State of Illinois
Educational Labor Relations Board

Service Employees International Union, Local 73,	)	
Complainant	)	
and	)	Case No. 2019-CA-0022-C
Cook County School District 130,	)	
Respondent	)	

OPINION AND ORDER

I. Statement of the Case

On November 28, 2018, Service Employees International Union, Local 73 (Union or Complainant) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board), against Cook County School District 130 (District or Respondent). Therein, the Union alleged that the District, through its agents and representatives, 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). Following an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing (Complaint), alleging that the District violated Section 14(a)(3) and derivatively (1) of the Act, by discriminating against Susan Gracie (Gracie), the Union steward, in regard to hire and tenure of employment, and terms and conditions of employment to discourage membership in an employee organization. The parties appeared for a hearing before an administrative law judge (ALJ). At the hearing, the ALJ granted Complainant's motion to amend the Complaint, to allege that Respondent committed an independent violation of Section 14(a)(1) of the Act when it failed or refused to arbitrate a grievance challenging Gracie's discharge. Following the hearing, the ALJ issued a Recommended Decision and Order (ALJRDO) finding that the District independently violated Section 14(a)(1) of the Act by refusing to arbitrate said

grievance, as well as Sections 14(a)(3) and derivatively (1) of the Act by retaliating against Gracie for engaging in union activity.

The matter is now before us on the following exceptions to the ALJRDO filed by the District: 1) It was against the manifest weight of the evidence for the ALJ to find that the District violated the Act when the District had a legitimate bona fide business reason for the adverse employment action; 2) The ALJ erred in finding a causal connection between Gracie's protected activities and the adverse employment action, when there was no evidence of shifting explanations for the District's action, inconsistencies in the reason given for the action, expressed hostility towards unionization or union activity, disparate treatment of employees based on Union membership, or a pattern of conduct which targets Union supporters; 3) The ALJ erred in relying upon the statement of District employee Dan Grand to find anti-union animus on the part of the District because the statement was uncorroborated hearsay, Grand was not a decision maker in the adverse employment action in question, and the ALJ attributed Grand's statement to District decision makers without any facts from which to do so; 4) The ALJ erred in relying on an incident where Jorge Coreas, a Union member, received a written reprimand for allegedly stealing salt in February of 2014 to find disparate treatment and that the District's legitimate reasons for terminating Gracie were pretextual; 5) The ALJ erred in relying on the fact that a teacher who testified at the hearing said that she had told Gracie to take what she needed if she was not around to find that the District's reasons for the adverse action were pretextual; 6) The ALJ erred in relying on the opinion of former District teacher Grace Haberkorn as to whether or not Gracie should have been terminated to find that the District's reasons for the adverse employment action were pretextual; and 7) The ALJ erred in holding that because the Union, not Gracie, had filed the instant charge, the election of remedies clause did not apply and the District violated Section 14(a)(1) of the Act by refusing to arbitrate Gracie's grievance.

The Union filed a response to the District's exceptions requesting that this Board uphold the ALJRDO.

For the reasons discussed below, we affirm the ALJRDO in its entirety and find that the District independently violated Section 14(a)(1) of the Act, and Section 14(a)(3) and derivatively (1) of the Act.

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.

III. Discussion

A. *Whether it was against the manifest weight of the evidence for the ALJ to find that the District violated the Act when the District had a legitimate bona fide business reason for the adverse employment action.*

In its first exception, Respondent argues that it was against the manifest weight of the evidence for the ALJ to find that the District violated the Act when it would have taken the same adverse employment action notwithstanding Gracie's protected union activity, and that it had a legitimate bona fide business reason for terminating her. It is the District's position that it discharged Gracie because she accessed a teacher's supply cabinet intended for special needs children, to use plastic ziplock baggies without first obtaining the teacher's permission, and then was not truthful about it during the District's subsequent investigation, in violation of the District's Ethics and Conduct policy.[1]

The ALJ determined that it was unlikely that the District discharged Gracie due to the September 2018 ziplock incident, and unlikely that the District's stated reason for doing so was anything other than a pretext. The ALJ based her finding on

[1] "All District employees are expected to maintain high standards in their school relationships and demonstrate integrity and honesty, to be considerate and cooperative, and to maintain professional and appropriate relationships with students, parents, and members, and staff members and others."

evidence that when another employee, Jorge Coreas (Coreas), engaged in similar conduct, he only received a written reprimand.

Section 14(a)(3) of the Act prohibits educational employers, their agents, or representatives from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization. To establish that a *prima facie* Section 14(a)(3) violation has occurred, the complainant must prove by a preponderance of the evidence that the employee engaged in union activity, the respondent was aware of that activity, and the respondent took adverse action against the employee for engaging in that activity based, in whole or part, on anti-union animus, or that union activity was a substantial or motivating factor. *Speed Dist. 802 v. Warning*, 242 Ill. 2d 92, 950 N.E.2d 1069 (2011); *City of Burbank v. ISLRB*, 128 Ill. 2d 335, 538 N.E.2d 1146 (1989); *Bloom Township High School v. IELRB*, 312 Ill. App. 3d 943, 728 N.E.2d 612 (1st Dist. 2000). Once a *prima facie* case is established, the burden shifts to the respondent to demonstrate, by a preponderance of the evidence, that it had a legitimate business reason for its actions and that the employee would have received the same treatment absent her union activity. *City of Burbank v. ISLRB*, 128 Ill. 2d 335, 538 N.E.2d 1146 (1989). Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. *Id.* If the proffered reasons are merely litigation figments or were not, in fact relied upon, then the respondent's reasons are pretextual and the inquiry ends. *Id.* However, whenever legitimate reasons for the adverse employment action are advanced and are found to be relied upon at least in part, then the case may be characterized as a "dual motive" case, and the respondent must establish, by a preponderance of the evidence, that the action would have been taken notwithstanding the employee's union activity. *Id.*

The record revealed that Coreas, a District employee and bargaining unit member, received a written reprimand in February of 2014 for allegedly stealing two bags of salt from the District. In the case at bar, the District purports it discharged Gracie because she accessed Grace Haberkorn's (Haberkorn) supply cabinet for three

(3) ziplock baggies for a school-related purpose, without first gaining Haberkorn's permission. Yet, prior to exiting the classroom, Gracie did get Haberkorn's permission for the baggies, then later that same day purchased baggies to replenish Haberkorn's supply. However, subsequently during an investigatory interview, Gracie was inconsistent as to whether or not she had the baggies in her hand when Haberkorn walked in on Gracie. The Coreas and Gracie incidents are the only comparable instances of record alluding to or alleging a similar lack of integrity or employee theft. In comparison, a more severe consequence was imposed upon Gracie, for what factually appears to be a lesser misdeed. Taking that into account, along with Gracie's role as the Union steward and her established union activity, as distinguished from Coreas, as well as Gracie's history of no formal discipline prior to 2018, it is reasonable, based on a preponderance of the evidence, to infer that the District's proffered reasons for discharging Gracie were pretextual, despite noted differences in the District's administration and governing body composition between the Coreas incident in 2014 and Gracie incident in 2018.

