STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO,	)	
Complainant	)	
and	)	Case No. 2022–CA–0018–C
Chicago Board of Education,	)	
Respondent	)	

ORDER

I. Statement of the Case

On September 22, 2021, Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO (Union) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board) alleging that Chicago Board of Education (CBE) 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.* Following an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing (Complaint) alleging that CBE violated Section 14(a)(1) of the Act by refusing to arbitrate the Daphne Moore and Olayinka Mohorn-Mintah grievances, and that its refusal breached the parties' collective bargaining agreement (Contract or CBA) so as to indicate repudiation or renunciation of its terms. The parties waived their right to hearing and agreed to proceed upon a stipulated record. Based on the stipulated record, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (ALJRDO) finding that CBE violated Section 14(a)(1) of the Act when it refused to arbitrate the grievances. CBE filed timely exceptions to the ALJRDO and the Union filed a response to the exceptions.

We have carefully considered the record, the ALJRDO, CBE's exceptions and the Union's response to those exceptions. For reasons explained in Section II, Chairman Shayne and Member Hays would reverse the ALJ's decision. For reasons explained in Section III, Members Grossman and Ishmael would affirm that decision. When there is a tie vote, as in this case, the Administrative Law Judge's Recommended Decision and Order becomes the final order of the

agency, but does not have precedential effect. *Board of Education of Community Consolidated High School District No. 230 v. IELRB*, 165 Ill. App. 3d 41, 518 N.E.2d 713 (4th Dist. 1987). Therefore, the order in this case is that CBE violated Section 14(a)(1) of the Act.

II. CHAIRMAN SHAYNE and MEMBER HAYS, reversing:

Section 14(a)(1) of the Act prohibits educational employers and their agents or representatives from "[i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act." An employer's refusal to arbitrate a grievance violates Section 14(a)(1) of the Act. *Board of Educ. of City of Chicago v. IELRB*, 2015 IL 118043, 69 N.E.2d 809; *Cobden Unit School District No. 17 v. IELRB*, 2012 IL App (1st) 101716, 966 N.E.2d 503; *Board of Trustees, Prairie State College v. IELRB*, 173 Ill. App. 3d 395, 527 N.E.2d 538 (4th Dist. 1988). There are two valid defenses to an unfair labor practice charge based on an educational employer's refusal to arbitrate a grievance: (1) there is no contractual agreement to arbitrate the dispute; or (2) the grievance is not arbitrable under Section 10(b) of the Act due to a conflict with Illinois law.[1] *Board of Educ. of City of Chicago*, 2015 IL 118043, ¶ 20; *Cobden Unit School District*, 2012 IL App (1st) 101716; *Niles Township High School District 219 v. IELRB*, 379 Ill. App. 3d 22, 883 N.E.2d 29 (1st Dist. 2007); *Chicago Teachers Union v. IELRB*, 344 Ill. App. 3d 624, 800 N.E.2d 475 (1st Dist. 2003).

CBE argues in its exceptions that the ALJ erroneously found that res judicata did not apply to the grievances at issue in this matter. The courts have acknowledged that there is a presumption favoring arbitrability of labor disputes. *Woods v. City of Berwyn*, 2014 IL App (1st) 133450; *Champaign Police Benevolent & Protective Ass'n Unit No. 7 v. City of Champaign*, 210 Ill. App. 3d 797, 802, 569 N.E.2d 275 (4th Dist. 1991); *Board of Governors of State Colleges and Universities v. IELRB*, 170 Ill. App. 3d 463, 524 N.E.2d 758 (4th Dist. 1988). They have likewise acknowledged that the right to pursue an arbitration action may be limited by the effect of the

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

doctrine of res judicata. *Village of Bartonville v. Lopez*, 2017 IL 120643 (2017); *Village of Rockford v. Unit Six of PBP*A, 362 Ill. App. 3d 556, 840 N.E.2d 1283 (2nd Dist. 2005); *Peoria Firefighters Local 544 v. Korn*, 229 Ill. App. 3d 1002, 549 N.E.2d 742 (3rd Dist. 1992); *Village of Creve Coeur v. Fletcher*, 187 Ill. App. 3d 116, 543 N.E.2d 323 (3rd District 1989). Res judicata is a judicially created doctrine resulting from the practical necessity that there be an end to litigation and that controversies once decided on their merits shall remain in repose. *Bartonville*, 2017 IL 120643. Three requirements must be present in order for the doctrine of res judicata to apply: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) the parties in the latter action were identical to or in privity with the parties in the action to which the final judgment was rendered; and (3) the cause of action was the same. *Bartonville*.

In this case, the courts' decisions meet the first requirement. The ALJ found that res judicata did not apply here because the remaining requirements were not satisfied.

