STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Maine Teachers' Association, IEA-NEA,	)	
	)	
Complainant	)	
	)	
and	)	Case Nos. 2018-CA-0077-C
	)	2018-UC-0026-C
	)	
Maine Twp. High Sch. Dist. 207,	)	
	)	
Respondent	)	

OPINION AND ORDER

I. Statement of the Case

On June 11, 2018, Maine Teachers Association, IEA-NEA (Union) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board), Case No. 2018-CA-0077-C, against Maine Township High School District 207 (District). Therein, the Union alleged that the District committed unfair labor practices within the meaning of Section 14(a) of the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5/1 (2019), by unilaterally removing bargaining unit work. That same day, the Union filed a unit clarification petition, Case No. 2018-UC-0026-C, seeking to clarify the bargaining unit at issue in its unfair labor practice charge to include the newly created title or position of College and Career Admissions Specialist (Specialist).[1] After an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing (Complaint) in the unfair labor practice charge and consolidated both cases

1 The existing bargaining unit description is as follows:

> INCLUDED: All the non-supervisory professional staff who are employed on at least a 50% basis and whose salary is computed from the Maine Township High School District 207 Compensation Schedule, all full-time and regularly employed part-time school nurses and school psychologists, all teacher aides, and all permanent substitute teachers.
>
> EXCLUDED: All other employees of the Board of Education, including all managerial, supervisory, craft and short-term employees as defined by the Act.

for hearing. The parties appeared for a hearing before an administrative law judge (ALJ). As a result of the hearing, the ALJ issued a Recommended Decision and Order (ALJRDO) finding that the District violated Section 14(a)(5) and (1) of the Act when it refused to bargain over the Specialist position or the removal of work from the bargaining unit and granting the unit clarification petition to include the Specialist in the existing unit. This matter is now before us because the District has filed the following exceptions to the ALJRDO: 1.) The ALJ applied the wrong legal standard to reach his conclusion that the District violated the Act; 2.) The ALJ improperly found that District Superintendent Wallace said that he would keep the Union updated on any new information relating to the elimination of the Career Counselor position and creation of the new position; 3.) The ALJ erroneously found that the Specialists shared a community of interest with the bargaining unit; and 4.) The ALJ incorrectly found that the unfair labor practice charge was timely. The Union filed a response to the exceptions requesting that the Board affirm the ALJRDO and uphold both the finding of the unfair labor practice and the clarification of the bargaining unit therein. For the reasons discussed below, we modify the remedy ordered by the ALJ, but otherwise affirm the ALJRDO.

II. Factual Background

We adopt the facts as set forth in the underlying ALJRDO. Because the ALJRDO comprehensively sets forth the factual background of the case, we will not repeat the facts herein except where necessary to assist the reader.

III. Discussion

A. Whether the ALJ applied the correct legal standard to reach his conclusion that the District violated the Act.

An educational employer violates Section 14(a)(5) of the Act when it unilaterally changes the status quo involving a mandatory subject of bargaining. *Vienna Sch. Dist. No. 55 v. IELRB*, 162 Ill. App. 3d 503, 515 N.E.2d 476 (4th Dist. 1987). In *Central City Educ. Ass'n v. IELRB*, 174 Ill. Dec. 808, 599 N.E.2d 892 (1992), the Court set forth a three-part test to determine whether a matter is a mandatory subject of bargaining. The

first question is whether the matter is one of wages, hours, and terms or conditions of employment. *Id.* If the answer to that question is no, the inquiry ends, and the employer is under no duty to bargain. *Id.* If the answer to the first question is yes, then the second question is whether the matter is also one of inherent managerial authority. *Id.* If the answer to the second question is no, the analysis stops, and the matter is a mandatory subject of bargaining. *Id.* If the answer is yes, the IELRB should balance the benefits that bargaining will have on the decision-making process with the burdens that bargaining imposes on the employer's authority. *Id.*

In its first exception, the District argues that the ALJ applied the wrong legal standard because in determining that the complained of conduct was a mandatory subject of bargaining, he looked at whether it deprived the bargaining unit of reasonably anticipated work opportunities. Instead, says the District, the ALJ should have looked at whether the complained of conduct significantly impaired, rather than simply deprived, reasonably anticipated work opportunities. This exception is without merit because the ALJ did find that the Specialists' takeover of almost all work that was performed by the Career Counselors constituted a significant impairment in bargaining unit employees' reasonably anticipated work opportunities. Furthermore, even assuming, arguendo, that transfer of bargaining unit work is a matter of inherent managerial authority, there is no evidence that the burden of bargaining would have outweighed its benefits. Thus, we uphold the ALJ's determination that the District violated Section 14(a)(5) and (1) of the Act.

