**STATE OF ILLINOIS**
**EDUCATIONAL LABOR RELATIONS BOARD**

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| Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO, | ) | |
| Complainant | ) | |
| and | ) | Case No. 2022-CA-0053-C |
| Chicago Board of Education, | ) | |
| Respondent | ) | |

## OPINION AND ORDER

On March 7, 2022, Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO (Union) filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) against Chicago Board of Education (CBE or Employer) alleging that CBE violated the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5/1 *et seq.*, when it refused to implement various terms of the parties' January 12, 2022 – August 26, 2022 Covid Safety Agreement (Safety Agreement). The Safety Agreement contained certain agreed-upon COVID-19 mitigation and reporting requirements, including that all persons entering a CBE facility must wear a face mask at all times, that CBE would provide masks and other face coverings for staff and student use, procedures that allowed for school level safety committees to vote to flip a school to remote learning based on the level of student and teacher absences and documented COVID-19 cases, terms concerning CBE's COVID-19 testing program, and school-based contact tracing. According to the Union, CBE unilaterally announced in early March 2022 that it was implementing a mask-optional policy for students and staff effective March 14, 2022. The Union further contends that CBE refused to provide information it requested as to mask distribution, testing, and screening after transitioning to remote learning. Following an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing (Complaint) setting the matter for hearing before an Administrative Law Judge (ALJ).

As part of the charge, the Union requested that the Board petition the circuit court for injunctive relief pursuant to Section 16(d) of the Act to require CBE to maintain the status quo until the Board resolves the underlying charge. For the reasons set forth below, we denied the Union's request. Our decision was limited to whether the Union met the high standard necessary for this Board to take the extraordinary step of seeking injunctive relief in circuit court. Although we found that the Union did not meet that standard, should this case come before us again with a fully developed record, our determination on the injunctive relief issue will not prevent us from a full review in relation to whether or not CBE violated the Act.

## 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. In *University of Illinois Hospital*, 2 PERI 1138, Case Nos. 86-CA-0043-C, 86-CA-0044-C (IELRB Opinion and Order, October 21, 1986), we held that 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. We examined this case and determined that those prerequisites had not been satisfied.

A. Is there reasonable cause to believe that the Act may have been violated?

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 the Board to consider 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).

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), and derivatively, Section 14(a)(1) of the Act when it unilaterally changes mandatory subjects 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 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 alleges that CBE did not bargain to the extent required by the Act before rescinding the universal mask policy, and, by those actions, repudiated the Safety Agreement.

The Union argues it will succeed on the merits of its case because health and safety is a mandatory subject of bargaining. The Board has recognized this in response to previous requests for injunctive relief during the COVID-19 pandemic. *Elmhurst CUSD No. 205*, Case Nos. 2021-CA-0049-C & 2021-CA-0050-C (IELRB Opinion and Order, February 18, 2021); *Cicero SD No. 99*, Case No. 2021-CA-0051-C (IELRB Order, January 21, 2021); *Chicago Board of Education*, Case No. 2021-CA-0043-C (IELRB Opinion and Order, January 21, 2021); *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); *see also, NLRB v. Gulf Power*, 384 F.2d 822 (5th Cir. 1967). But an allegation of bad faith bargaining over a health and safety issue, even during the COVID-19 pandemic, does not guarantee success on the merits necessary for the Board to seek injunctive relief. See *Elmhurst CUSD No. 205*, Case Nos. 2021-CA-0049-C & 2021-CA-

0050-C; *Chicago Board of Education*, Case No. 2021-CA-0043-C (IELRB Opinion and Order, January 21, 2021); *Chicago Board of Education*, ____ PERI ____, Case No. 2021-CA-0014-C.

The Union further argues it will succeed on the merits of its case because it has demonstrated CBE repudiated its statutory duty to bargain in good faith by unilaterally rescinding a principal element of the Safety Agreement – the universal masking requirement. That may ultimately be true, but there is presently an outstanding unresolved issue of law as to what effect, if any, the vacated temporary restraining order issued by Judge Raylene Grischow in pending litigation against CBE in the Circuit Court of Sangamon County seeking to enjoin CBE from requiring universal masking has on this case.

The unresolved issue of fact as to the Union's amenability to come to the bargaining table likewise detracts from the Union's likelihood of success on the merits. CBE claims its representatives made multiple attempts to engage in bargaining, but that the Union repeatedly declined. Similarly, CBE claims it either provided the Union with the requested information or that the Union did not request other items it claimed CBE refused to provide. The resolution of these factual disputes depends upon the testimony of witnesses in an evidentiary hearing before the 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 where critical facts are in dispute.

B. Is preliminary relief "just and proper?"

In determining whether preliminary injunctive relief is just and proper, the IELRB considers whether an injunction is necessary to prevent frustration of the basic remedial purposes of the Act; the degree, if any, to which the public interest is affected by a continuing violation; the need

to immediately restore the status quo ante; whether ordinary IELRB remedies are inadequate; and whether irreparable harm will result without preliminary injunctive relief. *Cahokia*, *supra.* Preliminary injunctive relief should be limited to those cases in which the alleged violations are serious and extraordinary. *Id.*

Here, because the first necessary element of a successful request for injunctive relief was not met, we did not address whether preliminary injunctive relief was just and proper.

**II.**

For the reasons discussed above, 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: **April 22, 2022**
Issued: **April 22, 2022**

/s/ Lara D. Shayne
Lara D. Shayne, Chairman

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

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

Members Grossman and Ishmael, dissenting

We would have granted the Union's request for preliminary injunctive relief. Accordingly, we respectfully dissent.

/s/ Steve Grossman
Steve Grossman, Member

/s/ Michelle Ishmael
Michelle Ishmael, Member

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