

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
GENERAL COUNSEL**

Troopers Lodge #41, Fraternal Order of)	
Police,)	
)	
Labor Organization)	
)	Case No. S-DR-16-003
and)	
)	
Illinois State Police,)	
)	
Employer.)	

CORRECTED DECLARATORY RULING¹

On December 31, 2015, the Illinois State Police (Employer) filed a unilateral Petition for Declaratory Ruling pursuant to Section 1200.143 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code Parts 1200 through 1300. The Employer requests a determination as to whether its proposals concerning Seniority Positions and a Merit Incentive Program are permissive or mandatory subjects of bargaining within the meaning of the Illinois Public Labor Relations Act, 5 ILCS 315 (2014). Troopers Lodge #41, Fraternal Order of Police (Union) objects to the Employer’s petition on the grounds that it is untimely filed. Both parties filed briefs addressing procedural and substantive issues.

I. Background

The Employer and the Union are parties to a collective bargaining agreement that expired on June 30, 2015. On or about May 11, 2015, the parties commenced negotiations for a successor contract. On August 20, 2015, the Union filed a demand for Compulsory Interest Arbitration. The parties selected Dan Nielsen as their neutral interest arbitrator. The parties

¹ This declaratory ruling initially issued February 18, 2016, contained a typographical error on page eleven, in former foot note 4. The words following “(emphasis added)” were inadvertently included and have been omitted.

agreed to submit their final offers to the interest arbitrator two days prior to the first day of hearing. They likewise agreed to present their objections to any proposals on the first day of hearing.

On December 23, 2015, the arbitrator held the first day of hearing in the parties' interest arbitration. On that date, the Union objected to the Employer's Seniority Positions proposal and its Merit Incentive Program proposal on the grounds that they addressed permissive subjects of bargaining.

On December 30, 2015, the Employer submitted its revised final offer to the interest arbitrator and the Union via email. The revised final offer corrected typographical errors in its Seniority Positions proposal and modified paragraph four of its proposal on the Merit Incentive Program proposal to address the Union's objections. The Employer also asked the Union to inform the Employer as to whether it would maintain its objection to the Employer's proposals. In addition, it asked the Union to notify it by December 31, 2015 as to whether it would join in the Employer's petition for declaratory ruling.

The Union responded by email that it would not join in the Employer's petition. The Employer replied by email to express its outrage at the timing of the Union's objection to the Employer's Merit Incentive Program proposal and the Union's concomitant refusal to join in the Employer's petition. The Employer claimed that the Union had not previously objected to the Employer's Merit Incentive Program proposal. The Employer also noted that the parties had openly discussed the potential of using the Board's procedures to resolve disputes, but that the Union never stated it would withhold its agreement to file a joint petition for declaratory ruling.

On December 31, 2015, the arbitrator replied by email in relevant part, as follows: “I agreed completely that the [Union’s] objection to going to the ILRB is inconsistent with the schedule we discussed, and with the options we discussed.”

The parties did not exchange their final health insurance proposals until two weeks after the commencement of the interest arbitration hearing.

II. Relevant Statutory and Constitutional Provisions

The duty to bargain is defined in Section 7 of the Act which provides in relevant part:

A public employer and the exclusive representative have the authority and duty to bargain collectively set forth in this Section.

For the purpose of this Act, “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, and to negotiate in good faith with respect to wages, hours and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

5 ILCS 315/7 (2014).

The Illinois Pension Code provides the following in relevant part:

(a) For periods of service on and after January 1, 1978, all remuneration for personal services performed defined as “wages” under the Social Security Enabling Act, including that part of such remuneration which is in excess of any

maximum limitation provided in such Act, and including any benefits received by an employee under a sick pay plan in effect before January 1, 1981, but excluding lump sum salary payments:

- (1) for vacation,
- (2) for accumulated unused sick leave,
- (3) upon discharge or dismissal,
- (4) for approved holidays.

(d) For periods of service after September 30, 1985, compensation also includes any remuneration for personal services not included as “wages” under the Social Security Enabling Act, which is deducted for purposes of participation in a program established pursuant to Section 125 of the Internal Revenue Code or its successor laws.

40 ILCS 5/14-103.10 (2014).

The Social Security Enabling Act provides the following in relevant part:

Wages. “Wages” means remuneration for employment, including the cash value of remuneration paid in any medium other than cash, but not including that part of such remuneration which would not constitute “wages” within the meaning of the Social Security Act for wages paid prior to January 1, 1987, or the Federal Insurance Contributions Act for wages paid after December 31, 1986

40 ILCS 5/21-102.17 (2014).

The State of Illinois Constitution provides the following in relevant part:

Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

Ill. Const. 1970, art. XIII, § 5.

