STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Teamsters Local 700,	)	
	)	
Complainant,	)	
	)	
and	)	Case No. 2019-CA-0060-C
	)	
Board of Trustees of the University of Illinois,	)	
	)	
Respondent.	)	

OPINION AND ORDER

I. Statement of the Case

On April 9, 2019, Teamsters Local 700 (Complainant or Union) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board) in the above-captioned matter against the Board of Trustees of the University of Illinois (Respondent or University), alleging that certain of the University's actions violated Section 14(a)(1) of the Illinois Educational Labor Relations Act (IELRA or Act). Subsequently, on April 18, 2019, the Union amended its charge to allege that the University's conduct also violated Section 14(a)(3) and derivatively (1) of the Act. The Board's Executive Director issued a Complaint and Notice of Hearing (Complaint) alleging that the University violated Section 14(a)(3) and derivatively (1) of the Act.

The parties appeared for a hearing before an Administrative Law Judge (ALJ). During the hearing, the parties had the opportunity to call, examine and cross-examine witnesses, introduce documentary evidence, and present arguments. The parties filed post-hearing briefs. The ALJ issued a Recommended Decision and Order (RDO) finding that Respondent violated Section 14(a)(3) of the Act in connection to the termination of Richard Esposito, one of the Union's bargaining unit members. Respondent filed exceptions to the ALJRDO. Complainant filed a

response to the exceptions. For the reasons discussed herein, we affirm the ALJ's finding that Respondent violated the Act, but modify the ALJ's recommended remedy.

II. Factual Background

We adopt the ALJ's findings of fact 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 except when necessary to assist the reader and in furtherance of deciding the issues raised by the Respondent.

III. Discussion

The ALJ found that the University violated Section 14(a)(3) of the Act, because while the University had legitimate reasons to terminate Esposito, his termination was deduced to be improperly motivated at least in part, and the University failed to establish by a preponderance of the evidence that it would have discharged Esposito notwithstanding his protected Union activity.

In sum, the University contends in its exceptions that the ALJ erroneously determined that Esposito was engaged in union activity within the meaning of Section 14(a)(3), that the University was aware of Esposito's union activity in question, and that Esposito was discharged for engaging in union activity. Additionally, the University disputes the ALJ's conclusion that the University would not have terminated Esposito but for his alleged union activity under the dual-motive analysis. Furthermore, the University excepted to the ALJ's recommended remedies. Consequently, the Respondent University argues that the ALJRDO should be reversed, and the Complaint dismissed in its entirety. We address the University's exceptions below.

a. Did Esposito Engage in Union Activity?

The ALJ determined that Esposito sought Union assistance with respect to a term or condition of employment, which constituted protected union activity.

The University set forth in its exceptions that the ALJ's determination of Esposito engaging in Union activity was unsupported by the record. In furtherance of this proposition, the University maintains that the ALJ erred by stating that an employee is involved in union activity where the employee seeks union assistance with respect to terms or conditions of employment, invokes a right arising out of a collective bargaining agreement, or acts with or on behalf of a group of fellow employees. Also in furtherance of its position that Esposito was not involved in Union activity, the University challenges the idea that seeking union assistance by asking or posing a question to a union representative about one's job responsibilities or duties constitutes a term or condition of employment and is protected activity for the purposes of Section 14(a)(3) and Section 3 of the Act.[1] Lastly, the University excepts to the ALJ's failure to rely on the Illinois Supreme Court's definition of protected union activity for Section 14(a)(3) purposes, as announced in *SPEED Dist. v. Warning*, 242 Ill. 2d 92 (2011). Under *Speed*, an employee engages in protected union activity only when the employee's actions invoke a right under the law or the collective bargaining agreement. According to the University, there was not a scintilla of evidence that Esposito's inquiries to Vince Tenuto, the Union's Business Agent, constituted protected activity under Section 14(a)(3) of the Act because the inquiries were not an attempt to invoke a right under the

[1] Section 3 of the Act provides that it shall be lawful for educational employees to organize, form, join, or assist in employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or bargain collectively through representatives of their own free choice and, except as provided in Section 11, such employees shall also have the right to refrain from any or all such activities. Section 14(a)(3) of the Act provides that Educational employers, their agents or representatives are prohibited 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.

law or collective bargaining agreement, and instead were mere requests for clarification about job duties from a union business representative.

An employee engages in union activity when he seeks union assistance with respect to his employment. *Georgetown-Ridge Farm Community Unit School District No. 4 v. IELRB*, 239 Ill.App.3d 428, 606 N.E.2d 667 (4th Dist. 1992).

Here, Esposito, on two separate occasions, engaged in protected union activity, which consisted of his actions on February 12, 2019, and February 13, 2019. Specifically, Esposito placed a telephone call to Tenuto on both dates following directives from Rocco Wlodarek, Automotive Sub-foreman, to perform specific job responsibilities, whereby Tenuto, the Union's business agent acting in his official capacity, then placed an inquisitorial phone call to Wlodarek. The phone calls between Wlodarek and Tenuto were cause and effect stemming from Esposito's actual work concerns. In other words, Esposito sought the assistance of the union with regard to his employment, when he contacted his union representative to clarify his job duties and express workplace concerns related to those job duties. A term or condition of employment is something provided by an employer which intimately and directly affects the work and welfare of employees. *Vienna School District No. 55 v. Illinois Educational Labor Relations Board*, 162 Ill. App. 3d 503, 506, 515 N.E.2d 476, 113 Ill. Dec. 667 (1987). We determine that probes related to one's job description or job responsibilities convincingly meets this definition.

Furthermore, as a member of the Union, Esposito exercised his contractual and statutory right to be represented by the Union and its agent, which is the very course of action Tenuto took by contacting Wlodarek in the interests of Esposito, after Esposito contacted him about issues on his job. We credit the record as having firmly established Esposito's involvement in union activity,

therefore, we affirm the ALJ's finding that Esposito engaged in union activity protected under Section 14(a)(3) of the Act.

b. Did the University Possess Knowledge of Esposito's Union Activity?

Next, the ALJ found that Wlodarek, Esposito's direct supervisor, and having apparent authority in exercising supervisory duties, was an agent authorized to act on behalf of the Respondent and was aware of Esposito's union activity.

The University excepts to the ALJ's finding that it was aware of Esposito's involvement in protected activity under Section 14(a)(3) of the Act because Wlodarek was aware. The University advances its theory by taking issue with the following actions of the ALJ: the failure to make a specific finding and or cite record evidence in support of such a finding that Wlodarek had knowledge about Esposito's alleged protected union activity; the failure to make a specific finding as to whether Wlodarek was an agent of the University for purposes of imputing knowledge and animus to the University in its institutional capacity; asserting that Wlodarek has supervisory duties as a normal and regular part of his job, where Wlodarek testified without rebuttal that he spends approximately 1 percent of his time performing what could be considered to be supervisory duties; concluding that Wlodarek was Esposito's immediate supervisor; and concluding that Wlodarek's recommendation would clearly carry great weight. According to the University, there is no evidence that established that a University agent had knowledge of Esposito's alleged protected union activity, and that Wlodarek is not an agent of the University for purposes of imputing knowledge or animus.

We affirm the ALJ's finding that Wlodarek, on behalf of the Respondent, was aware that Esposito engaged in union activity protected under Section 14(a)(3) of the Act for the reasons explained below.

First, Robert Witas, Wlodarek's manager, testified that Wlodarek was Esposito's direct supervisor. Secondly, Wlodarek testified that his duties consisted of handling timecards, scheduling, reviewing bus routes, handling day-to-day operational problems, and although he testified that he spent less than 1 percent of his time doing so, he possessed the authority to provide a recommendation to hire, transfer, suspend, lay off, recall or promote, discharge or discipline, reward, and adjust grievances. Additionally, the work directives which prompted Esposito to get Tenuto involved with the workplace matters at issue came directly from Wlodarek, not to mention the fact that Wlodarek evaluated Esposito. The substance of Wlodarek's role was supervisory. And apparently Wlodarek's recommendation did carry weight as a matter of fact, since the University's Human Resource Department terminated Esposito based upon it, which we agree was a reasonable inference for the ALJ to draw.

