause claim, a plaintiff must demonstrate that "a change in state law has operated as a substantial impairment of a contractual relationship."[62] This requires plaintiff to show: "(1) that there is a contractual relationship; (2) that a change in law has impaired that relationship; and (3) that the impairment is substantial."[63] The court held that because the State's Rules which implemented the wage freeze did not foreclose a remedy for breach of contract, no impairment of a contractual obligation existed and AFSCME failed to state a cognizable claim.[64]

With respect to the Fourteenth Amendment Equal Protection Clause Claim, the court applied a "rational relationship" test because AFSCME's members were not a suspect classification and the case did not involve the exercise of a fundamental right.[65]. Under that test, the government regulation will be upheld if "there is a rational relationship between the disparity of treatment and some legitimate government purpose." [66] In upholding the dismissal of AFSCME's claim, the court explained that instituting cost-savings measures is a legitimate governmental interest, particularly for a government in such dire financial straits.[67]

4. Conclusion

Despite having negotiated multi-year collective bargaining agreements with AFSCME since 1975, and for long periods of time with other unions as well, the State now has taken the position that it does not have to pay agreed upon wage increases and other economic benefits because those agreements are contingent upon sufficient appropriations from the General Assembly. If the State prevails on any of its claims, the decision will have serious ramifications for the future of public sector bargaining. Multi-year collective bargaining agreements bring stability to the parties and to the public. Such agreements lay out each party's obligations over a period of years and allow public sector employers to plan for the anticipated costs of wages and benefits so that they can budget accordingly. It is unlikely that unions would ever agree to multi-year agreements in the future or that interest arbitrators will award any more than one year agreements. If economic offers made by a public employer are contingent upon subsequent appropriations, any obligations incurred in outgoing years would be meaningless.

As a result, parties will be negotiating agreements every year and gone will be the usual three to five year agreements which have historically resulted in labor peace and stability as intended by the IPLRA. Furthermore, some contracts take years to negotiate, and the result will be chaotic and costly as public sector employers and unions will have to repeat the time consuming and laborious collective bargaining process on a yearly basis. Some unions have thousands of members spanning hundreds of separate units, each with separate agreements. In all likelihood, some of these unions will be physically unable to dedicate the labor and the money necessary to renegotiate all of its agreements on an annual basis. In sum, if the State is correct that negotiated economic benefits are contingent upon subsequent appropriations, multi-year agreements and public sector collective bargaining as we know it will be dead.

V. EMPLOYER PERSPECTIVES

A. The State Did Not Violate The Labor Agreements When The General Assembly Did Not Appropriate Funds for Those Labor Agreements

An arbitrator must base his decision solely on the terms of the parties' collective bargaining agreement. The particular contract terms at issue in the AFSCME-State dispute entitled the union to the re-negotiated wage increases and the no-layoff-protection. However, when constitutional and statutory issues arise, the arbitrator must defer judgment to the law and the courts. Even Arbitrator Benn acknowledged these limitations.[68] Therefore, the courts become the proper

venue to settle these issues, and it is improper to rely solely on the decision of an arbitrator with limited authority.

1. The IPLRA

The Union Perspectives Section of this Article urges that no party to a collective bargaining agreement may unilaterally terminate or modify that agreement. This argument ignores the language of Section 7 of the IPLRA:

> No party to a collective bargaining contract shall terminate or modify such contract, unless the party desiring such termination or modification:
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Board within 30 days after such notice of the existence of a dispute provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contact for a period of 60 days after such notice is given to the other party or until the expiration date of such contract, whichever comes later.[69]

When a labor agreement has an expiration date, a party wishing to terminate the agreement must serve notice to the other party sixty days before that agreement expires. The party wishing to terminate also should offer to meet and confer for the purpose of negotiation, notify the Illinois Labor Relations Board, and continue to honor the terms of the contract until the contract expires. While the process laid out by the statute is neither simple, nor timely, it allows one party to unilaterally terminate, or more likely modify, a labor contract, at or after its expiration date, while still honoring much of the agreement.

The State of Illinois, including any person acting on its behalf, is a public employer but the General Assembly is not.[70] Relying upon this definition, the Union Perspectives urges that the actions of the General Assembly cannot bind the parties to a labor agreement as would the actions of the Governor, because the statute excludes the General Assembly as a public employer.

