STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
P.O. BOX 19206
SPRINGFIELD, IL 62794-9206

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

To Counsel:

Appeal from the Circuit Court of County of

ILRBS No S-CA-16-087, S-CB-16-017

THE COURT HAS THIS DAY, 03/01/17, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 4-16-0827
Cons. Cases: 4-17-0125, 4-17-0126, 4-17-0127

CMS v. ILRB, et al.

Carla Bender
CARLA BENDER, CLERK

cc: David A. Moore
Laner Muchin, Ltd.
515 N. State St., Ste. 2800
Chicago, IL 60654

Ann C. Maskaleris
Assistant Attorney General
100 W. Randolph Street, 12th Floor
Chicago, IL 60601

Melissa J. Auerbach
Dowd, Block, Bennett, Cervone, Auerbach & Yokich
8 South Michigan Avenue, 19th Floor
Chicago, IL 60603

2017 IL App (4th) 160827

NO. 4-16-0827

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE STATE OF ILLINOIS (THE DEPARTMENT OF CENTRAL MANAGEMENT SERVICES), Petitioner, v. AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 31, and THE STATE OF ILLINOIS, THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL, Respondents.	)	Direct Review of Illinois Labor Relations Board, State Panel Nos. S-CB-16-017, S-CA-16-087, cons.

ORDER

On December 13, 2016, in two consolidated administrative cases, Nos. S-CB-16-017 and S-CA-16-087, the Illinois Labor Relations Board, State Panel (Board), issued a final decision, which held, *inter alia*, that, on January 8, 2016, the American Federation of State, County and Municipal Employees, Council 31 (Union), and the Department of Central Management Services (State) reached an impasse in their contract negotiations. The legal significance of this decision was that the State could unilaterally implement the terms of its last, best, and final offer and the Union could strike. See *State of Illinois Department of Central Management Services v. State of Illinois Labor Relations Board, State Panel*, 373 Ill. App. 3d 242, 253 (2007).

Both the Union and the State filed, in the appellate court, petitions for direct review of the Board's decision. See 5 ILCS 315/11(e) (West 2016); Ill. S. Ct. R. 335 (eff. Feb. 1,

1994). (The Board's decision was not entirely favorable to the State: the Board found the State had violated sections 10(a)(1) and (a)(4) of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/10(a)(1), (a)(4) (West 2016)) by failing to provide the Union with information the Union had requested.) The parties, however, filed their petitions for administrative review in different districts of the appellate court. The State filed its petition in the Fourth District (case No. 4-16-0827), whereas the Union filed three petitions in the First District (case Nos. 1-16-3136, 1-16-3206, and 1-16-3217).

On December 15, 2016, the Union filed, with the Board, a motion to stay the Board's decision, pending the outcome of the administrative review actions. Under section 1200.45(c) of the Board's rules, the State had five days after service to file a response to the Union's motion. See 80 Ill. Admin. Code § 1200.45(c) (2016).

On December 22, 2016, the day the State's response to the Board was due, the Union filed, with the First District, a "Motion For a Stay Pending Appeal."

On December 23, 2016, the First District ordered a temporary stay of the Board's decision. The stated purpose of the order was "[o]nly to keep the *status quo* in place pending this court's receipt and review of any response" to the Union's motion. As the order made clear, the stay was intended to be "temporar[y]" and could be lifted after the "review of any response." (Thus, a distinction might be drawn between the temporary stay the First District granted and the stay that the Union sought: a stay for the duration of the appeal.)

On December 27, 2016, the State filed, with the First District, a memorandum in opposition to the Union's "Motion For a Stay Pending Appeal" as well as a motion to lift the temporary stay. The Board also filed a response with the First District, pointing out that, under Illinois Supreme Court Rule 335(g) (eff. Jan. 1, 2016), the Union should have awaited a ruling

on the motion for a stay it had filed with the Board, before seeking a stay from the appellate court. Noncompliance with Rule 335(g) was one of the arguments the State made, too.

