STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Governors State University,	)	
	)	
Respondent	)	
	)	
and	)	Case No. 2020–CA–0041–C
	)	
University Professionals of Illinois, Local 4100, IFT-AFT, AFL-CIO,	)	
	)	
Complainant	)	

OPINION AND ORDER

I. Statement of the Case

On November 27, 2019, University Professionals of Illinois, Local 4100, IFT-AFT (Union) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board) alleging that Governors State University (University or GSU) committed unfair labor practices within the meaning of Section 14(a) of the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5/1 *et. seq.*, by unilaterally terminating its tuition waiver policy with several other universities. Following an investigation, the Board's Executive Director issued an Executive Director's Recommended Decision and Order (EDRDO) dismissing the charge in its entirety. The Union filed exceptions to the EDRDO. On April 15, 2021, the Board reversed the EDRDO and remanded the matter to the Executive Director for issuance of complaint and notice of hearing (Complaint). The Complaint followed and the parties appeared before an Administrative Law Judge (ALJ) for hearing. In her May 15, 2023 Recommended Decision and Order (ALJRDO), the ALJ found that the University violated Section 14(a)(5) and, derivatively, Section 14(a)(1) of the Act when it altered the status quo with regard to its tuition waiver benefit for non-civil service employees taking courses at other universities without bargaining in good faith with the Union. The University filed exceptions to the ALJRDO, and the Union filed a response.

II. Factual Background

We adopt the ALJ's finding of facts as set forth in the underlying ALJRDO. Because the ALJRDO comprehensively sets forth the factual background for the case, we will not repeat the facts herein except where necessary to assist the reader.

III. Discussion

The University filed the following exceptions: 1) To the ALJ's characterization that its Director of Human Resources, rather than the other universities, denied bargaining unit members Paula McMahon and Nichole Dalaly tuition and fee waivers; 2) To the ALJ's finding of the status quo, the approval of tuition waivers for GSU employees taking courses at other universities, because that was wholly within the control of the other universities and not GSU; 3) To the ALJ's finding that GSU had approval authority on the front end of the tuition waiver process; 4) To the ALJ's finding that its regulations expressly stated it had a certain degree of tuition waiver approval authority; 5) To the ALJ's finding that the face value implication that GSU was facilitating and assenting to a policy which provided non-civil service employees a tuition exempt benefit at certain other universities; 6) To the ALJ's finding that GSU's degree of administration and operation in this matter, the cessation of the employee benefit, or alteration of the status quo should be attributed to GSU; 7) To the ALJ's finding that the evidence did not support a waiver by the Union of its right to bargain tuition waivers; 8) To the ALJ's finding that the Union's silence did not indicate an intention to waive its bargaining authority, nor were there any facts conducive to sustain a waiver theory. Viewed broadly, GSU's exceptions each fit into one of two categories. The first six exceptions argue that the unilateral change to deny tuition waivers was made by third parties rather than GSU, so GSU is not at fault. The seventh and eighth exceptions argue that the Union waived its right to bargain the tuition waivers, excusing GSU from its duty to bargain.

An educational employer violates Section 14(a)(5) of the Act when it unilaterally changes the status quo involving a mandatory subject of bargaining. *Vienna Sch. Dist. No. 55 v. IELRB*, 162 Ill. App. 3d 503, 515 N.E.2d 476 (4th Dist. 1987). Intra-institutional fee and tuition waivers are a compensable fringe benefit, and thus mandatory subjects of bargaining. *Graduate Employees Organization, Local 6300, IFT/AFT*, 31 PERI 116, Case Nos. 2011-CA-0015-S & 2012-CA-0019-S

(IELRB Opinion and Order, November 15, 2012). The question here is whether the same can be said for inter-institutional fee and tuition waivers.

