STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
SPEED Education Association, IEA-NEA, and Rachel Warning,	)	
	)	
Complainant,	)	
	)	
and	)	Case No. 2006-CA-0013-C
	)	
SPEED District #802,	)	
	)	
Respondent.	)	

OPINION AND ORDER

On April 9, 2007, an Administrative Law Judge ("ALJ") issued a Recommended Decision and Order in this case. She determined that SPEED District #802 ("District") had violated Sections 14(a)(3) and 14(a)(1) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act") by non-renewing Rachel Warning.

The District filed timely exceptions to the ALJ's Recommended Decision and Order. Complainants SPEED Education Association, IEA-NEA ("Association") and Warning filed a reply to the District's exceptions, in which they incorporated their post-hearing brief.

We affirm the ALJ's Recommended Decision and Order as modified in this Opinion and Order.

I.

We adopt the ALJ's findings of fact as supplemented in this Opinion and Order. The District argues that the ALJ erred in determining that the Complainants' witness Beth Wierzbicki, the Association's grievance representative, was credible. However, **"i**t is the Board's policy not to overrule a Hearing Officer's resolution with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect," *Board of Regents of Sangamon State University*, 6 PERI 1049, Case Nos. 89-CA-0030-S, 89-CA-0035-S (IELRB, March 12, 1990), *aff'd*, 208 Ill.App.3d 220, 566 N.E.2d 963 (4th Dist. 1991). The record here does not establish by a clear preponderance of the relevant evidence that the ALJ's credibility resolutions are incorrect.

The fact that Wierzbicki's recollection was refreshed by notes is insufficient to establish that the ALJ should not have credited her testimony. A witness is permitted to refresh his/her memory by the use

of a document. *People v. Griswold*, 405 Ill. 533, 92 N.E.2d 91 (1950). Nor did Wierzbicki simply parrot the notes as the District claims. Wierzbicki testified that "if I'm refreshed as to what the meeting was about then I do recall the content of that meeting." (Transcript p. 30). The ALJ confirmed that Wierzbicki had looked at her notes, was closing the notes and was testifying without the notes. (Transcript p. 23). In addition, much of Wierzbicki's testimony was given on the basis of her recollection without it being refreshed by her notes. Nor do the District's arguments against the reliability of the notes indicate that Wierzbicki's testimony was unreliable. As noted above, Wierzbicki's testimony indicates that she recalled the content of the meeting independently of the notes after her recollection had been refreshed by looking at them. A witness may use anything to refresh his/her recollection. *Susan A. Loggans & Associates v. Estate of Sunnyland*, 226 Ill.App.3d 147, 589 N.E.2d 603 (1st Dist. 1992). The District also claims that, because Wierzbicki's testimony concerning the first and second meetings was inconsistent with her notes concerning subsequent meetings, her testimony was unreliable. However, Wierzbicki's testimony concerning the first and second meetings was consistent with her notes concerning those meetings.

We summarize the facts as follows.

From August 2001 through the end of the 2004-2005 school year, Warning was employed by the District as a teacher of high school aged students with severe physical disabilities. During Warning's first three years with the District, she received an evaluation rating of "Standard," which is comparable to a satisfactory rating. In a post-conference meeting on January 31, 2003, Kathy Call, who was then the Principal of the Program for Adaptive Learning ("PAL"), expressed concerns about Warning's relationship and interactions with her support staff.

Section 3-8(B) of the parties' collective bargaining agreement provides that "[p]rior to October 1, employees will be informed as to who will be responsible for each employee's supervision and evaluation." In the fall of 2004, Warning was notified that Julie Egan, the Assistant Principal of PAL, would evaluate her for the 2004-2005 school year. On or about November 22, 2004, Warning received a memorandum from Egan, which described her performance as "professional," "excellent" and "outstanding."