III. The Employer’s Proposals

ARTICLE 28 **Seniority Positions**

1. Position Subject to Seniority Bid

Should vacancies occur in any of the positions listed in Paragraph A of this Section, the most senior eligible Trooper / Special Agent (where applicable) (based on continuous service in the Department) within the district, bureau, or unit in which the position arises who bids for the position in accordance with the procedures established herein, shall be selected for the position provided the senior Troopers / Special Agents (where applicable) qualifications for the position are substantially equivalent to or greater than those of other officers seeking the position. In determining qualifications, the Department shall not be arbitrary or capricious but shall consider training, education, experience, skills, ability and performance.

Where the geographic area of responsibility of the positions is larger than a single district, bureau, or unit then seniority hereunder shall be determined within the larger area.

When the Department determines that a job vacancy exists in a position listed in Paragraph A of this Section, the vacancy shall be posted for bid on the appropriate bulletin board(s) of the district, zone, bureau, or unit for a period of at least fourteen (14) calendar days prior to the filling of the position and distributed to the Troopers / Special Agents (where applicable) of the district, bureau, or unit by mail or other appropriate means. The Department shall determine, in its discretion, whether a job vacancy exists; provided, however, that a vacancy shall be posted within thirty (30) days after the Department makes this determination. Except for the positions of Riverboat Unit/Gaming Officer and Riverboat Unit/Gaming Sergeant which shall be bid statewide, all such vacancies shall be posted in the district where the vacancy occurs. Once the posting period has ended, no other bids shall be accepted and no appointment shall be made to any person except the successful bidder. Where vacancies for seniority positions posted in a district are not filled, the vacancy shall be posted in the zone and available to investigative personnel who reside within the geographic boundaries of that district, prior to being posted statewide. If the bidding process does not fill the vacancy, then the Department may fill the position by other means. The vacancy posting shall contain the position title, work location, a summary of duties and responsibilities of the position. Non-probationary employees within the above units may bid during the fourteen (14) day posting period on a form supplied by the Department. If the bidding process does not result in interested applicants, then the Department may fill the position by other means.

Where skills and ability are relatively equal and there exists an underutilization of a minority class in a given geographical region and/or category, the Department may in accordance with applicable law, bypass the most senior employee in order to reduce the underutilization.

The Department retains the right, at any time during the procedure, to determine that a vacancy shall not be filled.

6. Merit Incentive Program

The parties agree to develop and implement a merit incentive program which will begin in the Fiscal Year starting July 1, 2016, to reward and incentivize high-performing employees, or group's/unit's performance. As a part of such efforts, the Department ~~may~~ shall create an annual

bonus fund for payout to those individuals deemed high performers or for a group's/unit's level of performance for the specific group/unit. Payment from this bonus fund will be based on the satisfaction of performance standards to be developed by the Department in consultation with the Union. Such merit compensation either for a group/unit or an individual shall be considered a one-time bonus and will be offered only as a non-pensionable incentive, and that any employ who accepts merit pay compensation does so voluntarily and with the knowledge and on the express condition that the merit pay compensation will not be included in any pension calculations.

Additionally, as a part of overall efforts to improve efficiency of state operations and align the incentives of the Department with its employees, the Department shall develop gain sharing programs. Under such programs, employees or agencies that achieve savings for the State will share in such savings. Savings shall be calculated based on achieved savings for the State and shall not include savings from other funds, such as Federal funds, if the State is forbidden from disbursing such monies as rewards. Such compensation either for a group or an individual shall be considered a one-time bonus and will be offered only as a non-pensionable incentive, any employee who accepts gain-sharing compensation does so voluntarily and with the knowledge and on the express condition that the merit pay or gain-sharing compensation will not be included in any pension calculations.

In each subsequent contract year in which a merit incentive program is created, no less than twenty-five percent (25%) of the employees subject to this Agreement will receive some form of merit compensation under such programs. Funding for these performance bonuses is subject to annual approval as a part of the State's overall budget, and limited to two (2) percent of the budgeted base payroll costs for bargaining unit employees.