As to the second requirement for a finding of res judicata, the ALJ determined that the parties were not the same because the court actions were brought by Moore and Mohorn-Mintah themselves, whereas the Union filed the grievances. Illinois courts have treated parties as identical or in privity for purposes of res judicata when they represent the same interests. *Bartonville*, 2017 IL 120643; *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296, 602 N.E.2d 820 (1992). In *Bartonville*, the court granted an employer's declaratory judgment action seeking to stay the arbitration of a police officer's grievance following a police and fire commission termination hearing. In *Burris*, the court found that an action by the Illinois Attorney General to recover charitable assets allegedly commingled with a corporation's assets was barred by a previous probate court proceeding under res judicata because the Attorney General's interests were adequately represented by the charity in the previous proceeding. There is privity because like the parties in *Burris* and *Bartonville*, the interests of the parties here, Moore and Mohorn-Mintah and the Union, are the same. That is, all parties seek as a result of each set of proceedings, to overturn the suspensions and obtain backpay for Moore and Mohorn-Mintah. The same Union attorneys represented both women in their court proceedings.

With regard to the third requirement for res judicata, the ALJ found that the causes of action were not the same because the court actions alleged that CBE violated the Illinois School Code (School Code), 105 ILCS 5/1, whereas the grievances allege CBE violated the Contract.

In *Bartonville*, 2017 IL 120643, the court used the transactional test to determine if causes of action were the same. Under the transactional test, the assertion of different theories or kinds of relief still constitute a single cause of action if a single group of operative facts give rise to the assertion of relief. Despite the different legal theories acknowledged by the ALJ, this difference does not create a separate cause of action for the purpose of res judicata because a single group of operative facts, the events leading up to the discipline, give rise to the assertion of relief. *Id.*

A finding that res judicata bars the arbitration of the grievances at issue in this case is in line with several court opinions concerning non-educational employees. Illinois courts have found the doctrine of res judicata applied to arbitration of public employees' grievances where an appeal of the disciplinary action that was the subject of the grievance was also pursued before an administrative body. *Bartonville*, 2017 IL 120643 (declaratory judgement finding that grievance over police officer's discharge barred by res judicata where officer and union participated in prior hearing on complaint for termination before the board of fire and police commissioners); *Village of Rockford*, 362 Ill. App. 3d 556 (res judicata precluded union from filing a grievance seeking reinstatement of police officer who had been terminated by the board of fire and police commissioners following a hearing); *Peoria Firefighters*, 229 Ill. App. 3d 1002 (court dismissed union's motion to compel arbitration of grievance over firefighters' dismissal where court had affirmed police and fire commissioner's finding); *Village of Creve Coeur*, 543 N.E.2d 323 (police officer's attempt to have a disciplinary decision of police and fire board reviewed both through administrative review and grievance procedure would provide for irrational and absurd result).

In addition to there being no violation of the Act because the doctrine of res judicata applies, we believe that CBE raised a valid defense to a refusal to arbitrate unfair labor practice charge. Arbitration of the grievances in this matter conflicts with Illinois law because the Illinois Supreme Court said on administrative review of Moore's suspension order that CBE had the power under the Illinois School Code to suspend a teacher in lieu of termination in the context

of termination proceedings. *Board of Education of the City of Chicago v. Moore*, 2021 IL 125785 (2021).

We are also persuaded by a prior Illinois Supreme Court case. In that case, the Illinois Supreme Court held that a school board's discretionary power to terminate the employment of probationary teachers by the non-renewal of their teachers' contracts may not be delegated to an arbitrator or limited by a collective bargaining agreement. *Board of Educ. of City of Chicago*, 2015 IL 118043, ¶ 29. Similarly, in the instant case, the subject matter conflicts with CBE's statutory right pursuant to Sec. 34-85 of the School Code to administer discipline proceedings, and therefore, CBE is within its rights to refuse to arbitrate.

The Illinois Supreme Court held in its administrative review of Moore's suspension, that CBE's "powers to make rules would be eviscerated and its ability to manage the school system would be ineffective if it could not elect to suspend a teacher when the evidence did not establish cause for dismissal." *Moore*, 2021 IL 125785, ¶ 33. CBE could have rejected the hearing officer's recommendation and dismissed the teachers. Instead, CBE issued suspensions and returned the teachers to work. As the Illinois Supreme Court stated, "[t]o preclude a remedial sanction where a teacher was negligent, yet require a dismissal because the charges were brought under 34-85 of the School Code, could lead to unjust decisions." *Id.*, at ¶ 59.

