STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

East Aurora Council of American Federation of Teachers, Local 604, IFT-AFT, AFL-CIO,	)	
Complainant	)	
and	)	Case No. 2022–CA–0029–C
East Aurora School District No. 131,	)	
Respondent	)	

OPINION AND ORDER

I. Statement of the Case

On November 30, 2021, East Aurora Council of American Federation of Teachers, Local 604, IFT-AFT, AFL-CIO (Union or Complainant) filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) against East Aurora School District No. 131 (Respondent or District or Employer). Following an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing alleging that Respondent violated Section 14(a)(1) of the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5/1 *et. seq.*, when it refused to arbitrate a grievance.

The parties appeared for a hearing before an IELRB Administrative Law Judge (ALJ) on August 10, 2022. 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. After reviewing the record, the ALJ issued an Order finding there were no material issues of fact requiring an ALJ's recommended decision and order and, on her own

motion, removed this matter to the Board for decision pursuant to Section 1120.40(f) of the Board's Rules and Regulations, 80 Ill. Adm. Code 1120.40(f).[1]

II. Facts

The facts, based upon our review of the record, are not in dispute and are as follows:

Respondent is an educational employer within the meaning of Section 2(a) of the IELRA and subject to the jurisdiction of the Board. ALJ Exs. 2 and 4.[2] The Union is a labor organization within the meaning of Section 2(c) of the Act and is the exclusive representative within the meaning of Section 2(d) of the Act of a bargaining unit covering support staff, including classroom aides, working for the District (bargaining unit). ALJ Ex. 4.

The Union and District are parties to a collective bargaining agreement (CBA) for the bargaining unit. ALJ. Ex. 4; Jt. Ex. A. Section 7.3 of the CBA describes the parties' three step grievance procedure, the last of which is binding arbitration. Jt. Ex. A. The process for selecting an arbitrator is set forth in step three:

> The Union shall submit, in writing, a request to the Superintendent within ten (10) days from the receipt of the step two answer. The parties shall jointly request the American Arbitration Association submit to them arbitrators' names and qualification. The arbitrator shall be selected in accordance with the practices of the American Arbitration Association. The arbitrator selected shall be jointly notified of his/her selection and requested to contact the parties with respect to setting up a time for a hearing. If a demand for arbitration is not filed within thirty (30) days of the date for the step two answer, then the grievance shall be deemed withdrawn.
>
> Jt. Ex. A.

The portion of the American Arbitration Association (AAA) rules regarding arbitrator selection relevant to the CBA provides at Section 12(c):

1 Neither party moved to remand this matter back to the ALJ or raised any objection to the ALJ's Order.

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

(c) If the parties have not appointed an arbitrator and have not provided any method of appointment, the arbitrator shall be appointed in the following manner:

i. Shortly after it receives the Demand, the AAA shall send simultaneously to each party a letter containing an identical list of names of persons chosen from the Employment Dispute Resolution Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

ii. If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable.

iii. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

Er. Ex. 1.

Michael Gonzalez (Gonzalez) was employed as a classroom aide at the District's East Aurora High School until the termination of his employment was affirmed by its Board of Education on April 2, 2018 for alleged physical abuse of a student. ALJ Ex. 4. While employed by the District, Gonzalez was an educational employee within the meaning of Section 2(b) of the Act and a member of the bargaining unit. ALJ Ex. 4.

On April 13, 2018, the Union filed a grievance challenging Gonzalez's termination. ALJ Ex. 4. On April 24, 2018, the District denied Gonzalez's grievance, as well as grievances for bargaining unit members Moore and Robledo that the Union filed simultaneous to Gonzalez's. ALJ Ex. 4; U. Ex. 2; Tr. 43. Ultimately, one of the other two grievances was settled and the other went to arbitration. Tr. 29. In a letter from then Union President Gerry Mestek (Mestek) to then District Superintendent Steven Megazzini (Megazzini) dated May 7, 2018, the Union requested that the District hold the Gonzalez grievance in abeyance until the results of his DCFS investigation and court case were determined. U. Ex. 3; Tr. 30. Therein the Union indicated that if the abeyance was not agreed to, it requested the grievance be advanced to arbitration. U.

Ex. 3. The Union knew they had to have written agreement to hold grievance in abeyance. Tr. 54. That is why they made the abeyance request first, in hopes they could hold off on requesting a panel until such time as they were prepared to go forward with it. Tr. 54. On May 16, 2018, Megazzini emailed Union Field Service Director Daniel Mercer (Mercer) about the Gonzalez grievance asking Mercer to draw up a letter jointly requesting arbitrators' names and qualifications and send it to him for signature. U. Ex. 4; Tr. 39. On behalf of District, Megazzini agreed to proceed to arbitration with the Gonzalez grievance. Tr. 40. Mercer said he would but reminded Megazzini that the Union was seeking an abeyance. U. Ex. 4. Megazzini sent the Union an email on May 18, 2018, that the District did not agree to the request. U. Ex. 4. Mercer admitted that the Union knew on May 18, 2018 the District did not agree with its request to hold the Gonzalez grievance in abeyance. Tr. –40. The Union filed a demand to arbitrate the Gonzalez grievance with AAA on May 21, 2018. ALJ Ex. 4. In a letter dated May 24, 2018, AAA provided Mercer and Pete Wilson (Wilson), one of the District's attorneys, with a list of fifteen arbitrators and their resumes for consideration. ALJ Ex. 4; Tr. 41–42. When Mercer received this list, he did not reach out to Wilson or anyone in Wilson's office to discuss selecting an arbitrator. Tr. 42. The District did not take any actions following receipt of the AAA panel. Tr. 62–63. The District did not refuse to arbitrate the Gonzalez grievance in 2018. Tr. 86.