On January 31, 2017, while the temporary stay was still in effect, the supreme court granted a motion by the State to transfer the three cases in the First District (case Nos. 1-16-3136, 1-16-3206, and 1-16-3217) to the Fourth District and to consolidate those cases with the case pending in the Fourth District, case No. 4-16-0827.

On February 3, 2017, the State filed with us a "Motion For Prompt Ruling on Its Pending Motion To Dissolve the Temporary Stay Order." On February 17, 2017, the Union filed with us a response, urging us to keep the stay in place.

The parties disagree whether Rule 335(g) obliged the Union to await a ruling from the Board before requesting a stay from the appellate court. Even if the Union's motion in the appellate court was premature under Rule 335(g), it would make no sense, now, for us to remand the cases to the Board for a ruling and then review the Board's ruling. The parties have filed with us substantial memoranda on this question of a stay, and the State has prepared a supporting record, which appears to be about a thousand pages long. Judicial efficiency and public need require that we go ahead and decide the Union's motion for a stay.

Under section 3-111(a)(1) of the Code of Civil Procedure (735 ILCS 5/3-111(a)(1) (West 2016)), we should grant a stay of the Board's decision only if the Union shows, among other things, "a reasonable likelihood of success on the merits." See Ill. S. Ct. R. 335(i)(2) (eff. Jan. 1, 2016) ("[Section] 3-111 of the Code of Civil Procedure [is] applicable to proceedings to review orders of the agency."). The Union challenges the merits of the Board's finding that the parties had arrived at an impasse in their contract negotiations. Whether the parties had arrived at an impasse appears, from case law, to be a question of fact (see *Wayneview*

Care Center v. National Labor Relations Board, 664 F.3d 341, 348 (D.C. Cir. 2011); *Saunders House v. National Labor Relations Board*, 719 F.2d 683, 687-88 (3d Cir. 1983)), and "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct" (735 ILCS 5/3-110 (West 2016)). See Ill. S. Ct. R. 335(i)(2) (eff. Jan. 1, 2016) ("[Section] 3-110 *** of the Code of Civil Procedure [is] applicable to proceedings to review orders of the agency."). (Characterizing the inquiry as purely factual might be an oversimplification, considering that, as we will soon discuss, an unfair labor practice can have the *legal* effect of precluding a finding of a legitimate impasse.) "*Prima facie* true and correct" means that, in our ultimate decision in the Union's appeal, we will uphold the Board's finding of an impasse unless it is "clearly evident," from the record, that the parties were not at an impasse (*Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009))—so evident that, when the evidence is viewed in the light most favorable to the Board, it would be impossible for any rational trier of fact to find an impasse (see *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 310 (1992)). Has the Union shown a "reasonable likelihood" of meeting this exacting standard? 735 ILCS 5/3-111(a)(1) (West 2016).

It appears the Union has identified an error in the Board's application of the single-critical-issue test for an impasse. The National Labor Relations Board has explained:

> "[O]verall impasse may be reached based on a deadlock over a single issue. A single issue *** may be of such overriding importance that it justifies an overall finding of impasse on *all* of the bargaining issues. [Citation.] The party asserting a single-issue impasse has the burden to prove three elements: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of overriding importance in the bargaining; and (3) that the impasse as

> to the single issue led to a breakdown in overall negotiations—in short, that there can be no progress *on any aspect of the negotiations* until the impasse relating to the critical issue is resolved." (Emphases in original and internal quotation marks omitted.) *Atlantic Queens Bus Corp.*, No. 29-CA-100833, 362 NLRB No. 65, 2015 WL 1815277, at *1 (Apr. 21, 2015).

The Board found the parties to be deadlocked on the issue of subcontracting and that this issue was so important to the parties that, under the single-critical-issue test of impasse, the deadlock on subcontracting resulted in an overall impasse.