Moreover, an employee is an agent when under all the circumstances, employees would reasonably believe that the employee in question was reflecting the educational employer's policy and speaking for management. *West Harvey-Dixmoor School District No. 147 Board of Education*, 6 PERI 1010, Case No. 88-CA-0073-C (IELRB Opinion and Order, December 6, 1989), page 55.

The record establishes that Wlodarek's actions constituted an agency relationship when he, by representing management or the Employer in the capacity of Esposito's supervisor, handled the telephone calls from Tenuto, who was in the scope of representing a union member. It was then that Wlodarek knew or should have known that Esposito contacted Tenuto for union assistance regarding clarification of his job duties and workplace concerns. Wlodarek also testified that Esposito told him directly that he called Tenuto on at least one occasion regarding the February 13th incident between Wlodarek and Esposito.

We find the University's exceptions regarding its knowledge of Esposito's protected union activity without merit, and thus affirm the ALJ's conclusion that the Respondent was aware that Esposito engaged in union activity protected under Section 14(a)(3) of the Act.

Did the University take Adverse Employment Action Against Esposito for Engaging in Protected Union Activity?

The ALJ found that the evidence tended to demonstrate that Esposito was terminated because of his union activity, given the argument that occurred between Tenuto and Wlodarek after Esposito raised workplace concerns regarding his job responsibilities to Tenuto, anti-union statements made by Wlodarek in connection to Esposito contacting Tenuto about his job responsibilities, the timing of Esposito receiving notice that he was at-fault for two accidents after the multiple encounters at issue involving Wlodarek, Esposito and or Tenuto, as well as inconsistent and shifting reasons provided by Wlodarek for Esposito's termination recommendation.

The Respondent filed exceptions to the ALJ's determination that Esposito was terminated in whole or in part due to his union activity. To that end, the University disagrees with inferences or conclusions reached by the ALJ leading to his determination, including that the argument between Tenuto and Wlodarek occurred at least in part because Esposito complained to Tenuto about his job responsibilities; the timing factor in that Esposito received notice that he was at-fault for the two accidents just a day after his conversation with Wlodarek, Esposito's subsequent conversation with Tenuto, and the argument between Tenuto and Wlodarek; that Wlodarek provided shifting, inconsistent and or contradictory explanations about the reasons for Esposito's recommended termination based on Wlodarek's testimony; that Wlodarek threatened Esposito with termination if Esposito consulted with Tenuto about his job responsibilities, then acted on

that threat when Esposito called Tenuto and informed him of such; that Esposito was targeted for termination because he called Tenuto for clarification about his job duties which led to the altercation between Tenuto and Wlodarek, which caused Wlodarek to want to retaliate against Tenuto for raising concerns about Esposito's job duties and Wlodarek's brother being given overtime outside of what was provided for by the contract; that the unusual tone of Wlodarek's February 15, 2019 text demonstrates the animus that Wlodarek had towards Esposito, which didn't exist two days prior, when Wlodarek stated that he was still contemplating whether Esposito should be let go; the fact that Wlodarek had not made up his mind about recommending Esposito for termination before February 13, 2019 indicated that while termination may have been justified under the circumstances, it was not necessary; that terminating a probationary employee like Esposito in response to Tenuto raising issues about job duties and the allocation of overtime hours would tend to prevent or could have simply been a quick and easy way of silencing others who may have raised those concerns in the future, or make it less likely that members would turn to the Union for assistance with matters related to Wlodarek in the future; and that Wlodarek's outspoken membership in the Union did not mean that he could not act in a way that tends to chill union activity when he engages in supervisory duties on behalf of the University.

We adopt the ALJ's inferences as rational and reasonable, and grounded in the record. We address certain points below made by the University in its exceptions that support the ALJ's conclusions.

Regarding the University's timing argument, it essentially asserts that it was coincidental that Wlodarek issued the at-fault notice for the two vehicle accidents to Esposito on February 14, 2019, based upon a departmental internal review and review by the State of Illinois Central Management Services, shortly after Esposito engaged in protected union activity. However, such

timing is but only a factor to be given consideration in the analysis of factors that demonstrate improper motivation. And it's well established that timing alone is insufficient to prove unlawful motivation. *Hardin County Education Association v. IELRB*, 174 Ill. App.3d 168, 528 N.E.2d 737 (4th Dist. 1988). Therefore, any limitation in terms of the timing factor has already been accounted for, and here, even if the timing could be considered coincidental, there are additional and more material factors, coupled with the timing factor that convince us of the presence of unlawful motivation by the University.[2] Evidently, the ALJ deemed it questionably noteworthy in totality that Esposito received the at-faults shortly after his run-ins with Wlodarek, Esposito's subsequent conversation with Tenuto, and the resulting conflict that transpired between Tenuto and Wlodarek.

As to the University's explanations for Wlodarek's shifting, inconsistent and contradictory dismissal recommendation, and the University's claim that the ALJ grossly misinterpreted Wlodarek's testimony during Tenuto's criminal trial, the ALJRDO indicated that Wlodarek stated that an alleged threat to a mechanic did not form any part of the basis for recommending Esposito's dismissal because the mechanic denied that any confrontation occurred. However, during Tenuto's criminal trial, Wlodarek testified that Esposito's alleged threat against the mechanic was the straw that broke the camel's back for deciding to recommend that Esposito be terminated. The University's explanation is that Wlodarek adjusted his rationale for Esposito's termination recommendation once he learned that both the mechanic and Esposito denied that any threat was ever made or even that a confrontation between the mechanic and Esposito occurred.

The University also cited confusion by Wlodarek in how the Union's attorney framed this line of questioning during the unfair labor practice hearing concerning Wlodarek's shifting, inconsistent and contradictory dismissal recommendation. Specifically, Wlodarek was asked point

[2] Those factors consist of union animus, timing coupled with knowledge of protected union activity, and shifting, inconsistent or contradictory explanations behind the reason(s) for the adverse employment action.

blank at the unfair labor practice hearing whether the alleged threat against the mechanic caused him to recommend Esposito's dismissal and Wlodarek answered no. Yet, when the criminal trial transcript was read to Wlodarek, and he was asked whether he testified during the criminal trial if the alleged threat against the mechanic was the straw that broke the camel's back, Wlodarek responded respectively that it "could have been part of it, was part of it, and was part of the circumstances" before being interrupted by the Respondent's counsel in objection. In light thereof, the ALJ's assessment of the shifting, inconsistent and contradictory factor is well-founded in the record.

Lastly, we note that Wlodarek's active membership in the Union, and support in providing new employees with information about the Union isn't persuasive that in turn, he was incapable of displaying animus towards an individual member's union activity. Wlodarek's union participation and targeting of Esposito for his union activity are not mutually exclusive acts, especially given Wlodarek's adverse conduct documented in the record in connection to Esposito's union activity and the ALJ's credit thereto.

These circumstances taken into account, the record contains sufficient evidence of unlawful motive, and there is nothing compelling enough otherwise in the record to disrupt the ALJ's observation here. Thus, a finding that the University took adverse employment action against Esposito for engaging in protected union activity was appropriate.

Prima Facie Case

Consequently, the ALJ concluded that the Union made a *prima facie* case that Esposito's termination was retaliatory in nature in violation of the Act. Given the above examination, we affirm the ALJ's finding that the Union established a *prima facie* case of the University's Section 14(a)(3) violation of the Act.

Once the charging party establishes a *prima facie* case, the respondent can avoid a finding that it violated the Act by demonstrating that it would have taken the adverse action for a legitimate business reason, notwithstanding the respondent's union animus. *City of Burbank*, 128 Ill. 2d at 346. 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 employer'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 it would have taken the action notwithstanding the employee's union activity. *Id*. at 346-7. The Illinois Supreme Court emphasized that the pretext/dual motive analysis strikes the appropriate balance between the employee's right to protection from an employer's unlawful motive and the employer's right to discharge the employee for legitimate business reasons. *City of Burbank*, supra, 131 Ill. Dec. at 594.

Here, the ALJ found that the University could have had legitimate reasons to terminate Esposito, including two at-fault accidents combined with poor job performance. Likewise, we concur with the ALJ's finding regarding the University's legitimacy of Esposito's discharge. As the ALJ correctly decided, a dual-motive analysis is applicable here.

Did the Respondent Prove By a Preponderance of the Evidence that Esposito Would Have Been Terminated Notwithstanding his Union Activity?