The Department, in consultation with the Union, will develop specific policies for both of these programs. Further, once developed, and will give the Union will be given an opportunity to review and comment on such policies prior to their implementation. The Department's intent is to develop policies that will reward employees or group of employees based on specific achievements and to prevent payouts that are influenced by favoritism, politics, or other purely subjective criteria. Compliance with the policies for both of these programs shall be subject to the grievance and arbitration procedure. Whenever the Department pays an employee or group of employees as part of the merit incentive program or gain-sharing initiatives, the payments shall be funded by the Department's operating funds. The Department shall forward all requests for payment to the Comptroller, and payments shall be issued as required by the obligations of this Agreement.

IV. Issues

At issue is (1) whether the Employer's petition is timely filed and (2) whether the Employer's proposals on Seniority Positions and the Merit Incentive Program are permissive or mandatory subjects of bargaining.

As a threshold matter, the Union argues that the Employer's petition is untimely filed under the Board's Rules because the Employer filed it unilaterally, after the first day of the parties' interest arbitration hearing. The Union further asserts that I should not grant a variance from the Board's Rule to allow a late filing because doing so would increase the Union's litigation costs, delay resolution of the issues, and foreclose the arbitration panel from considering the mechanics of implementing the Employer's proposals. Finally, the Union argues that the Employer has no viable excuse for its late filing. It notes that the parties agreed to submit their objections on the first day of hearing and denies that it "created" the timeliness issue by renegeing on an agreement to join in the Employer's petition for a declaratory ruling on disputed issues.

The Employer counters that its petition is timely filed under the circumstances. It claims that the interest arbitration hearing has not yet commenced with respect to the two proposals at issue because the parties have yet to present testimony on the subjects they address. In the alternative, the Employer asserts that if its petition is deemed untimely filed, I should grant a variance from the Board's filing rule. The Employer argues that application of the regulatory deadline in this case would be unduly burdensome where the Union acted in bad faith by waiting until the first day of interest arbitration to object to the Employer's proposals and then renegeing on its agreement to join in a petition for declaratory ruling on disputed matters.

On the merits, the Employer argues that its seniority positions proposal addresses a mandatory subject of bargaining because it affects employees' seniority rights and constitutes a departure from established operating practices. The Employer next argues that its Merit Incentive Program proposal is a mandatory subject of bargaining because it concerns wages. It denies that its proposal requires the Union to waive its statutory right to midterm bargaining by

reserving to the Employer broad and unfettered discretion. In addition, the Employer explains that the limited discretion reserved to the Employer under the proposal is consistent with its management rights.

The Union argues that the Employer's Seniority Positions proposal is a prohibited subject of bargaining because it contains an affirmative action plan that does not satisfy the standards set forth by the United States Supreme Court. Next, the Union argues that the Employer's Merit Incentive Program proposal is likewise a prohibited subject of bargaining, or alternatively a permissive subject of bargaining, because it allows the Employer to engage in direct dealing, conflicts with the Illinois Pension Code, and requires the Union to waive its members' individual statutory and constitutional rights.

V. Discussion and Analysis

1. Timeliness

The Employer's petition for declaratory ruling is untimely under strict application of the Board's rules, but I find it appropriate to grant a variance from the regulatory time limit given the facts of this case.

Section 1200.143(b) of the Board's Rules set forth the procedures for filing petitions for declaratory ruling that address protective service employee bargaining units, at issue here. It states that a party to an interest arbitration covering such protective service units may file a unilateral request for a declaratory ruling provided that it has "requested the other party to join it in filing a declaratory ruling petition[,]. . .the other party has refused the request[, and] the petition is filed no later than the first day of the interest arbitration hearing." 80 Ill. Admin. Code 1200.143(b).

Here, the Employer's petition is untimely under the Board's rule because the Employer filed it on December 31, 2015, after the arbitrator held the first day of hearing in the parties' interest arbitration on December 23, 2015. The Employer claims that the interest arbitration had not commenced when it filed its request for declaratory ruling because the interest arbitrator had not yet taken testimony on the proposals at issue; however, plain language of the rule creates a bright-line test that gauges timeliness based on the start of hearing process rather than on the evidence that the parties have introduced.

Nevertheless, a variance from the Board's rules is warranted here because adhering to the rule in this case would defeat the purpose of the declaratory ruling process. Under the Board's Rules, the Board—and by implication, the General Counsel—may grant a variance from any of its provisions if (1) the provision from which the variance is granted is not statutorily mandated; (2) no party will be injured by the granting of the variance; and (3) the rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome. 80 Ill. Admin. Code 1200.160.