Apparently, this is the first time the Board has ever used the single-critical-issue test of impasse. Not only does the Union challenge the Board's adoption of this test as an arbitrary departure from past precedent in Illinois (see *Mt. Vernon Educational Ass'n v. Illinois Educational Labor Relations Board*, 278 Ill. App. 3d 814, 823 (1996)), but the Union argues the Board misapplied the test. According to the Union, the record is devoid of evidence that the deadlock on subcontracting prevented the parties from making "progress *on any aspect of the negotiations*." (Emphasis in original and internal quotation marks omitted.) *Id.* Thus far in our review, we do not see any such evidence, either—at least as the evidence is summarized in the administrative law judge's recommended decision. We are aware of no evidence, for example, that the Union ever told the State, "We won't budge on wages and health insurance unless you make concessions on subcontracting," or words to that effect.

The Union argued to the administrative law judge that "the State [could not] prove that an impasse on any single issue precluded movement or even agreement on other pending issues" (we quote from the administrative law judge's recommended decision). But the administrative law judge interpreted *Erie Brush & Manufacturing Corp. v. National Labor*

Relations Board, 700 F.3d 17 (D.C. Cir. 2012), and *Richmond Electrical Services, Inc.*, 348 NLRB 1001 (2006), as rejecting the necessity of such a showing. She reasoned:

> "Similarly, here, I find that the record reflects that as of January 8, 2016, the parties had diametrically opposed positions on wages, health insurance, and subcontracting. The State[']s failure to provide information precludes me from finding a legitimate impasse on the Wages and Steps and Appendix A—Health Insurance packages. This is not the case for subcontracting, as I find that the parties did reach a legitimate impasse on this issue. The record reveals that the impasse on this critical issue was an insurmountable obstacle to an agreement. Therefore, I find that the third factor [of the single-critical-issue test for an impasse] is satisfied."

In this reasoning, however, with which the Board appeared to agree, the administrative law judge blurred the third element of the single-critical-issue test into the first and second elements. That the parties were at "a legitimate impasse on this issue" of subcontracting addressed the first element. That this issue was "critical" addressed the second element. That this issue presented "an insurmountable obstacle to an agreement" was nothing but a logical conclusion from the first and second elements. *Of course* there could be no collective bargaining agreement if there was an impasse on subcontracting and the parties regarded that issue as critical or of overriding importance. That is logical conclusion that inevitably flows from the conjunction of the first and second elements. The third element was supposed to add something more: that the impasse on the critical issue of subcontracting prevented the parties from making progress on any other issue in the negotiation. See *Stein Industries, Inc.*, No. 29-CA-134711, 365 NLRB No. 31, 2017 WL

680503, at *5 n. 10 (Feb. 10, 2017); *Atlantic Queens Bus Corp.*, No. 29-CA-100833, 362 NLRB No. 65, 2015 WL 1815277, at *1; *Calmat Co.*, 331 NLRB 1084, 1097 (2000).

Rejecting a single-critical-issue impasse (on the ground that the third element is unsupported by any evidence) would cause us to revert to the *Taft* factors (*Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967)), which the Board traditionally has used to determine whether parties have reached an impasse (*Illinois Departments of Central Management Services & Corrections*, No. S-CA-88-86, 5 PERI ¶ 2001, 1988 WL 1588758 (Ill. State Labor Relations Bd., Sept. 29, 1988)). The National Labor Relations Board stated in *Taft*:

> "Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft*, 163 NLRB at 478.

The administrative law judge concluded that all but the final *Taft* factor favored a finding of an impasse. In other words, she found no "contemporaneous understanding of the parties" that they were at an impasse—"contemporaneous" referring to January 8, 2016, when the State declared an impasse and made its final, last, best offer. *Id.* We do not understand the Board as rejecting this finding. The administrative law judge found that both of the lead union negotiators "credibly testified that they were surprised when [the lead State negotiator] stated at the table[,] on January 8, 2016[,] that he believed the parties were at an impasse. Not only were they surprised, but [one of the lead union negotiators,] Lynch[,] immediately and vehemently disagreed."

