STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Chicago Board of Education,	)	
	)	
Respondent	)	
	)	
and	)	Case No. 2004-CA-0011-C
	)	
Chicago Teachers Union, Local 1, IFT/AFT, AFL-CIO,	))	
	)	
Complainant	)	

OPINION AND ORDER

On September 5, 2003, the Chicago Teachers Union (CTU or Union) filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) against the Chicago Board of Education (CBOE or Employer). The charge alleged that the Employer violated Sections 14(a)(1), 14(a)(3) and 14(a)(5) of the Illinois Educational Labor Relations Act (IELRA or Act), 115 ILCS 5/1 et. seq. On June 10, 2004, the Executive Director issued a Complaint and Notice of Hearing. A hearing in this matter was held before an Administrative Law Judge (ALJ) on August 17, 2004. On December 21, 2004, the ALJ issued a Recommended Decision and Order. The ALJ found that the Employer violated Section 14(a)(5), and derivatively, Section 14(a)(1), of the Act by its failure and refusal to implement the terms of a mediation resolution agreement. The ALJ also found that the Employer violated Sections 14(a)(3) and 14(a)(1) of the Act by its discriminatory conduct toward Diaz after she filed grievances about her working conditions. The Employer filed exceptions to the ALJ's Recommended Decision and Order and a brief in support of its exceptions. For the reasons discussed below, we affirm the ALJ's Recommended Decision and Order in its entirety.

I.

Diaz is employed by the CBOE as a school clerk at Foreman High School. In summer 2001, Diaz met with Foreman principal Frank Candioto (Candioto) and Union representative Marty Lombardo in Candioto's office. Following the meeting, Candioto told Diaz that if she brought the Union in "one more time that he was going to throw them out on their ass."

Diaz filed criminal battery charges against another school clerk, Sabrina Woods (Woods), following an incident that occurred on June 7, 2001 while the two women were working in the school's main office. Woods was

found guilty and placed on six-months supervision. Woods and Diaz continued to work together in the school's main office during the supervision period. In January 2002, when the supervision was about to expire, Diaz grew concerned enough to file a grievance asking the Employer to move her workplace. In January 17, 2002, the Union filed a grievance on Diaz's behalf, alleging that she was in a stressful and unhealthy work environment because she continued to share a work location with Woods. The grievance requested that the Employer relocate Diaz's work location to the counselor's office.

Pursuant to the parties Collective Bargaining Agreement (CBA), a grievance conference was held on February 6, 2002. Candioto, Diaz and Union field representative Mary Dotson (Dotson) attended the grievance conference. In a response to the grievance dated February 8, 2002, Candioto wrote that it would be difficult, if not impossible, to find an alternative workstation for Diaz because of the nature of her position and the duties associated with the position. Candioto noted that Diaz had the option of going to the Employer's Department of Human resources to look for an alternate site and that he would be more than willing to assist her in finding a new school.

On February 25, 2002, Candioto had Diaz moved to a new work location within Foreman High School. Diaz's job title and rate of pay did not change. In a memorandum to Diaz dated February 22, 2002 (February 22 memo), Candioto stated, in relevant part:

> Effective Monday, February 25, 2002, you are assigned to Room 123…
> Your assignments are:
> CHARACTERISTICS OF THE CLASS: Under the general direction of Mr. Candioto, Principal, performs any of several specialized clerical functions in a large public school facility, or performs a variety of responsible clerical functions in a small public school facility; and performs related duties as required.
> ESSENTIAL FUNCTIONS: Prepares and types a variety of original correspondence, memorandums, and reports using either a personal computer or typewriter, as directed by Mr. Candioto, Principal, and the Principal's designees, Mrs. Woolfork, Mr. Wipachit and Mrs. Vazquez; opens, sorts, and distributes incoming mail and school correspondence; serves as a receptionist and greets and directs visitors to appropriate staff; responds to inquiries from students, parents and guardians and the general public concerning school operations and activities; maintains attendance records of students and staff; processes and prepares payroll for school personnel, both manually and by operating computerized timekeeping and payroll equipment; maintains enrollment records and processes student transfers; maintains student history records; prepares and processes requisitions for the procurement of supplies, instructional materials, furniture, and equipment; maintains and monitors the school's petty cash and internal account ledgers; issues checks and prepares money for deposits; receives and compiles periodic reports involving payrolls, pupil attendance and enrollment, various funds and account ledgers; compiles and forwards student transcripts to appropriate parties; may take and transcribe dictation; may operate personal computers utilizing spreadsheets, database, or other software applications.