Even though CBE's refusal to arbitrate was not a violation of the Act, the ALJ correctly determined that the grievances were not barred by the doctrine of waiver. This would have no bearing on the outcome of this case, we would still find no violation of the Act despite our position on waiver. CBE contends that in the context of labor arbitrations, a contractual right to arbitrate can be waived like any other contractual right. The case it cites in support of this, *Schroeder Murchie Laya Associates Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 746 N.E.2d 294 (1st Dist. 2001), involves a contractor's complaint against a condominium and does not arise in the context of labor relations. CBE's assertion that the Union could have contractually waived its right to arbitrate here is misguided because Section 10(c) of the IELRA requires collective bargaining agreements between educational employers and labor organizations to contain a grievance procedure for bargaining unit employees that provides for binding arbitration. This is

particularly important because even the Illinois Public Labor Relations Act allows parties to waive arbitration of grievances, whereas collective bargaining agreements for educational employers and educational employee union must provide for grievance arbitration of all contractual disputes. What is more, nothing in the record with regard to the Union's conduct suggested it waived the grievances. It filed them in a timely fashion and communicated with CBE regarding selection of an arbitrator.

III. MEMBERS GROSSMAN and ISHMAEL, affirming:

We respectfully disagree with our colleagues' conclusion that CBE did not violate the Act. Like the ALJ, we believe that res judicata does not apply because the second two requirements have not been met. Even though the courts' decisions meet the first requirement, the parties are not the same or in privity and the cause of action is not the same.

We agree with the ALJ's determination that the parties are not the same because the court actions were brought by Moore and Mohorn-Mintah themselves, whereas the Union filed the grievances. Privity does not exist here because it is not clear that Moore and Mohorn-Mintah's interests are the same as those of the Union. In their court cases, Moore and Mohorn-Mintah sought to overturn their individual suspensions and be paid for the time they were suspended. The Union claims in its response to exceptions that the grievance is not a challenge to the merits of the teachers' particular suspensions, but that it seeks a determination of whether the Contract bans all suspensions.

Judicial precedent on duty of fair representation cases arising under Section 14(b)(1) supports a finding that a union's interests in pursuing a grievance may not always align with the bargaining unit member's interests. In deciding whether to pursue an employee's grievance, a union may take into consideration the perceived merit of the complaint, likelihood that the union will prevail, the cost of pursuing the grievance, or the possible benefit to membership. *Jones v. IELRB*, 272 Ill. App. 3d 612, 622-23, 650 N.E.2d 1099 (1st Dist. 1995).

The Union, as a party to the Contract, has standing to allege violations of the Contract. Neither Moore nor Mohorn-Mintah are parties to the Contract. A union has no legal duty to process every grievance that is filed, or to pursue all grievances to arbitration. *Chicago Teachers Union*, 10 PERI 1008, Case No. 93-CB-0028-C (IELRB Opinion and Order, November 10,

1993). "In providing for a contractual grievance and arbitration procedure, in which the exclusive representative has discretion in processing grievances, the employer and the exclusive representative have the right to settle grievances by negotiations between them." *SIUC Faculty Association, IEA-NEA*, 20 PERI 4, Case No. 2003-CB-0005-S (Executive Director's Recommended Decision and Order, January 22, 2004) (citing *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903 (1967)). "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined[.]". *Vaca*, 386 U.S. at 191; 87 S. Ct. 903 at 917. A union may, and often does, settle grievances it has filed on behalf of members without their agreement or approval. *Amalgamated Transit Union, Local 241*, 24 PERI ¶8 (IL LRB-LP 2008). The parties' CBA allows grievances to be filed by individual employees, groups of employees, and the Union on behalf of employees. Yet the Contract mentions the Union's right to advance a grievance to arbitration, but grants the grievants themselves no such right. This indicates that the Union, rather than grievants Moore and Mohorn-Mintah, owns the grievances at this stage of the grievance procedure. *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 225 n.14 (1983) (where contract "provides the union with sole authority to press an employee's grievance, the union acts as the employee's exclusive representative in the grievance-arbitration procedure."). It follows that the parties to the court cases and the grievances are not identical or in privity for the purposes of res judicata.

With regard to the third requirement for res judicata, the causes of action are not the same. Moore and Mohorn-Mintah's court cases alleged that CBE violated their statutory rights under the School Code, whereas the grievances allege CBE violated the Contract. In our view, there remains an open question as to whether CBE can suspend in lieu of discharge under the Contract. Under the transactional test, the assertion of different theories or kinds of relief still constitute a single cause of action if a single group of operative facts give rise to the assertion of relief. The operative facts of the court cases here are not the same as the grievance for the purposes of res judicata. In the Moore grievance, the Union states:

> In negotiations of the 2012-2015 CBA, [CBE] agreed to concede suspensions without pay and replace it with the 3-step progressive warning discipline process that has been codified at Article 29 of the [CBA] ever since. In exchange for this consideration, the Union agreed that disciplinary warnings would not be subject to review unless and until they reached step

> 3 of the discipline process. This quid pro quo is reflected in the language of Article 29. (Stip. Ex. E).