The State of Illinois is a party to the AFSCME collective bargaining agreement, and therefore is a public employer. One cannot simply separate the duties and responsibilities of General Assembly from the State of Illinois. While this particular

statute may exempt the General Assembly as its own individual "pubic employer" or "employer," it does not suggest exempting the General Assembly from its constitutional duty to the State of Illinois. One such duty includes providing appropriations for programs or agreements entered into by the Governor, and it is the responsibility of the General Assembly to uphold this duty.[71]

The Union Perspectives also relies on *City of Burbank v. Illinois State Labor Relations Board*, which held that once an agent of the government enters into an agreement, the legislature is bound by those actions.[72], However, later Illinois cases questioned and rejected the reasoning in *City of Burbank*, especially where the agent did not have authority, nor communicate his dealings to a legislative body.[73]

The State's obligations to its unions are contingent on General Assembly appropriations. Support for this argument can be found in Section 21 of the IPLRA which authorizes multi-year collective bargaining agreements "*[s]ubject to the appropriation power of the* employer."[74] The Union Perspectives suggests that once an employer has appropriations power, it may enter into a multi-year collective bargaining agreement and be bound by the terms of that agreement. The union view goes so far as to suggest multi-year contracts are "not intended to impact whatever appropriations authority exists under State or local law."

The Union Perspectives also argues that the amendment of Section 21 evidences the fact that Section 21, as initially written, did not limit the power to enter into contracts "subject to appropriation." However, another reading of these amendments is that the legislature was clarifying the statute and emphasizing the appropriations authority.

This suggestion is, however, precisely what the General Assembly seeks to prevent. Once locked into a multi-year labor agreement, how could the State's appropriations authority not be impacted? The Union Perspectives asks the courts to force the State to make appropriations, impacting the General Assembly's constitutional authority to make such appropriations on its own. A plain interpretation of this statute leads to an understanding that the power to appropriate must control the spending authority of government, whether local or state. This maxim extends even to the negotiation of collective bargaining agreements. In difficult economic times, government can only spend the money it has, labor contracts notwithstanding.

The Union Perspectives argues that in a conflict between the collective bargaining agreement and *any* law related to wages, hours, or terms of employment that the

terms of the labor contract must prevail. In the union view, under IPLRA sections 15(a) and (b), a labor contract supersedes any law, ordinance, or statute related to wages, hours and terms of employment.[75] This statute does not grant a collective bargaining agreement the power to supersede a general appropriations bill enacted by the General Assembly. It only supersedes those laws regulating wages and workplace conditions. To interpret otherwise would allow a collective bargaining agreement to operate above any other law or action taken by the State of Illinois.

The union interpretation is too broad, especially in light of the public policy exception to the enforcement of collective bargaining agreements. This section of the statute does not suggest the IPLRA controls when in conflict with the public policy of the State.[76] If a court accepts the union interpretation, IPLRA section 15 would swallow the public-policy exception, because, no matter how offensive to public policy an arbitrator's decision is, the arbitrator's decision would stand.[77]. Considering the public-policy exception has been cited and applied by Illinois courts since the Labor Act's inception, it would be improper to read section 15 so broadly.[78]

2. The Illinois Constitution

If the State of Illinois, through the office of the Governor, abides by the collective bargaining agreements and wage awards and ignores the lack of General Assembly appropriations, the Governor will have violated the Illinois Constitution's separation of powers clause.[79] In the union view, since the Governor submitted his budget with the labor contract wage increases included, and the General Assembly decided not to fund the increases, the Governor should somehow fund the increases anyway. The Union Perspectives argues that because he exercised his amendatory veto power to cut other expenditures from the budget, the Governor could have included the labor contract wage increase and still been within the authorized appropriation. To accept the union position would make the Governor's actions *ultra vires*, because only the General Assembly shall make appropriations for all expenditures of public funds by the State.[80].

As a public employer, the State of Illinois may honor the terms of any collective bargaining agreement, only when authorized by law. "The State…shall incur obligations for payment or make payments from public funds only as authorized by law or ordinance."[81] In this situation, the General Assembly did not approve an appropriations bill which would have allowed the State to comply with the Governor's re-negotiated collective bargaining agreement terms. Therefore, the Illinois Constitution bars any payment of public funds for the labor contract or the wage awards.