B. Whether the ALJ improperly found that District Superintendent Wallace said that he would keep the Union updated on any new information relating to the elimination of the Career Counselor position and creation of the new position.

In its second exception, the District disputes the ALJ's finding that District Superintendent Ken Wallace (Wallace) told the Union he would keep them informed of the development of the new position. In making this finding, the ALJ relied on then-

Union President Stefan Panzilius'[2] testimony. The District, in its exceptions, points to Wallace's testimony that he never committed to provide information to the Union about the reinvention of the counseling department.

That the ALJ credited one witness's testimony over another's conflicting testimony is a credibility determination. Because the ALJ hears the witness' testimony and observes their demeanor, it is this Board's policy to accept an ALJ's credibility determinations unless we are convinced by a clear preponderance of all the evidence that those resolutions are incorrect. *McLean County Unit Sch. Dist. 5*, 30 PERI 207, Case No. 2011-CA-0005-S (IELRB Opinion and Order, February 20, 2014); *Rockford School District No. 205*, 22 PERI 45, Case No. 2004-CA-0034-C (IELRB Opinion and Order, April 12, 2006); *Fox Lake Elementary Sch. Dist. 114*, 11 PERI 1020, Case No. 93-CA-0028-C (IELRB Opinion and Order, January 27, 1995); *Board of Regents of Sangamon State University*, 6 PERI 1049, Case Nos. 89-CA-0030-S & 89-CA-0035-S (IELRB Opinion and Order, March 12, 1990), *aff 'd*, 208 Ill. App. 3d 230, 566 N.E.2d 963 (4th Dist. 1991) (affirming Board's reliance on Hearing Officer's credibility assessment). The District raises nothing in its exceptions nor is there anything in the record to indicate that the ALJ's credibility resolutions were incorrect. Therefore, we accept the ALJ crediting Panzilius' testimony over Wallace's as to whether Wallace said he would keep the Union up to date with any new information relating to the elimination of the Career Counselor position and creation of the new position.

C. *Whether the ALJ erroneously found that the Specialists shared a community of interest with the bargaining unit.*

The District contends that the ALJ failed to properly analyze the community of interest factors and, if he had, he would have concluded that the Specialists do not share a community of interest with the bargaining unit and would have excluded them

2 This witness is referred to as both Panzilius and Penzilius throughout the record. I will use the former spelling herein because that is how the witness spelled his own name in a letter he wrote that is Union Ex. 7.

from the bargaining unit.[3] Instead, notes the District, the ALJ only touched upon the skills and functions factor of the community of interest factors and determined that the Specialist position entailed job functions that were similar to those of employees in the existing unit, as the Specialist took on many duties that were performed by the bargaining unit position of Career Counselor.

The District's creation of the Specialist position violated the Act. In similar cases where an employer unlawfully creates a position and an unfair labor practice charge and a unit clarification petition are filed, the issue of whether the position created should be excluded from the bargaining unit is moot. *City of Burbank v. ISLRB*, 168 Ill. App. 3d 885, 523 N.E. 2d 68 (1st Dist. 1988), *aff'd as modified*, 538 N.E.2d 1146 (1989); *Cairo Association of Educational Support Personnel, IEA-NEA*, 20 PERI 2, Case Nos. 2001-CA-0033-S, 2002-CA-0012-S, 2001-UC-0085-S (IELRB ALJRDO, December 30, 2003); *Central Management Services*, 17 PERI 2046 (IL SLRB 2001) (where remedy awarded negated the employer's creation of positions, it was unnecessary to consider unit clarification petitions filed concerning those positions). In *Burbank*, *Cairo* and *Central Management Services*, the unit clarifications were either rendered moot or held in abeyance due to the Boards' remedial orders to rescind the unilateral change, the creation of the new position. In this case, the ALJ included a remedial order in paragraph 2(a) of his recommended order directing the District to "[r]escind the unilateral changes regarding the removal of work from the bargaining unit....". With the ALJ's remedy, the newly created Specialist position would cease to exist. Yet the ALJ

3 To determine whether a bargaining unit is appropriate, the Board is guided by the language contained in Section 7(a) of the Act, which provides, in relevant part: "the Board shall decide in each case, in order to ensure employees the fullest freedom in exercising the rights guaranteed by this Act." Pursuant to Section 7(a) of the Act, the Board considers the following community of interest factors in order to resolve unit determinations: employee skills and functions, degree of functional integration, interchangeability and contact among employees, common supervisor, wages, hours and other working conditions of the employees involved, and the desires of the employees.