When Diaz arrived at her new workstation, she did not find any of the equipment she had in her former workstation. At the new workstation, there was no desk, no computer, no telephone, and no supplies such as pens,

pencils or paper. Diaz was provided with a half table and a plastic chair on the first day at her new workstation. On her second day, a single pedestal metal desk was brought in to replace the half table. Diaz brought a chair from home to replace the plastic one, as well as pen and paper. Diaz performed none of the clerk duties listed in the February 22 memo under "essential functions," including the payroll clerk duties she had previously performed. Diaz estimated that she worked 10 minutes every Monday morning, when Woolfork gave her lesson plans to place in the teachers' mailboxes. Wipachit gave Diaz magazines and took her out to dinner to find out why she was being treated as she was. Students told Diaz that they wished they had a job like hers, where they could sit and do nothing all day. At the recommendation of Union representative Lou Pyster (Pyster), Diaz kept a daily log of her activities and forwarded it to Pyster.

On May 14, 2002, the Union filed a second grievance on Diaz's behalf alleging that the Employer deliberately harassed and discriminated against Diaz by not providing her with work assignments and supplies necessary to perform her job. As a resolution, the grievance requested that the Employer give Diaz work assignments germane to her job title. A grievance conference was held on June 7, 2002, with Candioto, Diaz and Dotson. Candioto subsequently denied the grievance. The Union requested a review of the grievance denial by the Office of Labor Relations and the Chief Executive Officer. On November 1, 2002, a labor relations hearing was held with a CBOE hearing officer. The grievance was subsequently denied in a letter dated November 15, 2002. Pursuant to Section 3-8 of the CBA, the Union submitted the grievance to mediation. Section 3-8.2 of the CBA provides that "the mediation panel may make recommendations for resolution to the General Superintendent of Schools and President of the UNION. If the General Superintendent and President mutually agree to a resolution for a specific grievance, that agreement will be reduced to writing, executed by the parties and implemented." A mediation session was held in January 2003. The mediation resolution stated:

> Resolution: The Undersigned Parties agree that the instant grievance is resolved pursuant the [sic] following terms and conditions. This is a full and final resolution. The terms are as follows: Resolved that the Memo from the principal of 2/22/02 shall be enforced with work assigned to Ms. Diaz. The 7-page log of assignments from Ms. Diaz shall also be shared with the principal.

The 7-page log refers to the daily log Diaz kept of her activities at Pyster's direction. The signatures of the Union President and the Employer's Chief Executive Officer appear below the words "Approved by" at the bottom of the mediation resolution.

On March 10, 2003, Diaz's workstation was moved to the office of two deans of students. Diaz's main complaint about this workstation was that she was given no school clerk work to perform. In a memo dated April

10, 2003, the Union advised the Employer that Candioto failed to implement the mediation resolution agreement and requested that the Employer take the necessary steps to ensure that Candioto implement the resolution. Candioto moved Diaz's workstation to the library at the beginning of the 2003-2004 school year. Diaz was assigned to this workstation at the time of the hearing in this matter. Diaz's job duties are not those of a school clerk listed in the February 22 memo referenced in the mediation resolution agreement. Rather, they are the job duties of a library assistant: shelving books, cataloging books in the computer, gluing pockets into the books, putting security tape in the books, and typing spine labels for the books. Diaz is busy for about fifteen minutes a day, the rest of the time she reads.

The record contains copies of Diaz's performance evaluation ratings for the 1996-97, 1999-2000, 2002-2003 and 2003-2004 school years. Diaz was given a rating of 98 for the 1996-1997 school year and a rating of 99.01 for the 1999-2000 school year. Diaz received ratings of 58 for both the 2002-2003 and 2003-2004 school years. In both the 2003 and 2004 evaluations, Diaz received a 50 for Quantity, Dependability and Attendance and a 70 for Quality and Personal Relations. Wipachit is listed as the rater on the 2003-2004 evaluation. Wipachit told Diaz that he had been directed to give her the rating she received. Woolfork is listed as the rater on Diaz's 2003-2004 evaluation. Woolfork told Diaz she had been directed to give her the same rating as her 2003 evaluation.

II.

A. Credibility Resolutions.

The Employer objects to many of the ALJ's findings of fact. The record in this matter reveals that the ALJ made the alleged erroneous fact findings based upon Diaz's uncontradicted testimony, the testimony of the Employer's own witnesses, Complainant's Exhibit 5[1] which was admitted into evidence without objection from Employer's counsel, and by crediting Diaz's testimony over conflicting testimony of three other witnesses.