The ALJ found that the evidence demonstrated that it was more likely than not that Wlodarek's exercise of his discretion to recommend that Esposito be terminated was because of Tenuto's involvement on matters involving job duties and overtime allocation.

In contrast, the University argues that it proved by a preponderance of the evidence that it would have terminated Esposito during his probationary period absent any protected union activity. In doing so, the University excepted to the ALJ's failure to mention that Esposito said to Wlodarek during the February 13, 2019, counseling session it was not Esposito's fucking job to shovel shit into a truck and Esposito wasn't going to be someone's bitch and clean up a mess that others left behind. The University excepted further to the ALJ's exploration that the Respondent's conduct outweighed the reasons given for Esposito's termination as the wrong legal question to ask for purposes of the dual-motive analysis, as well as the ALJ's failure to address the University's evidence that many other drivers have been terminated during their probationary periods for behavior much less egregious than Esposito's allegations. Additionally, the University contends that the ALJ misapplied the dual motive analysis by failing to analyze the University's proffered evidence in support of its assertion that it would still have terminated Esposito even in the absence of union activity, and instead regurgitated whether Wlodarek would have recommended Esposito's termination in the absence of union activity.

Credibility resolutions aside, Wlodarek and Witas' general testimony that in the past, similarly situated probationary drivers have been dismissed for at-fault accidents, does not rise to the level of satisfying the requisite standard to overcome a violation of the Act. Furthermore, the ALJ's weighing of the evidence that Esposito was terminated because of his union activity to the

evidence that he was terminated for legitimate business reasons is relevant to and not outside the scope of the dual-motive analysis.

We hold that the record fails to substantiate that the University met its burden of proof that it would have terminated Esposito notwithstanding his union activity.

The University's Credibility Exceptions

Additionally, the University excepted to various credibility resolutions made by the ALJ, as follows: the ALJ's conclusion that it therefore seems unlikely that two University officers were stationed outside the door when Wlodarek and Witas met with Esposito to inform him that they had recommended his termination; that certain incidents cast doubt on Wlodarek's other testimony, especially that he didn't demand that Esposito not call Tenuto about things that Wlodarek may have believed were clearly within the job duties of a driver; that the ALJ failed to acknowledge that Tenuto's testimony does not support Esposito's claim that Esposito called Tenuto to tell Tenuto about Wlodarek's alleged termination threat; and the ALJ's failure to expressly find Esposito to be an incredible witness and Wlodarek a credible witness.

It is the Board's policy not to overrule a Hearing Officer's resolution with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Board of Regents of Sangamon State University*, 6 PERI 1049, Case Nos. 89-CA-0030-S, 89-CA-0035-S (IELRB, March 12, 1990), aff'd, 208 Ill.App.3d 220, 566 N.E.2d 963 (4th Dist. 1991).

Here, the ALJRDO speaks for itself and we see no convincing reason to overrule the ALJ's credibility determinations either expressed or implied.

The University's Remedy Exception

The University excepted to each of the ALJ's recommended remedies, including but not limited to his proposed remedy of offering Esposito immediate and full reinstatement.

In accordance with the evidentiary record and law, we affirm the ALJ's remedy in part and modify the ALJ's remedy in part by rescinding the ALJ's Recommended Order to offer Richard Esposito immediate and full reinstatement to the position he previously held as Driver for the Transportation Division of Respondent's Facilities Management Department on a probationary basis for the reasons explained below. We modify the ALJ's remedy in part as relevant and applicable only to the instant case, the instant parties, and under the instant circumstances.[3]

The IELRA empowers the Board to award a make whole remedy in unfair labor practice cases. *Heyworth School District No. 4*, 1 PERI 1182, Case No. 84-CA-0044-S (IELRB Opinion and Order, October 9, 1985). The Board' s purpose in fashioning a remedy is to place the parties in the same position they would be in but for the unfair labor practice. *Granite City Unit School District No. 9 v. IELRB*, 366 Ill. App. 3d 330, 850 N.E.2d 821 (1st Dist. 2006); *Paxton-Buckley-Loda Education Association v. IELRB*, 304 Ill. App. 3d 343, 710 N.E.2d 538 (4th Dist. 1999). The IELRB has substantial flexibility and wide discretion in determining an appropriate remedy. *Paxton-Buckley-Loda Education Association v. IELRB*, 304 Ill. App. 3d 343, 710 N.E.2d 538. And while the Union did seek reinstatement in its request for relief, the ALJ did grant and order Esposito's full and immediate reinstatement, and reinstatement is traditionally a standard remedy for violations of Section 14(a)(3) of the Act, there are unique factors present here that

[3] Where the employer discharges an employee in violation of the Act, the Board presumes that a make whole remedy of reinstatement with back pay is the appropriate remedy. In "mixed motive" cases, as is the case here, the employer may rebut this presumption, and a lesser remedy may be ordered. *Village of Glendale Heights*, 1 PERI 2019 (Ill. SLRB 1985).

eclipse reinstatement as an appropriate remedy. Esposito was a probationary employee, and as such could have been terminated at any time during his probationary period for cause or simply for no reason at all, since he was not subject to the just cause standard contained in the collective bargaining agreement (CBA). Moreover, while the ALJ ultimately determined that the University did not satisfy its burden of proving that it would have terminated Esposito notwithstanding his protected union activity under the dual-motive test, the ALJ found nevertheless that the University did possess legitimate reasons, at least in part, to terminate Esposito. Therefore, we find it impracticable to reinstate Esposito, a probationary employee, who the record reveals was terminated at least in part for legitimate reasons, although simultaneously it evinces that he was likewise terminated at least in part for engaging in protected union activity.

To that end, we also modify Section IV.2.b. of the ALJRDO, whereby the ALJ ordered that Richard Esposito be made whole for the loss of any pay or benefit, with interest at a rate of seven percent per annum, resulting from the University's discriminatory removal of him from his position as Driver, to a make whole remedy for the loss of any pay or benefit, from February 18, 2019, Esposito's date of termination, to the date where Esposito can demonstrate that he made a reasonably diligent search for suitable interim employment, with interest at a rate of seven percent per annum, resulting from the University's discriminatory removal of him from his position as Driver.[4]

[4] We note that good faith reasonable efforts to find work are required of a complainant seeking backpay but, that person will not be held to the highest standard of diligence. *Thornton Township High School District No. 205*, 12 PERI 1041, Case No. 91-CA-0055-C (IELRB Opinion and Order, March 22, 1996). In determining the reasonableness of the complainant's effort, his skills, qualifications, age, and the labor market are factors to be considered.

The University's Oral Argument Request

As a final matter, the University requested an opportunity to present oral argument in support of its exceptions to the full IELRB pursuant to Section 1100.120 of the Board's Rules and Regulations, which states that oral argument shall be allowed only at the discretion of the Board. The Rules states further that the Board shall direct oral argument when it determines that oral argument will assist in determination of the issues.

We deny the University's request to present oral argument. Given the copious nature of the evidence, including the ALJRDO, transcript, exceptions, and briefs presented in this case, the above-referenced and analyzed issues do not necessitate oral argument before this Board to render a decision.

IV. Order

For the reasons discussed herein, we find that the Respondent University violated Section 14(a)(3) and derivatively (1) of the IELRA.[5] We affirm and adopt the ALJRDO in this case with the exception of the recommended remedy, which we find inappropriate insofar as it imposes an undue obligation on the University to reinstate Richard Esposito to his previously held position as Driver for the University. In that vein, we correspondingly tailor Esposito's backpay award.

[5] The Board clarifies here that the allegations, Complaint, and violation pertained to Section 14(a)(3) and derivatively (1) of the Act even though the ALJ referenced Section 14(a)(3) on page 17 of the ALJRDO yet also incorporated the language of Section 14(a)(1) into the Recommended Order. Under Section 14(a)(3) of the Act, educational employers and their agents or representatives are prohibited 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. 115 ILCS 5/14. Under Section 14(a)(1) of the Act, educational employers, their agents, or representatives are prohibited from interfering, restraining or coercing employees in the exercise of the rights guaranteed under the Act. 115 ILCS 5/14. Where an alleged violation of sections 14(a)(1) and 14(a)(3) stem from the same conduct, the Section 14(a)(1) violation is said to be derivative of the section 14(a)(3) violation. *SPEED District 802 v. Warning*, 242 Ill.2d 92, 950 N.E.2d 1069 (2011). The test to be applied is the one used to determine whether a section 14(a)(3) violation occurred. *Id*.