3. Conclusion

One of the stated purposes of the Illinois Public Labor Relations Act is to protect the public health and safety of the citizens of Illinois.[82] All Illinois citizens, whether as members of a union, as taxpayers, or as voters, are party to the collective bargaining agreements entered into by the State and other public employers. Responsible spending of the State's budgetary resources protects the public health and promotes the safety of all Illinois citizens, even when the ramifications may disadvantage individual union members. Section 2 of the IPLRA states that one of the purposes of the Act is to "regulate labor relations between public employers and employees."[83] While all those involved in contract negotiations may agree that multi-year collective bargaining agreements promote labor stability in the public sector, economic conditions may exist that mitigate against the feasibility of these agreements. The State of Illinois, and other public employers, have found themselves in this type of situation over the last few years. Public labor contracts, like all governmental obligations, must be subject to the appropriation and spending powers of the government.

VI. WHAT LIES AHEAD

While the authors were writing this article, the Circuit Court of Cook County issued a decision. In ruling from the bench on July 2, 2012, the court remanded the matter back to Arbitrator Benn, telling him to take additional evidence on the appropriated funds available to the State. The court issued a follow-up written ruling on July 9, 2012.[84]

The court's reasoning stemmed from the public policy defense raised by the State as well as the language contained in Section 21 of the ILPRA. The Court interpreted Section 21 to mean that:

> "the payment obligations for the wage increases in the CBA/CSA [collective bargaining agreement/cost savings agreement]are subject to the appropriations power of the employer. The Office of the Governor lacks power to appropriate funds to the ten agencies so that the salaries, wage or wage increases can be paid. Plaintiff cannot pay the wage increases unless the General Assembly that has the appropriations power appropriates public funds to the 10 agencies to allow them for plaintiff to do so."[85]

The Court found " a well defined and dominant public policy . . . that the plaintiff cannot spend public funds for the Wage Increases without sufficient appropriation by the General Assembly to do so."[86] The court explained that the burden was on the State to prove that its public policy defense applied, that is whether funds appropriated were insufficient to pay the wage increases.[87] The Court remanded the matter to Arbitrator Benn for further proceedings to allow the plaintiff to try to

establish its public policy defense by showing a lack of necessary appropriated funds.[88]

Thus, the outcome of the dispute and its impact on multi-year contracts and collective bargaining remains to be seen. However, one must ask whether the court ruled appropriately or prudently by applying the public policy exception as it did and remanding the matter back to the arbitrator.

The limited role of the arbitrator has been established by the U.S. Supreme Court. The Court has stated that "an arbitrator is confined to interpretation and application of the collective bargaining agreement."[89] Furthermore, "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land . . . the resolution of statutory or constitutional issues is a primary responsibility of courts."[90]

In the AFSCME/State of Illinois litigation, arguably, the court avoided its responsibility to resolve the important statutory and constitutional issues raised by the parties by remanding the matter back to Arbitrator Benn, and instructing him to take public policy considerations into account. The public policy defense was raised during the initial proceedings before the arbitrator, and he correctly refused to consider the argument. The CBA/CSA at issue did not contain language regarding public policy and a resolution of the public policy issue was a matter for the court and not the arbitrator to decide.

Arbitrator Benn reiterated his view that he lacks authority to consider the public policy defense. On July 16, 012, he declined the remand, reasoning, "Whether the narrow question remanded is a factual one or not, it remains a question going to application of public policy to this dispute."[91] Arbitrator Benn related that the parties represented that they would work cooperatively to develop a sufficient record for the court to proceed.[92]

Although the Court did not go so far as ordering that the State can avoid its contractual obligation to pay wage increases, its mandate that Arbitrator Benn make a public policy ruling second guesses not only the manner in which the arbitrator conducted his hearing but also the historical limited role of the arbitrator. Further, if the reasoning of the court is upheld, namely, that the State cannot spend funds that have not been appropriated, then, as described in the Union's perspectives section of this article, multi-year agreements and collective bargaining as we know them will no longer exist.

[1] During the pendency of the litigation, the State paid wage increases to employees of some but not all of the impacted agencies. At the time of the ruling, only ten agencies remained part of the dispute.

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[1] *See* P.A. 83-1012, § 21 (eff. July 1, 1984) (codified as amended at 5 ILCS 315/21).

[2] 133 Ill. App. 3d 286, 478 N.E. 2d 1187 (2d Dist. 1985).

[3] *Id.* at 286-88, 478 N.E. 2d at 1187-8.

[4] *Id.* at 1188, 478 N.E. 2d at 288.