Despite the parties' bargaining history and the language of the Contract, it was completely within the courts' purview to decide that CBE did not violate the School Code when it suspended Moore and Mohorn-Mintah. The courts did not need to consider either the bargaining history or the Contract when it made its determinations and a reading of the cases indicates that neither of these was a factor in either decision. However, these are facts that the arbitrator must take into consideration. Thus, under the transactional test, there is not a single identical group of operative facts in both matters.

The cases where courts have found the doctrine of res judicata applied to arbitration where an appeal of the discipline that was the subject of the grievance was also pursued before an administrative body are distinguishable from the case before the Board because they involve public employees within the meaning of Section 3(n) of the Illinois Public Labor Relations Act (IPLRA), 5 ILCS 315/3, subject to the jurisdiction of the Illinois Labor Relations Board (ILRB). *Bartonville*, 2017 IL 120643; *Village of Rockford*, 362 Ill. App. 3d 556; *Peoria Firefighters*, 229 Ill. App. 3d 1002; *Village of Creve Coeur*, 543 N.E.2d 323. The threshold for finding a public employer's refusal to arbitrate a grievance an unfair labor practice under the IPLRA is notably higher than for an educational employer under the IELRA. A public employer's isolated refusal to arbitrate a grievance, or even a class of grievances, does not amount to repudiation of an employer's duty to bargain necessary to find a violation of the IPLRA. *County of Bureau and Bureau County Sheriff*, 29 PERI ¶ 163 (ILRB-SP 2013). All of the court cases referenced above in this paragraph involve an employer's single refusal to arbitrate, over which the union has no recourse over under the IPLRA. Another distinction is that Section 10(c) of the IELRA requires collective bargaining agreements between educational employers and labor organizations to contain a grievance procedure that provides for binding arbitration, whereas Section 8 of the IPLRA states the same must be true unless mutually agreed otherwise. Thus, collective bargaining agreements for educational employers and educational employee unions must provide for grievance arbitration of all contractual disputes, whereas public employers and public employee unions may waive that right. With that standard, the ILRB has not adopted the IELRB's limitation of valid defenses an employer may assert to its refusal to arbitrate. As

discussed above, there are only two valid defenses that an educational employer may assert to its refusal to arbitrate and escape a finding that it committed an unfair labor practice and res judicata is not one of them.

While we acknowledge the practical necessity that the doctrine of res judicata serves, we cannot ignore the presumption favoring arbitrability of labor disputes. *Woods*, 2014 IL App (1st) 133450; *Champaign PBPA No. 7*, 210 Ill. App. 3d 802, 569 N.E.2d 275; *Board of Governors*, 170 Ill. App. 3d 463, 524 N.E.2d 758. In cases such as these, where the requirements of res judicata have not been met, the presumption of arbitrability trumps the doctrine of res judicata. Ensuring that the parties get their claims heard in the proper forum is an essential element in ensuring justice for all sides.

CBE contends that the ALJ erred in finding that a provision in a collective bargaining agreement that conflicts with a statute is not void. In *Rockford School District No. 205 v. IELRB*, 165 Ill. 2d 80, 649 N.E.2d 369 (1995), the court found that a contractual provision to overturn a notice to remedy through the parties' grievance procedure conflicted with the sections of the School Code granting school boards the power to dismiss tenured teachers. Provisions of a collective bargaining agreement that conflict with the School Code, or any other Illinois statute, are void. 115 ILCS 5/10(b). According to CBE, the courts in *Moore*, 2021 IL 125785 and *Mohorn-Mintah*, 2019 IL App (1st) 182011 affirmed CBE's power to apply suspension as a disciplinary measure in lieu of termination pursuant to a hearing under Section 34-85 of the School Code. Indeed, the court in *Moore* affirmed that CBE had that power, and that it was within its power to apply suspension as a disciplinary remedy in lieu of dismissal. But *Moore* did not find that an arbitrator's interpretation as to whether the employer had just cause to suspend the employee conflicted with the School Code. Stated another way, *Rockford School District* said the school board had the exclusive authority to dismiss tenured teachers so an arbitrator's interpretation as to whether it had just cause to do so conflicted with the School Code. Whereas *Moore* said it was within CBE's authority per the School Code to suspend instead of discharging a tenured teacher. Contrary to CBE's assertion, neither *Moore* nor *Mohorn-Mintah* rendered any provision in the Contract void.