The Union quotes from *Carey Salt Co.*, 358 NLRB 1142, 1153-54 (2012):

> "In order for there to be a valid impasse, both parties must believe that they are at the end of their rope. ***
>
> For an impasse to occur, neither party must be willing to compromise *** Essentially, one party cannot unilaterally establish or create an impasse. Both parties must have the same understanding and find themselves at the same point in negotiations." (Internal quotation marks omitted.)

("In state labor cases, the rulings of the National Labor Relations Board *** are considered persuasive authority for similar provisions in the state Act." *County of Cook v. Licensed Practical Nurses of Illinois*, 284 Ill. App. 3d 145, 154 (1996).)

In opposition to the Union's argument that a shared, contemporaneous understanding of the parties is essential to a finding of impasse, the State cites a case to the effect that, in applying the *Taft* factors, the Board looks to the "totality of the circumstances." *City of East Moline*, 33 PERI ¶ 15, at 13 (Ill. State Labor Relations Bd., June 22, 2016). The State argues that, by treating the final factor, the contemporaneous understanding, as trumping all the other *Taft* factors, the Union ignores the "totality of the circumstances." *Id.* The State's argument might be more convincing if it included a citation of a case holding that an impasse was possible despite the lack of a contemporaneous understanding that there was an impasse.

One of the parties to a contract negotiation, say, the union, might disagree there is an impasse because the union has requested information from the employer and, until the employer provides the information, the union lacks the means of deciding whether a concession is necessary, or defensible to union members. It is impossible to tell whether the parties are genuinely at an impasse on an issue unless the employer has given the union the requested

information it needs to evaluate the truth or justifiability of the employer's position and, possibly, to craft a feasible counterproposal. *Id.* "[T]he duty to provide information relevant to bargaining is a fundamental obligation that is crucial to the proper functioning of the collective bargaining process. [Citation.] Accordingly, impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." (Internal quotation marks omitted.) *Monmouth Care Center. v. National Labor Relations Board*, 672 F.3d 1085, 1093 (D.C. Cir. 2012).

The administrative law judge found the parties to be legitimately at an impasse on some core issues, but, because of the State's failure or refusal to comply with the Union's requests for relevant information, the administrative law judge found the parties not to be at a legitimate impasse on other core issues. She wrote as follows:

> "To summarize, I find the record supports the Union's contention that the parties were not at impasse with respect to the following four packages: Layoff, Outstanding Economics, Health and Safety Outstanding Issues, and Semi-Automatic/Classification In-Series Advancement packages. In contrast, I find that the record reflects that the parties were at a legitimate impasse on the following five packages: Subcontracting; Vacation, Holiday Scheduling, and Leaves of Absence; [Department of Corrections and Department of Juvenile Justice] Roll Call ***; Mandatory Overtime; and Management Rights and Check-off/Fair Share packages.
>
> Further, there are two packages that the Union successfully proved that the State's unlawful failure to provide information precludes a finding of impasse on two package[s]; Wages and Steps and Appendix A—Health Insurance. *** [T]he

State's failure to provide the Union an opportunity to respond after having provided the information precluded an impasse on a third package—Non-Discrimination, Upward Mobility Program (UMP) and Filling of Vacancies."

Specifically, as to the wages and steps package, the administrative law judge found that "the State [had] failed to bargain in good faith when it failed to provide the Union with information regarding the State's merit pay proposal and criteria developed with the Teamsters related to a similar proposal." As for the health insurance package, she found that the Union had requested information regarding "the savings of potential cost savings initiatives," the State never provided this information, and the failure "impeded the Union's ability to bargain over these issues." Also, the administrative law judge found the State had violated the Act by "failing to provide costing information related to increasing out-of-pocket items in the existing health insurance plan." She remarked: "There is no argument to be made that the information was not relevant or that it would not be assistive to the Union in formulating proposals and bargaining over health insurance."

Granted, as the State observes, there was no evidence that the deadlock over *subcontracting* had anything to do with these failures by the State to provide requested information. Even so, it appears that these failures "taint[ed] the negotiations" on other core issues, to which the requests for information related, namely, wages and health insurance. *Pleasantville Nursing Home v. National Labor Relations Board*, 351 F.3d 747, 763 (6th Cir. 2003).