On or about December 4, 2004, Warning had a meeting with PAL Principal Benoit Runyan and District Human Resources Director Dr. Generva A. Clasberry to discuss her alleged use of profane

language. Warning requested union representation at this meeting and was accompanied to this meeting by Wierzbicki, who spoke on Warning's behalf.

Warning was notified in February that Runyan would replace Egan as her evaluator. Runyan observed Warning's class for the first time on February 15, 2005. That observation, which lasted for about 20 minutes, was the sole basis for Runyan's summative evaluation of Warning. There was no pre-observation conference, and Warning was given no written summary of the observation.

On or about March 1, 2005, Warning had a meeting with Runyan to discuss Runyan's observation of Warning's class. Warning requested union representation at this meeting and was accompanied by Wierzbicki. At this meeting, Runyan provided Warning with a summative evaluation in which he rated her unsatisfactory in four of seven categories: instructional planning and development, management of instructional time, instructional presentation and feedback, and communication and professional responsibilities. Runyan stated in the evaluation that, due to the overall summative rating of unsatisfactory, he recommended that Warning be placed on a plan to correct her deficiencies. He attached a corrective deficiency plan to the evaluation. Runyan stated that Warning must take corrective actions by May 1, 2005 or he would recommend her termination.

At the March 1, 2005 meeting, Warning asked that Runyan separately rate each objective in her evaluation. Wierzbicki stated that Runyan had rated each of the objectives in her evaluation separately. Wierzbicki was evaluated using a different instrument than Warning. At the conclusion of the meeting, Runyan stated that Wierzbicki would not be needed at any further meetings. Warning responded that she wanted union representation and that she could be terminated. Runyan stated that "having the Union involved just makes the situation more complicated, I would rather just go through giving you instructions."

On or about March 4, 2005, Warning, accompanied by Wierzbicki, attended a meeting with Runyan to discuss the corrective plan. Warning again asked for specific areas Runyan thought that she was not meeting. In response, Runyan stated, "Look I can show you what I want, I can walk you through this, but we don't need [Wierzbicki] here. I don't mean any offense, I don't mean anything personal to you, [Wierzbicki], or the Union, but we can really just do this on our own." Warning continued to insist that she have representation.

Shortly after the March 4 meeting, Runyan encountered Warning in the hallway at the end of the school day and asked to meet with her for "two minutes." Warning agreed. Runyan and Warning then went to Runyan's office, where he told her that he would no longer allow Wierzbicki to be part of the post-observation conferences. Warning said that she would not meet without union representation, and she read her rights to Runyan from a little card that she carried with her. Runyan replied that he did not care what the card said and that he would meet her without a union representative present. He jumped from his chair, walked back and forth, and raised his voice. Warning told him that she did not have to take this treatment, and she left.

On March 9, 2005, Runyan stopped Wierzbicki in the hallway and asked her into his office. He told her that union representation was not required during remediation and that he had discussed the matter with Dr. Betty Pointer, the Executive Director of the District, who agreed with him. In response, Wierzbicki said that Warning was facing termination and that she would not meet with him without union representation.

On or about March 17, 2005, Wierzbicki sent Runyan a memorandum stating that "SEA will not prolong or interfere with the process of remediation, nor do we wish to make the process cumbersome. However, Ms. Warning is entitled by Collective Bargaining Agreement and Weingarten rights to have the SEA representative of her choice act as a witness, document her discussions and advise her as needed."

On March 18, 2005, Warning asked Wierzbicki to accompany her to a meeting in Runyan's office. Executive Director Dr. Pointer was also at the meeting. Dr. Pointer began by telling Wierzbicki that she would no longer be allowed to attend the post-observation conferences. During the course of the meeting, Dr. Pointer modified her position and stated that Wierzbicki would be permitted to attend, but could not participate verbally. While making these statements, Dr. Pointer raised her voice and pointed her finger at Wierzbicki. Wierzbicki tried to speak, and Dr. Pointer told her to shut her mouth up and that she was to sit there and be quiet. Dr. Pointer also said that, if Wierzbicki did speak, she would be asked to leave, or that Dr. Pointer was going to have Runyan notify her and then she would have Wierzbicki removed even if she had to come down herself and remove her.