[5] 65 ILCS 5/8-1-7(a).

[6] *Ligenza*, 133 Ill. App. 3d at 289-91, 478 N.E. 2d at 1189-90.

[7] P.A. 83-1012, (eff. July 1, 984) (codified at amended 5 ILCS 315).

[8] 5 ILCS 315/21 (emphasis added).

[9] 5 ILCS 315/14(h).

[10] *See State of Ill. and AFSCME Council 31*, Arb. Ref. 10.251 (July 1, 2011 Increases) at 12, 23 (July 1, 2011) (Benn, Arb.), *available at* <http://www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/State%20of%20Illinois%20&%20AFSCME,%20pay%20raises.pdf> [hereafter *July 1, 2011 Increases Award*].

[11] *See id.* at 3.

[12] *See id.* at 11-13.

[13] *Id.* at 3.

[14] *Id.*

[15] *Id.* at. 3-4.

[16] *Id.* at 4-5.

[17] *State of Ill. and AFSCME Council 31*, Arb. Ref. 10.251 (2011-2012 Layoffs and Facility Closures) at 3 (Oct. 3, 2011) (Benn, Arb.), *available at* <http://www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/State%20of%20Illinois%20&%20AFSCME,%20Layoffs%20&%20Facility%20Closures.pdf> [hereafter *Layoffs and Facility Closures Award*].

[18] *July 1, 2011 Increases Award*, *supra* note 10, at 7.

[19] *Id.* at 6.

[20] See House Joint Resolution 0045, 97th Gen. Assem. Reg. Sess. (Ill. 2011).

[21] *July 1, 2011 Increases Award*, *supra* note 10, at 7. 16-17.

[22] *Id.* at 9 (footnote omitted).

[23] *Id.* at 13 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 53-54, 57 (1974) (emphasis and elipses in original).

[24] *Id.* (footnote omitted).

[25] *Id.* at 15.

[26] *Layoffs and Facilities Closure Award*, *supra* note 17, at 3-4.

[27] *Id.* at 39.

[28] *Id.* at 36.

[29] *Id.* at 37-38.

[30] *Id.* at 26-31.

[31] *See State of Ill. (Cent. Mgmt. Servs.) v. Am. Fed'n of State, County, & Mun. Employees, Council 31*, 11 CH 25352 (Circuit Court of Cook County July 9, 2012).

[32] *See Council 31 of the Am. Fed'n of State, County, & Mun. Employees, AFL-CIO v. Quinn*, No. 11-3203, 2011 WL 3924231 (C.D. Ill. Sept. 7, 2011) (finding that the State of Illinois did not violate the Equal Protection Clause and Contracts Clause of the U.S. Constitution, denying AFSCME's motion for a preliminary injunction and granting the State's motion to dismiss), *aff'd,* 680 F.3d 875 (7th Cir. 2012).

[33] 5 ILCS 315/7.

[34] *Id.*

[35] 5 ILCS 315/3(o).

[36] *City of Burbank v. Ill. State Labor Relations Bd.*, 185 Ill. App. 3d 997, 1003-04, 541 N.E.2d 1259, 1264 (1st Dist. 1989).

[37] *Will County States Attorney v. Ill. State Labor Relations Bd.*, 229 Ill. App. 3d 895, 899, 594 N.E.2d 770, 773 (3d Dist. 1992).

[38] *See July 1, 2011 Increases Award*, *supra* note 10, at 13.

[39] *See id.*

[40] *See id.*

[41] *See id.* at 12-13.

[42] Ill. Const. art. II, § 1.

[43] Ill. Const. art, VIII, § 1(b).

[44] Ill. Const. art. VIII, § 2(a).

[45] Ill. Const. art. VIII, § 2(b).

[46] *See July 1, 2011 Increases Award*, *supra* note 10, at 5-6 & n.13.

[47] *See id.* at 17.

[48] *Id.* at 6-7.

[49] *See id.* at 17.

[50] *See Quinn*, 680 F.3d at 879.

[51] *See id.*

[52] *See* Ill. Const. art, VIII, § 1(b); *Am. Fed'n of State, County & Mun. Employees, Council 31*, 11 CH 25352 at 17-18.

[53] *See id.* at 3-4.

[54] *See* Ill. Const. art, VIII, § 1(b); *Am. Fed'n of State, County & Mun. Employees, Council 31*, 11 CH 25352 at 3-4.

