STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. 2005-CA-0055-C
	)	
Chicago Board of Education,	)	
	)	
Respondent.	)	

OPINION AND ORDER

On December 13, 2004, the Chicago Teachers Union, Local 1, IFT-AFT, AFL-CIO ("Union") filed an unfair labor practice charge. The charge alleged that the Chicago Board of Education ("CBE") had violated Sections 14(a)(1), 14(a)(3) and 14(a)(5) of the Illinois Educational Labor Relations Act ("Act") by failing to hire Frank Sacks, by communicating with principals and other agents with the authority to hire Sacks,[1] and by failing to comply with a request for information.

On February 28, 2005, the Executive Director issued a Recommended Decision and Order. He determined that, with respect to the bulk of the conduct that the Union alleged constituted an unfair labor practice under Sections 14(a)(1) and 14(a)(3) of the Act, the charge was untimely. With respect to the conduct concerning which he concluded that the charge was timely filed, he determined that the Union had not established a prima facie case of a violation of Section 14(a)(3) or 14(a)(1) of the Act. Therefore, he dismissed the allegations that the CBE had violated Sections 14(a)(3) and 14(a)(1).[2]

The Union filed timely exceptions to the Executive Director's Recommended Decision and Order. The CBE filed a response to the exceptions.

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[1] While the Union contends that the alleged communications violated the arbitration award, it does not allege a violation of Section 14(a)(8), which prohibits educational employers and their agents or representatives from "[r]efusing to comply with the provisions of a binding arbitration award." We, therefore, do not address Section 14(a)(8).

[2] The Executive Director issued a Complaint on the allegation that the CBE had violated Section 14(a)(5) and, derivatively, Section 14(a)(1) of the Act. Therefore, his Recommended Decision and Order did not address Section 14(a)(5). We also do not address Section 14(a)(5).

We have considered the Executive Director's Recommended Decision and Order, the Union's exceptions and the CBE's response. We have also considered the investigative record and applicable precedents. For the reasons in this Opinion and Order, we reverse the Executive Director's Recommended Decision and Order.

I.

We adopt the Executive Director's findings of fact as supplemented in this Opinion and Order. In order to assist the reader, we set forth the facts to the extent necessary to decide the issues presented.

The CBE is an educational employer within the meaning of Section 2(a) of the Act. The Union is an employee organization within the meaning of Section 2(c) of the Act and an exclusive representative within the meaning of Section 2(d) of the Act. At all times material herein, Sacks was an educational employee within the meaning of Section 2(b) of the Act.

Sacks' teaching position was closed on November 22, 1998. On or about December 21, 1998, the Union filed a grievance on Sacks' behalf challenging the closing of his position, which resulted in his placement in the reassigned teachers pool. The Union filed a second grievance on Sacks' behalf challenging his honorable termination when he failed to obtain another position within 10 months after his reassignment.

The grievances were consolidated for arbitration. On July 3, 2003, the arbitrator issued an award, which provided in part:

> 8. If Grievant avails himself of the services detaled [sic] in paragraph 7 above and secures a permanent assignment during the 2003-04 school year, the Employer shall make Grievant whole for salary and benefits lost as a result of his termination that was effective October 27, 2000
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> 9. The Employer shall not communicate to principals or other individuals who might be in a position to recommend Grievant's appointment to a vacant position that a permanent appointment will trigger the Employer's duty to make Grievant whole provided in paragraph 8 above.

Between August 6, 2003 and June 24, 2004, Sacks sent out approximately 47 resumes to many of the CBE's schools. On or about June 24, 2004, Sacks sent resumes to Principal William Gerstein of the School of Entrepreneurship and Principal Olufemi Adeniji of the School of Technology. He sent out other resumes on or about May 20, 2004 or earlier. However, Sacks was not able to obtain a permanent position.

