STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Highland Community College Faculty, Local 1957, IFT-AFT, AFL-CIO,	)	
Complainant	)	
and	)	Case No. 2022–CA–0033–C
Highland Community College, Dist. 519,	)	
Respondent	)	

OPINION AND ORDER

I. Statement of the Case

On December 22, 2021, Highland Community College Faculty, Local 1957, IFT–AFT, AFL–CIO (Union or Complainant) filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) against Highland Community College, District 519 (College or Employer or Respondent). The charge alleged that the College 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.*, when it unilaterally changed working conditions and placed bargaining unit members in unsafe conditions by failing to notify them of students who were not in compliance with Illinois Governor J.B. Pritzker's Executive Order No. 2021-20, 45 Ill. Reg. 11,639 (Sept. 3, 2021). Executive Order 2021-20 provided, in relevant part, that higher education students who are not fully vaccinated against COVID-19 must test weekly and have negative test results. On December 28, 2021, the Union amended its charge to request preliminary injunctive relief pursuant to Section 16(d) of the Act to require that the College release names of the students. Following an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing (Complaint). The Complaint alleged that the College violated Section 14(a)(5) and derivatively, Section 14(a)(1) of the Act by refusing to furnish the

Union with the names of all students who attend classes on campus, were not in compliance with Executive Order 2021-20 and were not yet excluded from campus. On January 31, 2022, this Board denied the Union's request that it seek preliminary injunctive relief. See *Highland Community College, Dist. 519*, 38 PERI 101, Case No. 2022-CA-0033-C (IELRB Opinion and Order, February 16, 2022).

The Complaint instructed the parties to appear for hearing on March 2 and 3, 2022, before Administrative Law Judge Dawn Harden (ALJ Harden). On February 24, 2022, ALJ Harden granted the Union's unopposed motion to continue the hearing to the following May 25 and 26. The parties appeared for hearing before ALJ Harden, via WebEx, on May 26, 2022. During the hearing, both parties had the opportunity to call, examine and cross-examine witnesses, introduce documentary evidence and present arguments. Both parties filed post-hearing briefs.

On June 26, 2024, the Board's General Counsel issued an order removing the case to the Board for decision after reviewing the record and finding there were no determinative issues of fact that required an Administrative Law Judge's recommended decision.[1]

II. Facts

James Yeager (Yeager) and Paul Rabideau (Rabideau) testified at the hearing on behalf of Complainant. Elizabeth Gerber (Gerber) and Christina Kuberski (Kuberski) testified on behalf of Respondent. Subsequent to the hearing, ALJ Harden left the Board's employ. Prior to her departure, ALJ Harden made findings as to the credibility of the witnesses who testified before her during the hearing. Therein, she found both Yeager and Rabideau's testimony to be credible because they both were detailed, knowledgeable, straightforward and answered questions on direct and cross in a confident, clear and convincing manner, which she indicated is reflected

[1] The General Counsel's order incorrectly stated that the hearing took place in 2023, rather than 2022.

in the hearing transcript. ALJ Harden found Kuberski and Gerber to be generally credible witnesses.

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

The College is an educational employer within the meaning of Section 2(a) of the Act and subject to the jurisdiction of the Board. ALJ Exs. 1 and 6.[2] The College is a post-secondary educational institution, as defined by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. ALJ Ex. 6. Most students enrolled at the College are 18 or older. Tr. 28. The Union is a labor organization within the meaning of Section 2(c) of the Act, and at all times material, was the exclusive representative of a bargaining unit comprised of faculty employed by the College. ALJ Exs. 1 and 6. The Union and the College are parties to a collective bargaining agreement (CBA or contract) for the bargaining unit which provides for a grievance procedure culminating in arbitration. R. Ex. K.