did not regard that remedy as rendering the Union's unit clarification petition moot, but instead determined the Specialist should be included in the unit and granted the petition. It is essentially irrelevant whether the ALJ properly analyzed the community of interest factors because his remedy would eliminate the Specialist position. That portion of the remedy and the recommended clarification of the unit are incongruous. Restoration of the status quo is a standard remedy in unilateral change cases. *See Northern Illinois University*, 34 PERI 61, Case No. 2016-CA-0084-C (IELRB Opinion and Order, September 14, 2017); *City Colleges of Chicago*, 34 PERI 23, Case Nos. 2016-CA-0030-C & 2016-CA-0048-C (IELRB Opinion and Order, July 20, 2017); *Mundelein Consolidated High School District 130*, 31 PERI 57, Case No. 2012-CA-0088-C (IELRB Opinion and Order, September 18, 2014); *City of Springfield*, 35 PERI ¶15 (ILRB-SP 2018) ("Typically, when an employer commits a unilateral change in violation of the Act, the Board will order the employer to rescind the change and restore the status quo while it bargains the issue with the union."). But when put into place in this matter could potentially result in the three people hired as Specialists losing work that the ALJ determined is bargaining unit work. The Board has wide discretion and substantial flexibility in determining an appropriate remedy. *Granite City Cmty. Unit Sch. Dist. No. 9 v. Sered*, 366 Ill. App. 3d 330, 335, 850 N.E.2d 821 (1st Dist. 2006); *Paxton-Buckley-Loda Education Ass'n, IEA-NEA v. IELRB*, 304 Ill. App. 3d 353, 710 N.E.2d 538 (4th Dist. 1999). Taking that into account, we modify that portion of the remedy to eliminate the following language from Section 2(a) "Rescind the unilateral changes regarding the removal of work from the bargaining unit" and affirm the ALJ's finding that the unit should be clarified to include the Specialist position.

D. Whether the ALJ incorrectly found that the ULP charge was timely.

The District's final exception is that the ALJ erroneously concluded that the ULP charge was timely filed. The District claims that the ALJ's determination that the charge is timely is undercut by his own finding that the Union had knowledge of the alleged misconduct in February 2017. That assertion is incorrect. The Union learned in February 2017 that the District intended to eliminate the Career Counselor position.

At that time, the District intended to create a new administrative managerial position. The ALJ noted that Wallace told the Union that the Career Counselors' work would be broken up and distributed among the Generalist Counselors. This would have meant the bargaining unit work performed by the Career Counselors would remain in the bargaining unit because it would be performed by Generalist Counselors.[4] The Union did demand to bargain the removal of the Career Counselor in February 2017 because the additional work would unduly burden the Generalists and the District refused to bargain. However, the alleged misconduct in this matter is not the removal of the Career Counselor and reassignment of its duties to other bargaining unit members. At issue here is the District's creation of the new non-managerial non-bargaining unit Specialist position and assignment of bargaining unit work to that non-bargaining unit position. The Union did not become aware of the alleged misconduct that this bargaining unit work would not remain in the bargaining unit but was to be performed by non-bargaining unit employees until after the District posted the Specialist position on December 12, 2017. The Union filed its unfair labor practice charge on June 11, 2018, just under six months later. As discussed above, Wallace said in February 2017 that he would keep the Union informed of the development of the new position. That he did not do so was something the Union did not become aware of until the Specialist position was posted. The District refused the Union's March 8, 2018 demand to bargain over the Specialist position on March 16, 2018, just under three months prior to the Union's charge filing. For these reasons, we find that the ALJ correctly concluded the unfair labor practice charge was timely filed.

4 The Generalist Counselors are part of the bargaining unit. (Tr. 328).

IV. Order

For the reasons discussed above, IT IS HEREBY ORDERED that:

The unit clarification petition is granted and remanded to the Executive Director to issue a certification clarifying the unit to include the title or position of College and Career Admissions Specialist.

Respondent, Maine Township High School District 207, its officers, and agents shall:

1. Cease and Desist from:
   (a) Refusing to bargain collectively in good faith with Maine Teachers Association, IEA-NEA.
   (b) Making unilateral modifications to any term or condition of employment without prior bargaining to agreement or impasse.
   (c) In any like manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
   (a) Bargain in good faith with Maine Teachers Association, IEA-NEA regarding the addition of the College and Career Admissions Specialist to the bargaining unit.
   (b) Bargain in good faith with Maine Teachers Association, IEA-NEA, regarding the collective bargaining agreement.
   (c) Post on bulletin boards or other places reserved for notices to employees for 60 consecutive days during which the majority of Respondent's employees are actively engaged in duties they perform for Respondent, signed copies the attached notice. Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.
   (d) Notify the Executive Director, in writing, within 35 days after receipt of this order of the steps taken to comply with it.

V. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the Appellate Court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). Petitions for review of this Order must be filed within 35 days from the date that the Order issued, which is set forth below. 115 ILCS 5/16(a). The IELRB does not have a rule requiring any motion or request for reconsideration.[5]

Decided: **May 21, 2020**
Issued: **July 27, 2020**

/s/ Andrea R. Waintroob
Andrea R. Waintroob, Chairman

/s/ Judy Biggert
Judy Biggert, Member

/s/ Gilbert F. O'Brien
Gilbert F. O'Brien, Member

/s/ Lara D. Shayne
Lara D. Shayne, Member

5 Board Member Lynne Sered recused herself from the Board' s decision in this case, and in no way participated in the discussion and deliberation of the matter.

STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Maine Teachers Association, IEA-NEA, Complainant/Petitioner and Maine Township High School District 207, Respondent	)	Case Nos.: 2018-CA-0077-C 2018-UC-0026-C

Administrative Law Judge's Recommended Decision and Order

On June 11, 2018, Complainant/Petitioner Maine Teachers Association, IEA-NEA (Union), filed an unfair labor practice charge against Maine Township High School District 207 (District), alleging that the District violated Section 14(a) of the Illinois Educational Labor Relations Act (IELRA or Act), 115 ILCS 5/1, *et seq*. After investigation, the Executive Director, on behalf of the Illinois Educational Labor Relations Board (IELRB or Board), issued a complaint and notice of hearing for Complainant's charge. The Union also filed a Unit Clarification Petition on June 11, 2018, seeking to add the position of College and Career Admissions Specialist to the bargaining unit represented by the Union. That petition was merged with the aforementioned unfair labor practice charge by the Executive Director on March 21, 2019. The parties appeared for a hearing before the undersigned Administrative Law Judge. At the hearing, both parties had the opportunity to call, examine, and cross-examine witnesses, introduce documentary evidence, and present arguments. Both parties filed post-hearing briefs.

I. Findings of Fact

During the hearing, Stephanie Maksymiu (Maksymiu) and Stefan Penzilius (Penzilius) testified on behalf of the Union. (R. 15, R. 102)[1]. Brianne Dilbeck

[1] Citations to "R" refer to the Record of Proceedings in this matter. Citations to "ALJ Ex. #" refer to documents entered into evidences as ALJ exhibits. The Union's and District's Exhibits will be labelled "Union Ex. #" and "District Ex. #," respectively.

(Dilbeck), Ken Wallace (Wallace), Claudia Rueda-Alvarez (Rueda-Alvarez), and Greg Dietz (Dietz) testified for the District. (R. 167, R. 194, R. 322, R. 465). The following findings of fact are based on the parties' stipulations, as well as testimony and documentary evidence in the record that I have determined to be relevant and credible:

The District is an educational employer within the meaning of Section 2(a) of the Act, and subject to the jurisdiction of the Board. (ALJ Ex. 4). The Union is a labor organization within the meaning of Section 2(c) of the Act, and the exclusive representative within the meaning of Section 2(d) of the Act of a bargaining unit comprised of certain of the District's employees. (ALJ Ex. 4). The District and the Union are parties to a collective bargaining agreement for the bargaining unit represented by the Union. (ALJ Ex. 4 at 1, 2). The District is comprised of four buildings: Maine South, Maine East, Maine West, and an alternative high school called Frost Academy. (ALJ Ex. 16).

Stephanie Maksymiu is currently employed as a generalist Guidance Counselor (Generalist) at Maine South. She has been employed by the District since 1994 and employed as a College and Career Counselor (Career Counselor) from 2004 until the 2018-19 school year. On or about October 30, 2017, Maksymiu was called into a meeting with the principal of Maine South, Ben Collins, the Director of Student Services, Kevin Scotellaro, and a fellow guidance counselor named Jennifer Pendergast. (R. 24). At this meeting, Maksymiu and Pendergast, who wanted to switch positions with Maksymiu, were informed that the District intended to eliminate the career counselor position and move all current Career Counselors into Generalist positions. (R. 24-25.) The District informed them that it intended to change the way that it did career counseling. The District did not provide the Union with any concrete information about a new position at that time. (R. 26). Immediately after the meeting with Maksymiu and Pendergast, Scotellaro and Collins met with the whole guidance staff and conveyed essentially the same information as during the first meeting. (R. 30).

Career Counselors were required to have a Type 10 license, a Specialist's Certificate for Guidance, or a Type 73 license, for School Service Personnel Certificate with a Guidance Specialist Endorsement, similar to that held by the Generalist counselors. (Union Exhibit 2, R. 106). The position was focused on what students did after high school. (R. 41). Much of the job entailed creating resources for students that helped to determine what a good fit would be for the student once they graduate. (R. 42). Maksymiu testified that she helped students search for colleges, identify scholarships and other sources of financial aid, create resumes, and write admissions essays, among other tasks. (R. 43-44). She would also organize events such as bringing a speaker to the school to discuss essay writing and host a college night where District students meet with college representatives.

