STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO,	)	
Complainant	)	
and	)	Case No. 2021-CA-0043-C
Chicago Board of Education,	)	
Respondent	)	

OPINION AND ORDER

On October 23, 2020, Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO (Union) filed an unfair labor practice charge against Chicago Board of Education (CBE) with the Illinois Educational Labor Relations Board (IELRB or Board) alleging that CBE 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, *et seq*., by, *inter alia,* refusing to bargain in good faith with the Union over its decision to resume in-person learning for some of its students during the COVID-19 pandemic.[1] In its charge, the Union requested that the IELRB seek preliminary injunctive relief under Section 16(d) of the Act. A Complaint and Notice of Hearing (Complaint) followed on the portion of the charge alleging that CBE violated Section 14(a)(5) of the Act by announcing its intent to re-open school buildings for pre-kindergarten and students enrolled in moderate and cluster intensive programs later in its second quarter of the school year without bargaining in good faith with the Union.[2] On November 5, we denied the Union's request for injunctive relief. On November 17, CBE set forth the following schedule for return to in-person learning: intent to return form sent to K–8 staff on November 23, intent to return deadline for K–8 staff December 7, pre-k and cluster program staff return on January 4, 2021, students in pre-k and cluster programs return on January 11, 2021, K–8 staff return on January 25, 2021, K–8 students return on February 1, 2021. The Union filed a Renewed Motion for Injunctive Relief (Renewed Motion) on December 7, arguing that CBE's schedule for employees to return to work made this case ripe for relief under Section 16(d) of the Act. The parties have set forth their positions on the Union's Renewed Motion through written submissions. We have carefully considered those positions. For the reasons below, we deny the Union's Renewed Motion.

[1] All dates referenced herein occur in 2020 unless otherwise indicated.

[2] The Executive Director issued a Recommended Decision and Order dismissing the portion of the charge alleging CBE violated the Act by refusing to arbitrate the Union's grievance.

I. Discussion

Section 16(d) of the Act provides that, upon issuance of an unfair labor practice complaint, the IELRB may petition the circuit court for appropriate temporary relief or a restraining order. Because the Executive Director has issued a complaint in this case, the statutory prerequisite has been satisfied. Preliminary injunctive relief is appropriate where there is reasonable cause to believe that the Act may have been violated and where injunctive relief is just and proper. *University of Illinois Hospital*, 2 PERI 1138, Case Nos. 86-CA-0043-C, 86-CA-0044-C (IELRB Opinion and Order, October 21, 1986).

For there to be reasonable cause to believe that the Act may have been violated, there must be a significant likelihood of the complainant prevailing on the merits. *Cahokia Community Unit School District No. 187*, 11 PERI 1059, Case No. 95-CA-0029-S (IELRB Opinion and Order, June 15, 1995). Although issuance of a complaint is the statutory prerequisite for our consideration of a request for injunctive relief, something more is required to establish a significant likelihood of prevailing on the merits. *Zion-Benton Township High School District 126*, 17 PERI 1015, Case No. 2001-CA-0031-C (IELRB Opinion and Order, March 6, 2001); *Chicago Teachers Union Local No. 1, IFT/AFT, AFL-CIO*, 3 PERI 1111, Case Nos. 88-CB-0003-C through 88-CB-0023-C (IELRB Opinion and Order, September 11, 1987).

In our previous opinion and order in this matter we found that there was not reasonable cause to believe that the Act was violated. We recognized that CBE announced a goal of bargaining unit members returning to the physical workplace at an uncertain date, but at that time had not made any movement in furtherance of its goal that would amount to a unilateral change. We indicated that we would be open to reviewing whether there is reasonable cause to believe that the Act has been violated if CBE directed employees to return to work on a specific date without first bargaining in good faith with the Union. Since then, CBE announced specific dates for certain teachers and staff to return to schools for in-person learning.