Arguendo, even if a fact finder considered this a "dual motive" case, the preponderance of the evidence fails to substantiate that the District would have terminated Gracie notwithstanding her protected activity.

For these reasons, we uphold the ALJ's finding that the District's proffered business reasons were not legitimate, and the District violated Section 14(a)(3) and derivatively (1) of the Act.

B. *Whether the ALJ erred in finding a causal connection between Gracie's protected activities and the adverse employment action, when there was no evidence of shifting explanations for the District's action, inconsistencies in the reason given for the action, expressed hostility towards unionization or union activity, disparate treatment of employees based on Union membership, or a pattern of conduct which targets Union supporters.*

The District's second exception asserts that there was no evidence of a causal connection between the District's adverse employment action and Gracie's protected concerted activity, and thus, a *prima facie* case of discrimination was not made.

As discussed previously, the third element of a Section 14(a)(3) *prima facie* case requires a showing that the respondent took adverse action against the employee for engaging in union activity based, in whole or part, on anti-union animus, or that union activity was a substantial or motivating factor. *City of Burbank v. ISLRB*, 128 Ill. 2d 335, 538 N.E.2d 1146 (1989). Motive is a question of fact, and can be inferred from either direct or circumstantial evidence. *Id.* Unlawful motive can be demonstrated by various factors, including expressions of hostility toward unionization, together with knowledge of the employee's union activities, proximity of the adverse action in relation to the occurrence of the union activity, disparate treatment or targeting of union supporters, inconsistencies between the reason offered by the respondent for the adverse action and other actions of the respondent, and shifting explanations for the adverse action. *Id.*

As the ALJ noted, multiple factors demonstrating circumstantial evidence of unlawful motive are sufficiently present here. First, Dan Grand (Grand), District Director of Facilities, commented to Gracie in August of 2018, that "when you cause trouble that's what you get, you get it taken away" in response to Gracie's question of why new custodian duties were divvied up between two schools instead of one. Grand's statement amounted to anti-union animus. Next, Respondent stipulated that Gracie was the Union steward, and as relevant, the District was aware of Gracie's union activities, specifically, her involvement in filing a grievance against the District in July of 2018 on behalf of affected employee George Frederick (Frederick), a grievance which challenged the hire of a District Board member's son (Frederick grievance). As far as timing is concerned, Gracie was terminated effective November 28, 2018, based on the superintendent's recommendation and the Board's adoption thereof, four months after the Frederick grievance was filed. Lastly, the disciplinary imbalance between the Coreas incident and Gracie's incident for misconduct associated with taking property without permission demonstrates disparate treatment and an

inconsistency between the reason offered by the respondent for the adverse action it imposed upon Gracie and its other actions.

What's more is that Gracie's adverse employment action resulted from the involvement of District representatives who harbored unlawful motive. Where an adverse employment action results from a recommendation or involvement of an employer representative who harbors unlawful motive, the employment action is unlawful, even if the employer's governing body does not harbor unlawful motive. *Chicago Board of Education*, 31 PERI 24, Case No. 2012-CA-0016-C (IELRB Opinion and Order, July 17, 2014); *McLean County Unit District 5, a/k/a Board of Education of McLean County Unit District 5,* 30 PERI 207, Case No. 2011-CA-0005-S (IELRB Opinion and Order, February 20, 2014), rev'd on other grounds, 382 Ill. Dec. 120, 12 N.E.3d 120 (4th Dist. 2014); *Staub v. Proctor Hospital*, 562 U.S. 411 (2011); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 (6th Cir. 1987).

Dudzik and McKay, were both in attendance during step meetings related to the July 2018 Frederick grievance, where Gracie was present in her capacity as Union steward.[2] Notably, it was a short span of four months between Gracie's initial involvement with the Frederick grievance and her November 2018 termination, based on Dudzik's and McKay's recommendations. As such, John Dudzik (Dudzik) and Colleen McKay (McKay), the District's agents, were aware of Gracie's union activity, and both recommended Gracie's termination, arising from an investigation of the September 2018 ziplock incident.[3] Thus, the decision to terminate Gracie would not have been before the District's governing body "but for" the unlawful motive of its representatives, Dudzik and McKay, which consequently tainted the District's disciplinary decision. It was on this evidence, buttressed by the presence of additional unlawful motive factors, that the ALJ determined that Complainant established the

[2] We note that Grand and Kathy Hinz (Hinz), District Human Resources Assistant, were also in attendance on behalf of the District.

[3] Dudzik, the District's Assistant Superintendent of Human Resources, recommended Gracie's termination to McKay, the District's Superintendent, and McKay in turn recommended Gracie's termination to the District's governing body.

third element in a *prima facie* case that Respondent violated Section 14(a)(3) of the Act.

Consequently, we uphold the ALJ's conclusion that a causal connection existed between Gracie's protected activities and her termination, which supports a determination that the District violated Section 14(a)(3) and derivatively (1) of the Act.

C. *Whether the ALJ erred in relying upon the statement of Dan Grand, a District employee, to find anti-union animus on the part of the District because the statement was uncorroborated hearsay, Grand was not a decision maker in the adverse employment action in question, and the ALJ attributed Grand's statement to District decision makers without any facts from which to do so.*[4]

The District's third exception contends that the ALJ erred in relying on Grand's statement to find anti-union animus attributable to the District.

Upon analyzing the factors which are demonstrative of unlawful motive, the ALJ observed that the District expressed hostility toward unionization by Grand's August 2018 statement to Gracie of, "when you cause trouble that's what you get, you get it taken away" as to why the new custodian duties were split between two schools. The District contends that the ALJ erred in relying on Grand's statement to find anti-union animus attributable to the District.

[4] It's worth mentioning that the District embedded a fair amount of credibility issues concerning Gracie in its exception three response. As far as the credibility issues raised against Gracie regarding the ziplock incident, as well as her subsequent employment endeavors post discharge from the District, the Board's policy is to accept an ALJ's credibility determinations unless the Board is convinced by a clear preponderance of all the evidence that those resolutions are incorrect. *Rockford School District No. 205*, 22 PERI 45, Case No. 2004-CA-0034-C (IELRB Opinion and Order, April 12, 2006); *Board of Regents of Sangamon State University*, 6 PERI 1048, Case Nos. 89-CA-0030-S, 89-CA-0035-S (IELRB Opinion and Order, March 12, 1990), *affirmed,* 208 Ill.App.3d 230, 566 N.E.2d 963 (4th Dist. 1991) (affirming Board's reliance on Hearing Officer's credibility assessment). Here, the preponderance of the evidence is not persuasive that the ALJ's credibility determinations were improper.