Accordingly, the attached Order shall substitute the ALJ's Ordered Remedy. Therefore, **IT IS HEREBY ORDERED** that the University, its officers, and agents shall:

1. Cease and desist from:
   (a) Interfering with, restraining, or coercing Richard Esposito or any of the University's employees in the exercise of guaranteed rights under the IELRA.
   (b) Retaliating against Richard Esposito or any of the University's employees for engaging in protected activities.
   (c) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in an employee organization.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
   (a) Make Richard Esposito whole for the loss of any pay or benefit, from February 18, 2019, to the date where Esposito can demonstrate that he made a reasonably diligent search for suitable interim employment, with interest at a rate of seven percent per annum.
   (b) 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 of the attached notice. Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.
   (c) 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.

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: October 18, 2023
Issued: October 19, 2023

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

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

/s/ Michelle Ishmael
Michelle Ishmael, Member

/s/ Steve Grossman
Steve Grossman, Member

STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Teamsters Local 700,	)	
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Complainant	)	
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And	)	Case No. 2019-CA-0060-C
	)	
Board of Trustees of the University of Illinois (University of Illinois Chicago),	)	
	)	
	)	
Respondent	)	

Administrative Law Judge's Recommended Decision and Order

On April 9, 2019, Charging Party Teamsters Local 700 (Union) filed an unfair labor practice charge, Case No. 2019-CA-0060-C, with the Illinois Educational Labor Relations Board (IELRB or Board) pursuant to Section 14 of the Illinois Educational Labor Relations Act (IELRA or Act), 115 ILCS 5/1, *et seq.*, against the Respondent, Board of Trustees of the University of Illinois, d/b/a University of Illinois Chicago (University)[1]. The charge alleged a violation of Section 14(a)(1) of the Act arising out of the termination of Richard Esposito. On April 19, 2019, the charge was amended to include an allegation that the termination also violated Section 14(a)(3) of the Act, as well as a derivative 14(a)(1) violation. On February 28, 2020, the Executive Director issued a Complaint and Notice of Hearing for this charge. A hearing was scheduled for April 1-2, 2020. A hearing date for this charge was subsequently set for August 4, 2022. The parties appeared before the undersigned Administrative Law Judge for the Board on that date. At the hearing, both sides had the opportunity to call, examine, and cross-examine witnesses, introduce documentary evidence, and present argument. Both parties filed post-hearing briefs on November 18, 2022.

I. Findings of Fact

During the hearing, Vincent Tenuto, James McNamara, and Richard Esposito testified for the Union. (R. 17, 40, 66).[2] Robert Witas and Rocco Wladarek testified for the

[1] Wherever possible, I will refer to the Board of Trustees and the University of Illinois-Chicago collectively as "University." If specific circumstances render the term "University" ambiguous, I will refer to the Board of Trustees by its title and to the University as "UIC".
[2] References to the Record of Proceedings in this matter will be denoted as (R. #).

Respondent. (R. 168, 192). Esposito was called for rebuttal by the Union, and Wlodarek was called by the University in surrebuttal. (R. 272, 277).

The University is an educational employer within the meaning of Section 2(a) of the Act. (Joint Pre-Hearing Memorandum, ALJ Ex. 10[3], hereinafter "Pre-Hearing Memo", at 5). The Union is a labor organization within the meaning of Section 2(c) of the Act and the exclusive representative within the meaning of Section 2(d) of the Act of a bargaining unit comprised of certain of the University's employees including those in the job title or classification of Driver. (Pre-Hearing Memo at 5). The Union and the University are parties to a collective bargaining agreement for the unit previously referenced now and at the time of the actions giving rise to the charge at issue. (Pre-Hearing Memo at 5). From January 14, 2019, until his termination on February 18, 2019, Richard Esposito was, until his termination, an educational employee within the meaning of Section 2(b) of the Act, employed by the University in the job title or classification of Driver for the Transportation Division of UIC's Facilities Management Department on a probationary basis. (Pre-Hearing Memo at 5).

At all times material, the University employed Rocco Wlodarek (Wlodarek) in the job title or classification of Automotive Sub-Foreman. (Pre-Hearing Memo at 5). Wlodarek's position is contained within the bargaining unit represented by the Union, and Wlodarek was a member of the Union. (R. 47, 194-95). He was employed previously as a driver. (R. 192). The job of a Sub-Foreman was to handle operational tasks such as assignment and scheduling. (R. 193). He did not have the authority to hire, fire, suspend, lay off, recall, promote, discharge, discipline or reward employees, or adjust grievances, but could recommend any or all the above. (R. 193-94). Any time spent on such recommendations was a small part of his job. (R. 194). He testified that he has been a union member since he was 17 years old, and a member of Teamsters Local 700 for 11 years. (R. 194-95). He testified that he never made recommendations that an employee be disciplined or dismissed for being a Union member or engaging in Union activity. (R. 196).

At all times material, the University employed James McNamara (McNamara) in the job title or classification of garage foreman. (R. 59, Pre-Hearing Memo at 2-3). At all times material, the University employed Robert Witas in the job title or classification of Transportation Manager. (Pre-Hearing Memo at 5). At all times material, Vincent Tenuto

[3] References to documents introduced into the record as ALJ Exhibits will be labelled as ALJ Ex. #. Documents introduced by the Union will be labelled "Union Ex. #", and documents introduced by the Respondent will be labelled as "University Ex. #".

was employed by the Union as a business agent for several units, including the one at UIC to which Esposito belonged. (R. 18-19).

A. Esposito's Background, Training, and Job Duties

Esposito had previously been employed by UIC as a temporary driver in 2006. (R. 67). At the conclusion of that temporary assignment, the University offered Esposito a full-time position, but Esposito was unable to accept at the time because of an illness in the family. (R. 67). Between that temporary appointment and being hired by UIC in 2019, Esposito worked for the City of Chicago and for the Illinois Department of Transportation (IDOT) as a truck driver. (R. 67-68). He was recommended for this position by the Union. (R. 20, Union Ex. 2). He has a Commercial Driver's License with a Tanker endorsement. (R. 68). While employed by the University, he received training in driving a bus and a cardboard recycling truck. (R. 70-71). He received no training in plowing snow, although he had experience plowing snow in his two previous jobs. (R. 71).

Wlodarek testified as to the duties of a driver. (R. 206, University Ex. 2). Drivers typically drive vehicles; load, secure, haul, and deliver materials; checks general condition of vehicles and perform minor repairs; operate snow removal equipment; may perform some unskilled labor that does not conflict with local labor practice; and perform other duties as assigned. (R. 206-07, University Ex. 2). A driver would be expected to convey to a Sub-Foreman if they are too tired to drive. (R. 208). Esposito never did so, nor did he ever refuse to work overtime when requested. (R. 208).

B. Safety Concerns About Calcium Chloride Salt

On or about January 24, 2019, Esposito testified that he talked to his immediate supervisor, Rocco Wlodarek, employed by the University as an Automotive Subforeman, about safety concerns that he had over handling a material that he called calcium chloride salt. (R. 26, 71, 76, 78, Pre-Hearing Memo at 5). Esposito testified that he recognized calcium chloride from his time working for the City of Chicago and for IDOT. (R. 74). He texted a picture of himself standing on a truck to Tenuto. (R. 79). In subsequent conversations with Tenuto on January 24, Esposito raised issues with the safety equipment given to bargaining unit members for handling the calcium chloride salt and explained that bargaining unit members were expected to stand on the truck to load salt into the trucks. (R. 79).

C. Auto Accidents on January 20 and January 25

Esposito was involved in three automobile accidents while on duty. First, on January 20, 2019, Esposito was driving a white Chevrolet Suburban with a plow on the front in Lot

1A, which is a flat parking lot just off Harrison Street. (R. 79, 81). The lot has several light poles with solid concrete bases. (R. 82). Esposito stated that he inspected the vehicle for damage at 11:00 p.m. or midnight outside of the 657 Building, which houses the transportation and moving departments. (R. 72, 81). He saw no damage on the rear right bumper before he drove the vehicle because it was covered in snow. (R. 81). However, reports issued on the vehicle by the Campus Auto Rental Service from July 2014 through November 2018 all showed damage to the right rear bumper consistent with the damage shown in the photos, as did reports after the January 20, 2019 incident. (Union Ex. 6).

