BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration **between** **STATE OF ILLINOIS** **and** **AFSCME COUNCIL 31**	**CASE NO.:** Arb. Ref. 10.251 2011-2012 Layoffs and Facility Closures

OPINION AND AWARD

APPEARANCES (on the Briefs):

For the State:	Joseph M. Gagliardo, Esq. Thomas S. Bradley, Esq. Lawrence Jay Weiner, Esq.
For the Union:	Stephen A. Yokich, Esq.

Date Briefs Received: September 28, 2011

Date of Award: October 3, 2011

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I. MATERIAL FACTS, ISSUES AND SUMMARY OF FINDINGS

The material facts in this case are as follows:

In 2010, the State of Illinois ("State") and AFSCME Council 31 ("Union" or "AFSCME") entered into a series of concession-granting agreements in which the Union agreed to reduce the State's financial obligations under the parties' 2008-2012 collective bargaining agreement ("2008-2012 Agreement" or "Agreement") by approximately $400,000,000. In return for those concessions agreed to by the Union and the employees, the State guaranteed that no employees represented by the Union would be laid off through June 30, 2012 and, with certain exceptions not relevant to this dispute, there would be no closures of State facilities prior to July 1, 2012.[1]

Specifically, a Cost Savings Agreement effective September 24, 2010 as agreed by the parties "... shall remain in full force and effect until July 1, 2012" and provides that "... the parties agree that there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012) nor shall the state close any facilities ...."[2] Further, a Cost Savings Agreement effective November 3, 2010 provides that "... there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012), nor shall the State close any facilities prior to July 1, 2012."[3]

Although promising to not lay off employees and to not close facilities prior to July 1, 2012, beginning November 1, 2011 and continuing through March 31, 2012, the State is laying off 1,968 employees (including 1,680 em-

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1 State Exhs. A-C; Joint Exhs. 1, 2(a), 2(b).

2 State Exh. B at pars. 3, 5; Joint Exh. 2(a) at pars. 3, 5.

3 State Exh. C at p. 1; Joint Exh. 2(b) at p. 1.

ployees who are represented by the Union) and closing seven mental health and correctional facilities.[4]

There are two questions in this case. The first question is whether the State violated its contractual commitments that it would not lay off employees represented by the Union and would not close facilities prior to July 1, 2012? The second question is if the State violated its commitments to not lay off employees represented by the Union and to not close facilities prior to July 1, 2012, what shall the remedy be?

The answer to the first question concerning the alleged contract violations is that by laying off employees represented by the Union and closing facilities prior to July 1, 2012, the State is in violation of the clear language of the relevant Cost Savings Agreements. Although making other arguments which, as an arbitrator, I cannot address (*see* discussion *infra* at III(C)), the State does not dispute that it violated the prohibitions against layoffs and facility closures found in the Cost Savings Agreements:[5]

> The State does not dispute that the Layoffs and the Closures are contrary to the language of the First CSA [Cost Savings Agreement], which expressly states: "the parties agree that there shall be no temporary or indeterminate layoffs through the end of FY 2012 (June 30, 2012) nor shall the state close any facilities ...."

As also demonstrated by the facts, the State therefore admittedly violated the Cost Savings Agreements.[6]

Arbitrators have broad discretion in the formulation of remedies for demonstrated contract violations. The purpose of a remedy is to restore the *status quo ante* and to put those harmed by a contract violation back to where they

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4 State Status Report dated September 20, 2011.

5 State Brief at 21.

6 *See* discussion *infra* at III(A).

were prior to the violation and to make whole those harmed by the contract violation. Therefore, the answer to the second question concerning the remedy is that in the exercise of my discretion to formulate remedies and to restore the *status quo ante* and to make the adversely impacted employees whole, no employees represented by the Union can be laid off through June 30, 2012; the seven mental health and correctional facilities targeted for closure cannot be closed prior to July 1, 2012; and if any employees represented by the Union are laid off, bumped or transferred as a result of layoffs and facility closures involved in this matter prior to July 1, 2012, those employees shall be reinstated and returned to their former positions and made whole in all respects for their losses flowing from the State's violation of its contractual promises to not lay off employees and to not close facilities prior to July 1, 2012.

The make whole relief for the adversely impacted employees includes payment by the State to those employes for lost wages and benefits.

The make whole relief further includes compensation to adversely impacted employees for medical expenses (including life insurance benefits for beneficiaries) which would otherwise have been paid for or covered by insurance had the employees not been laid off in violation of the Cost Savings Agreements.

Additionally, if as a result of the State's violation of the Cost Savings Agreements, adversely impacted employees are put in a position of not being able to make timely payments on their homes or cars and are foreclosed upon or evicted or otherwise forced to move from their residences, as part of the make whole relief the State shall compensate the employees for those losses.

The additional make whole entitlements above lost wages and benefits shall be decided on a case-by-case basis, taking into account the individual employee's circumstances and efforts at mitigation of damages.[7]

II. BACKGROUND

A. The Prior Wage Increase Dispute

This is the second award by me concerning the Union's position that the State failed to comply with the terms of the parties' 2008-2012 Agreement as modified by a negotiated Mediated Resolution Memorandum dated January 26, 2010 and the two Cost Savings Agreements effective September 24, 2010 and November 3, 2010 in which the Union agreed to concessions from terms of the 2008-2012 Agreement.[8]

As more fully explained in my award dated July 19, 2011 ("*July 2011 Wage Increase Award*"), the parties completed their negotiations and signed the 2008-2012 Agreement just a few weeks before the economy crashed in September 2008 and the recession at that time turned into the "Great Recession".[9] Recognizing the fiscal crisis facing the State and that the negotiated wage increases of 15.25% over the life of the 2008-2012 Agreement would result in massive layoffs of employees, the Union agreed to concessions from the 2008-2012 Agreement amounting to approximately $400,000,000. Those conces-

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[7] *See* discussion *infra* at III(B).

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

[9] That award has been posted by the Illinois State Labor Relations Board on its website at http://www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/State%20of%20Illinois%20&%20AFSCME,%20pay%20raises.pdf

sions were memorialized by the State and the Union in the Mediated Resolution Memorandum dated January 26, 2010 and in the Cost Savings Agreements. While agreeing to a number of modifications and cost savings programs, for purposes of the present dispute between the parties, the Union agreed to defer certain wage increases required by the 2008-2012 Agreement. In return, the Union received written contractual commitments from the State that there would be no layoffs of employees through June 30, 2012 and, with certain exceptions not relevant to this dispute, there would be no closures of State facilities prior to July 1, 2012. The parties also agreed that I have jurisdiction to decide disputes arising under those concession-granting agreements.[10]

As more fully explained in the *July 2011 Wage Increase Award*, the 2008-2012 Agreement called for a 4% wage increase effective July 1, 2011. As part of the wage deferral concessions agreed to by the Union, the Union agreed to defer 2% of the 4% wage increase due July 1, 2011 to February 1. 2012. However, even though the Union agreed to reduce the 4% wage increase due July 1, 2011 to 2%, the State did not completely honor its contractual commitment to pay the reduced 2% wage increase. Instead, the State refused to pay the 2% increase to employees in 14 departments, boards, authorities and commissions covered by the 2008-2012 Agreement, impacting approximately 30,000 employees.