In August 2021, Illinois Governor J.B. Pritzker issued Executive Order 2021-20, requiring college students to be vaccinated from COVID-19 or submit to weekly testing. R. Ex. L. The College informed students of these requirements in September 2021. ALJ. Ex. 6. Students who failed to remain compliant with the requirements were given notice of noncompliance and informed of potential consequences, notably possible exclusion from the campus. ALJ. Ex. 6. The Illinois Community College Board advised community colleges to undertake due process prior to implementing any exclusion of a student from campus for non-compliance with COVID-19 policies. ALJ Ex. 6. The College followed its Student Code of Conduct Policy for student compliance with Executive Order 2021-20. Tr. 78. The Student Code of Conduct Policy falls under the jurisdiction of the College's Student Services Office. Tr. 73. It is the responsibility

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

of the College's administration to maintain the confidentiality of educational records for matters relating to discipline, or possible discipline, of individual students. ALJ Ex. 6. Individual bargaining unit members are not responsible for the custody and maintenance of individual student disciplinary records. ALJ Ex. 6. Individual bargaining unit members are only a part of the formal implementation of the disciplinary process for events that may have occurred in their specific classroom or activities they directly supervise. ALJ Ex. 6. Individual bargaining unit members are in a position of authority over individual students, responsible for the implementation of instruction and grading of academic performance. ALJ Ex. 6.

While Executive Order 2021-20 was in effect, if a student did not provide proof of vaccination or submit to weekly testing, the College followed the progressive disciplinary approach in its Student Code of Conduct Policy. U. Ex. 1. That would start the disciplinary process. Tr. 89. After the first week of not testing, an unvaccinated student was given a verbal warning through an automated phone call and follow-up email stating that if they did not test or vaccinate, they would not be allowed access to in person classes or activities. Tr. 20, 91; R. Ex. N. If they continued not to do so for a second week, the student was issued a written warning sent to their school email address and hard copy by US mail indicating that they had one week to comply or be banned from campus. Tr. 20, 91. If it continued to a third week, the College issued the student a no access to campus letter that went out to their school email and hard copy by US mail. Tr. 20, 91. That is, the student was not allowed on campus. Tr. 20. At that point, the College notified each faculty member who had that student in an in-person class that the student had no access to campus. Tr. 20–21, 91. Faculty was only notified after the student was removed from campus, after three weeks of noncompliance. Tr. 21. Faculty was not advised as to the reason the student was given no access. Tr. 30, 91–93. There are multiple reasons why a student might be excluded from campus. Tr. 30, 92. Being aware that a student was noncompliant, but not excluded would not have given faculty members the authority to remove

them from class, that student would have the right to continue to come to class. Tr. 52. Union President and faculty member Yeager reported that many students do not check their school email, so they do not get the initial notification. Tr. 22.

Rabideau was a faculty member on the College Emergency Operations (EOT) team in fall 2021. ALJ Ex. 6. In an October 2021 email to College Vice President of Student Development and Support Services Gerber, acting on the Union's behalf, Rabideau requested the College notify faculty at the start of the process when the noncomplying student is initially contacted. U. Ex. 1; ALJ Ex. 6. Gerber refused, conveying the College's position that providing that information would be a FERPA violation. U. Ex. 1. If a student was not compliant with the Executive Order, it would start the disciplinary process. Tr. 89. The College considered records generated as a result of the disciplinary process disciplinary records and disciplinary records to be educational records under FERPA. Tr. 89–90. This was based in large part on College President Kuberski's consultation with the College's attorney. Tr. 81. Rabideau repeated the request in a November 4, 2021 email to Kuberski. U. Ex. 1; R. Ex. I. Therein, Rabideau stated he did not believe providing the information would violate FERPA and that notifying faculty at the beginning of the process would provide them with the opportunity to contact students to help them avoid disciplinary action, missing classes and/or exposing others to COVID. U. Ex. 1; R. Ex. I.