Despite this, there are factual disputes as to whether CBE's conduct amounted to bad faith bargaining. The Union contends that CBE has failed to bargain over its decision to return to in-person learning, but CBE claims that the parties have met 43 times since June. They began meeting weekly in June and have been meeting twice a week since mid-August, reports CBE. It is unclear whether these meetings were bargaining sessions. CBE submitted an affidavit from its Labor Relations Officer characterizing the meetings as such. The Union disputes this. CBE asserts that it put forth proposals on health and safety issues that the Union did not respond to until the 43rd meeting on December 10. As in our recent finding involving school clerks, *Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO/Chicago Board of Education*, 37 PERI ___, Case No. 2021-CA-0014-C (IELRB Opinion and Order, September 17, 2020), the resolution of these factual disputes depends upon the testimony of witnesses in an evidentiary hearing before an Administrative Law Judge (ALJ). As a result, whether a substantial likelihood of prevailing on the merits exists depends on a relative assessment of the credibility of both Union and CBE witnesses. This is something that is done by the ALJ, not the Board. Whether the Union is likely to

prevail on the merits depends on credibility resolutions in its favor. The credibility of witnesses' testimony cannot be assessed at this stage of the proceedings. We cannot conclude that there is a significant likelihood of the Union prevailing on the merits because critical facts are still in dispute.

CBE renews the argument it made in response to the Union's initial request for injunctive relief in this matter: that resumption of in-person learning is a permissive subject of bargaining under Section 4.5 of the Act because it concerns places of instruction.[3] According to CBE, it is obligated to bargain over the impact of that decision if requested by the Union, but is authorized to implement its decision while impact bargaining is ongoing. CBE acknowledges its obligation to engage in impact bargaining with the Union over any decision to return to in-person learning. The Union claims that CBE's willingness to meet and hear its concerns about the impact of its decision in no way validates CBE's violation of its mandatory duty to bargain about health and safety issues. That well may be, or it may not. Depending on whether the return to in-person learning is considered a permissive subject of bargaining under Section 4.5 of the Act because it concerns places of instruction or a mandatory subject of bargaining because it concerns employee health and safety. *Chicago Board of Education*, 20 PERI 63, Case No. 2004-CA-0001-C et. al (IELRB Opinion and Order, May 11, 2004) (Grievances over placement of teachers in the reassigned teacher pool, their termination or the procedures followed prior to termination were arbitrable because they did not concern places of instruction under Section 4.5 of the Act. The Board defined places of instruction as the physical locations where instruction is provided). *But see NLRB v. Gulf Power*, 384 F.2d 822 (5th Cir. 1967) (employee safety is a mandatory subject of bargaining); *Voith Industrial Services*, 363 NLRB No. 109 (2016); *Forest Preserve District of Cook County*, 34 PERI ¶106 (IL LRB-LP ALJRDO 2017). In our previous decision in this matter, we specified that we made no finding as to whether Section 4.5 renders the resumption of in-person learning a permissive subject of bargaining because the issue before us was whether to seek injunctive relief. We still find this to be true, and at this stage in the case do not make any determination as to whether Section 4.5 applies.[4] But it remains that this unresolved issue of law demonstrates that the Union has not established reasonable cause to believe that CBE violated the Act. *East St. Louis School District 189*, 11 PERI 1082,

Because there is not reasonable cause to believe that the Act was violated, we will not address whether preliminary relief is just and proper.

II.

For these reasons, we denied the Union's request that we seek preliminary injunctive relief pursuant to Section 16(d) of the Act.

[3] Section 4.5 of the Act is only applicable to collective bargaining between an educational employer whose territorial boundaries are coterminous with those of a city having a population in excess of 500,000 and an exclusive representative of its employees. HB 2275, repealing Section 4.5 of the Act passed both houses on January 11, 2021, but has not been signed into law by the Governor as of the date of this opinion and order.

[4] We are open to reviewing whether Section 4.5 applies in this case at a later stage in the proceedings.

III.