On March 24, 2005, the District sent Warning a nonrenewal letter stating that her contract would not be renewed. Dr. Pointer testified that the District sent this letter because of the legal requirement that it

notify an employee 45 days before the end of the school year when it was possible that his/her employment contract would not be renewed for the following year. Dr. Pointer testified that whether Warning would return for the following year was dependent on whether she successfully completed the corrective action plan.

On March 31, 2005, Runyan sent a memorandum to Warning indicating that meetings concerning the corrective action plan would only be attended by the teacher and the administrator. On or about April 6, 2005, Dr. Pointer, in a letter to IEA UniServ Director Janet Zitzer, stated:

> In discussing with Mr. Runyan what happened to precipitate his March 31 memo, which indicated that [Wierzbicki] would not be able to attend future meetings, he indicated the following: Despite our discussions with [Wierzbicki] and [Warning] regarding [Wierzbicki's] role in the meetings, [Wierzbicki] continues to insert herself into the discussion, in a different way. Instead of her verbally making her presence known, she has elected to pass notes back and forth to [Warning] with questions and responses for Mr. Runyan. In addition, her body language, nodding or moving her head to show agreement, disapproval, or that she has a question was evident as well.
>
> Frankly, [Wierzbicki's] behavior is insubordinate and in direct defiance of what I asked her not to do, which was to get involved in the meeting. To try and get around my directive by passing notes back and forth in the meeting, rather than speaking, is in my opinion very manipulative and absolutely unacceptable.
>
> It is not our intention to deny any staff member the opportunity to be represented by the union; however, we will not allow [Wierzbicki] to interfere with the process that was established for working through the Corrective Action Plan. If [Wierzbicki] is to attend future meetings and participate in any form or fashion in the meetings, other than being a listener or to take notes, which does not mean passing notes, I will consider it insubordination on her part and specifically address it as a disciplinary issue with her. I have directed Mr. Runyan to allow [Wierzbicki] to be present at future meetings, but with the understanding that I have stipulated above. If she decides to defy the directive outlined above either verbally, through manipulating the situation or through her body language, I have asked Mr. Runyan to ask her to leave the room and to contact me immediately so that disciplinary action can be taken.

(Emphasis in original).

In a memorandum to Warning dated April 22, 2005, Runyan provided written feedback on her progress on the plan to correct deficiencies that he had given her on March 1. According to Runyan's memorandum, Warning had received her unsatisfactory rating in two main areas: instructional presentation and professional communication/responsibilities. Runyan stated in the memorandum that Warning had shown "demonstrated improvement" in the area of instruction. However, he found that there had been "little growth in the area of improved communication." Runyan's memorandum stated:

> During the time span you were working on the plan to correct deficiencies more concerns were raised due to your lack of ability to communicate. You made the choice to

> be late for several scheduled meetings and failed to participate in a process that enabled you and me to communicate freely. Your actions have created barriers in our ability to effectively communicate. The process was tension driven and failed to honestly develop a relationship to move forward in this area.
>
> During the planning time line I had to present requests to you in verbal and written format. You failed to consistently provide prepared evidence when requested and seemed inadequately prepared for our meetings. We were unable to get into open dialog during our meeting time. During our conversations you failed to see your role in the breakdown of communication. The corrective process became cumbersome and chaotic due to the choices that you made.

Runyan stated in the memorandum that it was for these reasons that he would recommend that Warning be terminated. On or about April 28, 2005, Dr. Pointer sent Warning a notice that her contract with the District would terminate at the end of the 2004-2005 school year.

The ALJ found that the "choices" referred to in Runyan's memorandum referred to Warning's decision to have a union representative present at her post-observation conferences.[1] When Warning asked Runyan what were the choices she had made that were wrong, he refused to specify. (Transcript p. 159). The ALJ also found that the District based Warning's dismissal on her failure to remediate concerning professional communication/responsibility. The District states in its exceptions that Warning was not renewed because of, in addition, her inadequate teaching abilities.