Here, the regulatory deadline for filing a unilateral petition for declaratory ruling is not statutorily mandated.

Next, neither the Union nor the Employer is injured by the grant of a variance. The Union claims that it must bear the burden of increased legal expenses in responding to the Employer's substantive arguments. Yet, such a burden does not weigh in favor of denying the variance because it is not unique to the Union or this case and is instead the natural, expected consequence of granting any variance from a regulatory filing deadline. The Union further asserts that a declaratory rule would foreclose the arbitrator from considering the mechanics of implementing the Employer's proposals, but such an argument is disingenuous where it is the

Union that seeks to remove the proposals from the arbitrator's consideration by declaring them permissive. If the Union wishes the arbitrator to consider the mechanics of implementing the Employer's proposals, it can simply withdraw its objections to their consideration. The Union next claims that the declaratory ruling process would delay the interest arbitration, but the declaratory ruling process is in fact an expedited mechanism compared to the available alternatives. If the Union persisted in its claim that the arbitrator could not consider the Employer's proposals, the Employer could file an unfair labor practice charge alleging that the Union violated the Act by refusing to bargain over a mandatory subject. 80 Ill. Admin. Code 1230.90(k)²; Vill. of Bensenville, 14 PERI ¶ 2042 (IL SLRB 1998) ("raising objections to submission of mandatory subjects of bargaining to interest arbitration is contrary to the statutory duty to bargain in good faith and constitutes an unfair labor practice under the Act"). The Board's resolution of that charge would delay issuance of an award on the disputed issues far longer than a declaratory ruling would.³ Finally, the Union has not identified any injury to the Employer in granting this variance and I see none.

Lastly, strict application of the deadline would be unreasonable and unnecessarily burdensome where the arbitrator noted that the Union's refusal to join in the Employer's petition was inconsistent with the parties' agreed-upon schedule and the Union's earlier representations.

² Section 1230.90(k) of the Board's Rules provides the following: "Whenever one party has objected in good faith to the presence of an issue before the arbitration panel on the ground that the issue does not involve a subject over which the parties are required to bargain, the arbitration panel's award shall not consider that issue. However, except as provided in subsections (1) and (m) of this Section, the arbitration panel may consider and render an award on any issue that has been declared by the Board, or by the General Counsel pursuant to 80 Ill. Adm. Code 1200.140(b), to be a subject over which the parties are required to bargain." 80 Ill. Admin. Code 1230.90(k).

³ The Board must investigate all charges. 80 Ill. Admin. Code 1220.40. If the Executive Director finds issues of fact or law for hearing, she assigns the matter to an Administrative Law Judge, who holds a hearing and issues a written decision. 80 Ill. Admin. Code 1220.50. The parties may then avail themselves of the appeals process before the Board and then, in turn, before the Court. 80 Ill. Admin. Code 1200.135(b).

Here, the parties agreed to submit their final offers to the arbitrator two days prior to hearing and agreed to raise any objections to those final offers on the first hearing date. They also had discussions on and off the record concerning the manner in which they would resolve disputes over the permissive or mandatory nature of their respective offers. The arbitrator's comment on the parties' process and conduct is reliable in its neutrality and I rely on his statement as probative of the Union's conduct and the Employer's reliance on it. The arbitrator noted in an email that the Union's refusal to join in the Employer's petition was inconsistent with the agreed-upon arbitration schedule and the options discussed by the parties to resolve disputed issues.⁴ The Union correctly observes that parties should be aware of the Board's rules and that the Employer should have anticipated that the Union might use the parties' expedited schedule to argue that the Employer's unilateral petition was time-barred. However, the arbitrator's comment strongly suggests that the Employer did consider such matters and addressed them in discussion. Accordingly, I defer to the arbitrator's assessment of these particular matters of fact and equity in determining that application of the deadline would be unreasonable and unnecessarily burdensome in this case.⁵

Thus, the Employer's request for a variance from the filing deadline is granted and I therefore resolve the substantive matters raised by the parties below.

2. The Employer's Proposals

⁴ In light of the arbitrator's comment, it is unnecessary to resolve whether the Union ever expressly agreed to join in a petition for Declaratory Ruling.