At the end of the second paragraph of the "Findings of Fact" section of the Recommended Decision and Order, the ALJ states, "The findings of fact that follow are based on the testimony and documentary evidence in the record that I have determined to be relevant and credible." It has been this Board's policy not to overrule an ALJ's credibility resolutions unless the clear preponderance of all relevant evidence establishes that the resolutions are incorrect. Board of Regents of Sangamon State University, 6 PERI 1049, Case Nos. 89-CA-0030-S and 89-CA-

[1] Complainant Exhibit 5 is a copy of the grievance the Union filed for Diaz on May 14, 2002. The Employer states that it takes exception to the ALJ's finding that "[o]n May 14, 2002, the Union filed a second grievance on behalf of Diaz, alleging that in her new work location she was not permitted to perform her duties as school clerk, because she had no telephone, computer, or work assignments." Respondent's Exceptions, at page 3.

0035-S (IELRB Opinion and Order, March 12, 1990), aff'd 20 Ill. App. 3d 220, 556 N.E.2d 963 (4th Dist. 1991). Based on a review of the record in this case, we find that there is no basis for reversing the ALJ's findings of fact.

B. Alleged Hearsay Evidence.

The Employer asserts that the following portions of the ALJ's Recommended Decision and Order were based upon hearsay and thus should have been excluded from the record: Wipachit told Diaz he had been directed to give her the rating she received, Woolfork told Diaz that she had been directed to give her the same rating in her 2004 evaluation as her 2003 evaluation, students told Diaz they wished they had a job like hers where they could sit and do nothing all day, and Wipachit gave Diaz magazines and took her to dinner to find out why she was being treated as she was.

The Employer failed to object during the hearing to Diaz's testimony that Wipachit said he was directed to give her the evaluation she received. Tr. 111. An administrative body may consider hearsay evidence that is admitted without objection. Chicago Board of Education, 18 PERI 1158, Case No. 2002-RS-0008-C (IELRB Opinion and Order, October 17, 2002), citing Jackson v. Board of Review of Department of Labor, 105 Ill. 2d 501, 475 N.E.2d 879 (1985). The remainder of the Employer's hearsay exceptions relate to events that were not determinative to the ALJ's finding that the Employer violated the Act. Accordingly, we find no merit in the Employer's exceptions relating to hearsay.

C. Section 14(a)(5).

The ALJ found that the Employer refused to bargain collectively in good faith and in violation Section 14(a)(5) of the Act by its failure and refusal to implement the terms of the mediation resolution agreement. Section 14(a)(5) of the Act prohibits educational employers from "[r]efusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussion of grievances with the exclusive representative…"

In this case, the parties' CBA provides for grievance mediation at the option of the parties as a key step in resolving grievances. As explained above, pursuant to Section 3-8.2 of the CBA, a mediation resolution agreement will be executed and implemented by the parties. The Union alleges that the Employer did not follow the mediation resolution agreement that was reached.

An employer's failure to implement a grievance settlement has been determined a refusal to bargain in good faith under the Illinois Public Labor Relations Act[2], 5 ILCS 315/10(a)(4).[3] City of Chicago (Department of Police), 14 PERI 3010 (IL LLRB 1998); County of Cook, 11 PERI 3021 (IL LLRB 1995); Cook County (Cermak Health Services), 10 PERI 3009 (IL LLRB 1994); Illinois Department of Central Management Services (Department of Corrections), 6 PERI 2038 (IL SLRB 1990); Illinois Department of Corrections and Central Management Services, 4 PERI 2043 (IL SLRB 1988); City of Burbank, 4 PERI 2048 (IL SLRB 1988). Such cases reflect the fundamental principle that "a party's commitment to live up to its agreements is the cornerstone of good faith bargaining and effective labor relations." City of Chicago, 14 PERI 3010; CMS, 6 PERI 2038; Department of Corrections, 4 PERI 2043; City of Burbank, 3 PERI 2009 (IL SLRB 1986). An employer's blatant refusal to abide by a grievance settlement agreement, the terms of which are undisputed, and unambiguous, is a breach of that process as well as a breach of the agreement and therefore amounts to an unfair labor practice. City of Chicago, 14 PERI 3010; County of Winnebago (County Clerk and County Auditor), 7 PERI 2041(IL SLRB 1990).

In this case, the mediation resolution agreement provided that the February 22 memo shall be enforced with work assigned to Diaz. The February 22 memo enumerated the essential functions of Diaz's school clerk position. During the hearing, the Union presented unrebutted evidence that Diaz is not performing any of the essential functions listed in the February 22 memo. For that reason, we affirm the ALJ's determination that the Employer refused to bargain collectively in good faith and in violation of Section 14(a)(5) of the Act by its failure and refusal to implement the terms of the mediation resolution agreement.