In the *July 2011 Wage Increase Award*, I found that the State violated the 2008-2012 Agreement as modified by the Cost Savings Agreements by not

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[10] *See* the Mediated Resolution Memorandum dated January 26, 2010 at pars. 1 and 11; the Cost Savings Agreement effective September 24, 2010 at par. 6 and the Cost Savings Agreement effective November 3, 2010 at p. 2. Union Exh. 19; State Exhs. B, C; Joint Exhs. 2(a), 2(b).

paying the July 1, 2011 2% wage increase to all employees.[11] As a remedy, I directed the State to pay the 2% increase for all bargaining unit classifications and steps and continue to pay that increase and, within 30 days from the date of the award, to make whole those employees who did not receive the 2% increase.[12]

As of this writing, the State has not complied with the *July 2011 Wage Increase Award* and litigation over the enforcement of that award is currently pending in the Circuit Court of Cook County.[13]

B. The Present Dispute — The Layoffs And Facility Closures

The present dispute arises because even though the State agreed in the Cost Savings Agreements which granted concessions from the 2008-2012 Agreement that there would be no layoffs and facility closures prior to July 1, 2012, the State is laying off 1,968 employees and closing seven mental health and correctional facilities prior to that date.[14] The State announced that action on September 8, 2011.[15]

The State intends to lay off the 1,968 employees beginning November 1, 2011.[16] Of those 1,968 employees, 1,680 are covered by the 2008-2012 Agreement and represented by the Union.[17] Those 1,680 employees repre-

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11 *July 2011 Wage Increase Award* at 8-10, 19-25.

12 *Id*. at 19-20, 25.

13 *State of Illinois v. American Federation of State, County and Municipal Employees*, 2011-CH-25352 (Billik, J.).

14 State Status Report dated September 20, 2011.

15 State Status Report dated September 20, 2011 at 1; State Brief at 4; State Exh. I at p. 3, par. 10.

16 State Status Report dated September 20, 2011 at Appendix.

17 *Id*. The precise number of employees to be laid off appears to vary in the State Status Report dated September 20, 2011 (1,968 total including 1,680 represented by the Union) and the number asserted in the State Brief at 4-5 and State Exh. I at p. 3, pars. 11-13 (which, accord-

[footnote continued]

sented by the Union are also covered by the Cost Savings Agreements and are the employees involved in this dispute. I express no opinion on the entitlements of the other 288 employees to be laid off and who are not represented by the Union. I have no jurisdiction over disputes concerning the layoffs of those 288 employees.[18]

There is no dispute between the parties that even though the Cost Savings Agreements signed by State and the Union prohibit layoffs as well as the closing of facilities prior to July 1, 2012, the State is nevertheless laying off 1,680 employees represented by the Union and closing the following facilities prior to July 1, 2012:[19]

1. Tinley Park Mental Health Center
2. H. Douglas Singer Mental Health Center
3. Chester Mental Health Center
4. Jacksonville Developmental Center
5. Jack Mabley Developmental Center
6. Logan Correctional Center
7. Illinois Youth Center at Murphysboro

According to the State, the current status of the layoffs and facility closures impacting employees represented by the Union is:[20]

[continuation of footnote]
ing to State Exh. I totals 1,897 total employees, including employees not represented by the Union). As of this writing, the layoffs have not been completed and the difference in numbers represented is really not material. The undisputed facts are that there will be a massive layoff of employees and the closure of the seven facilities prior to July 1, 2012. Because of the detail in the State Status Report dated September 20, 2011, for purposes of discussion in this case, those numbers will be used. The exact number of employees laid off will probably not be known until the layoff process is complete.

[18] According to the State, 267 non-AFSCME represented employees and 21 management employees (totaling 288 additional employees) will also be laid off. State Status Report dated September 20, 2011 at Appendix.

[19] State Status Report dated September 20, 2011; State Exh. I at p. 3, par. 10.

[20] State Status Report dated September 20, 2011 and at Appendix.

Agency	Facility	Effective Date	Number Of AFSCME Represented Employees To Be Laid Off
Human Services	Tinley Park MHC	11/30/11	143
Human Services	Singer MHC	12/31/11	122
Human Services	Chester	3/31/12	419
Human Services	Jacksonville DC	2/29/12	390
Human Services	Mabley	2/29/12	162
Corrections	Logan CC	12/31/11	324
Juvenile Justice	IYC-Murphysboro	12/31/11	97
Human Rights	Agency wide	11/1/11	23
		Total	1,680

On September 15, 2011, the Union protested the layoffs and closing of facilities and invoked my jurisdiction.[21] Because of the enormity of the dispute, the impact this case will have on so many (the impacted employees, the State and the taxpayers) as well as the collective bargaining process in Illinois and because the layoffs and facilities closure process has already begun for the targeted facilities, this case was decided by me on an expedited basis. Time is of the essence in this matter.[22]

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[21] Letter from Union Supervising Counsel Thomas J. Edstrom dated September 15, 2011. The Cost Savings Agreement effective September 24, 2010 provides at par. 6 that "Arbitrator Benn shall be retained to decide any disputes relative to this agreement ... [and h]is decisions shall be final and binding on both parties." State Exh. B at par. 6; Joint Exh. 2(a) at par. 6. *See also*, the Cost Savings Agreement effective November 3, 2010 ("[t]his Agreement is incorporated into the September 24, 2010 Cost Savings Agreement including the dispute resolution mechanism outlined in paragraph 6 of that Agreement."). State Exh. C at p. 1; Joint Exh. 2(b) at p. 1.

[22] After conferring with the parties on September 16, 2011, by a Scheduling Order dated September 16, 2011 and an Amended Scheduling Order dated September 17, 2011, the procedures for this proceeding were established.

III. DISCUSSION

A. The Contract Violations

The Cost Savings Agreement effective September 24, 2010 as agreed by the parties "... shall remain in full force and effect until July 1, 2012" and provides that "... the parties agree that there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012) nor shall the state close any facilities ...."[23] The Cost Savings Agreement effective November 3, 2010 provides "... there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012), nor shall the State close any facilities prior to July 1, 2012."[24]

1. The Layoffs

Notwithstanding the repeated prohibitions which are found in the Cost Savings Agreements against layoffs through June 30, 2012, the State is going to lay off 1,680 employees represented by the Union.[25] The layoffs will com-

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[23] In pertinent part the Cost Savings Agreement effective September 24, 2010 provides (State Exh. B; Joint Exh. 2(a)):

* * *

> 3. In addition, the parties agree that there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012) nor shall the state close any facilities provided that the parties succeed in identifying at least $50 million in savings, including the $10 million savings credited herein pursuant to paragraph 2 above. ....
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> * * *
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> 5. This agreement shall remain in full force and effect until July 1, 2012.

* * *

There is no dispute that the condition that "... the parties succeed in identifying at least $50 million in savings ..." in paragraph 3 of the Cost Savings Agreement effective September 24, 2010 has been met.

[24] State Exh. C at p. 1; Joint Exh. 2(b) at p. 1.