An employer cannot be expected to bargain about third-party changes that they have no control or influence over. *Lamont's Apparel*, 268 NLRB 1332 (1984). Nevertheless, just because an employee benefit emanates from a third party does not automatically mean that an employer cannot have a duty to bargain about changes or discontinuance by the third party. *Id.* "[W]here an employer can influence third-party decisions concerning modifications and continuance of employee benefits, then to that extent the employer possesses the ability to affect its own employees' terms and conditions of employment and, concomitantly, is obliged to bargain about changes that it can influence." *Id.* In *Lamont's Apparel*, the commission rate paid to bargaining unit employees by vendors was a mandatory subject of bargaining between the union and the department-store employer because the employer suggested that the vendors reduce employees' commission rates. In *Ford Motor Co. v. NLRB*, 441 U.S. 488, 503 (1979), the Court relied on the employer's potential leverage over a third-party vendor in finding that a price increase for in-house cafeteria and vending machines was a mandatory subject of bargaining. The same can be said for the University. Even under its theory that the decision to discontinue tuition waivers was made by the other universities, the University's potential leverage is its ability to likewise disallow tuition waivers for employees of other universities previously part of the Board of Governors system when they take courses at the University.

The University's Board of Trustees regulations state that a faculty or administrative employee may enroll in any university previously part of the Board of Governors system for a maximum of two courses, or six credit hours, whichever is greater, in any one academic term with the exemption from payment of tuition and fees. The University's webpage that was entered into the record says the same. The University's advertising of inter-institutional tuition waivers as a benefit of employment is indicative of its level of control.

Accordingly, we affirm the ALJ's determination that the discontinuance of inter-institutional tuition waivers for bargaining unit employees was a unilateral change to a mandatory subject of bargaining.

The University further asserts in its exceptions that the ALJ incorrectly found that the Union did not waive its right to bargain the tuition waivers. A waiver of a statutory right, such as the Union's right to bargain, must be clear and unmistakable. *See Forest Preserve District of Cook County*

v. ILRB, 369 Ill. App. 3d 733, 861 N.E.2d 231 (1st Dist. 2006); *AFSCME v. SLRB*, 274 Ill. App. 3d 327, 653 N.E.2d 1357 (1st Dist. 1995); *AFSCME v. SLRB*, 190 Ill. App. 3d 259, 546 N.E.2d 687 (1st Dist. 1989).

The University did not reply to the Union's November 4 demand except to acknowledge its receipt. The University contends that a waiver could be construed by the Union's failure to repeat its demand to bargain over the unilateral change as the parties were negotiating a successor contract. These circumstances do not affect the University's obligation to bargain. There is no requirement that a union repeat its demand at every bargaining session.

The University notes that although the Union demanded to bargain over the termination of the inter-institutional tuition waivers on November 4, 2019, the Union subsequently entered into a successor agreement that does not guarantee inter-institutional tuition waivers. A contract is considered a waiver of both parties' right to bargain over matters fully negotiated and covered by the contract because the parties are not required to discuss or modify the terms of that contract. *Pembroke CCSD. No. 259*, 8 PERI 1055, Case No. 92-CA-0069-C (IELRB Opinion and Order, May 29, 1992); *Illinois Secretary of State*, 24 PERI 22 (IL LRB-SP 2008); *City of Chicago*, 18 PERI 3025 (IL LRB-LP 2002); *Illinois Dep' t of Military Affairs*, 16 PERI 2014 (IL SLRB 2000); *City of Decatur*, 5 PERI 2008 (IL SLRB 1989). However, waivers by express agreement are construed as applicable only to the specific item mentioned. *Illinois Secretary of State*, 24 PERI 22. Where a contract is silent on the subject matter in dispute, a finding of waiver by contract is absolutely precluded. *Id*. In this case, the successor contract is silent on inter-institutional waiver, so there was not waiver by the successor contract.

What is more, the University violated the Act before the Union made its demand to bargain because it engaged in bad faith bargaining when it made the unilateral change by altering the tuition waiver policy at issue here in June 2019. A union must receive advance notice of a pending change before it will be found to have waived its right to bargain. *Niles Elementary School District No. 71*, 9 PERI 1057, Case No. 92-CA-0075-C (IELRB Opinion and Order, March 12, 1993); *City of Waukegan*, 28 PERI 45 (IL LRB-SP 2011); *County of Cook*, 15 PERI 3001 (IL LRB-LP 1998). The record does not demonstrate that the Union waived its right to bargain the tuition waivers.