For students who did not intend to go to college, Maksymiu stated that she would go over their interests and find a way to get those students in a position where they could still obtain education or training necessary to have a meaningful career. (R. 50). She would help those students prepare for interviews and work on applications either for jobs or technical schools. However, Maksymiu stated that, at Maine South, there seemed to be an expectation that most students would attend college, and that about 70% of the school's students progressed directly from high school into a four-year institution. (R. 51). Career counselors would share their notes with the generalist counselors. (R. 59). They were also responsible for gathering data on whether students were enrolled or employed but that the District now has a more precise method for tracking this data. (R. 60-61).

Career Counselors generally did not have a specific caseload, instead working with students who came to them seeking advice on post-secondary options. However, at the start of the 2016-17 school year, before the position was eliminated, one Career Counselor named Gilit Abraham was given a Generalist caseload to go along with her responsibilities as a Career Counselor. (R. 107, 109, 347, District Ex. 9). The plan was proposed to lighten the load of the other generalist counselors, considering the expanded workload for the Generalists and the corresponding diminished duties for Career Counselors. (District Ex. 9). On or about February 13, 2017, the parties

reached an agreement on a Memorandum of Understanding that allowed Career Counselors who are given a Generalist workload additional time to prepare for a new school year in proportion to the size of the Generalist caseload as compared with counselors who only had a generalist caseload. (District Ex. 8).

During negotiations over the Memorandum of Understanding in February 2017, the District Superintendent, Dr. Ken Wallace, mentioned that the Career Counselor position was going to be removed. (R. 113). Wallace shared no details or specifics at the time with the Union but informed Union leadership that he would keep them up to date with any new information. (R. 113). Wallace told the Union that the work currently performed by the Career Counselors would be broken up and given to the Generalists. (R. 114). His intent was to create an administrative or managerial position to oversee the Generalists and better inform the District's college and career planning procedures. (R. 120). He eventually decided against making the position administrative or managerial because of the cost of hiring new administrators. (R. 247). Wallace testified that he did not ask the Career Counselors to perform their work differently before deciding to eliminate the position. (R. 311).

For the 2017-18 school year, the District moved to a hybrid schedule that the Union believed would burden the Generalists. (R. 116). The District conducted impact bargaining with the Union, led by then-Union president Penzilius. During negotiations, the Union demanded to bargain over the removal of the Career Counselor position, arguing that it would unduly shift the burden onto Generalist counselors who were already managing changes due to the shift in school schedules. (R. 118). The District refused to bargain over the elimination of the Career Counselor position, arguing that it was not related to the change to the hybrid schedule and was therefore not a topic that can be discussed during impact bargaining. (R. 118-19).

As of September 2017, five months after the District first expressed its intention to remove the Career Counselor position, the District still had not given the Union any information as to what a new position might look like. (R. 119). On or about December 12, 2017, the District posted a job notification for the Career &

College Admissions Specialist (Specialist). (Union Ex. 4). Prior to the posting for the Specialist position, the District employed three Career Counselors. (R. 128). The Specialist posting looked to hire three new people to fill those roles. (Union Ex. 4). Applicants for the Specialist position were required to have at least a bachelor's degree in a relevant field. (Union Ex. 4, R. 66, 139). The Specialist is a year-round position, and employees in that position pay into the Illinois Municipal Retirement Fund (IMRF). (R. 41, 66, 247). The Specialists have benefits in line with support staff rather than with bargaining unit members. (R. 248).

The Specialist job posting did not include a requirement that people hired to that position have the certification that was previously required for Career Counselors. (Union Ex. 4, District Ex. 5). On the question of whether the position did or did not require licensure, Brianne Dilbeck testified that it did not. Dilbeck is a principal consultant for the Illinois State Board of Education (ISBE). (R. 167). Dilbeck stated that she consulted ISBE's regulations as it relates to teaching and supervisory positions and compared those to the job description sent to her by the District but did not compare those job duties to licensing requirements for generalist or career guidance counselors. (R. 170, 177-79, 184, 189). She also testified that the determination of whether a position requires licensure often depends on specific verbiage, such as "teach" or "supervise", and that it is possible that, given two jobs that function in exactly the same way on a day-to-day basis, it is possible that ISBE could arrive at different answers on licensure for each of the two positions based on the verbiage of the job description. (R. 186-87). Two of the three people hired as Specialists held licenses substantially similar to the ones that would have been required for the Career Counselors. (R. 126).

Before posting the new position on or about December 12, 2017, the District never engaged the Union in any discussion about a new position, and never gave the Union any indication that it intended to create a position that was not administrative or managerial in nature. (R. 121, 124, 389-90). Upon review of the job posting,

Penzilius became concerned that the career counselors were being replaced by the Specialist position, because there was so much overlap between the two. (R. 136).