On August 26, 2003, Sacks interviewed for a position at Richards High School. According to Sacks, Richards' principal promised to call him concerning her decision, but he did not hear from her, nor did she return his telephone calls. On October 30, 2003, Sacks interviewed for a position at Lake View High School. According to

Sacks, Lake View's assistant principal did not return his follow-up phone messages. In a letter dated November 12, 2003, the Lake View principal informed Sacks that, although the interview team was very impressed with Sacks and the interview, he could not offer Sacks a position at the time.

According to the Union, Sacks contacted Dr. John P. Gelsomino, the Chief Executive Officer of G Productions and Consulting, an agent of the CBE for finding and hiring teachers, to seek help in his search for employment with the CBE. According to the Union, Dr. Gelsomino told Sacks that he could not help Sacks find employment with the CBE because the CBE would be unwilling to pay him back pay and benefits resulting from his termination. The CBE has not rebutted this evidence. The date on which Dr. Gelsomino spoke to Sacks is not established in the investigative record.

The Union filed its charge on behalf of Sacks on December 13, 2004.

II.

The Union contests the Executive Director's determination that only Sacks' June 24, 2004 applications for positions at the School of Entrepreneurship and the School of Technology would be considered timely. The Union contends that the time period for filing its charge must be measured from the CBE's actions collectively, rather than from each single interview or correspondence, and that the pattern of the CBE's discriminatory actions became clear later. The Union argues that the CBE should not be allowed to withhold information on why Sacks was not hired for a permanent position and then claim that an unfair labor practice charge concerning that failure to hire was untimely.

The Union also contests the Executive Director's determination that it did not establish a violation of Section 14(a)(1) or 14(a)(3). The Union argues that the timing of the CBE's failure to hire Sacks is suspicious, and that the CBE was able to avoid paying Sacks back pay by failing to place him in a permanent position during the 2003-04 school year.

The CBE contends that the Executive Director's dismissal of the Union's Section 14(a)(1) and 14(a)(3) allegations should be upheld. The CBE argues that the Union did not submit any evidence demonstrating that it took any adverse action against Sacks. The CBE also argues that the Union did not show any anti-union animus.[3]

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[3] The CBE also argues that the Executive Director correctly determined that the Union's Section 14(a)(5) allegation was untimely. The Executive Director, however, did not determine that the Union's Section 14(a)(5) allegation was untimely. Rather, he issued a Complaint on that allegation. The Executive Director's Recommended Decision and Order states that it only addresses the Union's allegations that the CBE violated Sections 14(a)(1) and 14(a)(3) of the Act.

III.

Initially, we address the Union's argument that the Executive Director erroneously determined that, with respect to the bulk of the conduct that the Union alleged constituted an unfair labor practice, the charge was untimely. We conclude that the CBE has not established that the charge is untimely.

Section 15 of the Act provides that "[n]o order shall be issued upon an unfair practice occurring more than 6 months before the filing of the charge alleging the unfair labor practice." This time limit is jurisdictional. *Jones v. IELRB*, 272 Ill.App.3d 612, 650 N.E.2d 1092 (1st Dist. 1995); *Charleston Community Unit School District No. 1 v. IELRB*, 203 Ill.App.3d 619, 561 N.E.2d 331 (4th Dist. 1990). The court stated in *Charleston*, *citing Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill.2d 202, 486 N.E.2d 893 (1985), that, if the right involved is unknown to the common law, the time restriction is an inherent element of the right and of the power of the tribunal to hear the matter. The rights protected by Section 14(a)(3) and 14(a)(1) of the Act are based on the Act's prohibition of discriminatory conduct by employers and of employers' interference with statutory rights, and do not arise from the common law. Therefore, the IELRB does not have jurisdiction over Section 14(a)(3) and 14(a)(1) allegations concerning events that occur more than six months before the filing of the charge.