The appellate court has held that "an employer's failure to furnish relevant information during contract negotiations may constitute an unfair labor practice" (*Water Pipe Extension, Bureau of Engineering, Laborers Local 1092 v. City of Chicago*, 195 Ill. App. 3d 50,

59 (1990)), and the National Labor Relations Board has held: "A finding of valid impasse is precluded where the employer has failed to supply requested information relevant to core issues separating the parties" (*Caldwell Manufacturing Co.*, 346 NLRB 1159, 1170 (2006); *cf. Sierra Bullets, LLC*, 340 NLRB 242, 243-244 (2003) (unfulfilled information request with no relation to core issues does not preclude impasse)). Wages and Steps and Health Insurance seem to be "core issues," or essential issues. *Id.* The administrative law judge wrote: "There can be no reasonable disagreement that the outstanding issues—including wages, health insurance, subcontracting, layoff—were of the utmost importance to the parties. The inherent nature of the topics still on the table, including health insurance benefits, is obviously important and go to the heart of collective bargaining."

It does not appear that the Board disagreed with the administrative law judge about the importance of wages and health insurance, the relevance of the requested information to those core issues, and the State's failure to comply with the requests for information. On the authority of *Sierra Bullets*, 340 NLRB at 243-44, however, the Board held that the State's failure to provide information on issues other than the critical issue of subcontracting was insufficient to preclude a finding of an impasse. The Board reasoned as follows:

> "It is well-established that an unfulfilled information request will preclude a finding of impasse where the requested information is 'relevan[t] to the core issues that separate the parties at the bargaining table.' *E.I. Du Pont de Nemours & Co. v. N.L.R.B.*, 489 F.3d 1310, 1315 (D.C. Cir. 2007); *Sierra Bullets LLC*, 340 NLRB 242, 244 (2003). Yet, it is equally clear that the mere existence of an unfulfilled information request does not by itself preclude a finding of impasse. *Sierra Bullets LLC*, 340 NLRB 242, 244 (2003).

> The question before us is whether information requests that are patently irrelevant to the critical issue of subcontracting, which serves as the basis for applying the [National Labor Relations Board's single-critical-issue test for impasse], qualifies [as] information relevant to a 'core issue' that separates the parties. We find it does not. Indeed, we find that the [State's] failure to provide information relevant to health care and wages and vacation/holiday pay had little to no bearing on the impasse that stemmed from the parties' disagreement on the issue of subcontracting, and that it was the impasse over subcontracting that led to the overall breakdown in negotiations."

Sierra Bullets, though, seems to us to be distinguishable. In *Sierra Bullets*, the parties were at an impasse on a so-called " 'four pack' " of issues: clean-slate attendance, union security, dues check-off, and a limited management rights clause. *Sierra Bullets*, 340 NLRB at 243. After eight months of bargaining on this " 'four pack' " of issues, and the day before the employer presented its last and final offer, the union requested information regarding the amount of Saturday overtime worked in 1998 and 1999. *Id.* The question was whether this unfulfilled request for information precluded a finding of a legitimate impasse. *Id.* at 243. The National Labor Relations Board stated: "[W]e find that the subject of this information request, made late in the course of bargaining, was unrelated to the core issues separating the parties in negotiations such that this unfilled information request was insufficient to preclude a bargaining impasse." *Id.* Saturday overtime was not one of the core issues, or essential issues, separating the parties. In the present case, by contrast, wages and health insurance, regarding which there were unfulfilled requests for information, were core issues separating the parties.

If the parties are legitimately at an impasse on some core issues but, because of the unfair labor practice of ignoring information requests, are not legitimately at an impasse on other core issues, it is impossible to know what effect the negotiation of one core issue ultimately might have had on the negotiation of another. That is why, in *Duffy Tool & Stamping, L.L.C. v. National Labor Relations Board*, 233 F.3d 995, 999 (7th Cir. 2000), the Seventh Circuit agreed with the National Labor Relations Board that piecemeal impasse should not entitle an employer to begin unilaterally implementing changes in the terms and conditions of employment.