[25] State Status Report dated September 20, 2011 and at Appendix.

mence November 1, 2011 and will be followed by layoffs effective November 30, and December 31, 2011 and February 29 and March 31, 2012.[26]

As was the State's commitment to pay the 2% increase discussed in the *July 2011 Wage Increase Award,* the language prohibiting layoffs through June 30, 2012 "... is, as a matter of contract, mandatory, clear and simple."[27] Further, as in the *July 2011 Wage Increase Award*, "[u]nder Article V, Section 2, Step 4(c) of the Agreement, the parties agreed that '[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement' ... [and a]s an arbitrator, I therefore have absolutely no authority to change the State's obligation ...."[28] Here, the State's obligation under the Cost Savings Agreements is to comply with its clear and repeated promise that there shall be no temporary or indeterminate layoffs through June 30, 2012. The State does not dispute that its actions of laying off the employees represented by the Union prior to July 1, 2012 "... are contrary to the language of the ... [Cost Savings Agreements]."[29] By the State's actions of laying off 1,680 employees represented by the Union commencing November 1, 2011 and going through March 31, 2012, the State violated the mandatory, clear and simple terms of the Cost Savings Agreements. The language "... there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012) ..." means what it says — there shall be *no* layoffs through June 30, 2012. As an arbitrator, I have no authority to change that clear language. The State there-

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[26] *Id.*

[27] *July 2011 Wage Increase Award* at 21.

[28] *Id.*

[29] State Brief at 21.

fore violated that clear contract language in the Cost Savings Agreements prohibiting layoffs through June 30, 2012.

2. The Facility Closures

The State has also commenced procedures to close seven facilities (Tinley Park Mental Health Center, H. Douglas Singer Mental Health Center, Chester Mental Health Center, Jacksonville Developmental Center, Jack Mabley Developmental Center, Logan Correctional Center and Illinois Youth Center at Murphysboro).[30]

In addition to the no layoff language in the Cost Savings Agreements, the Cost Savings Agreement effective September 24, 2010 which "... shall remain in full force and effect until July 1, 2012", also provides that "... nor shall the state close any facilities ...."[31] Similarly, the Cost Savings Agreement effective November 3, 2010 provides "... nor shall the State close any facilities prior to July 1, 2012."[32]

Closing a State facility does not happen overnight. Obligations under the 2008-2012 Agreement aside, prior to closing a State facility the State must first follow the procedures under the State Facilities Closure Act, 30 ILCS 608/5 *et seq.*, which include notice of a proposed closure to be filed with the Commission on Government Forecasting and Accountability ("COGFA"), recommendations, a public comment period, potential public hearings and issuance of an advisory opinion by COGFA.[33]

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[30] State Status Report dated September 20, 2011; State Brief at 4; State Exh. I at p. 3, par. 10.

[31] State Exh. B at pars. 3, 5; Joint Exh. 2(a) at pars. 3, 5.

[32] State Exh. C at 1; Joint Exh. 2(b) at 1.

[33] The process can be found at http://www.ilga.gov/commission/cgfa2006/home.aspx

According to the COGFA website, the facility closure process can take up to 157 days from the date of notice of a proposed closure.[34] On September 8, 2011, notice was given by the State to COGFA of the proposed closures of the seven facilities involved in this dispute.[35] By my calculation, adding 157 days to September 8, 2011 yields February 12, 2012. However, according to the State, it intends to close the seven facilities long prior to July 1, 2012 as it agreed in the Cost Savings Agreement:[36]

> On September 8, 2011, the State announced that, due to insufficient appropriations for fiscal year 2012, it was closing, effective December 31, 2011, the Illinois Youth Center - Murphysboro ..., Logan Correctional Center ... and Singer Mental Health Center .... Tinley Park Mental Health Center ... would be closing effective November 30, 2011. Chester Mental Health Center ... would be closing effective March 31, 2012. Mabley Developmental Center ... and Jacksonville Developmental Center ... would be closing effective February 29, 2012.

Further, according to the State:[37]

> Since the initial announcement [of the layoffs and closures], the State has issued notices to ... COFGA ... concerning all of the closures, and has submitted specific recommendations to COFGA for the closure of Tinley Park, Singer and Murphysboro. The State has received notice from COFGA that no public hearing will be required for Tinley Park and that the COFGA review process for Tinley Park has been completed.

The mandatory, clear and simple terms of the Cost Savings Agreements prohibit the State from closing the facilities involved in this dispute prior to July 1, 2012. The State does not dispute that its actions of closing the seven facilities prior to July 1, 2012 "... are contrary to the language of the ... [Cost

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[34] http://www.ilga.gov/commission/cgfa2006/Upload/FacilitiesClosureTimeline.pdf

[35] State Brief at 5; State Exh. I at p. 3, par. 14 ("On September 8, 2011, the State sent notices required to effectuate the Layoffs and the Closures pursuant to the State Facilities Closures Act ...."). *See also*, http://www.ilga.gov/commission/cgfa2006/home.aspx

[36] State Status Report dated September 20, 2011 at 1. *See also*, State Exh. I at p. 3, par. 10.

[37] State Status Report dated September 20, 2011 at 2.

Savings Agreements]."[38] Closing those seven facilities prior to the July 1, 2012 therefore violates the clear contract language prohibiting such closures.

B. The Remedy

I have found that the State violated the Cost Savings Agreements when it took action to lay off employees represented by the Union prior to June 30, 2012. Similarly, should the State close any of the seven facilities prior to July 1, 2012, the State is also in violation of those agreements. A remedy is therefore required.[39]

As discussed in the *July 2011 Wage Increase Award* at 19-20, it has long been held that arbitrators have a broad degree of discretion in the formulation of remedies. *See e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960):

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

Further, as discussed in the *July 2011 Wage Increase Award* at 20, it has also long been held that the purpose of a remedy is to restore the *status*

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[38] State Brief at 21.

[39] As required by the Amended Scheduling Order dated September 17, 2011, on September 20, 2011, the Union filed a statement that it seeks the following remedy:

1. An order declaring that the State's actions violate the collective bargaining agreements between the parties;
2. An order prohibiting the facility closures and layoffs that the State intends to implement as set forth in their statement of September 20, 2011;
3. An order requiring the State to pay damages to any employees who are laid off in violation of the State's violation of its collective bargaining agreements with AFSCME, including both economic damages and other consequential damages that are directly related to the State's violation of the collective bargaining agreements;
4. An order directing the State to pay the costs of the arbitration proceeding.

See also, Union Brief at 15.

quo ante and make whole those who have been harmed by a demonstrated contract violation. *See e.g., Wicker v. Hoppock*, 73 U.S. 94, 99 (1867)]:

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

The principle that arbitrators have this broad remedial discretion to formulate remedies is very well established.[40]

The parties recognize the broad, final and binding authority arbitrators have for the formulation of remedies. Aside from the 2008-2012 Agreement which provides at Article V, Section 2, Step 4(c) that "[t]he decision and award of the arbitrator shall be final and binding on the Employer, the Union, and the employee or employees involved", the State and the Union gave me that broad authority in the Cost Savings Agreements. In the Cost Savings Agreement effective September 24, 2010, the parties agreed:[41]

* * *

> 6. Arbitrator Benn shall be retained to decide any disputes relative to this agreement. His decisions shall be final and binding on both parties. ....

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

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

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

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

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

[41] State Exh. B at par. 6; Joint Exh. 2(a) at par. 6.

The same broad authority is also found in the Cost Savings Agreement effective November 3, 2010:[42]

* * *

> This Agreement is incorporated into the September 24, 2010 Cost Savings Agreement including the dispute resolution mechanism outlined in paragraph 6 of that Agreement.