D. Sections 14(a)(1) and 14(a)(3).

Employers are prohibited by Section 14(a)(1) of the Act from "interfering, restraining, or coercing employees in the exercise of the rights guaranteed under this Act." Under Section 14(a)(3), employers may not discriminate with regard to hire, tenure or any term or condition of employment in order to discourage or encourage membership in a union.

Where, as here, an alleged violation of Section 14(a)(1) is based on the same conduct as an alleged violation of Section 14(a)(3), the Section 14(a)(1) violation is essentially a derivative violation. Carmi Community

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[2] Section 17.1 of the IELRA states that decisions of the Illinois Labor Relations Board, although not binding, shall be considered by the IELRB.

[3] Section 10(a)(4) of the IPLRA is analogous to Section 14(a)(5) of the IELRA. Section 10(a)(4) of the IPLRA provides that it is an unfair labor practice for an employer "to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, the discussing of grievances with the exclusive representative."

Unit School District 5, 6 PERI 1020, Case No. 88-CA-0024-S (IELRB Opinion and Order, January 11, 1990). Where an employer's conduct is alleged to violate both sections, the applicable test is the one used in Section 14(a)(3) cases requiring proof of improper motivation on the employer's part. Bloom Township High School Dist. 206 v. IELRB, 312 Ill. App. 3d 943, 728 N.E.2d 612 (1st Dist. 2000). In order to establish a *prima facie* violation under that test, the Union must prove that: 1) Diaz engaged in union activity, 2) the Employer was aware of that activity, and 3) the Employer took adverse action against her for engaging in that activity. University of Illinois at Urbana (Rochkes), 17 PERI 1054, Case Nos. 00-CB-0006-S, 01-CA-0007-S (IERLB Opinion and Order, June 19, 2001).

The Union filed grievances on Diaz's behalf, which is union activity. City Colleges of Chicago (Wright College), 11 PERI 1055, Case No. 95-CA-0012-C (IELRB Opinion and Order, May 26, 1995). The Employer was aware of Diaz's union activity because it was a party to the grievance. The Employer took adverse action against Diaz by lowering her performance evaluations and by failing to implement the mediation resolution agreement.

In order to establish the third element of a *prima facie* case, there must be evidence that the adverse action was based, in whole or in part, on anti-union animus, or that union activity was a substantial or motivating factor. City of Burbank v. ISLRB, 128 Ill. 2d 335, 538 N.E.2d 1146 (1989). Antiunion animus is demonstrated though the following factors: expressions of hostility toward unionization, together with knowledge of the employee's union activities; timing; disparate treatment or targeting of union supporters; inconsistencies between the reason offered by the employer for the adverse action and other actions of the employer; and shifting explanations for the adverse action. Id. In this case, evidence was adduced that may be used to infer animus.

The Employer expressed hostility toward Diaz's union activity by Candioto's statement to Diaz that if she brought the Union in "one more time that he was going to throw them out on their ass."

The timing of Candioto's actions also supports a finding of animus. A little over a month after the Union filed the first grievance on Diaz's behalf in January 2002, Candioto moved Diaz to an office without a desk, computer, telephone, or other equipment necessary for performing her duties as a school clerk, and she was given few work assignments. Approximately six weeks after the mediation that took place pursuant to the second grievance, Candioto moved Diaz to a workstation in the office of two deans. At this workstation, Diaz was given little to do and no access to the Employer's computer networks that would permit her to perform her school clerk duties, despite the mediation resolution agreement that the Employer would enforce Candioto's February 22 memo

listing essential functions of a school clerk position. After the Union advised the Employer that Candioto had failed to implement the mediation resolution agreement, Diaz was moved to a workstation in the library where she performed none of the essential functions referenced in the mediation resolution agreement and was given little work to perform.

There are inconsistencies between the reasons offered by the Employer for Diaz's negative evaluations and other actions of the Employer. The Employer gave Diaz a rating of 50.00 on "Quantity" in her 2002-2003 and 2003-2004 evaluations, yet she was assigned almost no work to perform. The Employer points to Diaz's poor attendance record as a record as reason for her negative evaluations. However, she was never given any warnings or discipline for her attendance problems.

Accordingly, we affirm the ALJ's determination that the Union established a *prima facie* case that the Employer violated Sections 14(a)(1) and 14(a)(3) of the Act.