We find that Grand's hostile statement is attributable to the District decision makers under an agency relationship.[5] An agent is deemed to have the authority to bind his or her principal in the absence of clear notice to the contrary. *City of Burbank v. ISLRB*, 185 Ill.App.3d 997, 541 N.E.2d 1259, (1st Dist. 1989).

Here, the record establishes that Grand was an agent of the District, and acted on its behalf at the time the statement in question was made. Not only was Grand's position associated with administration as the District Director of Facilities, and Gracie's supervisor, but Grand's statement that, "when you cause trouble that's what you get, you get it taken away" was in response to Gracie's question regarding a workplace concern about the reason why new custodian duties were split between two schools instead of one, a matter that evidently was subject to management's decision making authority. The nature of Gracie's question and Grand's reply demonstrates the presence of an administrator employee dynamic, harbored animus, and a revelation of retaliatory actions taken by the District.

The timing of the statement and Gracie's discharge further supports an inference that the decision to discharge Gracie was improperly motivated by her union activity. Grand's statement was expressed the following month after the July 2018 Frederick grievance was initiated with Gracie's involvement, as well as shortly after Grand, among other District representatives, attended step meetings concerning the Frederick grievance, where Gracie was present in her capacity as Union steward. In connection to this time span, Gracie was discharged in November 2018 on account of the ziplock incident, within three months of Grand's comment. This encounter between Gracie and Grand, coupled with the manner and timing of the disciplinary action issued by the District, underpins the relevance of Grand's conduct as an agent of the District, to the consideration and finding that Gracie's discipline was

[5] Needless to say, with respect to the District's uncorroborated hearsay argument, an admission by a party-opponent is an exception to the hearsay rule so long as an agent of Respondent made the statement. Here, the exception to the hearsay rule applies, since Grand, a District representative, made the statement in question.

discriminatory. Consequently, Grand's animus is attributable to the ultimate decision makers.

For the reasons examined above, we find that the ALJ did not err in relying on Grand's statement to find anti-union animus attributable to the District, and uphold the ALJ's rationale surrounding the District's unlawful motive and consequent finding that it violated Section 14(a)(3) and derivatively (1) of the Act.

D. *The ALJ erred in relying on an incident where Jorge Coreas, a Union member, received a written reprimand for allegedly stealing salt in February of 2014 to find disparate treatment and that the District's legitimate reasons for terminating Gracie were pretextual.*

The District sets forth that the only evidence of the Coreas incident was the letter of reprimand, which it argues was hearsay and lacked foundation.[6] Furthermore, the District argues that the Coreas salt incident occurred under a different set of decision makers and is distinguishable from Gracie's ziplock incident.

As discussed above, the ALJ decided that the District engaged in disparate treatment, and its proffered reason for discharging Gracie was likely nothing more than a pretext, because when another employee, Coreas, engaged in similar conduct, he only received a written reprimand.

The relevant consideration here in relation to disparate treatment is whether the employer treated employees similarly situated in a manner better than Gracie was treated. While both Coreas and Gracie were similarly situated union members who were both accused of misconduct of a similar nature, as in a violation of trust and demonstrating a lack of integrity, albeit under different factual scenarios, the record distinctively illuminates Gracie's engagement in union activity as the Union steward. Noticeably, Gracie received the harsher penalty of termination, and arguably for a

[6] A statement by a party-opponent is an exception to the hearsay rule so long as an agent of Respondent made the statement. Here, the exception to the hearsay rule applies, since Grand, a District representative, authored the letter of reprimand.

lesser wrongdoing, whereas Coreas, having no union activity of record, received a written reprimand. It is therefore reasonable to deduce that Coreas was unjustifiably treated better than Gracie.

Coreas and Gracie were both accused of taking supplies or materials that did not belong to them, without permission, insinuating a lack of integrity and dishonesty. The District proposes that it also took into account that during the investigation of the ziplock incident, Gracie revealed an inconsistency as to whether she was or was not holding the plastic baggies in her hand when Haberkorn walked into her classroom and noticed Gracie there with the supply cabinet open. However, in Gracie's instance, she intended to (and in fact did) use the supplies for a school-related purpose, obtained permission for the three (3) ziplock bags from Haberkorn once Haberkorn entered the room and prior to exiting Haberkorn's classroom, and later that same afternoon following the incident, purchased Haberkorn a box of ziplock bags to replace in excess what Gracie had utilized. These things considered, including the significance of Gracie's union activity, as distinguished from Coreas, and Gracie's longstanding history of no formal discipline prior to 2018, the evidence suggests that the District's reasons for the discipline it issued to Gracie were pretextual.

Arguendo, even if a fact finder considered this a "dual motive" case, the preponderance of the evidence fails to substantiate that the District would have terminated Gracie notwithstanding her protected activity.

For these reasons, we uphold the ALJ's analysis as it relates to disparate treatment and pretext, and determination that the District violated Section 14(a)(3) and derivatively (1) of the Act.

E. *The ALJ erred in relying on the fact that a teacher who testified at the hearing said that she had told Gracie to take what she needed if she was not around to find that the District's reasons for the adverse action were pretextual.*

In its fifth exception, the District argues that the testimony of retired educator Paula Tagler (Tagler) was irrelevant to any of the issues presented, and reliance on such was clear error.

The ALJ opined that even aside from the comparison to Coreas, taking supplies without permission to use as part of her job, and then replacing them, did not seem to merit discharging a twenty-year employee with no prior history of discipline. And particularly since custodians at the school frequently asked teachers for supplies, to the point where Tagler told Gracie to take what she needed if she was not around.

The ALJ opined on the nature of Gracie's standing within the District, and outcome of her infraction, aside from the comparison to the Coreas incident to infer that the District's proffered reason for discharging Gracie was pretext, all while considering a totality of the evidence, which includes Tagler's testimony. Although Tagler was *not* in fact the teacher involved in the ziplock incident, and Gracie had not obtained standing permission from Haberkorn to access her supply cabinet, Tagler's testimony at issue was related to the existence of a general supply borrowing custom at the school, which is appropriate for evaluating Gracie's indictments and the resulting adverse employment action that she suffered. There is no legal authority or evidence that the weight the ALJ afforded to such evidence was improper.

Thus, we reject the District's position that the ALJ erred in relying on Tagler's testimony, and adopt the ALJ's result that the District's proffered business reasons were pretextual in violation of Sections 14(a)(3) and derivatively (1) of the Act.