As he was driving the vehicle, he backed up and "tapped" one of the concrete pillars around the base of a light pole. (R. 82). Esposito testified that he immediately got out and took pictures of the rear right bumper and tailgate of the vehicle, which is where he testified that it collided with the pillar and sent those pictures to Wlodarek. (R. 83). The photos show damage to the right rear bumper that Esposito testified could not have occurred at the speed at which he was driving when he backed the vehicle into the pole. (R. 85-86, Union Ex. 5f).

At Wlodarek's direction, Esposito filled out an incident report. (R. 87, Union Ex. 5e). The incident report described damage to the passenger side rear bumper and tailgate. (Union Ex. 5e). Esposito testified that he "knew" that he did not cause the damage, but described the damage in the incident report because he thought that Wlodarek would know that there was no way that Esposito did the damage shown in the photos. (R. 88). He also filled out an incident report. (Union Ex. 5d). Esposito testified that, after the January 20 accident, he had a conversation with Wlodarek where Wlodarek told him that Pablo Acevedo, Wlodarek's boss, said that Esposito should not worry about the accident. (R. 105-06).

Wlodarek testified that he went to the scene of the accident on January 20 and says that he saw damage to the rear right bumper, and that there were some small black shards of the bumper on the ground next to the concrete pole. (R. 209-10). Wlodarek admitted on cross-examination that he was not aware of whether the vehicle had any prior damage. (R. 253). An incident report was submitted, and the report given to Witas. (R. 211-12, University Ex. 5e). Witas then gave the report to someone named Rachelle Cirrintano, who appears to be an employee of the State of Illinois Central Management Services (CMS). (R. 212, University Ex. 5c). Wlodarek claimed that he saw small flakes of the bumper in a photograph taken by Esposito of the crash site. (R. 277). Esposito testified that the black spots depicted in the photograph were dirty snow. (R. 273).

Esposito had a second accident on January 25. (R. 107). His shift that day started at 6:30 a.m. (R. 107). At around the thirteenth hour of his shift that day, Wlodarek asked him to plow one of the parking structures at the 611 Building, which is where McNamara's office is and where the salt is stored. (R. 72, 111). Esposito testified that he agreed to plow the lot after telling Wlodarek that he was tired and hadn't eaten. (R. 110). He testified that the part of the parking lot that he was assigned to plow had an icy ramp, and while he was attempting to maneuver around the lot to plow the snow, other vehicles would pull up behind him. (R. 112-13). As he was backing up, he testified that he backed up onto the ramp and the vehicle slipped and ran into a vehicle's taillight. (R. 113-14). After the accident, Esposito testified that he took photos and sent them to Wlodarek, then called him to explain what happened. (R. 116, Union Ex. 7f). Wlodarek sent out the UIC police, who filled out an incident report. (R. 117). The UIC Police did not issue Esposito a ticket for this accident. Esposito testified that he spoke to Tenuto a few days after the accident. (R. 119).

Wlodarek testified that little damage was done to the vehicle that was driven by Esposito, but that the Jeep that his vehicle struck had a broken taillight and some damage to the rear panel. (R. 214). An incident report was again completed, following the same process as the January 20 incident. (R. 215, University Ex. 7c, 7e). Wlodarek testified that he did not tell Esposito not to worry about either accident because he had no control over what would happen as a result of the University's process. (R. 216). Wlodarek also would not be the one making the final decision on whether an accident was at-fault. (R. 216-17). However, Wlodarek does take part in three-person panels that conduct internal reviews of accidents in the Transportation Department. (R. 217). The employee is not present for this review. (R. 217). After the review process for both incidents, Wlodarek testified that CMS determined that Esposito was deemed to be at fault on both occasions. (R. 220, Union Ex. 8). Wlodarek testified that he received the findings on February 10 or 11, then wrote the notification letters to be delivered to Esposito the next day. (R. 220-21). The letters were delivered to Esposito on February 14. (R. 221-22). Wlodarek testified that Esposito's receipt of those letters on the 14th was entirely unrelated to the conversation they had the day before. (R. 243-44). Wlodarek testified that Esposito was involved in a third accident during his employment, but Esposito was not deemed to be at-fault for the third one. (R. 252).

D. Salt Shoveling on February 12

On February 12, Esposito testified that Wlodarek asked him to load up a salt spreader. (R. 120). Esposito got the truck, and proceeded to the lot where the salt was stored, but that

there was a pile of salt where he was supposed to park the truck. (R. 120). He sent a picture of the salt to Wlodarek. (R. 121, Union Ex. 9a, 9b). He testified that Wlodarek told him that another driver had an equipment malfunction and had to shovel the salt out of a spreader. (R. 122-23). When Wlodarek was unable to contact that driver, he sent Esposito to ask a garage foreman named James McNamara to position a Skid-Steer where Esposito could shovel the salt into it. (R. 126). Esposito called Tenuto and told him about the assignment from Wlodarek, which involved shoveling the calcium chloride salt up over his head. (R. 25). Esposito told Wlodarek that he had sent a copy of the photo to Tenuto and that Tenuto told him that it was not his job to shovel it. (R. 126). Wlodarek responded that Tenuto didn't know what he was talking about, and that it was Esposito's job to shovel the salt. (R. 126).

Tenuto testified that after he received the call from Esposito, he called Wlodarek, who told him that Esposito was asked to shovel the salt because the driver that left the salt behind had reached a 16-hour safety threshold and had to be off the clock. (R. 26). Wlodarek agreed to provide Esposito with mechanical equipment that Esposito could shovel the salt into, so that it then could be placed inside the truck. (R. 26-27). Tenuto called Esposito to convey what Wlodarek told him, and Esposito told him that he would take care of it. (R. 28).

E. Events of February 13

On February 13, Esposito was directed to unload a truck belonging to a private vendor. (R. 133). He testified that he did as directed. (R. 133). After unloading the truck, he had a conversation with Wlodarek in which he asked whether any other driver had ever been asked to unload a private vendor's truck. (R. 134). Wlodarek responded that he didn't want to hear Esposito talk about salt anymore and that if Esposito didn't do what Wlodarek directed him to do, he would be disciplined. (R. 135). Esposito testified that Wlodarek also told him that if he told Tenuto about having to unload the truck, that he would be terminated. (R. 135). Esposito stated that he called Tenuto immediately after the conversation. (R. 138).

Tenuto testified that Esposito called him to tell him that Wlodarek told Esposito that he should not be contacting the Union about matters involving whether work falls within his job description. (R. 28-29). Tenuto then called Wlodarek, who allegedly told him that he runs his department and the Union doesn't get to tell him what to do. (R. 29-30). In that same conversation, Wlodarek also informed Tenuto that Esposito's two prior incidents, which Esposito previously was not considered to be at-fault, would now be considered at-fault accidents for which Esposito could face discipline. (R. 30-31). Wlodarek and Witas both deny that Esposito was ever previously found to be not at fault for the accidents.

Wlodarek testified that he had a consultation with Esposito on February 13 because Esposito had been exhibiting some troubling behaviors. (R. 223). He characterized Esposito's reaction to the consultation as surprisingly poor, aggressive, angry, and violent. (R. 224). Because of his response to the consultation, coupled with the two at-fault accidents, Wlodarek consulted with Witas and a Human Resources employee named LaDonna Hudson and arrived at the conclusion that Esposito's employment should be terminated. (R. 225). After this conversation, Wlodarek submitted an incident report. (Union Ex. 16). Wlodarek's incident report stated that, the day before, he asked Esposito to shovel Paledow, a product described as Calcium Chloride, into the rear of a vehicle. (Union Ex. 16). He stated that Esposito refused to do so because he was a driver. (Union Ex. 16). Wlodarek explained that Esposito was asked to shovel the substance because the vehicle's spreader failed, and that shoveling was a duty that drivers were expected to perform. (R. 228, Union Ex. 16). Because of this failure, the driver had to shovel the substance out of the spreader manually but could not then shovel it into a new truck because the previous driver had hit his 16 hour safety threshold. (R. 226-27, Union Ex. 16). Wlodarek told Esposito to get the mechanics to position a Skid-Steer for him to shovel the product into, and from there it could be dropped into the truck. (R. 227). The mechanics apparently either failed or refused to do so, so Esposito went to the grounds crew. (R. 227). Wlodarek testified that he got a call soon thereafter to the effect that Esposito was asking the grounds crew to shovel the product into the vehicle. (R. 227-28).