This is not a final order that may be appealed under the Administrative Review Law. *See* 5 ILCS 100/10-50(b); 115 ILCS 5/16(a).[5]

Decided: **January 21, 2021**
Issued: **January 22, 2021**

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

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

Member Lynne O. Sered, dissenting

For the reasons below, I dissent from my colleagues' Opinion and Order denying the CTU's renewed motion requesting preliminary injunctive relief pursuant to 16(d) of the Illinois Educational Labor Relations Act.

I find no merit in CBE's argument that the resumption of in person learning is a permissive subject of bargaining under Section 4.5 of the Act. It is well established that the health and safety of employees is a mandatory subject of bargaining and as such, CBE is obligated to bargain over the decision to require employees to return to in person instruction. *NLRB v. Gulf Power*, 384 F.2d 822 (5th Cir. 1967); *Voith Industrial Services*, 363 NLRB No. 109 (2016); *Forest Preserve District of Cook County*, 34 PERI¶106 (IL LRB-LP ALJRDO 2017).

CBE relies on *Chicago Board of Education*, 20 PERI 63 to argue that the issue herein, is a permissible subject of bargaining which requires CBE to only bargain the impact of the decision. In *Chicago Board of Education*, 20 PERI 63, the Board defined places of instruction under Section 4.5 of the Act as the physical locations where instruction is provided. That case is distinguishable from this matter for two reasons. First, because it concerned CBE's implementation of an arbitration award that the Board found to be inconsistent with the Act, not CBE's refusal to bargain the implementation of a matter it deemed permissible. The arbitrator found that grievances over placement of teachers in the reassigned teacher pool, their termination or the procedures followed prior to termination were inarbitrable because they did not concern places of instruction under Section 4.5 of the Act. The Board found the aforementioned subjects were not places of instruction under 4.5 and defined places of instruction as the physical

[5] Board Member Chad D. Hays took no part in the Board's decision in this matter because he began his Board appointment on January 4, 2021, subsequent to the Board's deliberation and denial of the Union's Renewed Motion.

locations where instruction is provided. Second, Section 4.5 was not drafted to apply to instruction during a global pandemic and that case was not decided in the context of a global pandemic. Rather, in cases we have decided in the context of a global pandemic, we have found that requiring employees to be physically present in schools during the COVID-19 pandemic is a mandatory subject of bargaining because it is a health and safety issue. *Chicago Board of Education*, ___ PERI ___, Case No. 2021-CA-0014-C (IELRB Opinion and Order, September 17, 2020); *Western Illinois University*, ___ PERI ___, Case No. 2021-CA-0009-C (IELRB Opinion and Order, September 17, 2020). In my view, health and safety is a mandatory subject of bargaining which may not be disregarded by the provisions of 4.5 of the Act. Particularly, in light of the fact that the General Assembly when contemplating 4.5, could not have envisioned the scenario we now find ourselves in. By its own admission, the Chicago Board of Education relying on 4.5 of the IELRB implemented its decision to return to in person learning without bargaining that decision with the CTU. Contrary to the majority's decision is this matter, there are no factual disputes that need to be resolved in order to seek preliminary injunctive relief as the CBE presented the CTU with a fait accompli when it issued its reopening schedule. Thereby, refusing to bargain in good faith over a mandatory subject of bargaining. For these reasons, there is reasonable cause to believe that the Act may have been violated.

The public interest will be affected to a great degree by CBE's refusal to bargain because it could potentially lead to the further and unnecessary spread of COVID-19. Not just to bargaining unit members and their families, but also to CBE students and their families. Quite literally we are dealing with life and death issues. Ordinary IELRB remedies, such as backpay, are not adequate to remedy the irreparable harm resulting from the potential spread of COVID-19. The effects of CBE's alleged violation of the IELRA, that is, its failure to bargain, are serious and extraordinary. Consequently, preliminary relief is just and proper.

In view of the foregoing conclusion that preliminary injunctive relief is appropriate under these circumstances, contrary to my fellow Board members decision, I decline to join the majority Opinion and Order. Instead. I would direct the IELRB's General Counsel to seek the following injunctive relief: To prevent CBE from requiring bargaining unit members to report for in-person learning pending the IELRB's resolution of the instant unfair labor practice charge.

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

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