It became apparent that the Union was not satisfied with the College's contention that providing the information would violate FERPA, so Kuberski sought a second opinion from the law firm of Robins Schwartz. Tr. 82. Kuberski believed Robbins Schwartz had a strong reputation and would have a neutral opinion because they are legal counsel for the Illinois Community College Board and several community colleges within Illinois, and they often offer legal guidance for the community college system. Tr. 82. In a letter to Rabideau dated November 30, 2021, Kuberski explained that based on the second legal opinion, the College would not

provide the Union with the requested information and the College believed its process and guidelines provided a safe working and learning environment while also following the FERPA guidelines. U. Ex. 1; R. Ex. J.

Rabideau emailed Kuberski on December 3, 2021 to acknowledge he received her November 30 letter and said that the Union and its legal team would decide what, if any, further steps to take. U. Ex. 1. He continued:

> However, there is still something that's bothering me. After all of the legal back and forth, I think that the original question has been lost/unanswered. To be clear, we only asked to know which students needed to fill out the paperwork so that we can encourage them to do so earlier. This could be as simple as telling students on the list to go to Student Services, and it would not involve knowing anything about vaccination or testing status (at least it would not be any more obvious than it already is). Students would not be prohibited from attending classes, which only happens if further disciplinary steps have been taken. That said, in my opinion there has been no rationale provided for the claim that this would be a FERPA violation, a privacy violation, a liability, or that it would be different in any other way from what we are already doing. U. Ex. 1.

Yeager sent Kuberski a letter dated December 15, 2021 repeating the Union's request that the College disclose the compliance status of students and conveying advisement from the Union's legal team that FERPA does not forbid the College from disclosing the requested information. U. Ex. 1. Yeager further stated:

> With all of this, as well as an established pattern of an apparent lack of faith in faculty from the administration, we are left to conclude that the administration of Highland Community College is choosing to not disclose the information we are seeking; Information [sic] we have a right to know. More so, we are left to conclude that the reason the information is being withheld is due to a fundamental assumption that faculty, as a group, are not responsible enough to have the information, since other employee groups on campus are given access to the information.
>
> I am not happy it comes down to this but, simply put: if the administration of Highland Community College does not agree to disclose to faculty the compliance status of students, then IFT Local 1957 finds no other recourse than to proceed with litigation. It is our contention that withholding this information constitutes an unfair labor practice.
>
> It is my sincere hope that the administration agrees to disclose the compliance status of students with faculty and that no further action is necessary. Given the length of time this issue has already been discussed, and given the immediacy we face in satisfactorily addressing

> the situation, I must request a formal response from the college by 5 p.m. on Wednesday, December 22. U. Ex. 1.

Kuberski denied the Union's request in her reply letter to Yeager dated December 17, 2021. U. Ex. 1. She dispelled the Union's suggestion that the administration did not trust the faculty and indicated that was far from the truth, noted the College had received two legal opinions affirming that FERPA did not allow the College to provide the requested information, acknowledged the Union's right to file an unfair labor practice charge and stated she would share any response she received to the request for opinion on the issue that she intended to submit to the US Department of Education Office of Student Privacy after the holiday break. U. Ex. 1.

Students in Yeager's speech class are required to deliver a certain number of speeches in front of their classmates. Tr. 23. His classes often involved group projects. Tr. 23. A couple students in Yeager's class were unable to come to class to give their speeches because they were noncompliant. Tr. 23. Yeager felt that he could have better prepared for this if he had three weeks to plan and have that student scheduled at a different time or come up with accommodations, but instead that student was denied an opportunity. Tr. 23. In contrast, if Rabideau had been notified that a student in his psychology class was not in compliance at the first stage, it would not have resulted in any adjustments as to how his classroom was handled. Tr. 60, 62. Rabideau hoped to be able to use the information to prevent students who were not checking emails and texts from the College from missing classes by pulling them aside privately and encouraging them to fill out the paperwork and to avoid that issue in the future. Tr. 61.

III. Positions of the Parties

Complainant argues that Respondent violated Section 14(a)(5) when it refused to provide the requested information.

Respondent contends that the Complaint should be dismissed as moot because the requested information is no longer relevant. As to the merits of the case, Respondent asserts that it did not violate the Act because the requested information was not relevant to working conditions and because Rabideau was not authorized to make the request on the Union's behalf. Respondent claims that even if it had been relevant and Rabideau was authorized, FERPA restricted release of the information.