In *Duffy*, during negotiations on a collective bargaining agreement, the employer made a proposal to institute a no-fault attendance policy, under which an employee would be penalized with a certain number of points for each incident of tardiness, regardless of whether the employee was at fault, and, if the employee accumulated a certain number of points, he or she could be fired. *Duffy*, 233 F.3d at 997. The union refused to agree to this proposal. *Id.* Consequently, the employer declared an impasse and unilaterally implemented the no-fault attendance policy. *Id.* The National Labor Relations Board found that, although the parties might indeed have been deadlocked on the proposed no-fault attendance policy—although they might have been at a piecemeal impasse on that particular issue—they were not yet deadlocked on all the mandatory issues for collective bargaining and that, absent an overall impasse, it was an unfair labor practice for the employer to begin unilaterally changing any of the terms and conditions of employment. *Id.* In its appeal to the Seventh Circuit, the employer took the position that piecemeal impasse on the no-fault attendance policy entitled the employer to unilaterally implement that policy. *Id.*

The Seventh Circuit disagreed with the employer, and agreed with the National Labor Relations Board, because the employer's approach would undercut the statutory duty to bargain in good faith with the union. *Id.* at 998. It would undercut that duty in two ways. *Id.*

First, unilaterally implementing a proposal on which the parties were deadlocked would remove that issue from the negotiation, and "[a] negotiation is more likely to be successful when there are several issues to be resolved ('integrative bargaining') rather than just one, because it is easier in the former case to strike a deal that will make both parties feel they are getting more from peace than from war." *Id.* There is more possibility of movement in a multifaceted negotiation than in a zero-sum game.

It might be argued, however, that, if the parties were at an impasse on an issue, that issue *already* has been removed from the negotiation. To that argument, Judge Posner gave the following response:

> "There really is no such animal as a deadlock on a single issue in a multifaceted negotiation; or if there is[,] it is vanishingly rare, a truly endangered species. Nothing is more common during a negotiation than for one or both parties to make nonnegotiable demands. Usually this is bluffing, since if the negotiation is truly multifaceted, there is generally a price at which the parties will surrender these demands." *Id.* at 999.

If a party to a negotiation theatrically slams the door on one core issue but the parties have not yet reached an impasse on other core issues, it will be naïve to "take this emphatic refusal at face value, as creating an impasse that placed the issue beyond negotiation." *Id.*

Second, if, by deadlocking on a particular issue, the employer conferred upon itself the right to unilaterally implement its proposal regarding that issue, the employer could

easily undermine support for the union, and send it down the path to decertification, by creating the impression that the union is impotent, lacking the power to keep issues on the table. *Id.* at 998. In an effort to convince employees that they actually are worse off as a result of the election, the employer would make demands that are so unreasonable as to preclude any possibility of an agreement, demands that are predestined to be unilaterally implemented. *Id.* And then the union, in an effort to prove it is not a paper tiger, would feel the need to be unreasonable in return. *Id.* at 998-99. Thus, the negotiation would be doomed from the start.

For those reasons, the Seventh Circuit concluded "the [National Labor Relations] Board [was] on sound ground in insisting that the employer bargain until it [was] plain that the parties [were] deadlocked in the negotiation as a whole." *Id.* at 999. The National Labor Relations Board has continued to adhere to the overall impasse rule, the rule that impasse is required on all issues before there can be any unilateral implementation. *Southern Mail, Inc.*, No. 16-CA-20760-2, 345 NLRB 644, 2005 WL 2115866, at **3 (Aug. 27, 2005); *Connecticut Institute for the Blind, Inc.*, No. 34-CA-013016, 360 NLRB No. 55, 2014 WL 798031, at *83 (Feb. 27, 2014). (The National Labor Relations Board has recognized two limited exceptions to the overall impasse rule: "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). We do not understand the State as invoking either of those exceptions.)