Here, the time for filing the unfair labor practice charge in this case runs from when Sacks became aware, or should have become aware, of the CBE's adverse actions against him and the CBE's allegedly unlawful motivation. The Appellate Court has stated that the six-month time period begins to run when the charging party becomes aware, or should become aware, of the actions that it asserts constitute an unfair labor practice. *Jones*; *Wapella Education Association v. IELRB*, 177 Ill.App.3d 153, 531 N.E.2d 1371 (4th Dist. 1988). However, where the union is the charging party but an individual is the one adversely affected by an unfair labor practice, the time period runs from when that individual has knowledge of the alleged unfair labor practice, rather than from when the union has such knowledge. In *Board of Trustees, Illinois Public Community College District No. 508*, 19 PERI 64, Case No. 2002-CA-0031-C (IELRB, April 14, 2003) (*City Colleges*) and in *Eastern Illinois University (Board of Governors)*, 11 PERI 1008, Case No. 94-CA-0025-S (IELRB, December 12, 1994), where the union was the charging party, the IELRB determined that the six-month period should be calculated based on when the adversely affected employee had reason to know of the employer's unfair labor practice.

The date on which Sacks became aware of the CBE's allegedly unlawful motivation, as well as the date on which he became aware of the CBE's adverse actions against him, is relevant to a determination of the timeliness of

the charge. Where the individual adversely affected by the employer's discriminatory action does not have evidence of the employer's unlawful motivation until after the discriminatory action, the period for filing an unfair labor practice charge begins to run when the individual obtains the evidence of the unlawful motivation, rather than when the discriminatory action occurs. *City Colleges*, *supra*; *see Sheriff of Jackson County v. ISLRB*, 302 Ill.App.3d 411, 705 N.E.2d 924 (5th Dist. 1999). In *City Colleges*, the IELRB calculated the time period for filing an unfair labor practice charge from the time when the affected individual had reason to know of both the employer's adverse action and the employer's allegedly unlawful motivation. In this case, similarly, the time period for filing the unfair labor practice charge should run from when Sacks had reason to know of both the CBE's adverse actions and the CBE's allegedly unlawful motivation. Because the Union filed its charge on behalf of Sacks on December 13, 2004, the charge would be timely with respect to adverse actions concerning which both of those conditions were not satisfied until on or after June 13, 2004.

No exceptions were filed to the Executive Director's determination that, with respect to Sacks' June 24, 2004 applications for positions at the School of Entrepreneurship and the School of Technology, the charge was timely. Accordingly, we do not reconsider whether that determination was correct. *See Illini Bluffs Community Unit District No. 327*, 14 PERI 1038, Case No. 96-CA-0022-S (IELRB, February 6, 1998).

With respect to Sacks's earlier applications for positions at the CBE, the CBE has not established that the charge is untimely. Sacks obtained evidence of the CBE's allegedly unlawful motivation when Dr. Gelsomino allegedly informed Sacks that he could not help Sacks find employment with the CBE because the CBE would be unwilling to pay him back pay and benefits resulting from his termination. The date on which Dr. Gelsomino made that statement is not established in the investigative record. Accordingly, it has not been demonstrated that Dr. Gelsomino made that statement prior to June 13, 2004. Thus, it has not been demonstrated that the charge is untimely.

IV.

The Executive Director further determined that, where he concluded that the charge was timely—that is, where it concerned Sacks' June 24, 2004 applications for employment—the Union had not established a prima facie case. The Union contests that determination. We conclude that the Union has established a prima facie case with respect to the Section 14(a)(3) and 14(a)(1) allegations in the charge.

In processing unfair labor practice charges, the Illinois Educational Labor Relations Board ("IELRB") "must decide whether its investigation establishes a prima facie issue of law or fact sufficient to warrant a hearing of the charge," *Lake Zurich School District No. 95*, 1 PERI 1031, Case No. 84-CA-0003 (IELRB, November 30, 1984). In order for a complaint to be issued, "the investigation must disclose adequate credible statements, facts or documents which, if substantiated and not rebutted in a hearing, would constitute sufficient evidence to support a finding of a violation of the Act," *Village of Skokie v. ISLRB*, 306 Ill.App.3d 489, 714 N.E.2d 87, 90 (1st Dist. 1999), *quoting Lake Zurich*; *see* 80 Ill. Adm. Code 1105.100(b).