Warning was in fact never late for any of the meetings scheduled with Runyan. Similarly, there is no evidence that Warning failed to provide "prepared evidence when requested," much less that she did so on a "consistent" basis.

Two other employees of the District, Christine Maher and Ed Foote, were under corrective action plans with Runyan during the 2004-2005 school year. (Transcript pp. 208-09). Maher resigned before completing her corrective action plan, but Foote was successful in completing his corrective action plan. (Transcript p. 209). Foote requested a union representative during the corrective action plan. (Transcript p. 209). He was represented by either Association Vice President Bridgette Reed or UniServ Director Zitzer. (Transcript pp. 209-10).

[1] The District argues that this finding is incorrect. However, this finding is consistent with the record viewed as a whole. It is noteworthy that Runyan refused to specify what Warning's wrong choices were when Warning questioned him and that the District did not call Runyan to testify.

II.

The ALJ concluded that the District's termination of Warning violated Sections 14(a)(3) and 14(a)(1) of the Act. She concluded that a non-tenured teacher under remediation is entitled, upon request, to union representation at a post-observation conference. She determined that the Complainants had established a prima facie case that the District had violated Sections 14(a)(3) and 14(a)(1) of the Act by terminating Warning. She determined that this was a dual motive case, but that the District had not shown that Warning would have been dismissed notwithstanding her union activity.

III.

The District contends that the Complainants did not establish a prima facie case of a Section 14(a)(3) or 14(a)(1) violation, and that the ALJ erroneously determined that the District violated those provisions. The District argues that the presence of a union representative was not required in this case, and that, therefore, Warning's request for union representation at post-evaluation conferences was not a protected activity. The District asserts that the reasons for Warning's dismissal were provided to her prior to any arguable protected activity. The District contends that there was not evidence of anti-union animus. The District argues that there was insufficient evidence to show a shifting rationale for Warning's dismissal, and that the District's failure to dismiss Warning in 2002-2003 is not persuasive evidence that she was recommended for non-renewal for engaging in union activity. The District asserts that the driving issue behind Warning's dismissal was her unsatisfactory evaluation rather than her failure to remediate. The District argues that the ALJ did not have the authority to order the reinstatement of Warning and to demand that she be given tenure.

The Complainants argue that Warning had a right to union representation in her meetings with the District administrators. The Complainants assert that Warning engaged in concerted activity prior to and after March 1, 2005. The Complainants assert that the communication problem for which the District dismissed Warning was a euphemism for her choosing to have a union representative. The Complainants argue that the ALJ properly found that the District had an anti-union motivation. The Complainants contend that the ALJ properly considered the District's prior failure to dismiss Warning as one factor in her Recommended Decision and Order. The Complainants assert that the District offered no reason for Warning's dismissal other than the alleged communication problems. The Complainants argue that the

District's true reason for dismissing Warning was her insistence on union representation. The Complainants contend that the order of reinstatement was proper.

IV.

In this case, we must decide whether the District violated Section 14(a)(3) and, derivatively, Section 14(a)(1) of the Act by non-renewing Warning. We conclude that the District violated Section 14(a)(3) and, derivatively, Section 14(a)(1) by this conduct.

Section 14(a)(3) of the Act 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." 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."