IV. Discussion

A. Mootness

The College moved to dismiss the Complaint at the hearing because by the time the case was decided, the issues would become moot as Executive Order 2021-20 would have expired. ALJ Harden indicated that the College should follow up with a written motion. The College submitted its written motion with its post-hearing brief. Therein, it contends that when Governor Pritzker issued Executive Order No. 2022-17, 46 Ill. Reg. 14,128 (August 5, 2022), the requirements of vaccination and testing protocols for higher education were removed and not extended, thus the issues presented in the Complaint are moot and it should be dismissed.

The College's argument that the Complaint should be dismissed because the matter is no longer in controversy has been consistently rejected by courts and labor boards. See *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 412 n. 4 (1952) (negotiation of collective bargaining agreement had not rendered case moot); *Board of Educ. of Deerfield Pub. Sch. Dist. No. 109 v. Deerfield Educ. Association, IEA–NEA*, 2022 IL App (4th) 210359, 223 N.E.3d 1041 (union's claim for information not moot even though employer had already issued remedial notice which was not subject to the grievance procedure);*Wheaton Firefighters Union, Local 3706 v. Illinois Labor Relations Bd.*, 2016 IL App (2d) 160105, 58 N.E.3d 161 (execution of collective bargaining agreement did not render union's unfair labor practice

charge alleging bad faith bargaining moot); *Wilmette School District No. 39*, 4 PERI 1077, Case No. 86-CA-0073-C (IELRB Opinion and Order, May 17, 1988) (charge alleging employer refused to pay salary increases not moot because employer subsequently made retroactive salary payments).

A request for information unfair labor practice charge does not become moot if the information is no longer necessary or relevant to the union after the employer's refusal to provide the information. That is because a union's right to requested information "must be determined by the situation which existed at the time the request was made, not at the time the Board or courts get around to vindicating that right. Otherwise, important rights under the Act would be lost simply by the passage of time and the course of litigation." *Chicago Board of Education*, 30 PERI 162, Case No. 2011-CA-0088-C (IELRB Opinion and Order, July 23, 2012), *rev'd on other grounds*, 2013 IL App 122447 (1st Dist. 2013), quoting *Grand Rapids Press*, 331 NLRB 296, 300 (2000). That the information is no longer useful does not excuse an employer's misconduct. "A matter is not considered moot if it is capable of repetition yet evades review." *Wilmette School District*, 4 PERI 1077. If the information was relevant at the time of the request, subsequent events have no impact on the finding of a violation of the Act. *Lansing Automakers Federal Credit Union*, 355 NLRB No. 221 (2010). The conclusion of the proceedings for which a union may have needed the information does not moot its entitlement to information. *Bloomsburg Craftsmen*, 276 NLRB 400 (1985). There is an on-going relationship between the parties and that relationship benefits from a free flow of information. *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984). For these reasons, we deny the College's motion to dismiss the Complaint as moot. To hold otherwise would contravene longstanding Board precedent and could allow employers to refuse to furnish information a union is entitled to under the Act without recourse simply by the passage of time.