Although we would affirm the ALJ's determination that CBE violated the Act and the portion of his remedy ordering CBE to arbitrate the grievances, we would not affirm his determination that the Union is entitled to make-whole relief. Whether back pay or any other type of remedy is appropriate is for the arbitrator to decide in conjunction with a determination as to whether CBE violated the Contract.

Finally, we agree with our colleagues that the ALJ correctly determined that the grievances were not barred by the doctrine of waiver.

IV.

IT IS HEREBY ORDERED that the nonprecedential ALJRDO is final and binding upon the parties.

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: **February 16, 2024**
Issued: **February 16, 2024**

/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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Complainant	)	
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Chicago Board of Education,	)	
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ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. BACKGROUND

On September 22, 2021, Complainant, Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO (Union), filed an unfair labor practice charge against Respondent, Chicago Board of Education (CBE), alleging it had violated Section 14(a) of the Illinois Educational Labor Relations Act (Act), 115 ILCS 5/1, *et seq*. After investigation, on October 18, 2022, the Executive Director, on behalf of the Illinois Educational Labor Relations Board (IELRB or Board), issued a complaint for hearing.

The parties submitted a stipulated record on January 27, 2023. Both parties were afforded and took advantage of an opportunity to file post-hearing briefs on March 13, 2023.

II. ISSUES AND CONTENTIONS

Complainant: The Union contends Respondent violated Section 14(a)(1) of the Act in that the CBE has taken action to prevent two grievances from being arbitrated, thereby breaching the parties' collective bargaining agreement (CBA) so as to indicate repudiation or renunciation of its terms. The Union seeks an appropriate remedy.

Respondent: The CBE denies it violated the Act, contending it declined to arbitrate the grievances at issue because the disciplinary suspensions which are the subject thereof, were already fully adjudicated in actions before the Illinois Appellate Court and Illinois Supreme Court, and thus, subject to *res judicata*. Moreover, the CBE asserts the individual grievants waived their right to advance the propriety of their suspensions under the CBA, by failing to raise the issue during the earlier litigation. Lastly, the CBE contends the grievances at issue are not arbitrable under Section 10(b) of the Act, as the subject matter thereof conflicts with the CBE's statutory right to apply suspension as a disciplinary measure in lieu of termination pursuant to a hearing under the statutory framework of the Illinois School Code, 105 ILCS 5/34-85 ("Section 34-85").

III. FINDINGS OF FACT

The parties stipulated and I find as follows:

A. Complainant filed the unfair labor practice charge in this proceeding on September 22, 2021, and a copy thereof was served on Respondent.

B. At all times material, Chicago Board of Education (CBE) was an educational employer within the meaning of Section 2(a) of the Act and subject to the jurisdiction of the Board.

C. At all times material, Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO (Union), was a labor organization within the meaning of Section 2(c) of the Act.

D. At all times material, the 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 CBE, including those in the title or classification of Teacher.

E. At all times material, the Union and the CBE have been parties to a collective bargaining agreement for the unit referenced in paragraph D, with a term from July 1, 2015 to June 30, 2019, which provides for a grievance procedure culminating in arbitration.

F. At all times material, the CBE employed Daphne Moore.

G. At all times material, Moore was an educational employee within the meaning of Section 2(b) of the Act.

H. At all times material, Moore was a member of the unit referenced in paragraph D.

I. At all times material, the CBE employed Olayinka Mohorn-Mintah.

J. At all times material, Mohorn-Mintah was an educational employee within the meaning of Section 2(b) of the Act.

K. At all times material, Mohorn-Mintah was a member of the unit referenced in paragraph D.

1. The CBE administers the Chicago public school system.

2. Of the CBE's approximately 35,000 employees, approximately 20,000 are represented by the Union

3. The CBE and the Union were parties to a CBA for the period of July 1, 2015 through June 30, 2019 (Exhibit A).

4. Daphne Moore was a tenured teacher for the CBE.

5. On April 25, 2017, the CBE issued Moore dismissal charges, alleging Moore failed to appropriately respond to a student's apparent overdose of medication and then made false statements during an investigation of the incident (Exhibit B).

6. Pursuant to the Illinois School Code, 105 ILCS 5/34-85, Moore's dismissal charges proceeded to hearing before a hearing officer, Brian Clauss. In his Recommended Decision of September 7, 2018 (Exhibit C), Clauss concluded that the CBE had not shown cause to dismiss Moore.