* * *

In the *July 2011 Wage Increase Award,* the remedy to restore the *status quo ante* was straight-forward — the State was directed to pay the wage increase that it withheld from the approximate 30,000 employees.[43] Given that there are layoffs and facility closings involved in this matter and further given the condition of the economy into which the laid off employees will be thrown in violation of the Cost Savings Agreements, the remedy in this case is more complicated.

In the exercise of my broad discretion to formulate remedies and in order to restore the *status quo ante* and further in accord with the specific arbitral authority language found in the 2008-2012 Agreement as well as the Cost Savings Agreements, the remedy in this case shall be as follows:

First, as required by the Cost Savings Agreements effective September 24, 2010 and November 3, 2010, "... there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012) ..." That requirement speaks for itself as a remedy — *i.e.*, "... there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012) ...." Therefore, through June 30, 2012, there shall be no layoffs of the 1,680 employees represented by the Union.

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42 State Exh. C at p. 1; Joint Exh. 2(b) at p. 1.

43 *July 2011 Wage Increase Award* at 20, 25.

Second, because the Cost Savings Agreement effective September 24, 2010 which "… shall remain in full force and effect until July 1, 2012" requires that "… nor shall the state close any facilities …" and the Cost Savings Agreement effective November 3, 2010 requires that "… nor shall the State close any facilities prior to July 1, 2012", the State cannot close the seven facilities involved in this dispute prior to July 1, 2012.

Third, any employees represented by the Union who are laid off before July 1, 2012 shall be immediately reinstated without loss of seniority and made whole in all respects for all lost wages and benefits.

Fourth, in addition to any layoffs of employees represented by the Union prior to July 1, 2012 being found as a violation of the Cost Savings Agreements, I have found that the seven facilities targeted by the State for closure cannot be closed prior to July 1, 2012. Should the State nevertheless close any of those facilities prior to July 1, 2012, *any* employees covered by the Cost Savings Agreements who are laid off as a result of the layoffs and closures will be immediately reinstated without loss of seniority and made whole in all respects for all lost wages and benefits. Further, any such employees otherwise adversely impacted by the layoffs or closures prior to July 1, 2012 shall also be made whole in all respects. What this means is that should the State lay off employees or close any of the facilities involved in this case prior to July 1, 2012, *any* covered employees who are forced to exercise bumping or transfer rights under the 2008-2012 Agreement as a result of those layoffs and closures shall be restored to their prior positions at the facilities from which they are bumped or transferred and, if they suffer losses in wages and benefits as a result of the improper layoffs or closures, they shall be made whole in all re-

spects.[44] If other employees represented by the Union are similarly impacted as a result of being bumped, transferred or laid off by employees exercising their bumping and transfer rights because the State did not comply with the requirements to not lay off employees and to not close facilities prior to July 1, 2012, those down-the-line employees shall also be made whole in all respects (and reinstated if laid off). In brief, if the State chooses to lay off any employees or close any facilities prohibited by Cost Savings Agreements, to restore the *status quo ante*, the egg will be unscrambled and *all* adversely impacted employees represented by the Union shall be put back to where they were and made whole in all respects.

Fifth, 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 due to the State's violation of the Cost Savings Agreements, as part of the make whole remedy, those employees shall be further compensated by the State for those losses in addition to lost backpay and benefits.

Sixth, the State is now beginning to lay off employees in clear violation of its repeated promise not to do so through June 30, 2012 as required by the Cost Savings Agreements. If the State carries through with these layoffs as announced — which is a *clear* contract violation — the State is placing 1,680 employees represented by the Union into unemployment status when the unemployment rates at the national and State of Illinois levels are extraordinarily high.

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[44] *See e.g.,* Article XX, Section 3 of the 2008-2012 Agreement which provides for bumping and transfers in lieu of layoff.

According to the Bureau of Labor Statistics ("BLS"), the latest published data as of this writing show that in August 2011 the unemployment rate at the national level was 9.1%.[45] A more accurate national unemployment rate reflecting the real impact of unemployment is shown by the "underemployment" rate — *i.e.*, "[t]otal unemployed, plus all persons marginally attached to the labor force, plus total employed part time for economic reasons, as a percent of the civilian labor force plus all persons marginally attached to the labor force" — which in August 2011 was 16.1%.[46]

Further, according to the BLS, the unemployment rate in Illinois as of August 2011 was 10.0% — almost one percentage point higher than the national unemployment rate.[47] And while the national unemployment rate has basically remained steady (9.0% in April 2011, 9.1% in May 2011, 9.2% in June, 2011 and 9.1% in both July and August, 2011)[48], the unemployment rate in Illinois has steadily increased from 8.6% in April 2011 to 9.0% in May 2011 to 9.7% in June 2011 to 10.0% in July and August 2011.[49]

According to the Illinois Department of Employment Security ("IDES"), the latest reported county unemployment rates for August 2011 for the counties in which the seven targeted facilities for closure are located were as follows:[50]

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45 http://www.bls.gov/news.release/archives/empsit_09022011.pdf

46 *Id*. at Table A-15.

47 http://data.bls.gov/cgi-bin/surveymost?la+17 for Illinois rates (selecting "Illinois not seasonally adjusted" from the tables and retrieving data).

48 http://data.bls.gov/cgi-bin/surveymost?ln (selecting "Unemployment Rate - Civilian Labor Force" from tables and retrieving data).

49 http://data.bls.gov/cgi-bin/surveymost?la+17 for Illinois rates (selecting "Illinois not seasonally adjusted" from the tables and retrieving data).

50 http://lmi.ides.state.il.us/download/LAUS_YTD_COUNTY.pdf

Facilities Targeted For Closing	County	August 2011 Unemployment Rates
Tinley Park Mental Health Center	Cook	10.9%
H. Douglas Singer Mental Health Center	Winnebago	13.0%
Chester Mental Health Center	Randolph	8.3%
Jacksonville Developmental Center	Morgan	8.8%
Jack Mabley Developmental Center	Lee	9.6%
Logan Correctional Center	Logan	8.3%
Illinois Youth Center at Murphysboro	Jackson	7.8%

Two of the facilities targeted for closing are in counties with unemployment rates higher than the Illinois 10% level (Tinley Park and Singer). Those two facilities and Mabley are in counties with unemployment rates higher than the national level of 9.1%. Three of remaining facilities targeted for closing (Chester, Jacksonville and Logan) are in counties with unemployment rates at or over 8.3%. And one (IYC Murphysboro) is in a county with an unemployment rate of 7.8%.

As reported by the IDES, those remarkably high unemployment rates in the counties where the facilities will be closed coupled with the true unemployment rate as reflected in the "underemployment" rate tracked by the BLS — *i.e.*, "[t]otal unemployed, plus all persons marginally attached to the labor force, plus total employed part time for economic reasons, as a percent of the civilian labor force plus all persons marginally attached to the labor force" — which at the national level is an astounding 16.1%[51], lead to a sobering conclusion about what will happen to those employees who are laid off by the State in clear violation of the Cost Savings Agreements. Given the extraordinarily high unemployment rates in Illinois and as a result of the State's clear violation of its promises in the Cost Savings Agreements to not lay off employees repre-

[51] http://www.bls.gov/news.release/archives/empsit_09022011.pdf at Table A-15.

sented by the Union and to not close facilities prior to July 1, 2012, employees who gave concessions to ease the State's financial difficulties and in return were promised by the State that they had job security and would not be laid off through June 30, 2012 will, because of the State's violation of its promises, be thrown into an economy with little chance of finding comparable employment.