Wallace testified that the elimination of the Career Counselor position was part of a "re-imagining" of how the District handled college and career counseling for its students. (R. 221-222). As part of his re-imagining, he initially thought that the career counselor position would be replaced by an administrative position that would oversee the counselors. (R. 216). For the 2014-15 school year, the District hired Laura Cook to be a District-wide Career Coordinator. (R. 223). The Career Coordinator's primary responsibility is to build business relationships. (R. 224). The District has also hired three Assistant Career Coordinators to work under Cook, one for each building except the alternative school. (R. 230). The Assistant Career Coordinators are tasked with directly helping students with employment placement, including assistance with job applications, and helping students with issues related to employment including transportation. (R. 232). For the Specialist position at issue here, Wallace conceded that "in year one, it looks a lot like what it did last year and for the last 30 years," but that he anticipates significant change in the job description as time goes on that would make it look less like the former Career Counselor position. (R. 236, 238). One major difference is that the Specialists have access to better analytical tools than were available to the Career Counselors. (R. 201, 255, 280).

Specifically, the Specialists do the programming work that was previously done by the Career Counselors, such as the financial aid and college night programs. (R. 366, 370). However, the Specialists do not perform counseling work and if social or emotional issues arise during career or college counseling, the Specialists are instructed to bring those issues to the student's generalist counselor. (R. 251, 369). The primary focus of the Specialists will be to gather and coordinate data on career and college options, although the form that it will take in the future and how that compares to the work of the Career Coordinator is still largely unknown. (R. 252, 358-60). Once the necessary data is gathered, the Specialists work closely with the Generalists to allow the students to make an informed decision on what to do after

high school. (R. 395). Wallace described the position as "inward-facing", as opposed to the Career Coordinator and Assistant Career Coordinators, which were "outward-facing". (R. 252-53).

Penzilius first found out about the similarities between the Specialist position and the job duties of the Career Counselor from one of the Career Counselors, Gilit Abraham, who had already been informed that she would be moved from Career to Generalist Counselor at the end of the school year. At the time that the Specialist position was posted, Penzilius was engaged in final exams, Union council meetings, and impact bargaining over the schedule change for which the District had already informed him that discussion over the Career Counselor position was outside of the boundaries of the discussion. (R. 118-19, 154-55). Upon discovering the nature of the new position, he discussed it with the other Career Counselors, and then with the Union leadership, before deciding to submit a demand to bargain. (R. 130-31).

On or about March 8, 2018, Penzilius demanded bargaining on behalf of the Union over the CCAS position, claiming that the new position was taking over work that had previously been assigned to bargaining unit members and that the new positions belong in the bargaining unit. (R. 131, Union Ex. 7). The District replied on March 16 and refused to bargain, alleging that because the new position does not require a professional license, and was not paid or otherwise compensated in accordance with the CBA, that the new position does not belong in the bargaining unit. (R. 131-132, 503, Union Ex. 8). The District stated further that, if the Union wanted to add the position to the bargaining unit, it would have to file a petition with the IELRB but the District intended to oppose any such petition "vigorously." (R. 132-133, Union Ex. 8). The District's letter went on to state that if the IELRB granted the Union's petition to include the new positions, it would "consider" the Union's demand to bargain but reserved the right to refuse to bargain because the Union's demand was not timely, arguing that the Union first learned of the new position in February 2017. (R. 133, Union Ex. 8).

II. Unfair Labor Practice Charge 2018-CA-0077-C

The Union alleges that the District violated Section 14(a)(5) of the Act when it unilaterally removed work from the bargaining unit without first bargaining to agreement or impasse. The District argues that the charge is untimely, and that even if it is not, that it did not violate the Act because its actions do not constitute a significant impairment of reasonably anticipated work opportunities.

A. The Charge is Timely Filed

The District alleges that the charge was untimely filed because the Union had unambiguous notice as early as February 2017 that the District was eliminating the Career Counselor position, converting those employees into Generalists, and creating a new position outside of the bargaining unit. This claim fails because the District never put the Union on notice that the new position would be taking over bargaining unit work until December 12, 2017, when the new position was posted. The present charge was filed on June 11, 2018.

Pursuant to Section 15 of the Act, no order shall issue based upon any unfair labor practice occurring more than six months prior to the filing with the Board, of the charge alleging the unfair labor practice. The six-month limitations period begins to run when the party aggrieved by the alleged unlawful conduct either has knowledge of it, or reasonably should have known of it, regardless of whether that person understands the legal significance of the conduct. Jones v. IELRB, 272 Ill. App. 3d 612, 650 N.E.2d 1092 (1st Dist. 1995); Charleston Community Unit School District No. 1 v. IELRB, 203 Ill. App. 3d 619, 561 N.E.2d 331, 7 PERI ¶4001 (4th Dist. 1990); Wapella Education Association v. IELRB; 177 Ill. App. 3d 153, 531 N.E.2d 1371 (4th Dist. 1988). The statutory time period is jurisdictional in nature and cannot be tolled. Charleston Community Unit School District No. 1.