Wlodarek testified further that he had no issue with Tenuto being called about the pile of salt. (R. 229). Nor was he angry at Esposito for having called Tenuto. (R. 229). His only concern was that Esposito was refusing to shovel a pile of salt, which Wlodarek characterized as a standard driver's duty at the time. (R. 229). He responded to Esposito's incident report, in which Esposito wrote that he never refused to shovel, as "an absolute falsehood." (R. 232-33, Union Ex. 11).

The incident report also details an interaction with Esposito that occurred earlier in the day on February 13 where Esposito briefly refused to unload a truck because it was not a UIC truck. (R. 231). Once again, Wlodarek cited the initial refusal to perform the task, even though he did eventually aid in unloading the truck, as his concern. (R. 231). In response to Esposito's incident report on this occasion, where Esposito stated that he did not refuse to unload the truck, Wlodarek again disagreed, arguing that Esposito initially refused to unload the truck before eventually loading it. (R. 233, Union Ex. 11).

Wlodarek adamantly denied ever threatening Esposito's job, for consulting with Tenuto in Tenuto's capacity as Union business agent or for any other reason. (R. 233-35). He testified that not only did he not have the authority to fire anybody, but that he would have welcomed a conversation with Tenuto over job responsibilities because he spoke with Tenuto often at that time anyway. (R. 235).

He also testified that he gave Esposito the opportunity to file incident reports on February 13 as a way of allowing him to tell his side of the story, and to substantiate his insubordination. (R. 236). He stated that Esposito initially "blatantly refused" to fill out the incident reports, and that he failed to submit them by the end of the day on the 13th despite direction from both Wlodarek and Witas for him to do so. (R. 237). Wlodarek texted Witas early in the morning of February 15, noting that Esposito refused to submit his incident reports and that he expected that his failure to do so would be logged as insubordination. (R. 238, University Ex. 4).

Wlodarek also testified to his conversation with Tenuto on February 13 in which they discussed Esposito's situation. (R. 238). Wlodarek testified that Tenuto asked him to "lose" reports of Esposito's accident and his insubordination, as a favor to Union president Mike Malone, until Esposito's probation was finished. (R. 239). Wlodarek said that he refused, and that Tenuto told Wlodarek that Wlodarek "would be losing" the reports. (R. 239). Wlodarek told Tenuto to never call him again. (R. 239). In Wlodarek's incident report regarding this conversation, he stated that he was intimidated by Tenuto's suggestion that he withhold official action, which Wlodarek stated would be a Class 3 felony. (Union Ex. 18). The morning of February 15, Wlodarek claims that Tenuto threatened him and his family, and that Tenuto claimed that Wlodarek was "starting a war". (Union Ex. 18). Wlodarek testified that he was in fear for his life as a result of comments made by Tenuto. (Union Ex. 18). Later that day, Tenuto was arrested on allegations that he threatened Wlodarek and his family. (R. 41). He was later tried on felony charges and found not guilty. (R. 42-44).

Another aspect of that report detailed a threat that Esposito allegedly made regarding McNamara. Wlodarek claimed that Esposito talked about "having some Taylor Street guys roll on" a mechanic, and that Wlodarek assumed that the mechanic was McNamara because there were no other mechanics in the area. (R. 258-59). Wlodarek says he reported it to HR. (R. 259). Wlodarek initially stated that this alleged threat did not form any part of the basis for recommending Esposito's dismissal because McNamara denied that any confrontation occurred. (R. 260). However, during Tenuto's criminal trial, Wlodarek testified that the threat

against McNamara was "the straw that broke the camel's back" for deciding to recommend that Esposito be terminated. (R. 261). Wlodarek apparently did not ask McNamara about the incident before recommending Esposito's termination.

Witas testified that his understanding of the incident on February 13 was that Esposito refused to unload the truck that was loaded with bags of salt. (R. 170). An incident report filed by Miguel Matos on February 13, 2019, stated that after unloading the salt, Esposito stated that drivers shouldn't be unloading trucks. (Union Ex. 17). Witas testified that unloading trucks was within the job duties of a driver, and that drivers unloaded trucks "all the time." (R. 170).

Later on February 13, Witas directed Esposito to fill out incident reports regarding the salt shoveling dispute the previous day, and Esposito's initial refusal to unload the truck on February 13. Esposito did not do so on the 14th as directed but did submit them on the 15th. (R. 146-47). Witas agreed that the failure to submit an incident report in the time frame directed by Witas would be considered insubordination. (R. 174). Witas testified that insubordination, on its own, would not necessarily be a terminable offense, but that in his opinion it could be. (R. 179, 189). However, a probationary employee could be terminated for one at-fault accident, depending on the circumstances. (R. 184). While he was not familiar with the Accident Review Committee, he agreed that an employee should be part of the process. (R. 186-87).

On February 15, Wlodarek sent Witas a text message stating that Esposito had failed to submit the incident reports requested by Witas by the end of the day, and that he expected that be logged as an act of insubordination. (R. 173-74, Respondent Ex. 4). Witas testified that he would, in fact, consider that to be insubordination. (R. 174). Witas understood the reason for Esposito's termination to be either two or three at-fault accidents and poor job performance. (R. 175). Witas testified that other employees had been terminated because of at-fault accidents before Esposito, but that those terminations occurred before he became Transportation Manager. (R. 183). He denied claiming that the Union didn't have a role in what goes on at the University and denied that he would have a problem with an employee calling a business agent of the Union. (R. 175). He also testified that he didn't believe that Wlodarek would retaliate against a Union member for Union activity because Wlodarek was a Union member himself. (R. 176-77).

F. February 14 and beyond

When Esposito reported to work on February 14, he found two envelopes waiting for him, containing notices from Wlodarek stating that Esposito would be deemed at-fault for the January 20 and January 25 accidents. (R. 141, Union Ex. 10). The notice for the January 20 accident was signed on February 5 by Jerry Gill, on February 6 by Wlodarek, and on February 6 by Associate Director Pablo Acevedo. (Union Ex. 5b). The notice for the January 25 accident was signed by Gill on February 5, by Wlodarek on February 5, and by Acevedo on February 6. (Union Ex. 7b). In both instances, all three members of the review committee recommended that the accidents should be deemed chargeable, meaning that Esposito was at-fault. (Union Ex. 5b, 7b). The University sent Wlodarek a notice on either February 10 or 11 stating that Esposito would be considered at-fault for the accidents. (R. 220, Union Ex. 8). Esposito was not invited to meet with the accident review committee following either accident. (R. 102, 118).

After receiving the notices, Esposito had a conversation with Wlodarek's supervisor, Robert Witas, in the hallway. (R. 143). Witas asked Esposito to file three incident reports, the first for the February 13 dispute involving the shoveling of salt, a second for allegedly insulting or threatening McNamara, and the third on Wlodarek allegedly threatening his job when he asked whether a driver is supposed to be unloading a private delivery after already having unloaded the truck. (R. 142-45, Union Ex. 11). Esposito testified that, during this conversation, Witas told him that the Union "has nothing to do with anything that goes on down here." (R. 144). Esposito was asked to deliver the incident reports to Witas on February 14, but he submitted them on February 15 instead. (R. 146-47).

McNamara testified that Witas asked him to file an incident report regarding an accusation that Esposito threatened him following the incident concerning the pile of salt on February 12, 2019. (R. 60). McNamara was not aware of any incident. (R. 60-61). McNamara was asked several times over the next few days before finally submitting a report on February 19. (R. 61, Union Ex. 14). The incident report states that McNamara was approached by an unknown driver who asked for his help with loading a pile of salt that was on the floor. (Union Ex. 14). McNamara says that, when Esposito asked him for help, he asked a garage attendant to help Esposito put the salt back in the truck. (R. 63). McNamara denied that any argument occurred and stated that the salt pile was loaded into the truck as requested by Wlodarek. (R. 63).

At some point on February 14 or 15, Tenuto went to UIC and spoke with Wlodarek. Tenuto testified that he asked Wlodarek why Esposito's accidents were suddenly being considered preventable when they were not previously labelled as such. (R. 33). Wlodarek allegedly refused to answer except to say that "[t]hat's what I'm doing." (R. 33). Tenuto also raised the issue of Wlodarek assigning overtime to his brother in a manner that Tenuto alleged was a violation of the contract's overtime provisions. (R. 33-37).