This recession has shown me all too well what happens when employees are laid off in the kind of economic conditions now stressing the country and Illinois. *See* my award in *Chicago Transit Authority and Locals 241 and 308 Amalgamated Transit Union,* Grv. Nos. 1209-04, etc. (February 3, 2010) ("*CTA Layoff Award*") where I denied a grievance protesting the layoff of over 1,000 Chicago Transit Authority ("CTA") employees required by a budget deficit (created in large part by former Governor Blagojevich's seniors ride free amendment to legislation which caused a $36,000,000 loss of revenue to the CTA as part of a $96,000,000 budget deficit in 2009).[52]

The *CTA Layoff Award* cited a study conducted by a New York Times/CBS News poll for individuals who had been laid off from their jobs which showed that 25% of those polled either lost their homes or had been threatened with foreclosure or eviction for not paying their mortgage or rent; 50% did not have health insurance, with the vast majority citing job loss as the reason; 50% cut back on doctor visits or medical treatments because they were out of work; almost 50% suffered depression and anxiety; and over 60 percent

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[52] The *CTA Layoff Award* had been previously posted on the Local 241 ATU website at http://www.atu241chicago.org/site/files/635/42087/328812/451620/CTA_2010_Layoffs_Award.pdf

A recent trusteeship imposed on that union may have caused limited access to all parts of that website.

of those receiving unemployment benefits said the amount was not enough to cover basic necessities.[53]

As discussed in the *CTA Layoff Award*, the impact on the CTA employees who were laid off was obvious:[54]

> The layoffs of the 1,019 employees will therefore be tantamount to a mass execution. These laid off employees will likely have little prospects of employment — let alone equivalent employment — and they will suffer the hardships of the many who have recently lost their jobs in this recession.

The following numbers also provide the crystal ball for what is in the future for employees who are being laid off in violation of the Cost Savings Agreements. According to the BLS:[55]

Date	Number Unemployed In Illinois	Unemployment Rate In Illinois
September 2008 (signing of 2008-2012 Agreement)	418,823	6.3%
September 2010 (first Cost Savings Agreement)	619,768	9.3%
November 2010 (second Cost Savings Agreement)	603,187	9.1%
August 2010 (current)	663,250	10.0%

Thus, there are over 663,000 unemployed individuals in Illinois.[56] Nationally, there are 14,000,000 who are unemployed.[57] What will no doubt follow for many of the improperly laid off employees and their families in this mat-

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53 *CTA Layoff Award* at 5-6 [citing Luo and Thee-Brenan, "Poll Reveals Depth and Trauma of Joblessness in U.S. Emotional Havoc Wreaked on Workers and Family", New York Times (December 15, 2009)]. The web version of that article ("Poll Reveals Trauma of Joblessness in U.S.") is found at http://www.nytimes.com/2009/12/15/us/15poll.html

54 *CTA Layoff Award* at 6.

55 http://data.bls.gov/cgi-bin/surveymost?la+17 for Illinois rates (selecting "Illinois not seasonally adjusted" from the tables and retrieving data).

56 *Id*.

57 http://www.bls.gov/news.release/archives/empsit_09022011.pdf

ter is precisely that which faced the CTA employees who were laid off in 2010 as well as the millions who are unemployed in this economy — a high potential of foreclosures and evictions from their homes and residences for not being able to pay their mortgage or rent, loss of health insurance, loss and lack of medical care and the overall trauma of being unemployed in a very unforgiving economy. The difference here is that the layoff of the over 1,000 CTA employees was found by me to not violate the collective bargaining agreement, while the layoff of the 1,680 employees in this matter *is* in *clear* violation of the Cost Savings Agreements.

The number and percentages of unemployed workers in Illinois are growing. There is no reason why 1,680 employees who were guaranteed by the State that they would not be laid off through June 30, 2012 should be thrown into the present unemployment market in clear violation of the Cost Savings Agreements.

Further, in addition to high unemployment rates, reports show that Illinois has high foreclosure rates:[58]

> Illinois outdid its famously hard-hit neighbor to the northeast in at least one barometer of economic malaise last year: the Land of Lincoln surpassed Michigan in property foreclosures, tallying 151,304 filings to Michigan's 135,874.
>
> The two Midwestern states ranked fourth and fifth in the number of foreclosures, behind California, Florida and Arizona. Cumulatively, the five states accounted for 51 percent of the nation's home repossessions last year.
>
> * * *

And how does an arbitrator in fashioning a remedy in a case such as this restore the *status quo ante* and make whole those who have been harmed by a demonstrated contract violation of the type found in this case? An order only

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[58] http://chicago.cbslocal.com/2011/01/13/illinois-beats-michigan-in-foreclosures/

requiring reinstatement and compensation for lost wages and benefits may not make an employee whole if that employee lost his or her home or car because the employe could no longer make payments due to being laid off in violation of the Cost Savings Agreements.

An approach taken by National Labor Relations Board ("NLRB") answers that question. *See* the *NLRB Compliance Manual* [emphasis added]:[59]

NATIONAL LABOR RELATIONS BOARD
CASEHANDLING MANUAL
PART THREE
COMPLIANCE PROCEEDINGS

* * *

Section 10536 Backpay

Section 10536.1 Overview

* * *

> The goal in determining backpay is the same in all cases. The [National Labor Relations] Act is remedial; when it has been violated, its intent is to restore the situation to that which would have taken place had the violation not occurred. Backpay awards are intended to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation. Backpay awards do not include punitive damages *but may include compensable damages, such as the loss of a car or house due to the discriminatee's inability to make monthly payments as a result of being unlawfully laid off or terminated*. ...

* * *

As part of make whole relief to be formulated by an arbitrator for employees laid off from their jobs in violation of a collective bargaining agreement, I agree with the above approach of the NLRB and find that it is within my discretion and authority to formulate similar make whole remedies for contract violations which "... may include compensable damages, such as the loss of a car or house due to ... [an improperly laid off employee's] inability to make monthly payments as a result of being unlawfully laid off or terminated." That type of relief is not punitive. That type of relief is make whole and restores the *status*

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[59] http://www.nlrb.gov/sites/default/files/documents/44/compliancemanual.pdf

quo ante and, in the appropriate circumstances, is required when employees are laid off or otherwise adversely impacted as a result of violations of contracts prohibiting layoffs and facility closures.

Therefore, in the event State goes forward with the announced layoffs and facility closures which have been found by me to be in clear violation of the Cost Savings Agreements and employees represented by the Union are laid off or put into lesser positions had the violations not occurred and in the event those adversely impacted employees lose their homes or cars or are forced to move from their residences as a result of the State's clear violation of the Cost Savings Agreements which places the employees in a position of being unable to make timely payments on those items or should those employees suffer any other related losses, then as part of the make whole remedy, those employees shall be compensated by the State for those losses in addition to lost backpay and benefits.

Entitlement to the additional make whole relief over and above lost wages and benefits as discussed in this section shall be decided on a case-by-case basis, taking into account the individual employee's circumstances and efforts at mitigation of damages.

C. The State's Arguments

The State's arguments do not change the result.