In addition to restoring the status quo, the ALJ recommended a make whole remedy for the employees who were denied the tuition waivers. Traditionally, this means that the affected

employees would be reimbursed for the tuition costs and fees that they incurred out of pocket that would have been covered but for the University's unlawful conduct, with interest at the rate of seven percent per annum. Complainant urges this Board to expand that to include compensating the employees for additional losses they sustained by delays in achieving advanced degrees and loss of salary for higher paying jobs they could have taken had they not accepted employment at GSU with the expectation of tuition and fee exemption. Complainant offers that the National Labor Relations Board has recently held that employees harmed by unilateral changes should receive compensation for all direct or foreseeable pecuniary harms suffered by employees due to the employer's unfair labor practices in *Thryv*, 372 NLRB No. 22 (2022).

The Illinois Labor Relations Board recently addressed a complainant's request that it expand its definition of make whole relief per *Thryv*, noting that the National Labor Relations Board's decision does not purport to change the law on make-whole relief, it simply established new standard remedial language that clarifies and codifies its existing practices. *Cook County Sheriff*, 40 PERI ¶11 (ILRB-LP 2023). We see no reason to establish new remedial language. What is more, the facts of this case do not persuade us to believe that we should expand the traditional remedy.

IV. Order

Respondent violated Section 14(a)(5) and, derivatively, (1) of the Act by discontinuing its tuition waiver benefit for non-civil service employees without prior bargaining to agreement or impasse with Complainant. The ALJRDO is affirmed. For the reasons discussed above, IT IS HEREBY ORDERED that Respondent, Governors State University, its officers, and its agents shall:

1. Cease and Desist from:
    a. Refusing to bargain collectively and in good faith with University Professionals of Illinois, Local 4100, IFT-AFT, AFL-CIO.
    b. Making unilateral changes to any term or condition of employment without prior bargaining to agreement or impasse.
    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. Restore the status quo.

    b. Make whole any bargaining unit employees for any losses incurred as a result of Respondent's unilateral change, including interest at the rate of 7% per annum.

    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 thirty-five (35) calendar days after receipt of this 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: **December 13, 2023**
Issued: **December 14, 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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STATE OF ILLINOIS
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University Professionals of Illinois, Local 4100, IFT-AFT, AFL-CIO,	)	
Complainant,	)	
and	)	Case No. 2020-CA-0041-C
Governors State University,	)	
Respondent.	)	

Administrative Law Judge's Recommended Decision and Order

I. Procedural Background

On November 27, 2019, Complainant University Professionals of Illinois, Local 4100, IFT-AFT, AFL-CIO (Complainant or Union) filed an unfair labor practice charge against Respondent Governors State University (GSU or Respondent or University), alleging that the Respondent committed unfair labor practices within the meaning of Section 14(a) of the Illinois Educational Labor Relations Act (IELRA or Act), 115 ILCS 5/1, *et seq.* On April 22, 2021, following an investigation, the Executive Director, on behalf of the Illinois Educational Labor Relations Board (IELRB), issued a complaint and notice of hearing (Complaint) setting a June 9 and 10, 2021 hearing date, and alleging that the Respondent violated Section 14(a)(5) and derivatively (1) of the Act. The parties appeared before the undersigned on May 2

and 6, 2022.[1] Tr. 1, 100.[2] Both parties simultaneously filed post-hearing briefs on August 4, 2022.[3]

II. Issues and Contentions

The Complainant alleges that the Respondent violated the Act when it failed to bargain in good faith by unilaterally altering a policy that allowed University employees to take classes at certain other State universities with an exemption from the payment of tuition and fees, which adversely affected three of its bargaining unit members in the instant case.

The Respondent contends on the contrary, that the Complaint should be dismissed in its entirety because the Complainant has failed to meet its burden of proof in establishing that the Respondent violated the Act. Specifically, the Respondent argues that it did not unilaterally change the terms and conditions of its tuition waiver policy, but rather a third party was responsible for the change which resulted in three of the Union's bargaining unit members' interinstitutional tuition waivers being refused. Additionally, the Respondent sets forth that even if the

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[1] On June 3, 2021, pursuant to a request from counsel for the Complainant, the proceeding was continued for medical reasons and in light of settlement discussions between the parties. On February 17, 2022, pursuant to advisement from the Complainant that the parties did not reach a settlement, the matter was reset for hearing on April 27-28, 2022. On April 26, 2022, the parties advised the undersigned that the April 27-28, 2022 hearing dates were not feasible, therefore, the hearing was rescheduled to May 2 and May 6 of 2022.