F. *The ALJ erred in relying on the opinion of former District teacher Haberkorn as to whether or not Gracie should have been terminated to find that the District's reasons for the adverse employment action were pretextual.*

The District contends in exception six, that the ALJ should not have given credence to Haberkorn's opinion and feelings.

Here, the ALJ held that Haberkorn's tearful demeanor and testimony that she never would have reported Gracie if she had known it would lead to termination, supported the incongruent severity of Gracie's discipline.

As mentioned above, the ALJ relied on the discrepancy between the Gracie and Coreas incidents to find pretext, all while considering a totality of the evidence, which includes Haberkorn's testimony. The ALJ drew an inference based on Haberkorn's testimony and credibility determination of Haberkorn in relation to the severity of the District's adverse employment action imposed upon Gracie. The District points to no legal authority, neither does the record reveal that the weight the ALJ afforded to such evidence in this regard was improper, or that the ALJ's credibility resolution was incorrect.

Thus, we reject the District's position that the ALJ erred in relying on the opinion of former District teacher Haberkorn, and accept the ALJ's rationale and credibility determination, as observed by Haberkorn's demeanor and testimony, regarding the incongruent severity of Gracie's discipline, and determination that the District violated Section 14(a)(3) and derivatively (1) of the Act.

G. *The ALJ erred in holding that because the Union, not Gracie, had filed the instant charge, the election of remedies clause did not apply, and the District in turn violated Section 14(a)(1) of the Act by refusing to arbitrate Gracie's grievance.*

In its last exception, the District maintains that it properly refused to arbitrate the grievance challenging Gracie's termination, because pursuant to the CBA, the commencement of the instant unfair labor practice charge effectively barred the grievance. The District cites to Article IX(C) of the CBA as having preempted the grievance.

Article IX(C), Limitation of Remedies, provides that: In the event a member of the bargaining unit commences a proceeding in any State or Federal court or administrative agency against the Board and/or Superintendent and his/her administrative staff with an alleged violation of any of the terms of this Agreement, such remedy shall be exclusive and the said member of the bargaining unit shall be

barred from invoking any formal remedy provided by this Grievance Procedure, along with an obligation not to pursue an alternative after a final decision has been rendered as per the terms of the preceding grievance procedures.

A CBA is a contract, subject to traditional rules of contract interpretation. *Matthew v. Chicago Transit Authority*, 2016 IL 117638 ¶ 76. To resolve whether the administrative law judge erred in finding the CBA provision was inapplicable, we must construe the CBA. The basic rules of contract interpretation are well settled. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The primary objective in construing a contract is to give effect to the intention of the parties. *Id.* We first look to the contract language itself to determine the parties' intent. *Id.* If the words in the contract are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. *Thompson*, 241 Ill. 2d at 441. The contract is ambiguous, however, if its language is susceptible to more than one meaning. *Id.*

Examining the relevant plain language of the CBA, we find that such is clear in its usage of the term "member" as specifically referencing a bargaining unit member, with no indication that "member" allows for substitution or interchange with the terms "employee representative" or "labor organization" therein. Here, it was the Union, rather than a member of the bargaining unit, that filed the case at bar, rendering Article IX(C) inapplicable.

Accordingly, we adopt the ALJ's finding that the election of remedies clause did not apply, and therefore, the District independently violated Section 14(a)(1) of the Act by refusing to arbitrate Gracie's grievance.

IV. Order

For the reasons discussed above, IT IS HEREBY ORDERED that Respondent, Cook County School District 130, its officers, and agents shall:

1. Cease and desist from:
    (a) Refusing to arbitrate Susan Gracie's grievance.
    (b) Retaliating against Gracie, or any of its other employees, for engaging in union activity.

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

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

(a) Arbitrate, at the request of the Union, Gracie's grievance.

(b) Offer Gracie immediate and full reinstatement to the position of Custodian I without prejudice to her seniority or other rights and privileges.

(c) Make Gracie whole for all loses she incurred by Respondent denying her employment as Custodian I, including back pay with interest computed at a rate of 7% per annum as allowed by the Act, calculated from November 28, 2018 until she is unconditionally reinstated.

(d) Expunge from all its files and records any and all references to Gracie's termination and notify her in writing that this has been done and that evidence of the unlawful adverse action will not be used as a basis for future personnel actions against her.

(e) 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 the duties they perform for Respondent, signed copies of the attached notice. Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.

(f) 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.

Decided: June 18, 2020
Issued: Chicago, Illinois

/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/ Lynne O. Sered
Lynne O. Sered, Member

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

THIS IS A NOTICE TO EMPLOYEES THAT MUST BE POSTED PURSUANT TO THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD'S OPINION AND ORDER IN Service Employees International Union, Local 73/Cook County School District 130, Case No. 2019-CA-0022-C.

Pursuant to an Opinion and Order of the Illinois Educational Labor Relations Board and in order to effectuate the policies of the Illinois Educational Labor Relations Act ("Act"), we hereby notify our employees that:

This Notice is posted pursuant to an Opinion and Order of the Illinois Educational Labor Relations Board issued after an administrative proceeding in which both sides had the opportunity to present evidence. The Illinois Educational Labor Relations Board found that we have violated the Act and has ordered us to inform our employees of their rights.

Among other things, the Act makes it lawful for educational employees to organize, form, join or assist employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection.

WE WILL NOT refuse to arbitrate the grievance filed by Service Employees International Union, Local 73 on behalf of Susan Gracie.

WE WILL NOT retaliate against Susan Gracie, or any of our other employees, for engaging in union activity.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights them guaranteed under the Act.

WE WILL, at the request of Service Employees International Union, Local 73, arbitrate the grievance that it filed on Susan Gracie's behalf.

WE WILL offer Susan Gracie immediate and full reinstatement to the position of Custodian I without prejudice to her seniority or other rights and privileges.

WE WILL make Susan Gracie whole for all loses she incurred by our denying her employment as Custodian I, including backpay with interest computed at a rate of 7% per annum as allowed by the Act, calculated from November 28, 2018 until she is unconditionally reinstated.

WE WILL expunge from all our files and records any and all references to Susan Gracie's termination and notify her in writing that this has been done and that evidence of the unlawful adverse action will not be used as a basis for future personnel actions against her.