⁵ I acknowledge that pursuant to the Rules, "[d]eclaratory rulings shall not be issues concerning factual issues that are in dispute." 80 Ill. Admin. Code. 1200.143(b)(2). However, the limited factual findings set forth above are consistent with this rule because they are limited to issues of timeliness and do not impact the subject of the petition itself. *Id.* (General Counsel may refer factual issues to the interest arbitrator where they will "facilitate a determination of the issues that are the *subject of the petition.*") (emphasis added).

a. Merit Incentive Program

The Employer's Merit Incentive Program proposal is a mandatory subject of bargaining because it relates to wages and does not seek the Union's waiver of its statutory rights or the statutory rights of its members. Nor is the proposal a prohibited subject of bargaining.

As a general matter, wages are a mandatory subject of bargaining. 5 ILCS 315/7; City of Decatur v. Am. Fed'n of State, Cnty. and Mun. Empl., Local 268, 122 Ill. 2d 353 (1988); Am. Fed'n of State, Cnty. and Mun. Empl. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259 (1st Dist. 1989); Ill. Dep't of Military Affairs, 16 PERI ¶ 2014 (IL SLRB 2000); City of Mattoon, 13 PERI ¶ 2016 (IL SLRB 1997); City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1987). More specifically, merit pay increases, such as those at issue here, are a mandatory subject of bargaining. City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1987).

Furthermore, the Employer's proposal does not seek the Union's waiver of its right to represent employees with respect to terms and conditions of employment because it does not permit the Employer to engage in direct dealing.⁶ A proposal that seeks the waiver of a statutory right is a permissive subject of bargaining. Vill. of Midlothian, 29 PERI ¶ 125 (IL LRB-SP 2013); Vill. of Wheeling, 17 PERI ¶ 2018 (IL LRB SP 2001); Cnty. of Cook (Cook Cnty. Hosp.), 15 PERI ¶ 3009 (IL LLRB 1999); Bd. of Trustees of the Univ. of Ill., 8 PERI ¶ 1014 (IL ELRB 1991), *aff'd* 244 Ill. App. 3d 945, 612 N.E.2d 1365 (1993); Bd. of Regents of the Regency Universities System (Northern Ill. Univ.), 7 PERI ¶ 1113 (IL ELRB 1991). A union has the statutory right to represent employees with respect to their terms and conditions of employment where the Board has certified the union as their exclusive representative, as it has in

⁶ The Union frames its argument differently, asserting that the proposal addresses a prohibited subject of bargaining because it allows the Employer to violate the Act by engaging in direct dealing. As discussed below, direct dealing only violates the Act if Employer does not seek the Union's consent to it. I therefore interpret the Union's argument as an assertion that the Employer's proposal is a permissive subject of bargaining because it seeks the Union's waiver of its right to represent its members.

this case. 5 ILCS 315/6(c).⁷ An employer may deal directly with its employees over any lawful matter if it first obtains the consent of their union; however, a proposal that seeks a union's consent to allow the employer to engage in direct dealing is a permissive subject of bargaining. See J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944); Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220 (D.C. Cir. 1990).

Here, the Employer's proposal does not limit the Union's right to represent its members or otherwise permit the Employer to engage in direct dealing. The Union correctly observes that the Employer's Merit Incentive Program proposal allows the Employer to offer employees a benefit and, in turn, gives the employee an opportunity to accept it. However, there is no room for negotiation between the individual and the Employer because the conditions of acceptance are set by the Employer and would be memorialized in the collective bargaining agreement, should the arbitrator award the Employer's proposal. In this respect, the Employer's proposal is more akin to a management rights clause, which reserves to Employer specified rights and authority to set certain terms and conditions of employment. In this case, the authority reserved to the employer is the authority to award merit pay only to those individuals who exempt that pay from their pension calculation. Cf. Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220, 1224 (finding proposal permissive where it authorized employer to negotiate with employees over the terms and conditions of their retirement, and deprived the union of right to represent employees in buyout negotiations); but see N.L.R.B. v. Tomco Communications, Inc.,

⁷ Section 6(c) of the Act provides the following in relevant part: "A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act." 5 ILCS 315/6(c).

567 F.2d 871, 878 (9th Cir. 1978)(“An employer may insist on a management rights clause to impasse without violating the Act”).

Next, the Employer’s proposal does not seek the Union’s waiver of its right to mid-term bargaining over changes to employee compensation because the proposal does not give the Employer unlimited discretion to make such mid-term changes. A proposal that reserves to the Employer broad and unfettered discretion to make midterm changes to a mandatory subject of bargaining may be deemed a permissive subject of bargaining because it seeks the Union’s waiver of its right to midterm bargaining over that subject. City of Wheaton, 31 PERI ¶ 166 (IL LRB-SP 2015)(health care proposal deemed permissive); Cnty. of Peoria, 31 PERI ¶ 166 (IL LRB-SP G.C. 2013)(same); City of Danville, 26 PERI ¶ 32 (IL LRB-SP G.C. 2010)(same).