A prima facie case of a Section 14(a)(3) violation is established by demonstrating that the employee was 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) (*Peoria II*); *Bloom Township High School District 206 v. IELRB*, 312 Ill.App.3d 943, 728 N.E.2d 612 (1st Dist. 2000). Section 14(a)(3) applies to discrimination based on union activity. *Bloom Township*. When, 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, and the applicable test is the one used in Section 14(a)(3) cases. *Id.*

Here, Warning engaged in union activity when she invoked representation by Association grievance representative Beth Wierzbicki. In *Chicago Board of Education*, 22 PERI 143, Case No. 2004-CA-0061-C (IELRB, April 11, 2006), the Illinois Educational Labor Relations Board ("IELRB") ruled that an employee engaged in union activity when he sought the union's assistance in disciplinary matters and when union representatives accompanied him to pre-disciplinary meetings. In this case, Warning sought the Association's assistance and was accompanied by an Association representative to meetings with employer administrators. *See also Georgetown-Ridge Farm Community Unit School District No. 4 v. IELRB*, 239 Ill.App.3d 428, 606 N.E.2d 667 (4th Dist. 1992) (employee engaged in protected activity by

seeking union assistance). It is unnecessary for us to decide whether denying Warning union representation at the post-evaluation meetings would have been an unfair labor practice under *Summit Hill School District 161*, 4 PERI 1009, Case No. 86-CA-0090-C (IELRB, December 1, 1987) and *NLRB v. Weingarten*, 420 U.S. 251 (1975). In this case it is not alleged that the District violated the Act by denying Warning union representation, but rather that it retaliated against her for having union representation. Retaliation aimed at discouraging union activity is prohibited by the terms of Section 14(a)(3) of the Act. The District was clearly aware of Warning's union activity.

The Complainants have also shown that the District non-renewed Warning because of her union activity. Anti-union motivation may be inferred from a variety of factors, such as an employer's expressions of hostility toward union activity, together with knowledge of the employee's protected activity; timing; disparate treatment or a pattern of conduct that targets employees who engage in union activity; inconsistencies between the reason the employer gives for its action and other actions of the employer; and shifting explanations for the employer's action. *City of Burbank v. ISLRB*, 128 Ill.2d 335, 538 N.E.2d 1146 (1989).

Here, Runyan and Dr. Pointer repeatedly expressed hostility toward Warning's union activity in the form of representation by Wierzbicki. There is also evidence of shifting explanations for the employer's action in that, while Runyan's memorandum indicates that Warning was being non-renewed because of her failure to remediate concerning professional communication/responsibility and that she had shown "demonstrated improvement" in the area of instruction, the District states in its exceptions that Warning was not renewed because of, in addition, her inadequate teaching abilities.

In addition, in Runyan's April 22, 2005 memorandum stating that he would recommend Warning's dismissal, the District admitted that Warning's union activity was a basis for its non-renewal of Warning. In stating the reasons for which Warning was being non-renewed, Runyan listed the "choices" that Warning had made. The ALJ found that the choices referred to in Runyan's memorandum referred to Warning's decision to have a union representative present at her post-evaluation conferences. This conclusion is supported by the record considered as a whole and by the fact that, when questioned by Warning, Runyan refused to specify what were the choices she had made that were wrong. We conclude

that the Complainants have established a prima facie case that the District violated Section 14(a)(3) and, derivatively, Section 14(a)(1) of the Act when it non-renewed Warning.

Where a prima facie case has been established, the employer must show that it would have taken its actions for a legitimate business reason notwithstanding its improper motivation in order to avoid a determination that it violated the Act. *City of Burbank*. A case may be characterized as "pretext" or "dual motive." *Id.* In a "pretext" case, the employer's suggested reasons for its action are created for the purpose of litigation or were not relied on. *Id.* In a "dual motive" case, the employer states legitimate reasons for its action and is found to have relied on them in part. *Id.* The employer must then show by a preponderance of the evidence that it would have taken the action against the employee notwithstanding his/her union activity. *Id.*