Date of Posting: _____ By: _____

As agent for **Cook County School District 130**

STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

SEIU Local 73,	)	
	)	
Complainant	)	
	)	
and	)	Case No. 2019-CA-0022-C
	)	
Cook County School Dist. 130,	)	
	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On November 28, 2018, Service Employees International Union, Local 73 (Union or Complainant) filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) alleging that Cook County School District 130 (District or Respondent) committed unfair labor practices within the meaning of Section 14(a) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1, *et seq.* (IELRA or Act). After investigation, the IELRB's Executive Director issued a complaint and notice of hearing (Complaint), alleging that Respondent violated Section 14(a)(3) and, derivatively, (1) of the Act. The parties appeared for a hearing before the undersigned Administrative Law Judge on September 10, 2019. Pursuant to Complainant's motion, the Complaint was amended at the hearing to add an allegation that the District failed and refused to arbitrate a grievance in violation of Section 14(a)(1) of the Act. During 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

Susan Gracie, Matthew Duzer, Nicolas Reid, Matthew Thompson, and Paula Tagler testified on behalf of Complainant. John Dudzik, Colleen McKay, Grace Haberkorn, and Alicia Smith testified on behalf of Respondent. Based on the testimony of the witnesses, my

observation of their demeanors, the parties' stipulations, and the documentary evidence in the record, I make the following findings of fact:

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 Exs. 4 and 8; Tr. 9.[1] At all times material, the Cook County School District 130 Board of Education was authorized to act on the District's behalf. ALJ Ex. 8; Tr. 9. The Union is a labor organization within the meaning of Section 2(c) of the Act, and at all times material, was the exclusive representative of a bargaining unit comprised, in part, of all regular and temporary full time Building Custodians (Classifications I and II) employed by the District (bargaining unit). ALJ Exs. 4 and 8; Tr. 9. As relevant, the Union and the District were parties to a collective bargaining agreement (CBA) for the bargaining unit, which provided for a grievance procedure culminating in arbitration. ALJ Exs. 4 and 8; D. Ex. 1; Tr. 9.

At all times material, Susan Gracie (Gracie) was an educational employee within the meaning of Section 2(b) of the Act, and a member of the bargaining unit. ALJ Ex. 8; Tr. 9. Gracie began her employ with the District in August 1998 as a Custodian II and was eventually promoted to Custodian I. Tr. 29. She worked at the District's Nathan Hale Primary School (Hale). Tr. 157–158. Gracie was a member of the Union's bargaining committee. Tr. 30—33. As such, she attended negotiations and met with the Superintendent monthly. Tr. 30—33. Gracie served as Union steward for the last three or four years of her employment with the District. Tr. 35. As Union steward, Gracie listened to complaints from members, tried to resolve members' complaints by addressing them with their supervisor, and filed grievances. Tr. 34—35. Prior to 2018, Gracie had never received any formal discipline during her employ with the District. Tr. 42.

In a letter dated July 26, 2018, District Assistant Superintendent of Human Resources John Dudzik (Dudzik) notified Gracie that that an investigatory conference was scheduled for August 2, 2018 concerning an allegation that she had improperly disposed of used floor stripper solution. U. Ex. 28. At all times material, Dudzik was an agent of the District,

1 References to exhibits in this matter will be as follows: Union's exhibits, "U. Ex. ___", District's exhibits, "D. Ex. ___", Joint exhibits, "Jt. Ex. ___", and ALJ exhibits, "ALJ Ex. ___". References to the transcript of proceedings will be "Tr. ___".

authorized to act on its behalf. Gracie attended the investigatory conference with Union Representative Nick Reid (Reid). U. Ex. 27. Dudzik and Assistant Superintendent of Business Services Lucero Moreno attended on behalf of the District. U. Ex. 27. The result was a determination that there was insufficient evidence for the District to pursue any disciplinary action. U. Ex. 27.

On or about July 31, 2018, acting in her capacity as Union steward, Gracie filed a grievance on behalf of fellow bargaining unit member George Frederick (Frederick) alleging that the District violated the CBE when it failed to interview Frederick or notify him of the result of his application for a Custodian I position (Fredrick grievance). U. Ex. 4; Tr. 35. At the time the grievance was filed, Frederick was employed by the District as a Custodian II. U. Ex. 4. On or about August 3, 2018, acting in her capacity as Union steward, Gracie filed an all-affected grievance alleging that the District failed to interview internal applicants for the Custodian I position. U. Ex. 4; ALJ Ex. 8; Tr. 9. Union Representative Reid assisted Gracie with the grievances and both their names appear on the grievances. Tr. 37; U. Ex. 4. The Custodian I position at issue in the grievances was filled by a relative of one of the District's Board of Education members. Tr. 40, 152, 295. On or about August 13, 2018, Respondent issued a Step 2 Grievance response. ALJ Ex. 8; Tr. 9. Gracie attended the step meetings for Frederick's grievance. Tr. 101. Superintendent Colleen McKay (McKay), District Director of Facilities Dan Grand (Grand), Dudzik, and District Human Resources Assistant Kathy Hinz attended those step meetings on Respondent's behalf. Tr. 101.

When Gracie asked Grand in August 2018 why the new custodian's duties were divided up between two schools instead of just Hale, he told her that when you cause trouble that's what you get, you get it taken away. Tr. 97–100. In a letter to Gracie dated August 31, 2018, Grand indicated the gym windows Gracie had been directed to clean were dirty and had not been cleaned, outlined his expectations that Gracie clean the gym windows and follow the Night Custodial Supervisor's directives, and advised Gracie that further disciplinary action may be taken against her if she failed to meet the expectations. U. Ex. 26. At all times material, Grand was an agent of the District, authorized to act on its behalf. Tr. 34, 41–42. It is not clear from the record whether this letter is considered discipline.

Gracie routinely put scented material in plastic baggies and placed them in school bathrooms to keep the air smelling fresh. Tr. 49. On the morning of September 7, 2018, she was behind schedule and was already well into her cleaning duties when she realized she was short on baggies. Tr. 49. Believing teacher Grace Haberkorn (Haberkorn) might already be there, she went into Haberkorn's classroom Tr. 49. Haberkorn had not arrived and Gracie opened a cabinet in the classroom to see if there were any baggies she could borrow. Tr. 49. Then Haberkorn came in and was upset to find Gracie in her cabinets holding Ziploc or Ziplock style bags that Haberkorn used for her students. ALJ Ex. 8; Tr. 9, 49, 257–259. Haberkorn testified that upon seeing her, Gracie said that she was going to ask her permission to use the bags. Tr. 265. Haberkorn then exited the classroom. Tr. 266. Later that day, Gracie returned to Haberkorn's classroom with a box of plastic bags and replenished what she had used. Tr. 53, 266–268.