Here, the District alleges that it first informed the Union that it intended to eliminate the Career Counselor position in February 2017, and asserts that, if the Union intended to file a charge over changes made since that date, that it should have done so at that time. However, the only notice the Union was given at that time was that the District intended to move the Career Counselors to Generalist positions, and

that it intended to create an administrative position to oversee the transition to a new system. (R. 120). Evidence shows that, during negotiations in February 2017, Wallace told the Union that the work currently handled by the Career Counselors would be broken up and distributed among the Generalists. (R. 114). Wallace confirmed in his testimony that he initially intended to create an administrative position but decided against following that course of action. (R. 247). Wallace confirmed further that he did not have any conversations between February and December 12, 2017, when the position was posted, with the Union describing any updated plans for the new position. (R. 270, 283, 290, 300). Neither did any other District executive discuss plans to create a new position that was not administrative in nature with the Union. (R. 389-90, 412, 476, 478, 527).

The Union's allegation is that the District's elimination of the Career Counselor position and subsequent replacement with the Specialist position violated Section 14(a)(5) because it removed work from the bargaining unit. The allegedly violative act, then, was not merely the transfer of Career Counselors to Generalists, but the placement of work that would have otherwise been performed by the Career Counselors with a new position outside of the bargaining unit. The Union had no knowledge, and no reason to know, prior to December 12, 2017, that the District intended to create a position that the Union claims was designed to perform much of the work done by the former Career Counselors. The Union's unfair labor practice charge was therefore filed timely.

B. The District's Conduct Violated Section 14(a)(5) of the Act

Section 14(a)(5) of the Act establishes that an educational employer may not refuse to bargain collectively in good faith with an exclusive representative. An employer breaches its duty to bargain in good faith when it unilaterally changes the status quo as it relates to a mandatory subject of bargaining without first bargaining to agreement or impasse. Vienna School Dist. No. 55 v. IELRB, 162 Ill. App. 3d (4th Dist. 1987). Where an allegation that an educational employer violated Section 14(a)(1) of the Act and the charge arises out of the same conduct as a 14(a)(5)

violation, the 14(a)(1) allegation is said to be derivative in nature. Speed District 802 v. Warning, 242 Ill. 2d 92, 113 (2011).

A topic is a mandatory subject of bargaining when it concerns wages, hours, and terms and conditions of employment. When work is removed from the bargaining unit, the removal is a mandatory subject of bargaining when it results in a departure from established operating practices, changes to the conditions of employment, or a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit. Sesser-Vallier Community Unit School District No. 196 v. IELRB, 250 Ill. App. 3d 878 (4th Dist. 1993). In this case, the relevant inquiry is whether the elimination of the Career Counselor positions, coupled with the creation of the Specialist positions, deprived the bargaining unit of reasonably anticipated work opportunities, and I find that it did.

The District does not dispute that the Specialists perform at least some work that was done by the former Career Counselors. They perform the programming work that the Career Counselors performed before. (R. 366). The Specialists analyze, gather, and coordinate data on college and career options and on whether former students were employed or enrolled in a college or university in a similar way to the Career Coordinator (R. 252, 358-60, 395). They also work with the Generalists in much the same way as the former Career Coordinators did. (R. 59, 395). While the District's emphasis has changed more in the direction of providing more career-oriented options and away from an emphasis on college, and the Specialists have access to tools that the Career Counselors never had the opportunity to use, the essence of the work is very similar. Wallace himself admitted that "in year one, it looks a lot like it did" before the Specialist position was created. (R. 236). The only significant difference between the two positions is that the Specialists do not perform counseling work and are advised to forward any emotional or social issues to the student's Generalist[2].

[2] As Rueda-Alvarez pointed out in her testimony, it is difficult if not impossible to separate personal and career counseling. (R. 378).

While the record contains many instances of hypothesizing about how the Specialist position might evolve as time goes on, in the absence of evidence regarding any concrete future plans, we must treat the position as it is, not as it might be. On this issue, the record is clear. The Specialist position took almost all work that was performed by the Career Coordinators except for counseling. This constitutes a significant impairment of reasonably anticipated work opportunities for those in the bargaining unit. Because the transition contains a significant impairment of reasonably anticipated work opportunities, the transition of bargaining unit work to the new Specialist position was a mandatory subject of bargaining.

The District's letter of March 16 demonstrates that the District refused to bargain over the Specialist position or the resulting removal of work from the bargaining unit. Because the removal was a mandatory subject of bargaining, the District's failure or refusal to bargain over the removal was a violation of Section 14(a)(5) and, derivatively (1) of the Act.