[2] Reference to exhibits in this matter will be as follows: Complainant's exhibits, "C. Ex. ___"; Respondent's exhibits, "R. Ex. ___"; ALJ exhibits, "ALJ Ex. ___". Reference to the transcript of proceeding will be "Tr. ___".

[3] The undersigned set the simultaneous filing of post-hearing briefs for July 1, 2022. Subsequently, the Respondent requested an extension to July 22nd, then the Union requested an extension to August 4, 2022, both of which were granted by the undersigned.

undersigned determines that a bargaining obligation did exist in the instant case, the Union waived its opportunity to bargain.

III. Findings of Fact

a. Uncontested Material Facts

Complainant filed the unfair labor practice charge in this proceeding on November 27, 2019, and a copy thereof was served on the Respondent. ALJ Ex. 6; ALJ Ex. 13. At all times material, Governors State University (GSU) was an educational employer within the meaning of Section 2(a) of the Act and subject to the jurisdiction of the Board. ALJ Ex. 6; ALJ Ex. 13. At all times material, University Professionals of Illinois, Local 4100, IFT-AFT, AFL-CIO was an employee organization within the meaning of Section 2(c) of the Act. ALJ Ex. 6; ALJ Ex. 13. At all times material, the Complainant Union was the exclusive representative within the meaning of Section 2(d) of the Act of a bargaining unit comprised of certain persons employed by the Respondent, including faculty and academic professional employees. ALJ Ex. 6; ALJ Ex. 13. At all times material, the Complainant and the Respondent have been parties to a collective bargaining agreement (CBA) for the above-referenced bargaining unit, including the period from the beginning of the 2016-2017 academic year to the conclusion of the 2018-2019 academic year. ALJ Ex. 6; ALJ Ex. 13. The parties began bargaining for a successor collective bargaining agreement prior to June 2019. ALJ Ex. 13. The parties concluded bargaining for a successor agreement in November 2019. ALJ Ex. 13. On November 4, 2019, the Union demanded to bargain about the termination of the waiver of tuition and fees because it was a change in working conditions. ALJ Ex. 13. The University did not

make a formal response to the demand to bargain except to state that it had received the demand. ALJ Ex. 13.

b. Additional Material Facts

Nichole M. Dalaly, Paula A. McMullen McMahon (McMullen) and Stacy Amedeo testified at the hearing on behalf of the Complainant. Sandra Alvarado Marak (Alvarado) testified at the hearing on behalf of the Respondent. The following findings of fact are based on the testimony and documentary evidence in the record that I have determined to be relevant and credible:

Section II of the Respondent's Board of Trustees' regulations titled "Educational Benefits" provides that specific benefits, if approved, are described in Section II.B.5.f for faculty and administrative employees and in Section II.C.7.g for Civil Service employees, and the tuition waiver provisions, if any, of the applicable collective bargaining agreements. U. Ex. 2. Additionally, regarding its tuition reduction benefits program, the Board of Trustees solely reserves the right to amend, change or terminate benefits under the program. U. Ex. 2. The regulations provide further that a faculty or administrative employee may enroll in any university previously a part of the Board of Governors system for a maximum of two courses, or six credit hours, whichever is greater, in any one academic term with the exemption from the payment of tuition and fees.[4] U. Ex. 2. The fees which will be waived by such universities include registration, application fees, credit evaluation fees,

[4] In its Answer, the Respondent admitted that it maintained a written policy that employees who enrolled in other Illinois Board of Governor Universities were eligible to obtain a fee and tuition waiver. ALJ Ex. 6.

admission fees, activity fees, graduation fees, and textbook rental fees. U. Ex. 2. In addition, service fees, such as those imposed to secure revenue for bond retirement, will be waived by such universities for an employee of the university granting the waiver.[5] U. Ex. 2.

In the spring of 2019, three non-civil service employees respectively sought to avail themselves of tuition waivers for summer enrollment at institutions other than the Respondent's.[6] Historically, non-civil service employees completed a form then submitted it to have the interinstitutional waiver processed by Respondent as an initial eligibility step of vetting and application. U. Ex. 8; U. Ex. 9; Tr. 140. Once the Respondent's tuition waiver form was processed and accepted by the Respondent's operations team or Human Resources division, it was forwarded to the designated attending institution for further processing to honor or grant the tuition waiver and waive the associated enrollment fees. U Ex. 4; U. Ex. 12; U Ex. 13; Tr. 130-131, 106-107, 119, 140.