We conclude that the present case is a pretext case. The pretextual nature of the District's asserted reasons for Warning's non-renewal—Warning's alleged failure to remediate concerning professional communication/responsibilities and her allegedly inadequate teaching abilities—is evident from Runyan's April 22, 2005 memorandum. Runyan's memorandum indicates that the District was not non-renewing Warning because of her allegedly inadequate teaching abilities, especially as Runyan stated in the memorandum that Warning had shown "demonstrated improvement" in the area of instruction. The memorandum also contains veiled references to Warning's insistence that she be represented by Wierzbicki. Runyan stated that Warning "failed to participate in a process that enabled you and me to communicate freely" and that Warning's actions had "created barriers in our ability to effectively communicate." Runyan also condemned Warning's "choices," by which he referred to Warning's decision to have a union representative at her post-evaluation meetings. Moreover, Runyan inaccurately stated in the memorandum that Warning was late for several scheduled meetings and failed to provide "prepared evidence when requested." The inaccuracy of these statements demonstrates their pretextual nature.

While the District apparently did not dismiss Foote, another employee who was under a corrective action plan with Runyan during the 2004-2005 school year and who requested union representation, Dr. Pointer's comments at the March 18, 2005 meeting and in her April 6, 2005 letter to Zitzer indicate that it was in particular to Wierzbicki's assertiveness in representing Warning that the District objected. Foote was represented by a union representative other than Wierzbicki.

The District argues that Warning's non-renewal was driven by her unsatisfactory evaluation, which was issued before Warning's union activity, and that the reasons for Warning's non-renewal were provided to her prior to any arguable protected activity. However, Warning was also represented by Wierzbicki at a December 4, 2004 meeting attended by Runyan, which occurred prior to Warning's unsatisfactory evaluation and the listing of reasons in that evaluation. Moreover, the fact that Warning was placed on a corrective deficiency plan as a result of her unsatisfactory evaluation and the fact that Dr. Pointer testified that whether Warning returned for the following year was dependent on whether she successfully completed the corrective deficiency plan demonstrate that her non-renewal would not have necessarily followed from the evaluation.

For the above reasons, we conclude that this is a pretext case. Therefore, the District has not shown that it would have non-renewed Warning for a legitimate reason notwithstanding its improper motivation. The District violated Section 14(a)(3) and, derivatively, Section 14(a)(1) of the Act by non-renewing Warning.

V.

The District argues that the ALJ did not have the authority to order the reinstatement of Warning and to demand that she be given tenure. The District asserts that the Illinois School Code grants to the school board alone the power to terminate teachers, and that this power cannot be delegated. We determine that an order that Warning be reinstated, with the consequence that she receive tenure, is within the IELRB's authority.

Under Section 15 of the Act, the IELRB has the authority "to issue an order requiring the party charged to stop the unfair practice, and…take additional affirmative action…." This encompasses the authority to make whole victims of unfair labor practices by ordering that they be placed in the position that they would have occupied if the unfair labor practice had not been committed. *Paxton-Buckley-Loda Education Association v. IELRB*, 304 Ill.App.3d 343, 710 N.E.2d 538 (4th Dist. 1999). As the Appellate Court stated in *Paxton-Buckley-Loda*, 304 Ill.App.3d at 353, 710 N.E.2d at 546, *quoting County of Cook*, 12 PERI 3008 at XI-31 (ILLRB 1996), in fashioning remedies the IELRB has "substantial flexibility and wide discretion to ensure that victims of unfair labor practices be returned to the position that would have obtained had the illegal conduct not occurred."

Reinstating Warning, and, as a consequence, her receipt of tenure, is necessary to restore her "to the position that would have obtained had the illegal conduct not occurred." Dr. Pointer testified that whether Warning returned for the following year was dependent on whether she successfully completed the corrective deficiency plan, and Runyan's finding that Warning had not successfully completed the corrective deficiency plan was a pretext for anti-union discrimination rather than a legitimate reason on which the District actually relied. Section 24-11 of the School Code, 105 ILCS 5/24-11, provides for tenure after a teacher is employed by a special education joint agreement for four consecutive years. Therefore, Warning would have been rehired and thereby granted tenure in the absence of her insistence on union representation. Without receipt of tenure, Warning would not be placed in "the position that would have obtained had the illegal conduct not occurred" and, thus, would not be fully made whole within the meaning of *Paxton-Buckley-Loda*.