First, as it did in the *July 2011 Wage Increase Award,* the State argues that Section 21 of the Illinois Public Labor Relations Act, 5 ILCS 315/21 ("IPLRA") permits it to not comply with the clear language of the Cost Savings

Agreement dated September 24, 2010 with respect to the layoffs and facility closures in this case.[60]

Section 21 of the IPLRA provides:

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

I rejected consideration of the State's Section 21 argument in the *July 2011 Wage Increase Award* at 13-14 [emphasis in original, footnote omitted]

> I am an arbitrator whose authority flows strictly from the terms of the collective bargaining agreement. I am not a judge with authority to interpret statutory provisions. *See Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 53-54, 57 (1974) [quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), emphasis added]:
>
> > [A]n arbitrator is *confined* to interpretation and application *of the collective bargaining agreement* ...
> >
> > * * *
> >
> > ... Thus the arbitrator has authority to resolve only questions of *contractual* rights ....
> >
> > * * *
> >
> > ... [T]he specialized competence of arbitrators pertains primarily to the law of the shop, *not* the law of the land .... *[T]he resolution of statutory* or constitutional *issues is a primary responsibility of courts* ....
>
> Section 21 of the IPLRA is a *statutory* provision. The parties did not specifically make Section 21 part of the Agreement or the Cost Savings Agreements. As an arbitrator, I therefore have no authority to interpret that statutory provision. Statutory interpretations must be made by the courts and not by arbitrators.
>
> The parties' completely different views of the meaning and intent of Section 21 of the IPLRA, the lack of any real specific legislative history cited and the lack of court decisions concerning Section 21 reinforce my view that the courts and not an arbitrator should interpret Section 21.
>
> However, even if I could interpret Section 21, for me to do so in any fashion which changes the language of the Agreement and the Cost Savings Agreements to allow the State to avoid the mandatory requirement that "[e]ffective July 1, 2011, the pay rates for all bargaining unit classifications and steps shall be increased by 2.00%, which rates are set out in Schedule A" would again violate the limitations on my authority agreed to by the parties in Article V, Section 2, Step 4(c) of the Agreement which

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[60] *See* State Brief at 30-41.

> provides that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement."
>
> As an arbitrator, I cannot address the State's Section 21 argument.

The same rationale applies in this case. As an arbitrator, in this case I cannot interpret the statutory provisions of Section 21 of the IPLRA. That is for the courts.

Second, the State makes Constitutional arguments in this case as it did in the *July 2011 Wage Increase Award*.[61] Like the State's Section 21 argument, the State's Constitutional arguments could not be considered by me in the *July 2011 Wage Increase Award* at 14-15 [emphasis in original]:

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

I again cannot consider the State's Constitutional arguments in this case. That is for the courts.

Third, the State also argues the Judicial Branch cannot order the State to expend funds absent an appropriation by the General Assembly; the layoffs and closure issues are political issues that are not justiciable; the State did not impair the contract (with sub-arguments concerning the Contracts Clause, no substantial impairment of a contractual relationship, the actions were taken for a significant and legitimate public purpose and the actions were reasonable and necessary); and unspent appropriations from Fiscal Year 2011 cannot be

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[61] *See* State Brief at 30-41.

used to avoid the layoffs or facility closures.[62] Like the State's statutory and Constitutional arguments and for reasons discussed in the *July 2011 Wage Increase Award* at 17-19 where the State made similar additional arguments not based in the terms of the relevant contract language, those matters are also not for an arbitrator to decide, but must be decided by the courts.

Fourth, much has been made of the State's position that although it entered into the Cost Savings Agreements and took the concessions granted by those agreements from the Union and the employees, it now cannot "afford" to meet its reduced obligations to the employees under those concession-granting agreements because the General Assembly did not appropriate sufficient funds to fulfill the Governor's request to meet the State's contractual obligations. The State claims that it is therefore excused from living up to its contractual commitments.[63]

From a contract standpoint, whether the State can presently "afford" to meet its obligations because the General Assembly did not pass a budget sufficient to allow the State to keep its promises and meet its obligations cannot be determinative of the contract dispute before me. There are no pre-conditions in the Cost Savings Agreements (or any agreements relevant in this case) that make the State's commitments contingent upon the subsequent passing of budgets sufficient to fund the State's obligations under those agreements. If the parties intended that result, they would have said so in the Cost Savings Agreements. Where contractual commitments by public employers in this State are meant to be contingent upon the passing of a budget sufficient to

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62 State Brief at 41-54.

63 State Brief at 6-22.

fund a collective bargaining agreement, the parties memorialize that commitment in their contracts. The Union points to the following example in the 2008-2012 collective bargaining agreement between the State of Illinois Office of the Comptroller and IUOE Local 965:[64]

> **SECTION 24-2 LEGISLATIVE APPROPRIATION**
>
> The Employer shall request from the Illinois Legislature all of the monies necessary to fund all of the needs of the appropriate line accounts within the annual budget that are affected by this Agreement. If any appropriations to the Office of the Comptroller, which directly correspond to any economic obligations for personal services as reflected in this Agreement, is subsequently reduced by the Legislature or the Governor to an amount less than the original request, the parties agree to reopen this contract for the limited purpose of negotiating the issue of economics. ....

Similar language spelling out the condition precedent for the passing of a budget sufficient to support economic agreements can be found in other contracts cited by the Union between the Comptroller and IBT Local 916 and IFT Local 4717; the Illinois State Treasurer and IBT Local 916 and IFT Local 4460 and the Office of the Attorney General and IBT Local 916 and IFT Local 4408.[65]

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64 Union Exh. 20.

65 Union Exh. 21 at Section 25-2; Union Exh. 22 at Article XX, Section 5; Union Exh. 23 at Section 35.3; Union Brief at 7-9.

See also, Sections 36-3 and 47-2.2 of the collective bargaining agreement between the Chicago Board or Education and the Chicago Teachers Union (of which I can take note) found at http://www.ctunet.com/grievances/text/2007-2012-CPS-CTU-Collective-Bargaining-Agreement.pdf?1294199486

* * *

> **36-3.** In accordance with the provisions of the Illinois School Code, salary schedules and compensatory remuneration provisions in the 2007-2012 Agreement ... shall be subject to the terms, provisions and conditions of appropriations therefore contained in the fiscal 2011-2012 annual or supplemental school budgets for the school year 2011-2012.

* * *

> **47-2.2.** Any adjustments to the increase of four percent for Fiscal Years 2009, 2010, 2011 and 2012 to Appendix A of this Agreement are contingent upon a reasonable expectation by the BOARD of its ability to fund the increases for Fiscal Years 2009, 2010, 2011 and 2012. Therefore, any adjustments to the scheduled increases to Appendix A for Fiscal Years 2009, 2010, 2011 and 2012 shall not be effective until and unless the BOARD adopts a Resolution no later than fifteen calendar days prior to the beginning of each Fiscal Year that it finds there is a reasonable expectation that it will be able to fund such increases for that Fiscal Year. ...

There are no similar provisions in any of the agreements involved in this case which make an economic contract commitment by the State in any way contingent on the passing of a budget by the General Assembly sufficient to pay for those economic commitments.

The State made contractual promises to not lay off employees represented by the Union and to not close facilities prior to July 1, 2012. The State simply must keep those contractual promises. A party is not excused from previous contractual obligations by claiming that it presently can no longer afford to meet its obligations. The fact that the General Assembly passed a budget which the Governor determined was insufficient to fund the State's obligations under the Cost Savings Agreements is a political dispute between the Governor and the General Assembly and not relevant to this contract matter. As a matter of contract, the State's contractual obligations under the Cost Savings Agreements remain and must be enforced. As an arbitrator, I have absolutely *no* authority to alter the Cost Savings Agreements to excuse the State from the clear and unequivocal promises it made that in exchange for the approximate $400,000,000 in concessions given by the Union and the employees, the State *guaranteed* that there would be *no* layoffs of employees represented by the Union and *no* facility closures prior to July 1, 2012. The State did not keep its promises. It now must do so.