7. The CBE has the authority under Section 34-85 to decide whether to dismiss a teacher after receiving the hearing officer's report. After receiving the report, on October 24, 2018, the CBE

issued an order (Exhibit D) adopting in part and rejecting in part Clauss' factual findings. The CBE accepted the hearing officer's recommendation to reinstate Moore, but issued Moore a 90-day time-served suspension, reducing Moore's back pay by 90 working days. The Board also issued Moore a separate Warning Resolution.

8. Moore pursued administrative review of the CBE's October 24, 2018 order in the Illinois Appellate Court for the First District. On December 23, 2019, the Illinois Appellate Court issued a ruling in Moore's favor, Moore v. Bd. of Educ., 2019 IL App (1st) 182391.

9. The CBE then filed a petition for leave to appeal (PLA) to the Illinois Supreme Court, which was allowed. On January 22, 2021, the Illinois Supreme Court ruled in the CBE's favor, Bd. of Educ. v. Moore, 2021 IL 125785. No further appeal was possible.

10. On December 6, 2018, the Union filed a grievance (18-12-032(se/jk)-Exhibit E), challenging the CBE's imposition of a suspension on Moore. On January 29, 2019, the Union demanded arbitration (demand letter-Exhibit F).

11. The parties selected Arbitrator Daniel Nielsen to hear the grievance referenced in paragraph 10. Josiah Groff represented the Union in this arbitration proceeding. Peter Brierton represented the CBE in this arbitration proceeding. The parties and the arbitrator exchanged numerous emails about this arbitration proceeding, including those in Exhibits G, H, I, and J.

12. Another of the CBE's teachers was Olayinka Mohorn-Mintah. On December 9, 2016, the CBE issued charges (Exhibit L) against Mohorn-Mintah.

13. The charges, referenced in paragraph 12, proceeded to hearing before Hearing Officer Lisa Salkovitz Kohn, who issued a Recommended Decision (Exhibit M) on June 29, 2018, recommending against dismissal.

14. On August 22, 2018, the CBE issued an order (Exhibit N), adopting the recommendation of reinstatement, but suspending Mohorn-Mintah by imposing a suspension that reduced her backpay by 50%.

15. On September 18, 2018, Mohorn-Mintah filed a Petition for Review of the CBE's order, referenced in paragraph 14, with the Illinois Appellate Court.

16. On March 28, 2019, the Union filed a grievance (19-03-157(ac)-Exhibit P) on behalf of Mohorn-Mintah, regarding the 50% back pay reduction the Board ordered. On April 2, 2019, the Union demanded arbitration (demand letter-Exhibit Q).

17. On November 18, 2020, the parties agreed to consolidate the Mohorn-Mintah grievance with the Moore grievance for hearing on the same day, *i.e.*, May 18, 2021, before Arbitrator Daniel Nielsen (emails confirming the consolidation and scheduling-Exhibit R).

18. The Illinois Appellate Court for the First District ruled in the CBE's favor on November 24, 2020, Mohorn-Mintah v Bd. of Educ., 2019 IL App (1st) 182011.

19. Mohorn-Mintah subsequently filed a PLA. On March 24, 2021, the Illinois Supreme Court denied Mohorn-Mintah's PLA, thereby allowing the Appellate Court's ruling in favor of the CBE to stand (order denying PLA-Exhibit O). No further appeal was possible.

20. On March 30, 2021, the CBE amended its position based on the Illinois Supreme Court's decisions, referenced in paragraphs 9 and 19, and refused (Exhibit J) to arbitrate either Moore's December 6, 2018 grievance (18-12-032(se/jk)-Exhibit E), or Mohorn-Mintah's March 28, 2019 grievance (19-03-157(ac)-Exhibit P).

21. On April 14, 2021, Arbitrator Nielsen issued a "Ruling on Requests for Cancellation of Hearing/Compulsory Hearing" (Exhibit K), postponing the May 18, 2021 hearing on the Moore and Mohorn-Mintah grievances, pending resolution of the CBE's substantive arbitrability objection, by the IELRB.

IV. DISCUSSION AND ANALYSIS

Herein, the Union contends Respondent violated Section 14(a)(1) of the Act in that the CBE took action to prevent the Moore and Mohorn-Mintah grievances from being arbitrated, thereby breaching the parties' collective bargaining agreement so as to indicate repudiation or renunciation of its terms.[1] During the term of a collective bargaining agreement, neither party is required to bargain anew concerning matters settled by the contract, nor is either party free to modify the terms of the agreement over the objection of the other. Chicago Transit Authority, 14 PERI ¶3002 (IL LLRB 1997); City Colleges of Chicago, 10 PERI ¶1010 (IL ELRB Ex. Dir. 1993); Waverly School District, 5 PERI ¶1002 (IL ELRB 1988); American Thoro-Clean, Ltd., 283 NLRB 1107 (1987). A contractual breach which is substantial enough to indicate repudiation or renunciation of the terms of the collective bargaining agreement constitutes a refusal to bargain in good faith. NLRB v. Katz, 369 U.S. 736 (1962); City of Harvey, 13 PERI ¶2031 (IL SLRB 1997); Village of Creve Coeur, 3 PERI ¶2063 (IL SLRB 1987); Cahokia Community School District No. 187, 8 PERI ¶1058 (IL ELRB 1992). In other words, "a party to an