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[5] On Respondent's webpage under Human Resources Employee Benefits, and Employee Tuition Waiver, it states that full time permanent status employees may enroll in any university previously a part of the Board of Governors system for a maximum of two courses, or six credit hours, whichever is greater, in any one academic term with exemption from the payment of tuition and fees. (Governors State University, Northeastern Illinois University, Chicago State University, Northern Illinois University). Civil Service Tuition and fee waivers shall be granted by each state university in Illinois to status Civil Service employees of the University. U. Ex. 3.

[6] In the spring of 2019, and prior to, Northern Illinois University, as well as other participating Illinois institutions, were accepting and granting tuition waivers for non-civil service employees that they received from the Respondent. U. Ex. 19; U. Ex. 20; Tr. 126-145. Alvarado testified that the Respondent, upon a belief that there was an agreement in place, operated under a longstanding practice of reciprocal tuition waiver agreements with certain institutions for faculty and academic professionals who were classified as non-civil service employees. Tr. 131-134.

Towards or about the end of May of 2019, confusion arose about whether or not tuition waivers would be processed as they had been in the past for non-civil service employees, particularly Dalaly, McMullen and Amedo.[7] Dalaly applied for a tuition waiver to Northern Illinois University and received assurances from Respondent's Human Resource representatives that her waiver would be applied.[8] U. Ex. 5; Tr. 38-39. However, on May 30, 2019, Dalaly learned from Jim Schoenecker, Respondent's Human Resources (HR) Representative, of her tuition waiver benefit ineligibility. Schoenecker advised that Respondent had several instances where other institutions had discovered that non-civil service employees who were covered under a CBA and who should only be attending Respondent's institution by waiver were mistakenly granted waivers at those other institutions, and that Respondent was bound by the CBA as it pertained to tuition waivers.[9] U. Ex. 5; Tr. 41-43, 53-54.

Shortly thereafter on June 5th, another non-civil service employee, McMullen, after reaching out to discuss the status of her enrollment, was advised by a representative at Northern Illinois University (NIU) that there was a problem with the processing of interinstitutional tuition waivers, including the one she submitted to the Respondent for enrollment at NIU. U. Ex. 10; Tr. 62-63.

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[7] Tuition waivers were applied based on classifications of the State Civil Service System. Pursuant to Section 11 of the Respondent's regulations, tuition and fee waivers shall be granted by each state university in Illinois to Civil Service employees of the Respondent's. U. Ex. 2, p.28. Waivers regarding Civil Service employees are not at issue in this case, nor was this classification of employee denied a tuition waiver here.

[8] Dalaly testified that the higher education benefit of a tuition waiver was discussed and an employment consideration for her. Tr. 31, 34-35, 37, 53.

[9] Article 31 of the parties' CBA provides that a full-time employee may enroll for credit at the University (GSU) for a maximum of two courses, or six credit hours, whichever if greater, in any one Academic Term with exemption from the payment of tuition and fees.

After being admitted to and enrolling in NIU's Adult and Higher Education Program, Amedeo, in seeking to avail herself of a tuition waiver, reached out to an academic counselor at NIU on June 7th after learning that there were issues with tuition waivers being processed. U. Ex. 13; Tr. 82-89. Danae Miesbauer, an academic counselor at NIU, responded that there had been issues with the Respondent's waivers but the issue had been taken care of and she believed NIU was on track to accept tuition waivers from GSU for the fall, and copied a NIU Human Resources representative to confirm such. U. Ex. 13; Tr. 87-88. Mary Hoebing from NIU's HR services responded that NIU would be accepting tuition waivers from Respondent's employees and once the waivers were received from Respondent's Human Resources contact, they would approve and send over the waiver to their Bursar's office for processing.[10] U. Ex. 13; Tr. 88.

On June 7, 2019, Alvarado emailed Mary Hoebing at NIU the following in large part:

> "I wanted to contact you regarding the acceptance of inter institutional waivers for non-civil service employees. Can you tell me if NIU will accept waivers for our employees who are not civil service? In the past, we've had other institutions randomly deny waivers of employees who had been receiving waivers, which left employees in a bad spot. Previously, I attempted to ascertain which institutions would accept waivers for non-civil service employees and no one would give me a firm agreement to accept. I believe there was a thought that a reciprocal agreement existed with NIU but neither institution could find it. I hope you can provide us with guidance and firm answers." R. Ex. 1.