D. Other Evidence From The Parties And Further Proceedings

Pursuant to the Amended Scheduling Order dated September 17, 2011, the parties were given the ability to make offers of proof and to provide additional evidence and I would consider those offers and evidence along with the parties' briefs in determining whether further proceedings before me would be

necessary.[66] I have considered the parties' offers and evidence. With all that has been presented, the only material facts necessary for determining the outcome of this case are undisputed and admitted that: (1) the Costs Savings Agreements prohibit layoffs and facility closures prior to July 1, 2012 and (2) the State has initiated layoffs and facility closures to be effective prior to that date which will result in the layoff of 1,680 employees who were guaranteed that they would not be laid off through June 30, 2012. I find those facts are all that are needed to decide this dispute.

The language of the Cost Savings Agreements is clear and unambiguous. The repeated promises made by the State in the negotiated words found in the Cost Savings Agreements — "... the parties agree that there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012) nor shall the state close any facilities ... [and] there shall be no temporary or indeterminate layoffs through the end of FY2012 (June 30, 2012), nor shall the State close any facilities prior to July 1, 2012" — could not be clearer. Those words simply mean what they say — *i.e.*, there will be "no" layoffs or facility closures prior to July 1, 2012. With that clear language, there is no need for a hearing concerning what was involved in the negotiation of that language. Be-

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[66] The Amended Scheduling Order provides:

* * *

5. If the parties desire, the parties can make offers of proof with their briefs with accompanying evidence and I will rule on the relevance of those offers with respect to the dispute before me.
6. If after reading the parties' briefs and offers of proof, I determine that evidentiary hearings, further briefs and/or argument are necessary, I will notify the parties and those will be scheduled on an expedited basis.
7. In the event I deem the offers of proof discussed in paragraph 5 not relevant for my determining the dispute before me, the parties shall nevertheless be free to more fully develop their positions (either through depositions, affidavits, or production of evidence) so as to make a full and complete record which either party believes may be relevant to proceedings in other forums concerning this dispute.

cause the language is clear, parol evidence cannot be considered.[67] Nor is it material for my determination of the contract violation to consider evidence concerning the details of the General Assembly's failure to pass a budget which the Governor felt was sufficient to fund the State's promises. The only relevant and material facts are that the State promised to not lay off employees and to not close facilities prior to July 1, 2012 — promises which the State is now violating. If the contract language is clear as it is in this matter, I can go no further than consideration of that clear language. *See I-T-E Imperial Corp.*, 67 LA 354, 355 (Weiss, 1976) ("The threshold question in this case is whether the language of ... the collective bargaining agreement is so clear and unambiguous that I need go no further to resolve the issue herein"). The State violated the clear language of the Cost Savings Agreement. My contract analysis can go no further and the additional evidence and arguments made by the parties do not change the conclusion.

The remaining facts offered by the parties are therefore not material for resolution of the contract dispute before me. That being the case, if they choose, the parties are free to further supplement the record for purposes of proceedings in other forums concerning this dispute as allowed by the

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[67] Elkouri and Elkouri, *How Arbitration Works,* (BNA, 5th ed.*),* 504, 598:

> ... [I]f an agreement is not ambiguous, it is improper to modify its meaning by invoking the record of prior negotiations.
>
> * * *
>
> Under the parol-evidence rule a written agreement may not be changed or modified by any oral statements or arguments made by the parties in connection with the negotiation of the agreement. A written contract consummating previous oral and written negotiations is deemed, under the rule, to embrace the entire agreement, and, if the writing is clear and unambiguous, parol evidence will not be allowed to vary the contract.

In any event, there is no suggestion in anything submitted by the parties that in the formulation of the language in the Cost Savings Agreements the parties ever discussed, much less agreed upon, making the State's no layoff/no facility closures promises contingent upon subsequent appropriations by the General Assembly to fund those promises.

Amended Scheduling Order. However, no further finding of facts need by done by me and no further proceedings before me are necessary. Given the simplicity of the undisputed and admitted facts, the clear language in the Cost Savings Agreements prohibiting layoffs and facility closures prior to July 1, 2012 and the admitted facts that the State is laying off employees and closing facilities prior to that date, I find there is no need for a hearing or further proceedings in this matter.[68]

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[68] As discussed *supra* at III(B), in the Cost Savings Agreement effective September 24, 2010 at par. 6 and as further incorporated by the Cost Savings Agreement effective November 3, 2010 at p. 2, the parties specifically agreed that "Arbitrator Benn shall be retained to decide any disputes relative to this agreement [and h]is decisions shall be final and binding on both parties." That "final and binding" authority given to me by the parties goes not only to deciding the merits of disputes arising under the Cost Savings Agreements, but to establishing the procedures to determine facts for deciding those disputes. Given the undisputed and admitted material facts needed to decide this case (*i.e.*, the clear language of the Cost Savings Agreements which prohibit layoffs and facility closures prior to July 1, 2012 and the fact that the State is laying off employees and closing facilities prior to that date), in the exercise of my final and binding authority under the Cost Savings Agreements, I have determined that no hearings or further proceedings are necessary to establish the already undisputed and admitted material facts necessary for me to decide this contract dispute. The Amended Scheduling Order gives the parties the ability to make offers of proof and to provide additional evidence in order to preserve whatever arguments they may feel are necessary for proceedings instituted in other forums concerning this award (*i.e.*, court actions to vacate or enforce this award) and, if they desire, they can do so even after this award issues. An extensive record has already been compiled from both sides. However, for purposes of this case before me, I have considered the parties' submissions and their proffers and I have determined any additional facts proposed by the parties to decide this case are simply not material. I have what I need to decide this contract dispute. No further proceedings before me are necessary.

The State appears to question my ability to establish the procedures for this dispute as found in the Scheduling Orders. *See* State Brief at 21, note 6:

> Paragraph 7 [of the Amended Scheduling Order] raises an issue about the scope of Arbitrator Benn's jurisdiction after rendering an award, as well as the jurisdiction of an arbitrator to affect discovery in proceedings before other arbitrators, or in other forums.

In a case where an arbitrator is called upon to decide a single dispute, upon issuance of an award the arbitrator is "functus officio". *How Arbitration Works, supra* at 387 ("It has been said to be a "general rule in common law arbitration that when arbitrators have executed their awards and declared their decision they are functus officio and have no power to proceed further'" [citations omitted]). However, in this case I am not an arbitrator selected to hear a single dispute. The parties agreed in the Cost Savings Agreements that "Arbitrator Benn shall be retained to decide *any disputes relative to this agreement* [and h]is decisions shall be final and binding on both parties" [emphasis added]. State Exh. B at par. 6; Joint Exh. 2(a) at par. 6. That broad jurisdictional grant of authority concerning "any disputes relative to" the Cost Savings Agreements allows me to establish the procedures set forth in the Scheduling Orders. As to the State's concern about "... proceedings before other arbitrators ...", this procedure does not affect arbitrators under different agreements (for different unions). The procedure I have

[footnote continued]

[continuation of footnote]
established is only for the resolution of "… any disputes relative to this [Cost Savings] agreement …" for AFSCME represented employees.