They also discussed an incident report that was filed with regards to an alleged argument between Esposito and Jim McNamara, which both participants in the incident deny occurred. (R. 34). Wlodarek would not tell Tenuto who gave him the information about the incident but would later state that he overheard it. (R. 34). Tenuto described the general tenor of the conversation as "adamant", and that voices were raised. (R. 36-37). He denied threatening Wlodarek. (R. 37). After the conversation, he went to try to talk to Witas, who was not in his office at the time, then returned to work. (R. 37-38).

On February 18, Wlodarek and Witas brought Esposito in for a performance evaluation. (R. 155, Union Ex. 12). Wlodarek claimed that he needed two UIC police officers outside the room where the performance review took place, which Wlodarek said was unusual. Wlodarek testified that Esposito did not seem to have the skills he claimed to have, especially when it came to plowing snow. (R. 245, Union Ex. 12). Wlodarek also cited Esposito's relationship with supervisors and coworkers as another reason for his dismissal. (R. 246, Union Ex. 12). He described Esposito's job performance as quite poor compared with other candidates. (R. 245). He compared Esposito's record, containing two at-fault accidents and insubordination, with other drivers who had been dismissed at the end of their probationary period or before. (R. 248-49, University Ex. 5). He testified that he believed that Esposito was treated no differently from those other drivers. (R. 249). Before his conversation with Esposito on February 13, Wlodarek testified that he had not yet made up his mind on whether to recommend that he be terminated. (R. 257).

Esposito's performance evaluation shows that he received scores of zero in four of the eight categories on the performance evaluation. The evaluator's comments on the evaluation, which appear to have been written and signed by Wlodarek, stated that Esposito had two at-fault accidents and reacted inappropriately and unprofessionally to verbal counseling administered for overt displays of poor attitude. (Union Ex. 12). Esposito testified Wlodarek signed the observation. (R. 156). As they left the room, Wlodarek accused Esposito of falsifying an incident report, referring to the one where Esposito claimed that Wlodarek

threatened his job. (R. 156-57). On February 19, Esposito received notice that he was dismissed from his position because of his work performance. (R. 158, Union Ex. 13).

II. Issues and Contentions

The Union alleges that Esposito was terminated, in whole or in part, because of his union or concerted activity in violation of Section 14(a)(3) and, derivatively, (1) of the Act. The University states that Esposito's job performance was such that he would have been terminated regardless of any protected activity that Esposito may have been engaged in, and otherwise denies that any violation of the Act occurred.

III. Discussion

This charge alleges that Esposito's termination occurred, in whole or in part, because of Esposito's union or concerted activity. If proven, this would constitute a violation of Section 14(a)(3) of the Act, which prohibits educational employers 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." 115 ILCS 5/14(a)(3) (2022). To prove a Section 14(a)(3) violation, a charging party must first make a *prima facie* case that (1) the employee was involved in union or concerted activity or other protected activity as detailed in Section 3 of the Act; (2) the employer was aware of said protected activity; and (3) the employee was discharged, in whole or in part, for engaging in that activity. Georgetown-Ridge Farm Community Unit School District No. 4 v. IELRB, 239 Ill. App. 3d 428, 464-65 (4th Dist. 1992). The final element of the test requires a showing of anti-union animus, which may be inferred from factors including, but not limited to:

> "an employer's expressed hostility towards unionization, together with knowledge of the employee's union activities [citation removed], proximity in time between the employee['s] union activities and [his] discharge [citation removed], disparate treatment of employees or a pattern of conduct which targets union supporters for adverse employment action [citations removed], inconsistencies between the proffered reason for discharge and other actions of the employer [citation removed], and shifting explanations for the discharge." City of Burbank v. ISLRB, 128 Ill. 2d 335, 346 (1989).

If the charging party can demonstrate that a *prima facie* case exists, the burden then shifts to the respondent to demonstrate, by a preponderance of the evidence, that it had legitimate reasons for dismissing the employee in question and can demonstrate that they in fact relied on those reasons at least in part. Bloom Township High School Dist. 206 v. IELRB, 312 Ill. App. 3d 943 (1st Dist. 2000). If the reasons advance by the respondent are *bona fide* and not pretextual, and the employer can show that it relied on those reasons in taking the

adverse action at issue, the case is now considered to be "dual motive" in nature, and the employer must then demonstrate that it would have taken the action at issue regardless of any protected activity that the employee was engaged in. Bloom Township at 960.

A. *Prima Facie* Case

I find that Esposito was involved in Union activity. An employee is involved in union or otherwise protected concerted activity where the employee seeks union assistance with respect to a term or condition of employment, invokes a right arising out of a collective bargaining agreement, or acts with or on behalf of a group of fellow employees. Georgetown-Ridge Farm at 464. The essence of this conflict is that Esposito contacted Tenuto to enquire into his job responsibilities, and then that a conflict between Tenuto and Wlodarek triggered a set of events that culminated in Tenuto's arrest and Esposito's termination. Wlodarek was aware that Esposito contacted Tenuto, and that the subject of that call was Esposito's job responsibilities, which fits squarely within the terms and conditions of his employment. Esposito therefore sought Union assistance with respect to a term or condition of employment, and having done so, was engaged in protected union or concerted activity.

The University argues that union activity must also be "concerted" in nature to constitute a violation of the Act. To explain why this is not so, it is important to understand just what rights are protected by the IELRA. Section 3(a) of the Act defines employee rights. It describes the right to "organize, form, join, or assist in employee organizations *or* to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection [. . .]" (emphasis added). In other words, Section 3(a) protects the right to engage in union activity, and it protects an entirely separate right to engage in lawful concerted activity irrespective of whether the employee is a member of a union. Union activity does not need to also be concerted in nature to be protected by the Act. Similarly, Section 14(a)(1) prohibits employers from interfering, restraining, or coercing employees in the exercise of Section 3 rights. Section 14(a)(3) of the Act prohibits educational employees from "discriminating in regard to hire or tenure of employment" in order to "encourage or discourage membership in an employee organization," If the legislature had intended a requirement that Section 14(a)(3) only apply to educational employees who were also engaged in concerted activity with said organization, it could have done so but did not.

I also find that the University was aware of Esposito's protected activity, because Wlodarek was aware. Wlodarek had the job title of Automotive Sub-Foreman, and as such was Esposito's direct supervisor. He had the authority to assign work, to set schedules, and

to offer a recommendation on a wide range of decisions including hiring, firing, and disciplining employees. The University argues that Wlodarek's knowledge of Esposito's protected activity should not be treated as knowledge of the University because Wlodarek is a Union member and not considered a supervisor under the Act. However, this position is mistaken because Wlodarek has supervisory duties as a normal and regular part of his job but is not considered a supervisor pursuant to Section 2(g) of the Act because he does not spend a majority of his time performing those duties. Similarly, Wlodarek's comments at issue in this matter were made concerning a matter in the scope of his employment and within the existence of the employment relationship, which Illinois courts tend to find are considered statements of the employer. Pietruszynski v. McClier Corp., 338 Ill. App. 3d 58 at 65 (2003).

I also find that the Union successfully demonstrated that evidence existed that would tend to show that Esposito was terminated, in whole or in part, because of his Union activity. It is undisputed that the argument between Tenuto and Wlodarek occurred, at least in part, because Esposito complained to Tenuto about his job responsibilities. As discussed above, that is a term or condition of employment, and therefore activity protected under Section 3 of the Act. During his testimony, Esposito alleged that Wlodarek made anti-union statements in relation to Esposito contacting Tenuto about job responsibilities. Furthermore, Esposito received notice that he was at fault for the two accidents just a day after his conversation with Wlodarek, Esposito's subsequent conversation with Tenuto, and the argument between Tenuto and Wlodarek, does raise eyebrows. The Union argues further that the University's reasons for his termination were inconsistent and shifting, in part because Wlodarek's testimony at Tenuto's criminal trial indicated that he decided to recommend that Esposito be terminated because of Esposito's supposed argument with and threats toward McNamara, even though both deny that any argument occurred. The Union has therefore made a *prima facie* case alleging that Esposito's termination was retaliatory in nature. We now move to whether the University had legitimate reasons to terminate Esposito.