In May 2021, Gonzalez's criminal complaint was dismissed. U. Ex. 9. The Union was then prepared, without that complaint being involved in the arbitration process, to go forward and begin striking names to select an arbitrator. Tr. 34. Mercer emailed then District Superintendent Jennifer Norrell (Norrell) on July 22, 2021, that they were proceeding with striking arbitrators for the Gonzalez grievance. U. Ex. 8. Norrell replied that they were looking for documentation that addresses the District's agreement to postpone the process and that she was copying John Fester (Fester), one of the District's attorneys, so he could respond. U. Ex. 8. Mercer wrote back that he did not believe Norell would find any documentation to that effect but that "we fulfilled

all of the contractual requirements and the timelines with respect to moving the grievance to arbitration. The next step is striking names to select an arbitrator, which has no timeline specified in the agreement." U. Ex. 8. In a September 3, 2021 email, Fester told Mercer that the District did not intend to move forward with the Gonzalez grievance arbitration due to the time that had expired. U. Ex.10; Tr. 35. The Union filed the instant charge almost three months later, on November 30, 2021.

III. Positions of the Parties

Complainant alleges that Respondent refused to arbitrate the Gonzalez grievance when it would not participate in the arbitrator selection process in September 2021. It claims that the charge was timely filed. Respondent's conduct, says Complainant, violated Section 14(a)(1) of the Act and the Board should order Respondent to cooperate with Complainant to select an arbitrator and arbitrate the Gonzalez grievance.

Respondent argues that the charge should be dismissed because it agreed to arbitrate the Gonzalez grievance in 2018, when the grievance was filed, in accordance with the grievance procedure in the CBA. It contends that Complainant's claim arises from its lawful refusal to agree to Complainant's request to hold the matter in abeyance in 2018, which renders the charge untimely. Accordingly, Respondent requests the Board dismiss the charge.

IV. Discussion

A. Timeliness

The threshold issue is whether the charge was timely filed. Respondent asserts that it is untimely, and Complainant contends the opposite. Section 15 of the Act provides that "[n]o order shall be issued upon an unfair labor practice occurring more than 6 months before the filing of the charge alleging the unfair labor practice." Only acts that occur within the six month period can serve as the basis for a timely charge. *Jones v. Illinois Educational Labor Relations Board*, 272 Ill. App. 3d 612, 650 N.E.2d 1092 (1st Dist. 1995). The six month period begins to run

when the charging party knows or has reason to know that an unfair labor practice has occurred. *Wapella Education Association v. Illinois Educational Labor Relations Board*, 177 Ill. App. 3d 153, 531 N.E.2d 1371 (4th Dist. 1988).

The District argues that the date of the alleged unlawful conduct on which the six month time period began to run was the date of Gonzalez's dismissal, April 4, 2018. This argument fails because the alleged misconduct here is the District's refusal to arbitrate the grievance, not the dismissal that was the subject of the grievance. In the alternative, the District argues that the six month period started on the date it refused the Union's request to hold the matter in abeyance in May 2018. But the District's refusal to hold the matter in abeyance was not a refusal to arbitrate. The District's final alternative argument is that if the Union anticipated an unfair labor practice, it could have filed a charge within six months of the District's refusal to hold the grievance in abeyance. But an unfair labor practice charge filed when a respondent has yet to take any action constituting unlawful conduct would be dismissed. *Benton CCSD 47*, 4 PERI 1043, Case No. 86-CA-0025-C (IELRB Opinion and Order, February 25, 1988). It is undisputed that the District did not refuse to arbitrate the grievance in 2018. It was not until September 2021, less than six months before the charge was filed, that the District refused to arbitrate the grievance. As a result, we find that the charge was timely.

B. 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. IELRB*, 2015 IL 118043, ¶ 20, 69 N.E.2d 809; *Cobden Unit School District No. 17 v. IELRB*, 2012 IL App (1st) 101716, 966 N.E.2d 503; *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.[3] *Board of Educ. of City of Chicago*, 2015 IL 118043, ¶ 20; *Cobden Unit School District*, 2012 IL App (1st) 101716; *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).

In this case, the District does not adopt either of the legitimate defenses, claiming the only issue before the Board is the timeliness of the charge, not the arbitrability of the grievance. The District is incorrect. Because we find that the charge was timely, we must decide the case on the merits and determine whether the grievance is arbitrable. The District's contention that the Union's inaction after receiving the AAA panel rendered the grievance withdrawn per the CBA could be viewed as asserting that there was no contractual agreement to arbitrate the dispute. Accordingly, we will analyze it that way.