Here, the Union alleges that the CBE violated Section 14(a)(3) of the Act in that it failed to hire Sacks and communicated to principals and other agents with the authority to hire Sacks, in violation of the arbitration award. The Union also alleges, based on the same conduct, that the CBE violated Section 14(a)(1) of the Act. When an alleged violation of Section 14(a)(1) of the Act 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, and the applicable test is the one used in Section 14(a)(3) cases, which requires proof of the employer's unlawful motivation. *Bloom Township High School District 206 v. IELRB*, 312 Ill.App.3d 943, 728 N.E.2d 612 (1st Dist. 2000). Therefore, we analyze this case under Section 14(a)(3) of the Act.

Section 14(a)(3) prohibits educational employers and their agents or representatives from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization." A prima facie case of a Section 14(a)(3) violation is established by showing that the employee engaged in activity protected by Section 14(a)(3), that the employer was aware of that activity, and that the employer took adverse action against the employee for engaging in that activity. *Board of Education, City of Peoria School District No. 150 v. IELRB*, 318 Ill.App.3d 144, 741 N.E.2d 690 (4th Dist. 2000); *Bloom Township*. Section 14(a)(3) applies to discrimination on the basis of union activity. *Bloom Township*.

Here, Sacks engaged in union activity when he filed grievances through the Union. *See City Colleges of Chicago (Wright College)*, 11 PERI 1055, Case No. 95-CA-0012-C (IELRB, May 26, 1995). The CBE was necessarily aware of the grievances. In addition, the Union has provided evidence that the CBE's actions against Sacks were due to his union activity.[4]

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[4] The CBE argues that the Union did not submit any evidence demonstrating that it took any adverse action against Sacks. However, the Union submitted evidence demonstrating that the CBE failed to hire Sacks for the positions for which he applied. This constitutes adverse action.

Anti-union motivation may be inferred from either direct or circumstantial evidence. *City of Burbank v. ISLRB*, 128 Ill.2d 335, 538 N.E.2d 1146 (1989). Anti-union motivation may be inferred from various factors, including an employer's expressions of hostility toward union activity, together with knowledge of the employee's union activity; proximity in time between the employee's union activity and the employer's action; differing treatment of employees or a pattern of conduct targeting employees who engage in union activity for adverse employment action; inconsistencies between the reason the employer offers for its action and other actions of the employer; and shifting explanations for the employer's action. *Id.* These factors are not exclusive. *Effingham Community Unit School District No. 40*, 8 PERI 1013, Case No. 91-CA-0023-S (IELRB Opinion and Order, December 30, 1991).

Here, Dr. Gelsomino's alleged statement to Sacks that he could not help Sacks find employment with the CBE because the CBE would be unwilling to pay him back pay and benefits is evidence that the CBE's actions against Sacks were motivated by his union activity. It is alleged that Dr. Gelsomino was acting as an agent of the CBE for finding and hiring teachers. By its express words, Dr. Gelsomino's statement reflects that the CBE was motivated by hostility toward grievance arbitration in its actions against Sacks.

In addition, as the Union notes, the timing of the CBE's actions is suspicious. The pattern of the CBE's actions began when Sacks first sent out his resume on August 6, 2003. This is approximately one month after the arbitrator's July 3, 2003 award.

We conclude that the Union has presented evidence that the CBE took adverse action against Sacks because of his union activity. Therefore, we conclude that the Union has established a prima facie case under *Lake Zurich, supra,* that the CBE violated Section 14(a)(3) and, derivatively, Section 14(a)(1) of the Act by its adverse actions against Sacks.

V.

For the above reasons, we reverse the Executive Director's Recommended Decision and Order and remand the case to the Executive Director. The Executive Director is directed to issue a Complaint with respect to the Section 14(a)(3) and 14(a)(1) allegations of the charge.

VI.

This is not a final order subject to the Administrative Review Law. *See* 5 ILCS 100/10-50(b); 115 ILCS 5/16(a).

Decided: July 12, 2005
Issued: July 14, 2005
Chicago, Illinois

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

/s/ Ronald F. Ettinger
Ronald F. Ettinger, Member

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

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

/s/ Jimmie E. Robinson
Jimmie E. Robinson, Member

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