[1]More specifically, the allegation of a refusal to arbitrate violates 14(a)(5) and (1) of the Act, but the distinction is ultimately unimportant to the disposition of the instant matter. Herein, the charge and complaint were grounded instead on the decision in Niles Twp. High School Dist. 219 v. Illinois Educ. Labor Relations Board, 379 Ill. App. 3d 22, 883 N.E.2d 29 (1st Dist. 2007)(a refusal to comply with an agreement to arbitrate is essentially a violation of Section 14(a)(1)).

agreement violates its statutory duty to bargain collectively by modifying the terms of a contract, where those terms are of such importance to the agreement that their unilateral modification would negate the very statutory duty to bargain collectively." Chicago Teachers Union/Chicago Board of Education, 7 PERI ¶1114, 1991 WL 11749496 (IL ELRB 1991); Oak Cliff-Golman Baking Company, 207 NLRB 1063, 1064 (1973), enf'd 505 F.2d 1302 (5th Cir. 1974), cert. den. 423 U.S. 826 (1975)(this sort of unilateral action is "in reality a basic repudiation of the bargaining relationship"). The refusal to arbitrate grievances as provided for in the parties' CBA constitutes a repudiation or renunciation of the terms thereof. Chicago Teachers, 7 PERI ¶1114; Chicago Transit, 14 PERI ¶3002.

The CBE denies the complained-of actions violated the Act. The CBE asserts it sought to dismiss Moore and Mohorn-Mintah for cause under Section 34-18 of the Illinois School Code. In both cases, hearing officers recommended against dismissal, and in both cases, the CBE accepted the hearing officers' recommendations. Instead, the CBE determined Moore and Mohorn-Mintah should be suspended, in essence, reducing their back pay awards. Moore and Mohorn-Mintah filed administrative review actions against the CBE, asserting the CBE lacked authority to suspend them in lieu of termination. Moore and Mohorn-Mintah ultimately did not prevail. The CBE contends it declined to arbitrate the grievances at issue because the disciplinary suspensions which are the subject thereof, were already fully adjudicated in actions before the Illinois Appellate Court and Illinois Supreme Court, and thus, subject to *res judicata*. Secondly, the CBE contends Moore and Mohorn-Mintah waived their right to advance the propriety of their suspensions under the CBA, as they failed to raise the issue during the earlier litigation. Finally, the CBE contends the grievances at issue are not arbitrable under Section 10(b) of the Act, as the subject matter thereof conflicts with the CBE's statutory right to apply suspension as a disciplinary measure in lieu of termination pursuant to a hearing under the statutory framework of Section 34-85 of the Illinois School Code.

The Union correctly asserts a district is entitled to refuse to arbitrate a grievance only as follows: (1) where there is no contractual agreement to arbitrate the substance of the dispute; or (2) where the dispute is not arbitrable under Section 10(b) of the Act because the subject matter of the dispute conflicts with Illinois law. Cobden Unit School Dist. 17 v. Illinois Educ. Labor Relations Board, 2012 IL App (1st) 101716, 966 N.E.2d 503; Niles Twp. High School Dist. 219 v. Illinois Educ. Labor Relations Board, 379 Ill. App. 3d 22, 883 N.E.2d 29 (1st Dist. 2007). The Union further asserts the CBE's *res judicata* and waiver defenses are procedural and should be left to the arbitrator to determine their merit. Although there may be validity to the Union's position on this point, the more efficient course at this juncture is to review the applicability of these defenses.

Res judicata is an equitable doctrine, under which a final judgment on the merits of a claim prevents subsequent litigation of the same claim between the same parties. Murneigh v. Gainer, 177 Ill. 2d 287, 685 N.E.2d 1357 (1997). In the court actions at issue, Moore and Mohorn-Mintah challenged the CBE's authority under Section 34-18 of the Illinois School Code to suspend them in lieu of termination. Ultimately, the CBE prevailed, but the Union was not a party to the litigation, and the issue therein, whether the CBE had the authority under Section 34-18 of the Illinois School Code to suspend Moore and Mohorn-Mintah in lieu of termination, had no bearing on the issue presented by the grievances, that is, whether, pursuant to the parties' CBA, the CBE retained the authority to suspend Moore and Mohorn-Mintah. *Res judicata* does not apply, therefore, as the grievances are not subsequent litigation of the same claim between the same parties.