In addition, Section 17 of the Act states: "[i]n case of any conflict between the provisions of this Act and any other law…the provisions of this Act shall prevail and control." Therefore, assuming arguendo that there is a conflict between the School Code and the IELRB's authority to order remedies under Section 15 of the Act, the IELRB's authority under Section 15 of the Act prevails and controls.

In *McFarland Unified School District v. PERB*, 228 Cal.App.3d 166, 11 Cal.Rptr.2d 405 (1991), the California Court of Appeal determined that the California Public Employment Relations Board had the authority to order the reinstatement of a teacher even though she would automatically obtain tenure as a result of reinstatement. The court recognized the discretion of the school board in tenure decisions, but stated that the school board's power to deny tenure for any lawful reason did not insulate it from the scrutiny of the California Public Employment Relations Board. The court stated that the fact that the employee would automatically obtain tenure as a result of reinstatement "merely [gave] effect to the determination that [the employee] would not have been denied tenure but for her exercise of protected rights," *id.* at 169, 11 Cal.Rptr.2d at 406-07. Similarly in this case, Warning would not have been non-renewed and thereby denied tenure, in the absence of her insistence on union representation. Ordering that Warning be reinstated and thereby be awarded tenure merely gives effect to this determination.

In addition, the Executive Director determined that a reinstatement remedy included tenure in *Hoyleton Consolidated School District No. 29*, 6 PERI 1097, Case No. 89-CA-0057-S (IELRB Executive Director, June 29, 1990). The Executive Director stated:

> Where a teacher is wrongfully denied tenure through unlawful discriminatory acts of the District, the District cannot be allowed to benefit by its ill-inspired purpose and any employment decisions must be subordinated to the statutory goals of the Act. See, e.g., *Brown v. Trustees of Boston University*, 891 F.2d 337, (1989).

Id., 6 PERI 1097 at IX-331. While the Executive Director's Recommended Decision and Order is not precedential, his discussion is persuasive. Similarly in this case, tenure is an appropriate part of the reinstatement remedy, which will place both Warning and the District in the position in which they would have been if the unfair labor practice had not occurred.

The case which the District cites, *Midwest Central Education Association v. IELRB*, 277 Ill.App.3d 440, 660 N.E.2d 151 (1st 1995), concerned the authority of an arbitrator to award reinstatement for a third probationary year and did not concern the IELRB's authority to award remedies for discrimination prohibited by the Act. The court stated in *Midwest Central*, 277 Ill.App.3d at 446, 660 N.E.2d at 155, that the power to terminate teachers "cannot be delegated or limited *by a collective bargaining agreement*." (Emphasis added). *Midwest Central* was decided under Section 10(b) of the Act, which prohibits the effectuation or implementation of provisions in collective bargaining agreements that violate, are inconsistent with, or conflict with Illinois statutes. Section 10(b) of the Act does not limit the IELRB's authority to order remedies for unlawful discrimination.

For the above reasons, we affirm the ALJ's recommended order reinstating Warning and determine that she will thereby receive tenure.

VI.

We conclude that the District violated Section 14(a)(3) and, derivatively, Section 14(a)(1) of the Act by non-renewing Warning. Wherefore, **IT IS HEREBY ORDERED** that SPEED District #802:

1 Cease and desist from:

a. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed under the Act.

b. Discriminating against Rachel Warning, or any of its employees, in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.

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

a. Offer to Rachel Warning immediate and full reinstatement to the position she held as teacher of high school aged students with severe physical disabilities.

b. Make Rachel Warning whole for the loss of any pay or benefits, with interest at a rate of seven percent per annum, resulting from the District's discriminatory removal of her from the position of teacher.

c. Preserve and, upon request, make available to the IELRB or its agents for examination and copying all records, reports and other documents necessary to analyze the amount of remedy due under the terms of this Opinion and Order.

d. Post in all District 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 District's authorized representative and maintained for 60 calendar days during which the majority of employees are working. The District shall take reasonable steps to ensure that said Notices are not altered, defaced, or covered by any other materials.

e. 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.