B. 14(a)(5)

Section 14(a)(5) of the IELRA prohibits employers from refusing to bargain collectively in good faith with a union. An employer violates Section 14(a)(5) when it refuses to provide the union with information the union has requested that is directly related to its function as the exclusive bargaining representative and reasonably necessary for the union to perform this function. *Chicago School Reform Board of Trustees v. IELRB*, 315 Ill. App. 3d 522, 734 N.E.2d 69 (1st Dist. 2000); *Western Illinois University*, 31 PERI 201, Case No. 2014-CA-0007-S (IELRB Opinion and Order, May 21, 2015). However, a union is not entitled to all information. *Chicago School Reform Board of Trustees*, 315 Ill. App. 3d 522, 734 N.E.2d 69. The requested information must be directly related to the union's function as a bargaining representative and must appear reasonably necessary for the performance of that function. *Id.* The standard for determining relevancy is liberal, there only needs to be the probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities. *Alton Community Unit Sch. Dist. 11*, 21 PERI 79, Case No. 2002-CA-0051-S (IELRB Opinion and Order, March 23, 2005). The standard by which relevance is determined is the discovery standard, rather than a trial-type standard. *Alton*, 21 PERI 79; *Dupo Community Unit Sch. Dist. #196*, 13 PERI 1044, Case No. 96-CA-0021-S (IELRB Opinion and Order, March 5, 1992). The union should be allowed a broad range of potentially useful information for the purpose of effectuating the bargaining process. *Procter & Gamble Manufacturing Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979). Information relating to unit employees, including all terms and conditions of employment, is deemed presumptively relevant, and the employer has the initial burden to rebut that presumption. *City of Chicago (Chicago Fire Dep't)*, 12 PERI ¶3015 (IL LLRB 1996); *Chicago Transit Authority*, 4 PERI ¶ 3013 (IL LLRB 1988). When a union requests information from an employer that does not fall within the presumptively relevant category, the union has the initial burden to show relevancy. *City of Chicago (Chicago Fire Dep't)*, 12 PERI ¶3015. An

employer is not required to provide information that is unrelated to any pending grievance or contractual dispute, where the union offers no additional evidence of its need for the information. *Lebanon Community Unit School District 9*, 11 PERI 1032, Case No. 94-CA-0021-C (IELRB Opinion and Order, March 30, 1995).

An employer's duty to supply information arises upon the union's good-faith request that the information be furnished to it. *Thornton Community College*, 5 PERI 1003, Case No. 83-CA-0008-C (IELRB Opinion and Order, November 29, 1988). In this case, the Union requested the names of all students who attend classes on campus, were not in compliance with Executive Order 2021-20 and were not yet excluded from campus in its October 2021 email. Respondent refused to provide that information by its responsive email. The Union repeated its requests in its November and December 2021 emails and the College repeated its refusals in its replies.

The College argues that Rabideau was not authorized to make requests for information on the Union's behalf. But nothing in the College's repeated refusals to provide the information indicate that they believed Rabideau did not have the authority to ask. Nor did the College cite any apparent lack of Rabideau's authority as a reason for their refusal to provide the information. Even if Rabideau had lacked the authority to make the request on the Union's behalf, the request was repeated by Union President Yeager, whose authority the College does not question. Yeager made the request for information and the College refused to provide it, thus engaging in the conduct alleged to violate the Act.

The information requested in this case, the names of all students who attend classes on campus, were not in compliance with Executive Order 2021-20 and were not yet excluded from campus, does not relate to wages, fringe benefits, hours, or any term or condition of employment. As such, this information is not presumptively relevant to the Union's performance of its duty to represent bargaining unit employees, and the burden falls initially on the Union to demonstrate the relevance of this information to that duty. Yet the Union does

not convey to this Board or to the College in making its requests how the information was directly related to its function as the exclusive bargaining representative and reasonably necessary to perform this function. Nor is there any indication the requested information is relevant to regulating the contract. The Union has not drawn any specific connection between its obligation to regulate the contract and its need for this information. Moreover, there is no connection from the evidence presented that the Union sought the information to "gain an understanding of the employer's procedures affecting unit members or to determine whether grounds for a grievance may exist." *City of Chicago*, 4 PERI ¶ 3025 (IL LLRB 1988) (an active grievance is not required).