Believing in the hours following the incident that Gracie had made a bad choice by taking bags out of her cabinet without permission, Haberkorn wanted Gracie to know in the future that was not okay with her. Tr. 271. Haberkorn did not know if Gracie understood that and wanted a supervisor to speak with her because she was a second-year teacher at that time. Tr. 271. Haberkorn did not want Gracie to be fired. Tr. 271. Haberkorn spoke with Hale Principal Alicia Smith (Smith) later that day about the incident. Tr. 260, 271. Because Smith directed Haberkorn to email her a written account of what she had told her, Haberkorn sent an email to Smith stating:

> I just wanted to bring this to your attention:
> I came in to [sic] my classroom this morning earlier than usual and Sue Gracie was taking supplies from the drawers in my classroom. She did replace what was taken later than day, but I let her know that in the future I would like her to ask me before taking items from the classroom as they are intended for the children.

D. Ex. 1; Tr. 260.

Smith forwarded Haberkorn's email to McKay and Dudzik. D. Ex. 1. Dudzik and Hinz investigated the incident that occurred in Haberkorn's classroom on September 7, 2018 (Ziplock incident). ALJ Ex. 8; Tr. 9. In a letter dated September 20, 2018, Dudzik notified Gracie of the allegation that she had taken bags from a teacher's supply cabinet without permission and that she would have the opportunity to respond to the allegation during a

meeting on September 25, 2018. U. Ex. 8. At McKay's direction, the District placed Gracie on suspension with pay starting September 24, 2018 pending the outcome of the investigation. U. Ex. 9. At all times material, McKay was an agent of the District, authorized to act on its behalf.

In another letter also dated September 24, 2018, Grand notified Gracie the timesheet she submitted for overtime from September 10 through 21, 2018 was not for overtime he had approved in advance per the CBA and as a result, he would not approve it for payment.[2] U. Ex. 24.

After Dudzik concluded investigating the Ziplock incident, he prepared a report recommending that Gracie be terminated and submitted it to McKay and the District's attorneys. Tr. 217–218. In a letter to Gracie dated November 20, 2018, McKay stated that she would be recommending Gracie's discharge to the District's Board of Education because of the Ziplock incident. U. Ex. 11. On November 28, 2018, the District's Board of Education voted to terminate Gracie's employment. ALJ Ex. 8; Tr. 9. The following day, Respondent sent Gracie a letter informing her that her employment was terminated effective November 28, 2018. ALJ Ex. 8; Tr. 9.

Haberkorn described Gracie as someone who was kind to her students and did a good job cleaning her classroom. Tr. 263, 269. Prior to the Ziploc incident, Haberkorn had no complaints about Gracie. Tr. 263. Haberkorn was visibly upset during her testimony, she spoke in a quiet, flat tone and at times I observed her crying as she testified. She had simply hoped Gracie would be spoken to so it would not become a pattern and admitted that had she known that Gracie's termination would have been the outcome, she would never have reported her. Tr. 269–271.

2 Gracie testified that "[W]hen I asked for overtime, I was denied overtime due to the fact that I was stated that we were causing problems." Tr. 96. There was no foundation laid for that portion of her testimony. It is not clear who allegedly made the statement or when they made it. In its post-hearing brief, the District indicates that Gracie attributed the statement to Grand. I am unable to draw that conclusion. Because it is lacking the requisite foundation, I do not credit the portion of Gracie's testimony quoted earlier in this footnote. The District further attacks Gracie's overall credibility due to some minor inconsequential inconsistencies during this hearing and its interviews of her following the Ziplock incident. However, I do not find that those alleged inconsistent statements are dispositive of any issue in this case or significant enough to undermine Gracie's credibility. Aside from the portion of Gracie's statement quoted earlier in this footnote, I found her testimony credible.

In Paula Tagler's (Tagler) experience as a teacher at Hale, custodians ask teachers to borrow supplies.[3] Tr. 160. Tagler told Gracie that if she was not there, Gracie could take what she needed when she needed it. Tr. 160. If Gracie ever borrowed anything from Tagler, she told her about it and asked if she could replace it. Tr. 160. Custodians often needed to use teachers' supplies at Hale. Tr. 164.

In 2014, Custodian I J. Coreas (Coreas) received a written reprimand for allegedly stealing two bags of salt from the District. U. Ex. 14; Tr. 54–56, 241. Coreas is a Union member, but not a Union steward or a member of the bargaining committee. Tr. 57. McKay did not work for the District in 2014 and the makeup of the District's Board of Education was different. Tr. 88, 226, 240, 283. Dudzik was not the District's Superintendent of Human Resources in 2014, he was Hale's principal. Tr. 240. Dudzik claimed that he was not aware of the Coreas salt incident in 2014 and as Hale's principal at that time, that he would not have knowledge of such incidents. Tr. 240. Despite this, it was Hale's current principal, Smith, who reported the Ziplock incident to him in his current capacity as Superintendent of Human Resources. Dudzik did not know why one employee would be given a written reprimand for stealing two bags of salt and another employee terminated for stealing two Ziploc bags. Tr. 241. Other than Gracie, Dudzik has never disciplined a custodian for taking cleaning supplies from teachers' classrooms to use for school cleaning purposes. Tr. 235. Other than Gracie and Coreas, the record does not indicate any allegations of theft of District property by employees.

On December 3, 2018, the Union filed a grievance at step three of the grievance procedure alleging that the District violated Articles II (Sec. C) and III (Sec. A) of the CBA when it terminated Gracie's employment (Gracie's grievance). U. Ex. 13; Tr. 171. The CBA's grievance procedure section contains the following:

> C. Limitation of Remedies:
> In the event a member of the bargaining unit commences a proceeding in any State or Federal court or administrative agency against the Board and/or Superintendent and his/her administrative staff with an alleged violation of any of the terms of this Agreement, such remedy shall be exclusive and the said member of the bargaining unit shall be barred from invoking any formal remedy provided by this Grievance

3 Tagler was retired at the time of the hearing. Tr. 163. She worked as a teacher at Hale from 1989 until she retired in 2016. Tr. 157, 163.

> Procedure, along with an obligation not to pursue such an alternative after a final decision has been rendered as per the terms of the preceding grievance procedures.
>
> (D. Ex. 1)

The District denied the grievance at steps three and four. U. Ex. 16; Tr. 171. On February 1, 2019, the Union notified the District that it was moving Gracie's grievance to arbitration. U. Ex. 18; Tr. 175–176. The District responded on February 12, 2019, refusing to arbitrate, and notifying the Union that it filed an action in Cook County Circuit Court for a judicial determination and order declaring that the instant charge rendered the grievance inarbitrable and to stay all proceedings under the grievance.[4] U. Ex. 18; Tr. 176. Thereafter, the District continued to refuse to arbitrate Gracie's grievance. U. Ex. 30.