III. Unit Clarification Petition 2018-UC-0026-C

On June 11, 2018, the Union also filed a Unit Clarification petition to include the Specialists in the bargaining unit. A unit clarification petition may be used to determine the bargaining unit status of a newly created position where that position entails job functions similar to those of classifications covered by the existing unit. Thornton Township High School Dist. 205, 2 PERI 1103 (IELRB Opinion and Order, August 20, 1986); Support Staff of Elgin Community College Association, IEA-NEA and Elgin Community College, 33 PERI 122 (IELRB Opinion and Order, May 18, 2017). In this matter, there is no dispute that the Specialist position is newly created as of December 12, 2017. As discussed above, the Specialist position took on many of the duties that were performed by the bargaining unit position of Career Counselor before that position was eliminated. I therefore find that the Specialist position entails job functions similar to those of classifications covered by the existing unit, and grant the Union's petition to include the Specialist positions in the bargaining unit.

IV. Respondent's Motion for Sanctions

On August 28, 2019, the District filed a Motion for Sanctions against the Union, alleging that, by raising a claim that the District committed a 14(a)(1) violation, it engaged in frivolous litigation and needlessly delayed and increased the costs of litigation. (Resp. Motion for Sanctions, hereinafter "Motion", at 2-3). The Motion arises out of Section II of the Union's Post-Hearing Brief, which argues that the District's actions as discussed above restrained or coerced employees in the exercise of rights guaranteed by the Act and therefore constitutes a separate violation of Section 14(a)(1) of the Act. (Union's Post-Hearing Brief at 30-31). The Motion alleges that the claims raised in that section are frivolous both because the Complaint did not assert a separate 14(a)(1) offense and because the Union stipulated during the hearing that it did not intend to pursue separate 14(a)(3) or (a)(1) charges. (Motion at 2-3).

However, a review of the portions of the transcript at issue tell a different story from the version of events set forth in the Motion. The stipulation referred to by the District was that there would be no 14(a)(3) retaliation for union activity, or 14(a)(1) retaliation for protected concerted activity. (R. 506). Section II of the Union's brief, on the other hand, argues not that the District engaged in retaliatory behavior, but that the District's conduct was of a nature that restrained or coerced the employees rights as defined by the Act, based solely on the conduct that gave rise to the Union's 14(a)(5) allegation. The 14(a)(1) allegation is, therefore, derivative. For these reasons, I do not find that it was frivolous for the Union to argue that the District committed a Section 14(a)(1) violation, or that it submitted a one-page argument in its post-hearing brief for the purposes of delay or to needlessly increase the costs of litigation. The District's Motion is denied.

V. Recommended Order

For the reasons discussed above, I recommend the following:

The Union's Unit Clarification petition, Case # 2018-UC-0026-C, is granted, and the position of College and Career Admissions Specialist is included in the bargaining unit.

Respondent, Maine Township High School District 207, its officers and agents shall:

1. Cease and Desist from:

   (a) Refusing to bargain collectively in good faith with Maine Teachers Association, IEA-NEA.

   (b) Making unilateral modifications to any term or condition of employment without prior bargaining to agreement or impasse.

   (c) In any like manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   (a) Rescind the unilateral changes regarding the removal of work from the bargaining unit, and bargain in good faith with Maine Teachers Association, IEA-NEA regarding the addition of the College and Career Admissions Specialist to the bargaining unit.

   (b) Bargain in good faith with Maine Teachers Association, IEA-NEA, regarding the collective bargaining agreement.

   (c) Post on bulletin boards or other places reserved for notice to employees for 60 consecutive days during which the majority of the Respondent's employees are actively engaged in the duties they perform for the Respondent, signed copies of the attached notice. The Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.

   (d) Notify the Executive Director, in writing, within 35 days after receipt of this Order of the steps taken to comply with it.

VI. Right to File Exceptions

Pursuant to Section 1105.220(b) of the Board's Rules and Regulations, 80 Ill. Admin. Code 1105.220, the parties may file written exceptions to this Recommended Decision and Order and briefs in support of those exceptions no later than 21 days after receipt of this decision. Exceptions and briefs must be filed with the Board's General Counsel. If no exceptions have been filed within the 21-day period, the parties will be deemed to have waived their exceptions. Under Section 1100.20 of the Board's Rules, 80 Ill. Admin. Code 1100.20, parties must send a copy of any exceptions they choose to file to the other parties and must provide the Board with a certificate of service. A certificate of service is "a written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service." 80 Ill. Admin. Code 1100.20(e). If a party fails to send a copy of its exceptions to the other parties or fails to include a certificate of service, that party's appeal rights with the Board will end.

Dated: October 4, 2019
Issued: Chicago, Illinois

Nick Gutierrez
Administrative Law Judge

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
(312) 793-3170 / (312) 793-3369 Fax