Arguably, the Board has taken a position in the present cases that is even more radical than the position the employer took in *Duffy Tool*: the Board holds that piecemeal impasse on the issue of subcontracting entitles the State to unilaterally implement not only its proposal on that issue but also its proposals on all other issues, including core issues upon which

the parties were not yet legitimately at an impasse, such as wages and health insurance. The Union raises a "fair question" as to whether the position the Board has taken in this matter violates the overall impasse rule (*Markert v. Ryan*, 247 Ill. App. 3d 915, 917 (1993))—a rule that, if it were abandoned, might "empty the duty to bargain of meaning." *Duffy Tool*, 233 F.3d at 998. Under section 3-111(a)(1)(ii) of the Code of Civil Procedure (735 ILCS 5/3-111(a)(1) (West 2016)), one of the things an applicant must show is that the proposed stay would not be "contrary to public policy," and, far from being contrary to public policy, it is consonant with public policy to preserve the meaningfulness and good faith of collective bargaining (see 5 ILCS 315/2 (West 2016)).

The applicant also must show "that an immediate stay is required in order to preserve the status quo without endangering the public." 735 ILCS 5/3-111(a)(1)(i) (West 2016). A stay of the Board's decision would not put the public in danger. We have held there is a necessity to preserve the status quo if the remedy to which the appellant would be legally entitled after the determination of the appeal would be inadequate to make up for the deprivation the appellant experienced during the pendency of the appeal. *Moore v. Mankowitz*, 127 Ill. App. 3d 1050, 1055 (1984). The State argues that, because the Illinois General Assembly has not appropriated enough funds to pay wages and health insurance benefits at levels above those proposed in the State's last, best, and final offer, allowing the Board's decision to take effect would inflict no financial hardship on union members beyond that which they otherwise would inevitably experience both before and after the determination of the appeal. The Illinois Constitution "authorizes only the General Assembly to appropriate for the State expenditure of funds"'; neither the courts nor the executive branch has constitutional authority to appropriate the State's revenues. *McDunn v. Williams*, 156 Ill. 2d 288, 308 (1993).

Wages and health insurance, however, are not the Union's only concerns. The Union also is concerned about subcontracting. In unilaterally implementing its last, best, and final offer, the State would eliminate a time-honored standard that hitherto has guided the decision of whether to subcontract out union work. We quote from the Board's decision:

> "For the Union, the State's proposal to eliminate the longstanding 'efficiency, economy, or related factors' language was a direct threat to members' job security. The Union had previously used that language to challenge the State's subcontracting decisions at arbitration. Its removal left few, if any, constraints on the State's authority to subcontract unit work and to challenge the State's subcontracting decisions."

If, because of the State's unrestrained authority to subcontract unit work, a union member were laid off, it is unclear what post-appeal remedy, if any, the union member would have.

Speaking of layoffs, the State's last, best, and final offer would unilaterally eliminate bumping. Under the 2012 to 2015 collective bargaining agreement, employees subject to layoff could bump into positions for which they were previously certified or into lower levels of their classification series, either at their workplace or in the same county. The Union believes that the elimination of bumping will result in the layoff of senior employees instead of their assumption of lower-ranking positions. It is unclear that these laid-off employees would have an adequate post-appeal remedy.

Also, as *Duffy Tools* explained, an employer's unilateral changes to the terms and conditions of employment can weaken support for the union by making it look like a paper tiger, without any real bargaining ability. *Duffy Tool*, 233 F.3d at 998. The ultimate successful conclusion of an appeal would not necessarily dispel that impression among union members.

We conclude, then, that the Union has shown "good cause" within the meaning of section 3-111(a)(1) of the Code of Civil Procedure (735 ILCS 5/3-111(a)(1) (West 2016)). Therefore, we grant the State's motion for an expeditious ruling on its motion to lift the temporary stay. We deny the State's motion to lift the temporary stay, and we grant the Union's motion to stay the Board's decision, pending the outcome of these four administrative cases.