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[10] Amedeo ultimately withdrew her classes after her balance remained unwaived, then decided to leave her non-civil service position for a civil service position in order to take advantage of the express tuition exemption provided under Section 11 of the Respondent's regulations. Tr. 89-90, 94.

Hoebing ultimately responded that unfortunately NIU would not be able to accept interinstitutional tuition waivers for non-civil service employees and apologized for the inconvenience and confusion it may have caused. R. Ex. 1. Alvarado acknowledged to Hoebing that she believed her team accidently approved three waivers for employees who were not civil service. R. Ex. 1.

On or about June 7, 2019, the Union filed a grievance against the Respondent citing that it had been honoring a regulation in which Respondent's employees enrolled at up to 2 courses or six credit hours (whichever was greater) per semester at either Chicago State University, Northeastern Illinois University, Eastern Illinois University[11] or Northern Illinois University and paid no tuition or fees, yet McMullen and Dalaly had been denied tuition and fee waivers by Sandra Alvarado, Director of Human Resources. U. Ex. 14; U. Ex. 18. The Union asserted that the denial severely impacted employees' ability to continue their education. U. Ex. 18. The Union sought to have the Respondent honor the regulation immediately and reimburse employees for any out-of-pocket expenses incurred that should have been covered according to the regulation. U. Ex. 18. The parties were unable to resolve the matter informally. U. Ex. 14.

On or about June 17, 2019, Schoenecker reached out to a representative at Northeastern Illinois University to determine whether it still accepted and waived tuition for non-civil service employees and was advised that it does not accept non-civil service employees' interinstitutional tuition waivers. R. Ex. 3.

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[11] Although immaterial, there is no explanation in the record for the discrepancy of Eastern Illinois University being referenced in the grievance yet not in the Respondent's regulations.

In or about July of 2019, a grievance meeting convened where the three previously mentioned members of the Union who had applied for tuition waivers learned from the Respondent's agents that the benefit was no longer available and had been erroneously applied in the past for non-civil service employees.[12] Tr. 46-49, 64-65, 113, 118-120.

On November 4, 2019, the Union demanded to bargain the termination of the tuition and fees waiver as a change in working conditions for its bargaining unit members. U. Ex. 14. The Union did not raise this issue during negotiations for the parties' successor agreement. Tr. 123.

In December of 2019, in reference to a tuition waiver to be applied at Chicago State University, McMullen learned that it would not be accepting or approving non-civil service waivers going forward. R. Ex. 2.

IV. Discussion

a. Respondent's Alleged Violation of the Act

The Complainant argues that the University unilaterally altered the right of its members to take courses at other universities with the exemption from tuition and fees, which was a significant fringe benefit of employment, and within its realm of control to decide. With respect to the Respondent's affirmative defense, the Complainant argues further that it did not waive its right to bargain the issue at hand, as the Respondent suggests.

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[12] During this time, and ongoing since the Fall of 2018, the parties were bargaining a successor agreement. Tr. 120. The parties reached a tentative agreement in November of 2019. Tr. 123. The successor agreement was signed in August of 2020. U. Ex. 15; Tr. 123.

The Respondent contends that it was other state universities that took the unilateral action which resulted in its non-civil service employees and the Union's bargaining unit members being unable to participate in the tuition waiver program. Respondent's position is that that Complainant failed to prove that it took affirmative action or had any control, influence, or power to preclude the tuition waivers from being granted and was not responsible for the denial made by other institutions. Alternatively, assuming there was a bargaining obligation, the Respondent sets forth that the Complainant waived any right to bargain when it remained silent on the matter during contract negotiations.