[55] *See Am. Fed'n of State, County & Mun. Employees, Council 31*, 11 CH 25352 at 21.

[56] Amended Complaint at 7-9, *AFSCME Council 31 v. Quinn*, No. 11 CV 3203, 2011 WL 3808028 (C.D.Ill, Jul. 20, 2011).

[57] *Id.* at 10-12.

[58] *Quinn*, 680 F.3d at 885-86.

[59] *Id.* at 884.

[60] *Id.* at 884-85.

[61] U.S. Const. art. 1, § 10, cl. 1; Ill. Const. of 1970, art. 1 § 16 similarly reads: "No…law impairing the obligation of contracts…shall be passed."

[62] *Quinn*, 680 F.3d at 885, (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)(additional citations omitted)).

[63] *Id.* (citing *Romein*, 503 U.S. at 186; *Khan v. Gallitano*, 180 F.3d 829, 832 (7th Cir. 1999)).

[64] *Id.* at 886.

[65] *Id.* at 886.

[66] *Id.* (quoting *United States v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2011)(additional citations omitted)).

[67] *Id.* at 887.

[68] *July 1, 2011 Increases Award*, *supra* note 10, at 7. 13-15.

[69] 5 ILCS 315/7.

[70] 5 ILCS 315/3(o).

[71] *See*. Ill. Const. of 1970, art. VIII § 2(b).

[72] 185 Ill. App. 3d 997, 1004, 541 N.E.2d 1259, 1264 (1st Dist. 1989).

[73] *City of Belleville v. Illinois FOP Labor Council*, 312 Ill.App. 3d 561, 564-5, 732 N.E.2d 592, 595 (5th Dist. 2000) (exempting a city council kept in the dark about an agreement with its agent); *Davis v. City of Springfield,*2006 WL 3590185 (C.D.Ill. 2006)(finding when an agent made it clear that an ordinance was needed to approve an agreement, she did not represent that she had the authority to bind the city).

[74] 5 ILCS 315/21 (emphasis added).

[75] 5 ICS 315/15(a) & (b).

[76] *Decatur Police Benevolent& Protective Assn. Labor Comm. v. City of Decatur*, 2012 Ill. App. (4th) 110, 764, ¶ 30, 968 N.E.2d 749, 756 (4th Dist. 2012).

[77] *See id.*

[78] *See Chicago Transit Auth. v. Amalgamated Transit Union*, 399 Ill. App. 3d 689, 696-98, 926 N.E.2d 919, 926-8 (1st Dist. 2010).

[79] Ill. Const. art. II, § 1 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.").

[80] Ill. Const. art. VIII, § 2(b) ("The General Assembly by law shall make appropriations for all expenditures of public funds by the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during the year.").

[81] *See* Ill. Const. art. VIII, §1(b) ("The State . . . shall incur obligations for payment or make payments from public funds only as authorized by law or ordinance.").

[82] 5 ILCS 315/2 ("It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all.")

[83] *See Id.*

[84] *State of Ill. (Central Mgmt Srvs.) v. AFSCME Council 31*, No. 11 CH 25352 (Cir. Ct. Cook Cnty. July 9, 2012).

[85] *Id.* at 23 (citation omitted).

[86] *Id.* at 24.

[87] *Id.* at 31.

[88] *Id.* at 32.

[89] *United Steelworkers of Am. v. Enter. Wheel & Car Corp*., 363 U.S. 593, 597 (1960).

[90] *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 57(1974).

[91] *State of Ill. and AFSCME Council 31*, Arb. Ref. 10.251, July 1,. 2011 Increases at 11 (Supp. Award July 16, 2012) (Bwnn, Arb).

[92] *Id.* at 15.

RECENT DEVELOPMENTS

By, Student Editorial Board
Karina Fruin, Daniel Quist, Ryan Thoma, and Daniel Zapata

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent developments of interest to the public employment relations community. This issue focuses on developments under the collective bargaining statutes and the U.S. Constitution.

I. IELRA DEVELOPMENTS

A. *Bargaining Units*

In *Board of Trustees of the University of Illinois and Service Employees International Union, Local 73*, Case No. 2011-RS-0018-C (IELRB 2012), the IELRB granted SEIU's petition to add several positions to the clerical/administrative bargaining unit that SEIU represents at the University of Illinois. The IELRB allowed the addition of several new positions to the historical unit, including Chief Clerk, Collection Specialist and Customer Service Representative.