The Complaint in this matter issued in March 2019. ALJ Ex. 3. The Union initially made a motion to the Board's Executive Director to amend the Complaint in April 2019 to include an allegation that the District refused to arbitrate the grievance in violation of Section 14(a)(1) of the Act. [5] Tr. 12. Having received no response to its motion from the Executive Director, the Union made the motion to the undersigned ALJ during the hearing.[6] Tr. 12, 197, 199. I granted Complainant's motion at the conclusion of its case in chief and amended the complaint. Tr. 205. I also gave the District leave to file its Motion to determine that Gracie's grievance is not arbitrable and to strike the Union's amended charge with its post-hearing brief. Tr. 203.

II. Issues and Contentions

The Complaint alleges that Respondent violated Section 14(a)(3) of the Act when it terminated Gracie's employment because of her union activity and in order to discourage support for the Union. The Complaint was amended during the hearing to allege that Respondent also committed an independent violation of Section 14(a)(1) of the Act when it failed or refused to arbitrate Gracie's grievance. Complainant argues that the Board should

4 The Union reports in its post-hearing brief that it filed a Motion to Dismiss the District's Circuit Court action on the grounds that it was improperly filed with the Court and that the District voluntarily dismissed its action from the Court.

5 Section 1105.100(g) of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code §§ 1100–1135, provides that the Board's Executive Director may amend the complaint prior to the hearing.

6 Section 1105.120(j) of the Rules allows the ALJ to amend a complaint before the hearing concludes.

hold that Respondent violated Section 14(a)(1) of the Act and compel Respondent to arbitrate Gracie's arbitrable termination grievance and that Respondent violated Section 14(a)(3) of the Act by disciplining and discharging Gracie in retaliation for her recent protected activity. Respondent argues that Complainant has presented insufficient evidence to prove its case and requests the Complaint be dismissed in its entirety.

III. Discussion and Conclusions of Law

A. 14(a)(1)

Section 14(a)(1) of the Act prohibits educational employers and their agents or representatives from "[i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act." An employer's refusal to arbitrate a grievance violates Section 14(a)(1) of the Act. *Board of Educ. of City of Chicago v. Illinois Educ. Labor Relations Board*, 69 N.E.3d 809 (2015); *Cobden Unit School District No. 17 v. IELRB*, 966 N.E.2d 503 (1st Dist. 2012); *Board of Trustees, Prairie State College v. IELRB*, 173 Ill. App. 3d 395, 527 N.E.2d 538 (4th Dist. 1988). There are two valid defenses to an unfair labor practice charge based on an educational employer's refusal to arbitrate a grievance: (1) there is no contractual agreement to arbitrate the dispute; or (2) the grievance is not arbitrable under Section 10(b) of the Act due to a conflict with an Illinois statute. *Board of Educ. of City of Chicago*, 69 N.E.3d 815; *Cobden Unit School District*, 966 N.E.2d 503; *Niles Township High School District 219 v. IELRB*, 379 Ill. App. 3d 22, 883 N.E.2d 29 (1st Dist. 2007); *Chicago Teachers Union v. IELRB*, 344 Ill. App. 3d 624, 800 N.E.2d 475 (1st Dist. 2003).

The District asserts the first defense, that it did not contractually agree to arbitrate disputes where an election of remedies has been made. In support of its assertion, the District points to the limitation of remedies provision in the CBA, that if "a *member of the bargaining unit* commences a proceeding in any ... administrative agency against the Board ... with an alleged violation of any of the terms of this Agreement, such remedy shall be exclusive and the said member of the bargaining unit shall be barred from invoking any formal remedy provided by this Grievance Procedure, along with an obligation not to pursue such an alternative after a final decision has been rendered as per the terms of the preceding grievance procedures." [Emphasis added]. D. Ex. 1. Yet it was the Union, not Gracie or any other bargaining unit member, who filed the instant charge. The Union is listed on the charge form as the name of

the party filing the charge and it is signed by the Union's Deputy General Counsel. ALJ Ex. 2. The Union is the only named Complainant on the Complaint. ALJ Ex. 3. There is a presumption favoring arbitration, and in cases of doubt the matter should be sent to arbitration. *Board of Governors of State Colleges & Universities v. IELRB*, 170 Ill. App. 3d 463, 524 N.E.2d 758 (4th Dist. 1988); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Any exclusion from arbitration must be expressly stated in the contract. *Staunton Community Unit Sch. Dist. No. 6 v. IELRB*, 200 Ill. App. 3d 370, 558 N.E.2d 751 (4th Dist. 1990); *Rock Island County Sheriff v. AFSCME, Council 31*, 339 Ill. App. 3d 295, 791 N.E.2d 57 (3rd Dist. 2003). In the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where the arbitration clause is broad. *Warrior & Gulf*, 363 U.S. 574. Apart from matters specifically excluded under the contract, "all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provision of the collective agreement." *Id.* This conforms to the general policy that questions about arbitrability be resolved in favor of arbitration. In this case, there is no express language excluding this matter from arbitration because the limitation of remedies provision does not apply to charges initiated by the Union. Accordingly, I do not find the District's asserted defense to its refusal to arbitrate Gracie's grievance valid. It follows that by refusing to arbitrate Gracie's grievance, the District violated Section 14(a)(1) of the Act.[7]

B. 14(a)(3)

Section 14(a)(3) of the Act & prohibits educational employers, their agents, or representatives from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization." In order to establish its prima facie case of a 14(a)(3) violation, the complainant must prove by a preponderance of the evidence, that the employee engaged in union activity, the respondent was aware of that activity, and the respondent took adverse action against the employee for engaging in that activity based, in whole or in part, on anti-union animus, or that union activity was a substantial or motivating factor. *Speed Dist. 802 v. Warning*, 242 Ill. 2d 92,

7 In light of my finding that the District's refusal to arbitrate Gracie's grievance violated Section 14(a)(1) of the Act, its Motion to determine that Gracie's grievance is not arbitrable and to strike the Union's amended charge is denied.

