STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Elmhurst Teachers Council, West Suburban Teachers Union, Local 571, IFT-AFT, AFL-CIO, Complainant	)	
and	)	Case No. 2021-CA-0049-C
Elmhurst Community Unit School District No. 205, Respondent	)	

Elmhurst Paraprofessional and School Related Personnel Council, West Suburban Teachers Union, Local 571, IFT-AFT, AFL-CIO, Complainant	)	
and	)	Case No. 2021-CA-0050-C
Elmhurst Community Unit School District No. 205, Respondent	)	

OPINION AND ORDER

On December 29, 2020, West Suburban Teachers Union, Local 571, IFT-AFT, AFL-CIO filed unfair labor practice charges against Elmhurst Community Unit School District No. 205 (District) with the Illinois Educational Labor Relations Board (IELRB or Board) on behalf of its Elmhurst Teachers Council (ETC) and Elmhurst Paraprofessionals and School Related Personnel Counsel (PSRP) (collectively referred to herein as Union). The charges 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, *et seq*., by refusing to bargain in good faith with the Union over its decision to resume hybrid learning during the COVID-19 pandemic and unilaterally changing the criteria for the resumption of hybrid learning. In its charges, the Union requested that the IELRB seek preliminary

injunctive relief under Section 16(d) of the Act. After investigation, the Board's Executive Director issued a Complaint and Notice of Hearing for each charge alleging that the District violated Section 14(a)(5) of the Act when it decided on December 15, 2020 that it would resume hybrid classes as of January 11, 2021, thereby requiring all members of the ETC and PSRP bargaining units to be physically present in school each day.[1] The parties have set forth their positions on the Union's request for injunctive relief through oral argument and written briefs. We have carefully considered those positions. For the reasons set forth below, we denied the Union's request that the IELRB seek preliminary injunctive relief pursuant to Section 16(d) of the Act.

I. Discussion

ETC has been and is the exclusive representative within the meaning of Section 2(d) of the Act of a bargaining unit of approximately 700 teachers and other professional employees of the District. PSRP has been and is the exclusive representative within the meaning of Section 2(d) of the Act of approximately 225 paraprofessionals employed by the District. The District is an educational employer within the meaning of Section 2(a) of the Act. There are fourteen schools in the District, including eight elementary schools, three middle schools, one high school, a transition program, and an early childhood center.

District employees began working remotely in March 2020, when Governor J.B. Pritzker issued an Executive Order directing schools to shut down in-person learning and convert to a remote learning format in light of the COVID-19 pandemic. Members of both bargaining units physically returned to schools when the District phased in hybrid learning in or around September 2020. In late October 2020, the District took an adaptive pause and moved back to remote learning for all students and bargaining unit members returned to working remotely. The adaptive pause was based on

1 The charges have not been consolidated for hearing. The allegations in the charges and the complaints in both cases are identical and the parties have briefed the cases together, so the Board considered them together for the limited purpose of determining whether injunctive relief is appropriate.

DuPage County health metrics. On November 30, 2020, a small group of students with disabilities returned to schools for in-person learning. Bargaining unit members who worked with these students also returned to schools at that time. In November 2020, the District adopted specific health criteria for determining whether to continue remote learning or to return to hybrid classes. The Union admits that it did not demand to bargain the District's decisions to begin phased-in hybrid learning, to take an adaptive pause, or to use specific health criteria for determining whether to continue remote learning or to return to hybrid classes because it did not object to those decisions. The Union reports that as of December 9, 2020, as far as plans for January 2021, members of the District administration recommended a gradual return to the hybrid model that would stretch over five weeks. The Union believed this would be consistent with the previously adopted health criteria. On December 15, 2020, the District's Board of Education adopted a plan to return to hybrid learning on January 11, 2021. The Union believed the plan contradicted the previously adopted specific health criteria. The Union sent the District a demand to bargain. When the parties met on December 28, 2020 and January 7, 2021, the health and safety discussion seems to have centered around whether the District had gotten a hazard assessment. The parties' submissions do not indicate that agreement was reached. It is unclear from the record currently before us what sort of agreement the Union was looking for from the District.

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).

This case is not about whether unions get to decide when schools resume in-person learning, it is about the process of bargaining. The Union alleges that the District violated Section 14(a)(5) of the Act by refusing to bargain in good faith over its decision to resume hybrid learning during the COVID-19 pandemic and unilaterally changing the criteria for the resumption of hybrid learning. Section 14(a)(5) of the Act prohibits educational employers from refusing to bargain collectively in good faith. An educational employer violates Section 14(a)(5) when it unilaterally changes mandatory subjects of bargaining without bargaining in good faith to impasse. *Vienna School District No. 55 v. IELRB*, 162 Ill. App. 3d 503, 515 N.E.2d 476 (4th Dist. 1987). It is well-settled that an employer must notify and bargain to agreement or impasse with an exclusive representative before implementing any change in employees' wages, hours, terms and conditions of employment that may be a mandatory subject of bargaining. Here, the Union argues that requiring employees to be physically present in the workplace during the COVID-19 pandemic and the health metrics used to determine when to resume in-person learning are mandatory subjects of bargaining because they are health and safety issues. Employee safety is a mandatory subject of bargaining. *Proviso Township High School Dist. 209*, ____ PERI ____, Case No. 2021-CA-0041-C (IELRB Opinion, November 5, 2020); *Chicago Board of Education*, ____ PERI ____, Case No.

2021-CA-0014-C (IELRB Opinion, September 17, 2020); *Western Illinois University*, ____ PERI ____ , Case No. 2021-CA-0009-C (IELRB Opinion, September 17, 2020); *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); *Passaic Valley Regional High School Board of Education / Passaic Valley Education Association*, 47 NJPER ¶ 54 (2020) (union granted interim relief in charge alleging employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 and the Workplace Democracy Enhancement Act, N.J.S.A. 34:13A-5.13, for refusing to allow union to conduct a health and safety walkthrough of school in light of COVID-19 pandemic).

In this case, it is not clear at this juncture that the District engaged in bad faith bargaining. The record currently before us indicates that the Union did not demand to bargain the District's previous decisions regarding returning to the physical workplace, as it did not object to them. That is the Union's prerogative. A union's past acquiescence in an employer's previous unilateral change does not, without more, constitute a waiver of its right to bargain over such changes for all time. *Pembroke CCSD No. 259*, 8 PERI 1055, Case No. 92-CA-0069-C (IELRB Opinion and Order, May 29, 1992); *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). But when they sought to bargain, it is not clear from the demand to bargain and the bargaining that followed what agreement the Union was looking for. There was discussion of a hazard assessment, but it is not clear in the record before us how that could lead to an agreement as to the metrics used to determine a return to in-person learning. For the Board to proceed on injunctive relief, there must be a significant likelihood that the complainant will succeed on the merits of the case. This is not to say that on a full evidentiary record, the Union could not succeed on the merits of this case. But the record before us does not meet the standard necessary for the Board to seek injunctive relief.

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.

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).

Decided: **February 18, 2021**
Issued: **February 19, 2021**

/s/ Chad D. Hays
Chad D. Hays, Member

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

/s/ Lynne O. Sered
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