The university opposed the certification and contested the petition on the ground that the proposed bargaining unit was not appropriate under the IELRB's rules for presumptively appropriate bargaining units. The IELRB agreed that the bargaining unit was not presumptively appropriate under its rules, but reasoned that this did not preclude the unit from certification. The IELRB cited *Board of Trustees of the University of Illinois*, 7 PERI 1011 (IELRB 1990), where the IELRB allowed certain building service employees at the university to be included in the historical bargaining unit of housing maintenance inspectors even though the resulting unit would not qualify as presumptively appropriate under the IELRB's rules. The IELRB certified thepetition mainly because the addition of the building service employees to the existing unit would help prevent the future proliferation of bargaining units.

In the present case, the university contended that SEIU had not put forth clear and convincing evidence that the bargaining unit should be certified. Under the IELRB's rules, when a bargaining unit is not presumptively appropriate the burden shifts to the union to show by clear and convincing evidence: (1) that the "establishment of a different unit [would] not cause undue fragmentation . . . or proliferation of bargaining units;" (2) that "special circumstances and compelling

justifications" existed to warrant the certification of a bargaining unit other than those set forth in the IELRB's rules; and (3) that the unit was otherwise appropriate under Section 7 of the IELRA.

The IELRB reasoned that the addition of extra clerical employees to an existing unit of clerical employees is the polar opposite of bargaining unit "fragmentation or proliferation." The IELRB held that the union had proven all the factors that constituted "compelling justifications" for certification. The IELRB found that SEIU was seeking an extension of the natural bargaining unit rather than trying to change the character of the bargaining unit, that no other petitions were pending that sought to include the at issue employees in other bargaining units, and that there was no bargaining history that would lead the IELRB to think that the inclusion of the new employees would create instability.

The IELRB reasoned that the unit was otherwise appropriate under Section 7 of the IELRA. The Board noted that the union had a history of adding similar types of clerical and administrative employees to the bargaining unit, and that the petitioned-for employees had a similar community of interest with the currently represented employees.

The university further argued that the petition was not proper because the proposed bargaining unit omitted a number of clerical/administrative positions that should otherwise be included in the unit. The IELRB, relying on two Illinois Appellate Court opinions, stated that a proposed unit need not be the most appropriate unit to be certified, but that the bargaining unit must be appropriate under the Act and not "artificial or arbitrary."

II. IPLRA DEVELOPMENTS

A. *Duty of Fair Representation*

In *Michels v. ILRB*, 969 N.E.2d 996 (Ill.App. 4th Dist. 2012), the Appellate Court for the Fourth District affirmed the ILRB State Panel's decision upholding its Executive Director's dismissal of an unfair labor practice charge alleging that a union breached its duty of fair representation.

Michels was employed as a parole agent with the Illinois Department of Corrections. On May 20, 2008, he was discharged for various acts of misconduct involving several parolees, including excessive use of force, socializing with committed persons, trafficking, filing false reports, verbal and physical harassment of parolees, and various civil rights violations. The union grieved the discharge but informed Michels that it was not going to pursue his grievance to arbitration.

The court affirmed the ILRB dismissal of Michels' unfair labor practice charge that the union violated its duty of fair representation. Michels argued that he raised sufficient facts to warrant issuance of an unfair labor practice complaint against the union. The court stated that the IPLRA requires the ILRB to exercise its discretion when determining whether there is enough evidence to justify a hearing. The court also noted that the ILRB will dismiss a charge if the charge fails to state a claim on its face or the investigation reveals no issue of law or fact sufficient to warrant a hearing. The court further stated the ILRB abuses its discretion only where its decision to dismiss the charge is clearly illogical. Thus, the court found that Michels had to establish that no reasonable person could possibly take the ILRB's view.

The court noted that a union commits an unfair labor practice and violates its duty of fair representation if it commits intentional misconduct in representing an employee. The court further noted that "to establish intentional misconduct, the charging party must prove by a preponderance of the evidence: (1) the union's conduct was intentional and directed at the charging party and (2) the intentional action occurred because of and in retaliation for some past activity between the employee and the union's representative." The court noted that the second element of intentional misconduct requires the charging party to prove unlawful discrimination by a preponderance of the evidence showing: "(1) the employee engaged in activities tending to engender the animosity of union agents, (2) the union was aware of the employee's activities, (3) the union undertook an adverse representation action, and (4) the union took an adverse action against the employee for discriminatory reasons." The Court found that Michels failed to submit any evidence to support his argument that the union's decision to not pursue his grievance to arbitration was intentional, invidious, and directed at him in retaliation for some past activity. Further, the court noted that Michels failed to provide evidence that the union harbored any animosity toward him. Thus, the court found that the ILRB did not abuse its discretion in dismissing the charge against the union.