VII. 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 Board 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: January 8, 2008
Issued: January 8, 2008
Chicago, Illinois

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

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

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

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

****SAMPLE****SAMPLE****SAMPLE****SAMPLE****SAMPLE****SAMPLE****

SPEED District #802
Case No. 2006-CA-0013-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 an Opinion and Order of the Illinois Educational Labor Relations Board issued after a hearing in which both sides had the opportunity to present evidence. The Illinois Educational Labor Relations Board found that we have 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 organize, form, join or assist employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection.

We assure 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.

WE WILL offer to Rachel Warning immediate and full reinstatement to the position she held as teacher of high school aged students with severe physical disabilities.

WE WILL make Rachel Warning whole for the loss of any pay or benefits, with interest at a rate of seven percent per annum, resulting from our discriminatory removal of her from the position of teacher.

SPEED DISTRICT #802

By:_____Dated:_____
(Representative) (Title)

-NOTICES TO BE POSTED MUST BE OBTAINED
FROM THE EXECUTIVE DIRECTOR OF THE IELRB-

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Members Lamont and Robinson, dissenting in part

We agree with our colleagues' conclusion that SPEED District #802 ("SPEED") violated Section 14(a)(3) and, derivatively, Section 14(a)(1) of the Illinois Educational Labor Relations Act by non-renewing Rachel Warning and with their supporting rationale. However, we do not agree with their conclusion that an award of tenure is within the authority of the Illinois Educational Labor Relations Board ("IELRB"). Therefore, we respectfully dissent.

The IELRB's authority to order make-whole relief does not extend to an award of tenure, which is a decision vested by statute in SPEED. See 105 ILCS 5/24-11. It is well established that teacher tenure provisions are in derogation of the common law and must be strictly construed in favor of the school district. *E.g., Bart v. Board of Education of City of Chicago*, 256 Ill.App.3d 880, 632 N.E..2d 39 (1st Dist. 1993); *Stamper v. Board of Education of Elementary School District No. 143*, 141 Ill.App.3d 884, 491 N.E.2d 36 (1st Dist. 1986). Under this principle of strict construction, the tenure provision in 105 ILCS 5/24-11 cannot be construed to allow an automatic award of tenure. Rather, the IELRB having set aside SPEED's unlawful non-renewal of Warning, SPEED must be given the opportunity to exercise its statutory discretion in tenure matters.

The proper remedy in this case would be to reinstate Warning for another final probationary year and order that she be evaluated by someone other than Principal Benoit Runyan or Dr. Betty Pointer. *See Minooka Community Consolidated School District No. 201*, 9 PERI 1127, Case Nos. 91-CA-0015-C, 92-CA-0023-C (IELRB, August 19, 1993) (ordering that an individual be precluded from serving as an employee's evaluator in the future). This remedy is similar to the remedy awarded by an Administrative Law Judge in a non-precedential decision, *City Colleges of Chicago*, 19 PERI 100, Case No. 2002-CA-0010-C (IELRB ALJ, June 12, 2003). This remedy, rather than reinstatement with tenure, would place Warning in "the position that would have obtained had the illegal conduct not occurred," *Paxton-Buckley-Loda Education Association v. IELRB*, 304 Ill.App.3d 343, 353, 710 N.E.2d 538, 546 (4th Dist. 1999), *quoting County of Cook*, 12 PERI 3008 at XI-31 (ILLRB 1996). If Warning had not been non-renewed on the basis of her union activity, there would have been an assessment by SPEED as to whether tenure was appropriate on other grounds. Putting Warning in the position in which she would have been if a decision

had not been made to non-renew her on the basis of her union activity includes allowing such an assessment.

For these reasons, we respectfully dissent in part.

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

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