B. Legitimate Reasons for Termination

I also find that the University could have had legitimate reasons to terminate Esposito. Witas testified that Esposito was terminated because of two at-fault accidents, coupled with poor job performance including refusal to perform job duties. Witas testified that at-fault accidents had been used in the past to terminate probationary employees, but that he had not done so himself before Esposito. Similarly, Wlodarek testified that Esposito

was terminated for being at fault for two accidents and insubordination and was treated no differently than other drivers terminated under similar circumstances. Because the University had legitimate reasons to terminate Esposito, it must now demonstrate by a preponderance of the evidence that it would have terminated Esposito notwithstanding any Union activity. Bloom Township at 960.

C. "Dual Motive" Analysis

The final step of the Bloom Township analysis requires that I compare the evidence that Esposito was terminated because of his Union activity to the evidence that he was terminated for legitimate business reasons. In "dual motive" cases such as this one, the employer must demonstrate that the preponderance of the evidence shows that Esposito would have been terminated notwithstanding his Union or other concerted activity.

The Union relies heavily on the notably short period of time between Esposito raising safety concerns about shoveling salt on February 12, his calling Tenuto about those concerns the same day, the conflict between Tenuto and Wlodarek on February 13, and Esposito's termination. The Union argues that Wlodarek threatened Esposito's job, then acted on that threat when Esposito called Tenuto to inform Tenuto that Wlodarek threatened his job. This position is supported by substantial evidence, including Wlodarek's role in reviewing both of Esposito's accidents and his performance review. The University, in reply, argues that Wlodarek could not have retaliated against Esposito because Wlodarek was a proud member of the Union and would not have committed unfair labor practices against a union to which he was a member.

I find that Wlodarek targeted Esposito for termination because Esposito called Tenuto for clarification about his job duties, which led to the subsequent altercation between Tenuto and Wlodarek. Because of this altercation, Wlodarek wanted to retaliate against Tenuto for raising concerns about Esposito's job duties and for Tenuto raising the issue of Wlodarek's brother being given overtime outside of what was provided for in the contract. Wlodarek provided several inconsistent and contradictory explanations for why Esposito was terminated, and some of his recollections appear to be quite different from the testimony provided not just by Esposito and Tenuto, but at times from Witas as well. For example, Wlodarek testified that he and Witas told Esposito to submit his incident reports by the end of the day on February 13, the same day that Wlodarek spoke with Esposito to raise his concerns about Esposito's job performance. Witas was out that day. When asked about that on cross-examination, Wlodarek insisted that Witas came into work that day. (R. 267).

Wlodarek also accused Esposito of "blatantly refusing" to submit incident reports. Esposito submitted the incident reports on February 15. Wlodarek's insistence on Esposito's refusal closely matched the language contained within the February 15 text message that Wlodarek sent to his supervisor, Witas, essentially demanding that Esposito's failure to submit those incident reports on the day they were requested would be logged as insubordination. The unusual tone of this text demonstrates the animus that Wlodarek had toward Esposito, which did not exist before February 13, when Wlodarek stated that he was still contemplating whether Esposito should be let go.

Similarly, Wlodarek stated that two UIC officers were stationed outside the door when he and Witas met with Esposito to inform him that they had recommended his termination. (R. 247). He described the presence of officers as "not normal" for a meeting of that nature. Esposito denied that UIC police were present outside the conference room. (R. 274). Despite being present for the meeting, Witas was not asked whether UIC police was present, and did not mention the unusual presence of UIC police officers at a meeting during his testimony. It therefore seems unlikely to have happened.

These incidents cast doubt on Wlodarek's other testimony, especially that he didn't demand that Esposito not call Tenuto about things that Wlodarek may have believed were clearly within the job duties of a driver.[4] Under the circumstances, Wlodarek was Esposito's immediate supervisor, and by his own admission, Wlodarek had the authority to recommend that an employee under his supervision be terminated from a probationary appointment. His recommendation would clearly carry great weight. Terminating a probationary employee like Esposito in response to Tenuto raising issues about job duties and the allocation of overtime hours could have been simply a quick and easy way of silencing others who may have raised those concerns in the future.

In short, Wlodarek recommended that Esposito be terminated more because Esposito got Tenuto involved than because of Esposito's job performance. Terminating Esposito would tend to prevent employees from consulting with the Union on matters of job duties in the future and would prevent employees from raising questions about the allocation of overtime

[4] While deciding on Wlodarek's credibility as a witness, I will note that I give no weight to Tenuto's not guilty verdict, although the charges against him were based solely on Wlodarek's claims. *See, e.g.*, Rizzo v. Board of Fire and Police Commissioners of Franklin Park, 131 Ill. App. 2d 229 at fn. 5 (acquittal not admissible as evidence in a civil case because of the difference in the "quantum of proof" required in civil and criminal trials). The IELRB largely follows the rules of evidence as applied in Illinois courts in civil matters, with the caveat that the IELRB may also rely on evidence which is material, relevant, and would be relied upon by reasonably prudent persons.

hours. Wlodarek may be an outspoken member of the Union, but that does not mean that he cannot act in a way that tends to chill union activity when he engages in supervisory duties on behalf of the University.

I find further that the aforementioned conduct outweighs the reasons given for his termination. By Wlodarek's own admission, he had not yet made up his mind on whether to recommend Esposito's termination before February 13. This indicates that, while testimony demonstrates that termination may have been justified under the circumstances, it was not necessary. Wlodarek's recommendation that Esposito be terminated was a decision that he had the discretion to make, and the evidence demonstrates that it is more likely than not that Wlodarek's exercise of that discretion to recommend that Esposito be terminated was because of Tenuto's involvement on matters involving job duties and overtime allocation. Wlodarek's decision to recommend that Esposito be terminated in this way would make it less likely that other members of the unit would turn to Tenuto or other Union representatives for assistance with matters related to Wlodarek in the future. Accordingly, while there is little doubt that Wlodarek is a supporter of the Union, there can similarly be little doubt that, in this case, he acted with the requisite anti-union animus to constitute a violation of Section 14(a)(3) of the Act.

IV. Recommended Order

For the reasons discussed above, I recommend the following:

Respondent, Board of Trustees of the University of Illinois, d/b/a University of Illinois Chicago, its officers, and its agents shall:

1. Cease and Desist from:
    a. 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.

    b. Retaliating against Richard Esposito, or any of its other employees, for consulting their Union in matters relating to their job duties or other terms and conditions of employment.

    c. Otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in the Illinois Educational Labor Relations Act.

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

   a. Offer to Richard Esposito immediate and full reinstatement to the position he previously held as Driver for the Transportation Division of UIC's Facilities Management Department on a probationary basis.

   b. Make Richard Esposito whole for the loss of any pay or benefits, with interest at a rate of seven percent per annum, resulting from the University's discriminatory removal of him from his position as Driver.

   c. Preserve and, upon request, make available to the IELRB or its agents for examination and copying all records, reports, and other documents necessary to analyze the amount of remedy due under the terms of this Opinion and Order.

   d. Post on bulletin boards or other places reserved for notices to bargaining unit employees copies of the Notice to Employees attached to this Recommended Decision and Order. Copies of this notice shall be provided by the Executive Director of the Illinois Educational Labor Relations Board and shall be signed by Respondent's authorized representative, posted and maintained for sixty (60) calendar days during which a majority of bargaining unit employees are working. Reasonable steps shall be taken by the University to ensure that the notices are not altered, defaced, or covered by any other materials.

   e. Notify the Executive Director in writing within thirty-five (35) calendar days after receipt of this Recommended Decision and Order of the steps taken to comply with it.

V. Right to File Exceptions

Pursuant to Section 1120.50(a)(1) of the Board's Rules and Regulations, Ill. Admin. Code tit. 80 § 1120.50(a)(1) (2017), the parties may file written exceptions to this Recommended Decision and Order no later than 21 days after receipt of this decision. Exceptions and briefs must be filed with the Board's General Counsel. If no exceptions have been filed within the 21-day period, the parties will be deemed to have waived their exceptions. Under Section 1110.20(e) of the Board's Rules, 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. Ill. Admin. Code tit. 80 § 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: May 12, 2023
Issued: Chicago, Illinois

/s/ Nick Gutierrez
Nick Gutierrez
Administrative Law Judge

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