III. CONSTITUTIONAL LAW DEVELOPMENTS

A. *Affordable Care Act*

In *National Federation of Independent Business v. Department of Health and Human Services*, 132 S.Ct. 2566 (2012), the U.S. Supreme Court held that the Patient Protection and Affordable Care Act, 26 U.S.C. §5000A, *et seq*. (ACA) requirement that individuals obtain health insurance or pay a penalty is constitutional but its requirement that states expand Medicaid to all citizens with

incomes below 133 percent of the poverty level or lose all Medicaid funding is unconstitutional.

Chief Justice Roberts, writing for the Court, considered three possible sources of congressional authority to enact the individual mandate: (1) the power to regulate interstate commerce including the channels of commerce, people and things involved in interstate commerce, and activities that substantially affect interstate commerce, (2) the Necessary and Proper Clause, and (3) the power to tax.

According to Chief Justice Roberts, for the act to fall under Congress' interstate commerce power, its provisions must regulate an already existing commercial activity because the power to regulate implies an existing activity that needs regulation. However, the ACA requires individuals to enter into a new area of commerce. It evokes an act; it does not regulate an act previously evoked. Chief Justice Roberts stated in upholding the ACA's individual mandate under Congress' power to regulate interstate commerce would extend that power to a new area that compels commerce, and that extends the power too far because the federal government has the power to regulate activities, but the power to regulate individuals is reserved to the states.

Chief Justice Roberts also found the ACA deficient under the Necessary and Proper Clause. He reasoned that the Necessary and Proper Clause extends Congress' reach in areas that are already included within an enumerated power. It is not a means to reach over the boundaries the Constitution places on the federal government. In order for the Necessary and Proper Clause to apply, the act of buying insurance must have already existed.

Chief Justice Roberts, however, found the individual mandate constitutional under Congress' taxing power. He observed that the ACA may be upheld under the power to tax if the payment individuals without insurance are required to pay could be considered a tax, and not a penalty.

Chief Justice Roberts, focused his analysis on whether the payment acts more like a tax or more like a penalty. The ACA gives the IRS the power to determine who must pay the fine, and to collect the fine, in the same fashion it calculates and collects other tax penalties. However, the ACA does not permit the IRS to use its typical enforcement mechanisms, such as criminal prosecutions and tax levies, and says certain individuals, such as those at certain income levels, don't have to pay the penalty. The fine also does not have the severity of a penalty because it is not so cumbersome that it compels the purchase of insurance, and, like most penalties, the payment of the fine is not limited to willful violations. It is not uncommon for

the federal government to tax activities it wants to discourage at a higher rate. The IRS also collects the fine in the fashion that it collects taxes.

Chief Justice Roberts found that the wording of the ACA does not require it to be construed as punishing law breakers, but may be read as taxing those without insurance who are also not eligible for an exemption. He determined that the fine may be reasonably construed to be a tax instead of a penalty. Accordingly, he concluded that Congress has the power to enact the individual mandate. Justices Breyer, Ginsburg, Kagan and Sotomayor concurred that the individual mandate was a valid exercise of Congress' taxing power, but also would have upheld it under the Commerce power and the Necessary and Paper Clauses. Justices Alito, Kennedy, Scalia and Thomas dissented. They agreed with Chief Justice Roberts that Congress lacked authority under its commerce powers and the Necessary and Proper Clause, and argued that the penalty was not a tax and would have declared the ACA unconstitutional.

With respect to the expansion of Medicaid, Chief Justice Roberts focused his inquiry on whether Congress had power to both grant funds to states and withhold funds to non-compliant states under its spending power. The spending power permits the federal government and states to work together in spending programs. Chief Justice Roberts relied on College *Savings Bank v. Florida Prepaid Postsecondary Education*, 527 U.S. 666, 686 (1999), holding that Congress may condition its offers of funds to the states on compliance with certain demands. He cited *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), for the assertion that the state must voluntarily enter into the arrangement with the federal government, and not be coerced into compliance with a program. Relying on *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), he maintained that if the federal government is exerting pressure on a state by threatening to withdraw funds to a point such that it creates compulsory compliance, it has overstepped the boundaries of federalism. The Necessary and Proper Clause gives Congress much latitude in exercising its enumerated powers, but the Court must not disrespect the constraints on federal power that the U.S. Constitution intended.