Here, the proposal places two significant limits on the Employer’s discretion. First, it bars the Employer from eliminating the benefit or limiting its application to very few employees because it provides that “no less than twenty-five percent (25%) of [unit members] *will receive* some form of merit compensation. (emphasis added). Second, the proposal effectively limits the criteria that the Employer may use in deciding who will receive the merit increase and how much of an increase they will receive by including a statement of intent whose interpretation is subject to the grievance procedure.⁸ Specifically, the proposal provides that the Department intends to “develop policies that will reward employees...based on specific achievements and to prevent payouts that are influenced by favoritism, politics, or other purely subjective criteria.” Although the Union’s participation in formulating those policies is limited to “consultation,” “review,” and “comment,” the Union may file a grievance if the Employer’s policies do not conform to the Employer’s contractually-specified intent. Moreover, the Employer’s own interpretation of its

⁸ There is no indication that the Employer has sought to exclude disputes over the interpretation of this clause from the grievance arbitration process.

proposal supports a finding that the proposal limits the Employer's discretion because the Employer concedes "the Union would have the right to challenge the [policy's] standards pursuant to the grievance arbitration procedure."⁹

Thus, the Employer's Merit Incentive Program proposal is a mandatory subject of bargaining.

b. Seniority Positions

The Employer's Seniority Positions proposal is a mandatory subject of bargaining.

Seniority rights are matters that relate to wages, hours and other terms and conditions of employment. City of Peoria, 11 PERI ¶ 2007 (IL SLRB 1994); Martin-Marietta Corp., 159 NLRB No. 59, 906 (1966). The Employer's proposal in this case addresses seniority rights because it limits the circumstances under which the Employer will use seniority as the sole criterion in making position assignments. Specifically, it allows the Employer to bypass the most senior candidate where the less senior employees' skills are equal, where there exists an underutilization of a minority class, and where selection of the less senior candidate would reduce the underutilization.

The Union's attack on the constitutionality of the Employer's proposal does not warrant a finding that the Employer's proposal addresses a permissive subject of bargaining. Here, the Union claims that the Employer's proposal contains a vague and overly broad affirmative action program, and it cites to a case from the private sector that suggests the plan would not withstand

⁹ The Employer asserts that the Union's authority to grieve the Employer's standards is "expressly" stated in the proposal. I therefore infer that the language referenced by the Employer is the following: "compliance with the policies for both of these programs shall be subject to the grievance and arbitration procedure." This language is open to the interpretation that Union can merely challenge the Employer's application of the policies, as opposed to their content. However, the Employer has offered a different interpretation, discussed above, and I rely on it in rendering this Declaratory Ruling.

judicial review.¹⁰ As a preliminary matter, administrative agencies—and by extension, their agents—lack the authority to dispositively decide constitutional issues. Crowley v. Bd. of Educ. of City of Chicago, 2014 IL App (1st) 130727, ¶ 35; Singh v. Reno, 182 F.3d 504, 510 (7th Cir.1999). Furthermore, it is not my role in a Declaratory Ruling to determine, on a subject by subject basis, whether an employer’s proposal represents a narrower scope of rights than that conferred by statute or the constitution. Tri-State Fire Protection District, 31 PERI ¶ 175 (IL LRB-SP GC 2014)(referring such comparison to the interest arbitrator); Vill. of Elk Grove Vill., 21 PERI ¶ 14 (IL LRB-SP GC 2005)(applying same rationale). Finally, in this case, the Union has not argued, as it did with respect to the Employer’s Merit Incentive Program proposal, that the express language of the proposal conflicted with any specific statutory or constitutional provision nor has it otherwise presented a waiver argument.

Thus, the Employer’s Seniority Positions proposal addresses a mandatory subject of bargaining.

Issued in Chicago, Illinois, this 10th day of March, 2016.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD**



**Kathryn Zeledon Nelson
General Counsel**

¹⁰ Notably, the case cited by the Union is of questionable value to the parties’ public sector bargaining dispute at issue here because it addressed the “narrow statutory issue of whether Title VII forbids *private employers* and unions from voluntarily agreeing upon bona fide affirmative action plans....” United Steelworkers American v. Weber, 442 U.S. 193, 208-209 (1979)(emphasis added).