This case is distinguishable from cases where this Board stated that bargaining involving the return to the classroom during the COVID-19 pandemic was a mandatory subject of bargaining because it involved employee safety. In all those cases, the information requested, or the unilateral change was clearly tied to employee safety, a mandatory subject of bargaining. *Chicago Board of Education*, 39 PERI 95, Case No. 22-CA-0053-C (IELRB Opinion and Order, January 2023) (employer unilaterally rescinded its universal mask mandate contained in parties' safety agreement); *Cicero SD No. 99*, Case No. 2021-CA-0051-C (IELRB Order, January 21, 2021) (employer's refusal to provide the metrics it would use to determine when to return to the classroom); *Proviso Township High School Dist. 209*, Case No. 2021-CA-0041-C (IELRB Opinion, November 5, 2020) (during height of pandemic employer unilaterally required bargaining unit members to teach remote learning from school buildings despite parties memorandum of understanding). In this case, it is not clear how notifying faculty when a student was initially noncompliant with the Executive Order relates to employee safety. It is true that in the Union's November 4 request, Rabideau lists one of the reasons the information would be useful was so faculty could notify noncompliant students and to help them avoid exposing others to COVID. But the College already contacted noncompliant students by telephone and email when they

were initially noncompliant for that very reason. Even if Yeager is correct that many students fail to check their school email and miss the initial notice, they are also given an automated telephone message. Furthermore, most students are 18 or older. Unlike *Chicago Board of Education*, *Cicero SD No. 99* and *Proviso Township High School Dist. 209*, there is no direct tie in this case between the requested information and employee safety.

In Rabideau's November 4 email to Kuberski, he said notifying the faculty at the beginning of the process would provide them with the opportunity to contact students and help them avoid disciplinary action and possibly missing classes, and/or exposing others to COVID. While these are noble reasons for wanting the information, there is nothing in the record to indicate they are directly related to the Union's function as exclusive representative. Yeager disclosed during the hearing that if he had the requested information, he could have better prepared for the effects of students being absent from class because they were noncompliant, which would have allowed him to schedule his students' speeches or come up with accommodations so they would not be denied opportunities. Information regarding the students' compliance status would have changed the way Yeager provided instruction because his classes involved a lot of group work. He could have planned and grouped students accordingly with the intel that not all group members may be able to participate in the whole of the project because they could be excluded from campus. There is nothing in the record to indicate that the Union conveyed this to the College in its requests for information. Even if it had, it is not clear how it relates to the Union's function as exclusive representative. In his December 15 email to Kuberski, Yeager stated the Union has a right to the information and contends that the College's refusal to provide it is an unfair labor practice. Again, there is no indication of how the information relates to the Union's function as exclusive representative. In its post-hearing brief, the Union argues that it sought the information to negotiate over the application of FERPA. The College's reasoning for not providing the Union with the information was that it was prohibited from doing so under

FERPA. The Union could not have asked for the information in the first place to negotiate over the College's asserted defense to providing that information.

The information requested by the Union is not directly relevant to its function as the exclusive bargaining representative and accordingly is not reasonably necessary for the performance of this function. Therefore, we find that the College did not violate Sections 14(a)(5) of the Act by refusing to provide this information and dismiss the Complaint.

C. FERPA

Even where information is presumptively relevant or the union has met the burden of demonstrating its relevance to its function, a union is not entitled to the information requested when the employer has raised a bona fide objection, such as a reasonably good faith confidentiality concern. *Alton*, 21 PERI 79; *Dupo*, 13 PERI 1044.

FERPA prohibits the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons. The College contends that the student names are privileged under FERPA. If a student was not compliant with the Executive Order, the College would start the disciplinary process. The College considered records generated as a result of the disciplinary process disciplinary records and disciplinary records to be educational records under FERPA.

Because we find that the information is not presumptively relevant and that the Union has not met its burden of demonstrating its relevance to its function as exclusive representative, we do not need to determine whether FERPA prohibits its disclosure.

V. Order

For the reasons discussed above, **IT IS HEREBY ORDERED** that (1) the College's motion to dismiss the Complaint as moot is denied; and (2) the Complaint is dismissed on its merits.

VI. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the Appellate Court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). Petitions for review of this Order must be filed within 35 days from the date that the Order issued, which is set forth below. 115 ILCS 5/16(a). The IELRB does not have a rule requiring any motion or request for reconsideration.

Decided: **September 18, 2024**
Issued: **September 18, 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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