Once a *prima facie* case has been established under Section 14(a)(3), the burden shifts to the employer to demonstrate, by a preponderance of the evidence, that it had a legitimate business reason for its actions and that the employee would have received the same treatment in absence of his or her union activity. City of Burbank, 128 Ill. 2d 335, 538 N.E.2d 1146. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. If the proffered reasons are merely litigation figments or were not, in fact relied upon, then the employer's reasons are pretextual and the inquiry ends. However, when legitimate reasons for the adverse employment action are advanced, and are found to be relied upon at least in part, then the case may be characterized as a "dual motive" case, and the employer must establish, by a preponderance of the evidence, that the action would have been taken notwithstanding the employee's union activity.

As legitimate business reasons for its actions, the Employer argues that the changes to Diaz's work locations were precipitated by her requests and that Diaz's performance evaluations were lowered because of her poor attendance. We find these reasons to be pretextual. Although Diaz filed grievances or otherwise complained when she was unhappy with a new work location, the Employer did not honor her requests or the mediation resolution agreement by assigning her to work locations where she could not perform the essential functions of a school clerk. For the reasons discussed above with regard to the Employer's inconsistencies for the lowered evaluation ratings, we also find that the Employer's proffered reason that it lowered Diaz's evaluations ratings

because of her attendance as pretextual. Thus, the Employer has failed to satisfy its burden. Accordingly, we affirm the ALJ's determination that the Union established an unrebutted *prima facie* case that the Employer violated Sections 14(a)(1) and 14(a)(3) of the Act.

III.

The Employer violated Sections 14(a)(1), 14(a)(3) and 14(a)(5) of the Act. The ALJ's Recommended Decision and Order is affirmed.

Therefore, **IT IS HEREBY ORDERED** that against the Chicago Board of Education:

1. Cease and desist from:

   a) Retaliating against Veronica Diaz, or any of its other employees, for engaging in activity protected by Section 3 of the Act.

   b) Failing and refusing to implement the mediation settlement agreement dated January 29, 2003.

   c) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 3 of the Act.

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

   a) Immediately implement the parties' mediation settlement agreement of January 29, 2003.

   b) Expunge from its files, including Diaz's personnel file, any references to her job performance evaluations in June 2003 and June 2004 and notify Diaz in writing that this has been done and that evidence of the unlawful performance evaluations will not be used as a basis for future personnel actions against her.

   c) Post in all CBOE buildings, on bulletin boards or other places reserved for notices to employees, copies of an appropriate Notice to Employees. Copies of this Notice, a sample of which is attached, shall be provided by the Executive Director. This Notice shall be signed by the CBOE's authorized representative, posted immediately and maintained for sixty (60) calendar days during which the majority of employees are working. The CBOE shall take reasonable steps to ensure that said Notices are not altered, defaced or covered by any other materials.

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

IV. Right to Appeal

This is a final order of the IELRB. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to 115 ILCS 5/16(a), such review must be taken directly to the appellate court of the judicial district in which the IELRB maintains an office (Chicago or

Springfield). "Any direct appeal to the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision." 115 ILCS 5/16(a).

Decided: December 13, 2005
Issued: December 16, 2005
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald Ettinger
Ronald Ettinger, Member

/s/ Bridget L. Lamont
Bridget L. Lamont, Member

/s/ Michael H. Prueter
Michael H. Prueter, Member

/s/ Jimmie Robinson
Jimmie Robinson, Member

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601-3103
Telephone: (312) 793-3170

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Chicago Board of Education
Case No. 2004-CA-0011-C

Pursuant to an Opinion and Order of the Illinois Educational Labor Relations Board and in order to effectuate the policies of the Illinois Educational Labor Relations Act ("Act"), we hereby notify our employees that:

This Notice is posted pursuant to a Recommended Decision and Order of an Administrative Law Judge of the Illinois Educational Labor Relations Board issued after an administrative proceeding in which both sides had the opportunity to present evidence. The Administrative Law Judge found that we violated the Act and has ordered us to inform our employees of their rights.

Among other things, the Act makes it lawful for educational employees to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection.

We assure all of our employees that:

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

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization, including the Chicago Teachers Union, Local 1, IFT/AFT, AFL-CIO.

WE WILL IMMEDIATELY implement the mediation settlement resolution concerning Veronica Diaz dated January 29, 2003.

WE WILL IMMEDIATELY expunge all files and records, including Veronica Diaz's personnel file, of any and all documents and references to her performance evaluation in June 2003 and June 2004, when we were not in compliance with the mediation settlement agreement of January 29, 2003.

CHICAGO BOARD OF EDUCATION

By:_______________________________ Dated:_______________________
(Representative) (Title)

COPIES OF NOTICES TO BE POSTED
MUST BE OBTAINED FROM THE EXECUTIVE DIRECTOR

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