The Court determined that the new requirement that Medicaid be offered to anyone with an income below 133 percent of the poverty level, with a level of benefits equal to the minimum requirements of the individual mandate, was a dramatic shift in the Medicaid program because it created a new tier of beneficiaries. The new requirement exceeded the mere alteration authorized, in the prior statutory scheme and states could not have envisioned such a scenario. Therefore, the Court saw the threat of the loss of all Medicaid funding as

rising to the level of coercion. Chief Justice Roberts found the threat of withholding funds to be incompatible with the Spending Clause.

IV. FAIR SHARE FEES

In *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012), the Supreme Court held that the First Amendment prohibits a public-sector union from requiring objecting non-members to pay a special fee for the purpose of funding a union's political and ideological activities unless they affirmatively agree to do so.

The case arose from a dispute between public-sector employees in California and SEIU Local 1000. California law permits public-sector employees in a bargaining unit to create an "agency shop" arrangement through a majority vote under which all employees are represented by the majority-selected union. Employees within the union are not required to join, but non-members are still required to pay the union an annual fee covering the cost of union services related to collective bargaining.

In prior decisions, the Court held that public-sector unions could not require non-members to fund their political and ideological projects, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and established procedural requirements for how unions can collect fees from non-members, Chicago *Teachers Union v. Hudson*, 475 U. S. 292 (1986). Under *Hudson*, unions are required to send out an annual notice setting monthly dues for the year and establishing the percentage of dues dedicated to collective bargaining activity. Non-member employees have a set period of time to object to paying the full amount of dues after the notice is received and must inform the union if they will only cover the fees related to collective bargaining.

In *Knox*, SEIU Local 1000 sent out its notice in June 2005 informing employees of the fees for the coming year. The collective bargaining related fees were set at 56.35 perecent of the total amount of dues and non-members were given thirty days to object to paying the entire amount. The notice also stated that the agency fee was subject to increase at any time without further notice.

Shortly after the union sent out its notice, the California governor announced a special election where voters would consider a number of propositions aimed at state-level structural reform, with two propositions potentially having significant impact on public-sector unions. After the announcement, Local 1000, as well as other public-sector unions, immediately took action to raise money to defeat the propositions and help achieve their political objectives.

On August 31, SEIU sent out a letter addressed to "Local 1000 Members and Fair Share Employees," stating that fees would temporarily be raised from 1 percent of gross monthly salary to 1.25 percent and that a $45-per-month cap on regular dues would not apply. The letter explicitly stated that the increased dues would be used to fund the union's political activities. Initially, non-members had no ability to object to paying the assessment. After some non-members complained about the increase, SEIU informed the non-members that those who had previously objected to the notice in June would only have to pay 56.35 percent of the special assessment. A class of non-members responded by filing suit against Local 1000, alleging that they were being forced to contribute to the Union's political activities in violation of the First Amendment.

The Court first addressed the Union's argument that the case was moot because Local 1000 agreed to refund the money collected from non-members after the Supreme Court granted *certiorari*. The Court rejected this argument, holding that the non-members who filed suit still had an interest in the case and, if the controversy was not resolved by the Court, nothing would prevent the union from collecting such assessments in the future.

The Court then examined Local 1000's collection of the special assessment, holding that it violated the non-members' rights under the First Amendment. The Court noted the "primary purpose" of allowing unions to collect fees from non-members is to prevent non-members from free-riding on the union's efforts. However, free-rider arguments are unable to overcome First Amendment objections. Unions do not have a constitutional entitlement to collect fees from non-members and non-members' First Amendment rights cannot be violated through the collection process. The Court also noted that the general rule that individuals should not be compelled to subsidize private groups or private speech must prevail.

Taking all of this into account, the Court ruled that when a public-sector union imposes a special assessment or mid-year dues increase, the Union must provide an additional notice. Further, non-members must affirmatively consent to pay such special assessments or dues increases; it is improper to require non-members to opt-out or object in order to avoid paying increases. The majority further noted in a footnote that the opt-in requirement was only for these limited situations and the Court was not changing the procedures required under *Hudson* for collection of regular dues.