The conduct alleged to violate the Act in this case is the District's refusal to arbitrate the grievance. The CBA provides that that if the demand for arbitration is not filed within thirty days from the step two answer, in this case Megazzini's April 24, 2018 letter, the grievance shall be deemed withdrawn. It was at that point, after the step two answer but before the demand for arbitration, that the Union sought to hold the matter in abeyance. It was that action, the demand for arbitration that the Union wished to hold off on filing. It was there that the Union sought to push the pause button procedurally. But the District did not agree. If at that point the Union had taken no further action until 2021, the District may have been able to successfully argue that the grievance was inarbitrable because it was considered withdrawn, as the demand to arbitrate

3 Section 10(b) of the Act provides: "The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois."

was not filed within thirty days and the District had not agreed to the abeyance. Yet that is not what happened in this case. Instead, upon learning that the District would not agree to the abeyance pausing the procedure between steps two and three, the Union carried on to step three and the parties sent their letter to AAA. Once the grievance is at step 3, there is nothing in the CBA that would indicate either party's inaction rendered it withdrawn and thus, inarbitrable. The CBA does not set forth a specific method for selecting arbitrators. It says that the arbitrator shall be selected in accordance with AAA practices. The AAA rules say parties are encouraged to agree to an arbitrator from the submitted list and advise AAA of their agreement. Here, the parties did not agree to an arbitrator and advise AAA. Paragraph 12(c)(ii) of the AAA rules provide that if parties are unable to agree upon arbitrator, each party shall have fifteen days from transmittal days to strike names objected to, number the remaining names in order of preference, and return list to AAA. If the parties do not comply, there is nothing to indicate AAA closes the matter or the grievance is withdrawn, only that all arbitrators on the list are deemed acceptable. Thus, there is nothing in the CBA rendering the Gonzalez grievance inarbitrable.

The District claims that the Board, rather than the arbitrator, must determine whether the demand for arbitration is timely, which it says involves the consideration of such legal concepts as waiver, abandonment, withdrawal, and laches due to the delay caused by the Union. Procedural arbitrability is concerned with whether the parties have complied with the procedural prerequisites for arbitrating a particular dispute, such as timeliness, waiver, delay, notice, laches, and estoppel. *Amalgamated Transit Union, Local 900 v. Suburban Bus Division of the Regional Transportation Authority*, 262 Ill. App. 3d 334, 340-41, 634 N.E.2d 469, 199 Ill. Dec. 630 (2nd Dist. 1994). Matters of procedural arbitrability are generally decided by an arbitrator rather than labor boards or courts. *Niles Township Support Staff v. Niles Township High School District No. 219*, 2014 IL App (1st) 131044-U, ¶ 18; *Thornton Community College*, 5 PERI 1003, Case No. 88-CA-

0008-C (IELRB Opinion and Order, November 29, 1988), citing *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1963) (procedural concerns bearing upon final disposition of dispute should be left to arbitrator).

V. Order

For the reasons discussed above, we find that the unfair labor practice charge was timely filed and that the District violated Section 14(a)(1) by refusing to arbitrate the Gonzalez grievance. Therefore, **IT IS HEREBY ORDERED** that East Aurora School District 131:

1. Cease and desist from:
   (a) Refusing to arbitrate the grievance the Union filed regarding the termination of Michael Gonzalez's employment.
   (b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them under the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
   (a) Cooperate with the Union to select an arbitrator for the grievance regarding the termination of Michael Gonzalez's employment.
   (b) Arbitrate the Union's grievance regarding the termination of Michael Gonzalez's employment.
   (c) Post on bulletin boards or other places reserved for notices to employees for 60 consecutive days during which the majority of Respondent's employees are actively engaged in duties they perform for Respondent, signed copies the attached notice. Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.
   (d) Notify the Executive Director in writing within 35 calendar days after receipt of this Opinion and Order of the steps taken to comply with it.

VI. 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: **February 22, 2023**
Issued: **February 23, 2023**

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

/s/ Steve Grossman
Steve Grossman, Member

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

/s/ Michelle Ishmael
Michelle Ishmael, Member

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NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE STATE OF ILLINOIS

THIS IS A NOTICE TO EMPLOYEES THAT MUST BE POSTED PURSUANT TO THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD'S OPINION AND ORDER IN East Aurora SD 131/East Aurora Council, American Fed. of Teachers, Local 604, IFT-AFT, AFL-CIO , Case No. 2022-CA-0029-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 the East Aurora Council, American Federation of Teachers, Local 604, IFT-AFT, AFL-CIO ("Union") filed regarding the termination of Michael Gonzalez's ("Gonzalez") employment.

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

WE WILL cooperate with the Union to select an arbitrator for the grievance regarding the termination of Gonzalez's employment.

WE WILL arbitrate the Union's grievance regarding the termination of Gonzalez's employment.

Date of Posting: _____ By: _____

As agent for **East Aurora School District 131**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 160 N. Lasalle, Ste N-400, Chicago, IL 60601 (312) 793-3170