The CBE next contends Moore and Mohorn-Mintah waived their right to advance the propriety of their suspensions under the CBA, as they failed to raise the issue during the earlier litigation. However, the Union timely filed grievances on behalf of Moore and Mohorn-Mintah, thereby preserving the issue of compliance with the CBA, and there is no evidence to support an inference of waiver. Western Casualty and Surety Co. v. Brochu, 105 Ill. 2d 486, 499, 475 N.E.2d 872 (1985)(waiver arises from an affirmative act, is consensual, and consists of the intentional relinquishment of a known right). Moreover, it is the Union's responsibility to pursue grievances to enforce the CBA; Moore and Mohorn-Mintah's challenge to the CBE's authority under Section 34-18 of the School Code cannot waive the Union's obligation in that regard. Id.

Lastly, the CBE contends the grievances at issue are not arbitrable under Section 10(b) of the Act, as the subject matter thereof conflicts with the CBE's statutory right to apply suspension as a disciplinary measure in lieu of termination pursuant to a hearing under the statutory framework of Section 34-85 of the Illinois School Code. The CBE's assertion is unavailing. As noted above, Moore and Mohorn-Mintah's litigation with the CBE confirmed its statutory right to apply suspension as a disciplinary measure in lieu of termination under Section 34-85. The existence of that statutory right, however, explains nothing with regard to the issue presented by the Moore and Mohorn-Mintah grievances, namely, whether the CBE retained the ability to exercise that statutory right under the parties' CBA, or did it relinquish it pursuant to Article 29 of the CBA, which deals with employee discipline, and does not provide for the use of suspension as a disciplinary measure—this is the arbitrator's province. As the CBE and the Union have a contractual agreement to arbitrate the substance of the Moore and Mohorn-Mintah grievances, and the subject matter of those grievances do not conflict with Illinois law, the CBE's refusal

to arbitrate the Moore and Mohorn-Mintah grievances violated the Act. Cobden, 2012 IL App (1st) 101716, 966 N.E.2d 503; Niles, 379 Ill. App. 3d 22, 883 N.E.2d 29.

V. CONCLUSIONS OF LAW

Respondent, Chicago Board of Education, violated Section 14(a)(1) of the Act in that it unlawfully failed or refused to arbitrate the Moore and Mohorn-Mintah grievances. Accordingly, the Union is entitled to make-whole relief.

VI. RECOMMENDED ORDER

In light of the above findings and conclusions, I recommend the following:

1. That Respondent, Chicago Board of Education, having violated Section 14(a)(1) of the Act in connection with its failure or refusal to arbitrate the Moore and Mohorn-Mintah grievances, be ordered to cease and desist from, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them under the Act;
2. That Respondent, Chicago Board of Education, be ordered to immediately take the following steps which would effectuate the policies of the Act:
    A. Arbitrate the December 6, 2018 Daphne Moore grievance (18-12-032(se/jk);
    B. Arbitrate the March 28, 2019 Olayinka Mohorn-Mintah grievance (19-03-157(ac);
    C. Make whole its employees represented by the Union, for all losses they incurred as a result of the Chicago Board of Education's failure or refusal to arbitrate the Moore and Mohorn-Mintah grievances referenced in paragraphs 2.A. and 2.B. above;
    D. Preserve, and upon request, make available to the Illinois Educational Labor Relations Board or its agents, all payroll and other records required to calculate the amount of back pay or other compensation to which unit employees may be entitled as set forth in this decision;
    E. Post, for 60 days during which the majority of employees in the bargaining unit are working, at all places where notices to employees of the Chicago Board of Education are regularly posted, signed copies of a notice to be obtained from the

Executive Director of the Illinois Educational Labor Relations Board and similar to that attached hereto;

3. That Respondent, Chicago Board of Education, be ordered to notify the Board, in writing, within 20 days of the Board's order, of the steps Respondent has taken to comply herewith.

VII. EXCEPTIONS

In accordance with Section 1120.50 of the Rules and Regulations of the Board, Rules and Regulations (Rules), 80 Ill. Admin. Code §§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 receipt hereof. Parties may file responses to exceptions and briefs in support of the responses not later than 21 days after receipt of the exceptions and briefs in support thereof. Exceptions and responses must be filed, if at all, at **ELRB.mail@illinois.gov** and with the Board's General Counsel, 160 North LaSalle Street, Suite N-400, Chicago, Illinois 60601-3103. 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.

Issued in Chicago, Illinois, this 13th day of June, 2023.

STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

John F. Brosnan

John F. Brosnan
Administrative Law Judge