Paragraph 7 of the Amended Scheduling Order provides "[i]n the event I deem the offers of proof discussed in paragraph 5 not relevant for my determining the dispute before me, the parties shall nevertheless be free to more fully develop their positions (either through depositions, affidavits, or production of evidence) so as to make a full and complete record which either party believes may be relevant to proceedings in other forums concerning this dispute." That is an optional right the parties can take advantage of to preserve their positions and to make their record for any court reviewing this award. This right is particularly advantageous to the State because I made it clear in the *July 2011 Wage Increase Award* that I would not address its non-contract arguments and it should have been evident to the parties that I again would not do so here. By taking advantage of the option given to the parties to present evidence as provided in paragraph 7 of the Amended Scheduling Order, the State can preserve everything it may want to present to a court reviewing this matter. If the State questions my authority to provide it with such an avenue for making a complete record to its liking, then the State should simply not take advantage of the vehicle I have provided for it.

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

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

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

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

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

In establishing the procedures to be followed for the presentation of evidence and determining the material facts and demonstrated contract violations, I have performed my role as the arbitrator under the Cost Savings Agreements and "interpreted" those agreements.

IV. CONCLUSION

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.

The language in the Cost Savings Agreements signed by the State and the Union clearly prohibits layoffs and facility closures prior to July 1, 2012. The Cost Savings Agreements modified the parties' 2008-2012 Collective Bargaining Agreement. Under Article V, Section 2, Step 4(c) of the 2008-2012 Agreement, the parties agreed that "[t]he arbitrator shall neither amend, modify, nullify, ignore, add or subtract from the provisions of this Agreement." I therefore have absolutely no authority to change the State's promises in the Cost Savings Agreements to not lay off employees and to not close facilities prior to July 1, 2012. The contract language prohibiting layoffs and facility closures is clear. The State's violations of that contract language are also clear.

As a remedy for these contract violations, the *status quo ante* must be restored and those employees adversely impacted by the State's contract violations must be made whole. Specifically, and as discussed *supra* at III(B), in the exercise of my discretion to formulate remedies, the remedy in this case shall be:

1. There shall be no temporary or indeterminate layoffs of employees represented by the Union through June 30, 2012.

2. The State cannot close the seven facilities involved in this dispute (Tinley Park Mental Health Center, H. Douglas Singer Mental Health Center, Chester Mental Health Center, Jacksonville Developmental Center, Jack Mabley Developmental Center, Logan Correctional Center and Illinois Youth Center at Murphysboro) prior to July 1, 2012.

3. If any employees represented by the Union are laid off before July 1, 2012, they shall be immediately reinstated without loss of seniority and made whole in all respects for all lost wages and benefits.

4. Any employees represented by the Union who are bumped or transferred by improperly laid off employees forced to exercise their bumping or transfer rights under the Agreement as a result of any layoffs or closures prohibited by the Cost Savings Agreements and this award shall be restored to their prior positions at the facilities from which they are bumped or transferred and made whole in all respects. Further, if any other down-the-line employees represented by the Union in the bumping and transfer process are laid off or suffer losses in wages and benefits as a result of the layoffs or closures in this case, they shall also be restored to their former positions and made whole in all respects.

5. 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.

6. 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 lay-offs, 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.

7. Entitlement to the additional make whole relief over and above lost wages and benefits as discussed in paragraphs 5 and 6 shall be decided on a case-by-case basis, taking into account the individual employee's circumstances and efforts at mitigation.

The statutory, Constitutional and other non-contract arguments raised by the State in which the State seeks to avoid its contractual obligations are not for me as an arbitrator to decide. My function is to interpret the State's contractual obligations and those obligations are clear and have been violated. The State's statutory, Constitutional and other non-contractual arguments are to be resolved by the courts. However, as I observed in the *July 2011 Wage Increase Award* at 22-23 [emphasis in original, footnote omitted]:

> If the State is correct in its statutory and Constitutional arguments, the result will be that public sector employers and unions will have to negotiate collective bargaining agreements *every year* instead of having mufti-year agreements (typically three to five years and sometimes longer) which bring labor peace and stability. Some public sector contracts in this state have taken years to negotiate or settle through the interest arbitration process under Section 14 of the IPLRA. Having been involved in the collective bargaining process as a mediator and interest arbitrator for over 25 years, I estimate that *thousands* of multi-year collective bargaining agreements have been settled in this state. If the State is correct that economic provisions of multi-year collective bargaining agreements are not enforceable or are contingent upon subsequent appropriations for

> the out years of the agreements, then the collective bargaining process will be, to say the least, severely undermined. If the State is correct, the result will be most chaotic and costly as public sector employers and unions will now have to drudge through the often laborious, time-consuming and costly collective bargaining process on a yearly basis. Unions will do that. Public sector employers will be loathe to have to engage in that costly and time consuming endeavor on a yearly basis. If the State is correct in its statutory and Constitutional arguments, the multi-year collective bargaining agreement is, for all purposes, probably dead.

Given what it is at stake in this case — for the impacted employees, the State, the taxpayers and the collective bargaining process in the State of Illinois (as well as what is similarly at stake in the *July 2011 Wage Increase Award*) and because the layoffs and facilities closure process have already begun with the first layoffs to take effect November 1, 2011 — time is of the essence. I have issued this award on an expedited basis. As with the *July 2011 Wage Increase Award,* litigation in the courts will no doubt now follow. Given the importance of this case, one would hope that any judicial determinations will also be handled on an expedited basis. This case must be expedited by all involved.[69]

V. AWARD

The Union's protest over the State's announced layoffs and facility closures is sustained. As set forth in detail at III(B) and IV of this opinion and pursuant to the Cost Savings Agreements, no employees represented by the Union can be laid off through June 30, 2012; the seven mental health and correctional facilities targeted for closure cannot be closed prior to July 1, 2012;

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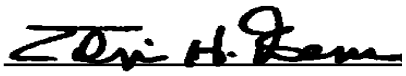
[69] The State argues that because I have performed my role as an arbitrator interpreting only the contract language and have not agreed to consider the State's statutory, Constitutional or other arguments, I should "… not render an award or order any relief until the Circuit Court has an opportunity to decide these determinative legal issues." State Brief at 24. Given the immense impending harm to the impacted employees, the State, the taxpayers and the collective bargaining process, any delay in deciding this contractual dispute would be most injurious to all involved. I therefore deny the State's request that I delay issuance of this award.

and if any employees represented by the Union are laid off or transferred as a result of the layoffs and facility closures involved in this matter prior to July 1, 2012, those employees shall be reinstated and made whole in all respects for their losses flowing from the State's violation of its contractual promises to not lay off employees and to not close those facilities. This make whole relief includes lost wages and benefits; compensation for medical expenses (including life insurance benefits for beneficiaries) which would otherwise have been paid for or covered by insurance had the employees not been laid off in violation of the Cost Savings Agreements and compensation to adversely impacted employees who lose their homes or cars or are forced to move from their residences as a result of the State's clear violation of the Cost Savings Agreements which places the employees in a position of being unable to make timely payments on those items. The additional make whole entitlements above lost wages and benefits shall be decided on a case-by-case basis, taking into account the individual employee's circumstances and efforts at mitigation of damages.[70]



Edwin H. Benn
Arbitrator

Dated: October 3, 2011

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