950 N.E.2d 1069 (2011); *City of Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 345–346, 538 N.E.2d 1146, 1149–1150 (1989); *Bloom Township High School v. IELRB*, 312 Ill. App. 3d 943, 957, 728 N.E.2d 612, 624 (1st Dist. 2000). Once the complainant establishes a prima facie case, the burden shifts to the respondent to demonstrate, by a preponderance of the evidence, that it had a legitimate business reason for its actions and that the employee would have received the same treatment absent her union activity. *City of Burbank*, 128 Ill. 2d 335, 538 N.E.2d 1146. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. *Id.* If the proffered reasons are merely litigation figments or were not, in fact relied upon, then the respondent's reasons are pretextual and the inquiry ends. *Id.* However, when legitimate reasons for the adverse employment action are advanced and are found to be relied upon at least in part, then the case may be characterized as a "dual motive" case, and the respondent must establish, by a preponderance of the evidence, that the action would have been taken notwithstanding the employee's union activity. *Id.*

The record contains examples of Gracie's union activity and demonstrates Respondent's awareness of those activities. The parties stipulated that Gracie was a Union steward. She served as a member of the Union's bargaining team and filed and attended step meetings for grievances on behalf bargaining unit members. As a party to bargaining and the grievances, Respondent would have been necessarily aware of this activity. The District argues that Gracie did not file the Frederick grievance. This argument fails because Gracie's name appears on the face of the Frederick grievance. Even if it did not, the record is clear that Gracie was involved in the Frederick grievance because she attended step meetings for the grievance. Gracie sought the Union's assistance by having Reid accompany her to her August 2, 2018 investigatory conference which the District was aware of because it convened the conference. Accordingly, I find that Respondent was aware of Gracie's union activity.

Respondent's termination of Gracie's employment was adverse employment action. In order to establish the third element of a prima facie case, there must be evidence that the adverse action was based, in whole or in part, on animus toward union activity, or that union activity was a substantial or motivating factor. *City of Burbank*, 128 Ill. 2d at 346, 538 N.E.2d at 1150. Because motive is a question of fact, it can be inferred from either direct or

circumstantial evidence. *Id.* Unlawful motive can be demonstrated by various factors, including expressions of hostility toward unionization, together with knowledge of the employee's union activities; timing of the adverse action in relation to the occurrence of the union activity; disparate treatment or targeting of union supporters; inconsistencies between the reason offered by the respondent for the adverse action and other actions of the respondent; and shifting explanations for the adverse action. *Id.* The record evidence indicates that there are several of these factors present in this case.

The District expressed hostility toward unionization by Grand's August 2018 statement to Gracie that's what you get when you cause trouble as to why the new custodian's duties were divided between two schools. The timing of the adverse action supports a causal connection. Gracie was discharged within a few months after she filed a grievance on another bargaining unit member's behalf challenging a Board of Education member's relative's hire. There is evidence of disparate treatment or targeting of union supporters. The only other allegation of employee theft in the record resulted in a written reprimand. The record does not indicate that that employee, Coreas, engaged in any union activity. Yet Gracie, who engaged in an abundance of union activity, was discharged. The disparity between the level of disciplinary measures the District took against two employees for the same offense, theft, demonstrates inconsistency between the reason offered by the District for terminating Gracie, theft, and its other actions. The record does not contain any evidence as to Coreas' disciplinary record prior to his written reprimand for theft. It is unlikely to be any more stellar than Gracie's twenty years on the job without any history of discipline. Even absent the comparison to Coreas, the severity of Gracie's offense, taking supplies without permission to use as part of her job and then replacing them, does not seem to merit discharging a twenty year employee with no prior history of discipline. Particularly given that custodians at Hale frequently asked teachers for supplies, to the point where Tagler told Gracie to take what she needed if she was not around. Haberkorn's tearful demeanor and her testimony that she never would have reported Gracie if she had known it would lead to termination support the incongruent severity of Gracie's discharge as discipline.

The District further contends that there is no evidence that its Board of Education, who made the final decision to terminate Gracie, had any knowledge of her union activity.

However, its agents Dudzik and McKay had knowledge of her union activity, as they attended the step meetings on the District's behalf and Dudzik attended Gracie's August 2018 investigatory conference where she was accompanied by Union Representative Reid. Dudzik, who was aware of Gracie's union activity, prepared a report recommending Gracie's termination. McKay, who was likewise aware of Gracie's union activity, recommended to the Board of Education that Gracie's termination. Where an adverse employment action results from a recommendation or involvement of an employer representative who harbors unlawful motive, the employment action is unlawful, even if the employer's governing body does not harbor unlawful motive. *Chicago Board of Education*, 31 PERI 24, Case No. 2012-CA-0016-C (IELRB Opinion and Order, July 17, 2014); *McLean County Unit District 5, a/k/a Board of Education of McLean County Unit District 5*, 30 PERI 207, Case No. 2011-CA-0005-S (IELRB Opinion and Order, February 20, 2014), rev'd on other grounds, 382 Ill. Dec. 120, 12 N.E.3d 120 (4th Dist. 2014); *Staub v. Proctor Hospital*, 562 U.S. 411 (2011); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 (6th Cir. 1987). That is, if the adverse action would not have been before the ultimate decision-maker but for the unlawful motive of an employer representative, the decision has been unlawfully tainted by that motive. *City of Harvey*, 18 PERI 2032 (IL SLRB 2002). Accordingly, based on the foregoing, I find that Complainant has proved a prima facie case that Respondent violated Section 14(a)(3) of the Act.

The burden now shifts to Respondent to demonstrate, by a preponderance of the evidence, that it had a legitimate business reason for discharging Gracie and that she would have received the same treatment if she had not engaged in union activity. Respondent asserts that it discharged Gracie because of the Ziplock incident. It is unlikely that Respondent's legitimate business reason is anything more than pretext because when Coreas engaged in similar behavior he only received a written reprimand. For these reasons, I find that Respondent has not met its burden to demonstrate that it had legitimate business reasons for its actions and that Gracie would have received the same treatment in absence of her union activity. Instead, the District's proffered legitimate business reason was not actually relied upon but is pretextual. Consequently, the Union has established an unrebutted prima facie case and I find that the District violated Section 14(a) (3) and (1) of the Act.

IV. Recommended Order

Respondent, Cook County School District 130, its officers, and agents shall:

1. Cease and desist from:
    (a) Refusing to arbitrate Susan Gracie's grievance.
    (b) Retaliating against Gracie, or any of its other employees, for engaging in union activity.
    (c) Otherwise interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
    (a) Arbitrate, at the request of the Union, Gracie's grievance.
    (b) Offer Gracie immediate and full reinstatement to the position of Custodian I without prejudice to her seniority or other rights and privileges.
    (c) Make Gracie whole for all loses she incurred by Respondent denying her employment as Custodian I, including backpay with interest computed at a rate of 7% per annum as allowed by the Act, calculated from November 28, 2018 until she is unconditionally reinstated.
    (d) Expunge from all its files and records any and all references to Gracie's termination and notify her in writing that this has been done and that evidence of the unlawful adverse action will not be used as a basis for future personnel actions against her.
    (e) 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 the duties they perform for Respondent, signed copies of the attached notice. Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.
    (f) 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 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 Associate General Counsel, Dawn Harden. 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. Adm. 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. Adm. 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: **January 6, 2020**
Issued: Chicago, Illinois

/s/ ***Ellen Maureen Strizak***
Ellen Maureen Strizak
Administrative Law Judge

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