An educational employer violates Section 14(a)(5) when it makes a unilateral change to a term or condition of employment that deals with mandatory subjects of bargaining without giving the exclusive representative of the employees notice and an opportunity to bargain over the change. *Vienna School District No. 55 v. IELRB*, 162 Ill. App. 3d 503. Unilateral changes are those alterations implemented without prior negotiation to impasse. A term or condition of employment is something provided by an employer which intimately and directly affects the work and welfare of the employees and which has become a mandatory subject of bargaining. For a past practice to constitute a term or condition of employment, in the absence of contractual terms describing the policy, the charging party must prove that the practice is sufficiently established to constitute a status quo. *Vienna* at 507. The test for determining whether a specific practice is sufficiently established is objective. The determination of whether a status quo has been established must be made on a case-by-case basis, including history, past bargaining practices, existing

contractual terms, and the reasonable expectations of employees. *Vienna Sch. Dist. No. 55 v. IELRB*, 162 Ill. App. 3d 503, 515 N.E.2d 476 (4th Dist. 1987).

Here, I find that the Respondent's long-standing practices with certain Illinois institutions, involving reciprocal tuition waivers constituted a defacto agreement that was being utilized for non-civil service GSU employees. Despite the Respondent's evidence that the waivers in question were, as it turned out, being applied in error, the record supports a finding, which favors the existence of a status quo, that the Respondent nevertheless had an active and essential role in consistently processing tuition waiver eligibility, which apparently served as the gateway for a non-civil service employee's tuition waiver ultimately and unquestionably being honored or accepted by the attending institution prior to the spring of 2019. Alvarado, testified to having approval authority as it related to the waivers, even if only on the front end of the process for those attending other institutions. With such authority also infers and attaches a degree of obligation, and any subsequently discovered mistake should not be construed against the Union or beneficiary. Moreover, the Respondent's regulations expressly state at least a certain degree of approval authority, as well as provide that its Board of Trustees solely reserve the right to amend, change or terminate the benefits under the applicable tuition reduction benefit program, which only buttresses an inference that the existing benefit was altered to an extent under the Respondent's purview.

As it relates to the past bargaining practice here, the issue at bar, namely interinstitutional tuition waivers, was not bargained for by the parties for non-civil service employees, nor did the Union raise such at the table during negotiations in

2019 for a successor agreement. It wasn't until November of 2019 that the Union demanded to bargain the Respondent's alleged alteration of the tuition waiver practice concerning non-civil service employees, to which the Respondent did not respond formally, after unsuccessfully pursuing a grievance in June of 2019.

The parties' CBA does not address interinstitutional tuition waivers, and instead provides under certain conditions for its employees being able to enroll at Respondent's institution, exempt from the payment of tuition and fees. However, Respondent's policy or regulations state that an employee may enroll in any university previously a part of the Board of Governors system for a maximum of two courses, or six credit hours, whichever is greater, in any one academic terms with exemption from the payment of tuition and fees. Similarly, Respondent's website displayed as a benefit, the employee tuition waiver language that permanent status employees may enroll in any university previously a part of the Board of Governors system for a maximum of two courses, or six credit hours, whichever is greater in any one academic term with exemption from the payment of tuition and fees (Governors State University, Northeastern Illinois University, Northern Illinois University and Chicago State University). For all intents and purposes, although there was no express reciprocal agreement in place per se, outlining the terms and conditions of engagement between each participating institution, the face value implication is that Respondent was facilitating and assenting to a policy which provided non-civil service employees a tuition exempt benefit at certain other institutions.

Lastly, the reasonable expectations of employees under the facts here substantiate a finding that the tuition waiver benefit was indeed an established

status quo. On at least one occasion, the relevant tuition higher education benefit was discussed with and considered by an employee as an employment consideration. Furthermore, it is well documented that non-civil service employees had been granted the tuition waiver benefit at issue in the past, and the affected employees here sought to avail themselves of said benefit with the reasonable expectation of the waiver being accepted and approved by the Respondent and waived at the respective attending institutions, primarily based on the longtime conduct of Respondent and participating schools. There was no indication, reason to believe, or notice that their or any other non-civil service employee's benefit eligibility would cease in the spring of 2019.

Consequently, the overall weight of the above discussed factors suggests that the tuition waiver benefit for non-civil service employees constituted the status quo. The bottom line is that the Respondent was part of a process, under exercised authority, which resulted in non-civil service employees being afforded a valuable employment benefit, that was taken away in or around the spring of 2019. Given the Respondent's degree of administration and operation in the matter, the cessation of this employee benefit, or alteration of the status quo, should be attributed to Respondent in this instance. As a result, I find that the Respondent violated Section 14(a)(5) and derivatively (1) of the Act when it made a unilateral change to a term or condition of employment that dealt with a mandatory subject of bargaining

without giving the exclusive representative of the employees notice and an opportunity to bargain over the change.[13]

The Respondent presented an affirmative defense that the Complainant, due to its awareness of the tuition waiver issue during the parties' bargaining negotiations for a successor agreement, and decision to remain silent regarding such at the bargaining table, waived its right to bargain.

An exclusive representative may lawfully waive its right to demand collective bargaining under the Act, but such a waiver must be clear and unmistakable. *See Rock Falls Elementary School District No. 13*, 2 PERI 1150, Case No. 85-CA-0052-C (IELRB Opinion and Order, November 12, 1986).

The evidence in the record does not support a clear and mistakable waiver by the Union. The Union's silence is not indicative of an intention to waive its bargaining authority, nor do I find any facts conducive to sustain a waiver theory. Therefore, the Union did not waive its right to bargain the tuition waiver benefit for its non-civil service bargaining unit members and the Respondent's obligation to bargain in good faith existed at the time the status quo was altered. Accordingly I

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[13] Section 14(a)(1) of the Act prohibits educational employers, their agents or representatives from interfering, restraining or coercing employees in the exercise of the rights guaranteed under the Act. 115 ILCS 5/14. The alleged violation is treated as a derivative action, since the Respondent's failure to bargain in good faith with the Complainant, has interfered with and or restrained the bargaining unit's fundamental right of representation. Where an alleged violation of sections 14(a)(1) and 14(a)(5) stem from the same conduct, the section 14(a)(1) violation is said to be derivative of the section 14(a)(5) 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)(5) violation occurred. *Id.*

find that the Respondent's conduct violated Section 14 (a)(5) and derivatively (1) of the Act.

V. Recommended Order

On the basis of the above findings and conclusions, I recommend the following: Respondent, its officers, and agents shall,

1. Cease and desist from:

(a) Interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the IELRA; and

(b) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative in an appropriate unit; and

(c) Making unilateral changes to terms or conditions of employment that deal with a mandatory subject of bargaining without giving the exclusive representative of the employees notice and an opportunity to bargain over the change.

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

(a) Restore the status quo; and

(b) Make the adversely affected employees whole stemming from the Respondent's violation of the Act; and

(c) Post on bulletin boards or other places reserved for notices to employees, for sixty (60) consecutive days during which the majority of Respondent's employees are actively engaged in the 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; and

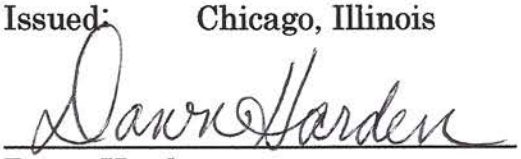
(d) Notify the Executive Director, in writing, within 35 days after receipt of this Order of the steps taken to comply with it.

VI. Exceptions

In accordance with Section 1120.50(a) of the Board's Rules and Regulations (Rules), Ill. Admin. Code tit. 80 §§1100-1135, parties may file written exceptions to this Recommended Decision and Order together with briefs in support of those exceptions, not later than 21 days after service hereof. Parties may file responses to exceptions and briefs in support of the responses not later than 21 days after service of the exceptions. Exceptions and responses must be filed, if at all, with the Board's General Counsel, 160 North LaSalle Street, Suite N-400, Chicago, Illinois 60601-3103. At this time, parties are highly encouraged to direct said exceptions and responses, if at all, to the general email account at ELRB.mail@illinois.gov. Pursuant to Section 1100.20(e) of the Rules, the exceptions sent to the Board must contain a certificate of service, that is, "**a written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service.**" If any party fails to send a copy of its exceptions to the other party or parties to the case, or fails to include a certificate of service, that party's appeal will not be considered, and that party's appeal rights with the Board will immediately end. See Sections 1100.20 and 1120.50 of the Rules, concerning service of exceptions. If no exceptions have been filed within the 21-day period, the parties will be deemed to have waived their exceptions, and unless the Board decides on its own motion to

review this matter, this Recommended Decision and Order will become final and binding on the parties.

Dated: May 15, 2023
Issued: Chicago, Illinois



Dawn Harden
Administrative Law Judge

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