STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Laborers' International Union of North America, Local 773,	)	
	)	
Complainant,	)	
	)	
and	)	Case No. 2007-CA-0020-S
	)	
Cairo Unit School District 1,	)	
	)	
Respondent.	)	

OPINION AND ORDER

On December 19, 2006, Laborers' International Union, of North America, Local 773 ("Union") filed an unfair labor practice charge. The charge alleged that the Cairo Unit School District 1 ("District") violated Sections 14(a)(1), 14(a)(3) and 14(a)(4) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act") by involuntarily transferring Lorenzo Nelson. The Union requested preliminary injunctive relief pursuant to Section 16(d) of the Act.

The parties have set forth their positions on the Union's request for injunctive relief. We have carefully considered those positions. For the reasons set forth below, we grant the Union's request that the Illinois Educational Labor Relations Board ("IELRB") seek preliminary relief pursuant to Section 16(d) of the Act.

I.

Section 16(d) of the Act provides that, upon issuance of an unfair labor practice complaint, the IELRB may petition the circuit court for appropriate temporary relief or a restraining order. Because the Executive Director has issued a Complaint in this case, the statutory prerequisite has been satisfied.

In *University of Illinois Hospital*, 2 PERI 1138, Case Nos. 86-CA-0043-C, 86-CA-0044-C, we held that preliminary injunctive relief is appropriate where there is reasonable cause to believe that the Act has been violated and where injunctive relief is just and proper. Thus, we examine this case to determine whether those prerequisites have been satisfied.

II.

A. Is there reasonable cause to believe that the Act may have been violated?

In order for there to be reasonable cause to believe that the Act may have been violated, there must be a significant likelihood of the complainant prevailing on the merits. *Chicago Board of Education*, 20 PERI 41, Case No. 2004-CA-0048-C (IELRB, March 3, 2004); *Crete-Monee School District 201-U*, 19 PERI 145, Case No. 2004-CA-0009-C (IELRB, August 20, 2003). In this case, we determine that there is a significant likelihood that the Union will prevail on the merits. Therefore, there is reasonable cause to believe that the Act may have been violated.

On or about May 24, 2005, Nelson filed an unfair labor practice charge against the District (Case No. 2005-CA-0034-S). On or about August 19, 2005, Nelson filed a second unfair labor practice charge against the District (Case No. 2006-CA-0003-S). The cases were consolidated on August 30, 2005, and a hearing was conducted in the consolidated cases on August 8, 9 and 10, 2006. The case was later transferred to Administrative Law Judge RyAnn McKay, and, on or about November 29, 2006, Administrative Law Judge McKay issued a Recommended Decision and Order finding that the District had violated the Act. The District has filed exceptions to Administrative Law Judge McKay's Recommended Decision and Order, which are currently pending before the IELRB.

During the 2005-06 school year, Nelson had excessive absences due to illness. Between July 10, 2006 and December 14, 2006, Nelson missed 45 days. According to the District, the District has been forced to hire substitutes and contractors to complete many projects. The District asserts that Nelson's failure to perform his duties as Asbestos Manager has resulted in the District receiving multiple citations from the Illinois Department of Public Health.

According to the District, the District's Superintendent, Gary Whitledge, desired to transfer Nelson to a custodial position because, if Nelson were absent, it would be easier to find a substitute to perform custodial duties than one to perform maintenance duties. In late July 2006, Whitledge consulted with the District's legal counsel about whether, under the collective bargaining agreement, Nelson could be transferred to a custodial position. Whitledge determined that an involuntary transfer was permitted. According to the District, Whitledge did not act at that time because he wanted to determine whether Nelson's attendance would improve once the school session began in late August 2006.

When Nelson's absences continued to be excessive after the school session began, Nelson consulted with the Board of Education at its December 11, 2006 meeting about transferring Nelson to a custodial position. The Board of Education authorized Whitledge to transfer Nelson to a custodial position.

On or about December 14, 2006, Whitledge issued a letter to Nelson stating that Nelson would be reassigned to work a shift beginning at 3:00 p.m. and ending at 11:30 p.m., performing custodial/housekeeping duties. The letter stated that the reassignment would not change Nelson's hourly rate of pay and that Nelson would work a 40-hour week. The letter stated that the reassignment was being made "due to your inordinate absentee rate and your overall uncooperative attitude."

Nelson had been working as a maintenance employee for a 7:00 a.m. to 3:30 p.m. shift. He had been working at a second employer after this shift. The change in his shift is causing him to give up his second job.

In this case, the District's transfer of Nelson may be, as the Union asserts, a continuation of the District's alleged discrimination against Nelson. Therefore, it is appropriate to consider evidence that was submitted in Nelson's prior cases. In the hearing on those cases, Nelson testified that, in July 2005, Superintendent Whitledge told him that he was doing a good job and that it was a pleasure to work with him. According to Whitledge's own testimony, he was not aware of Nelson's unfair labor practice charges at the time.

In this case, there is a significant likelihood that the Union will prevail on the merits of its claim that the District violated Section 14(a)(4) and, derivatively, Section 14(a)(1) of the Act. A prima facie case of a Section 14(a)(4) violation is established by demonstrating that the employee used or participated in the processes of the IELRB, that the employer was aware of that activity, and that the employer took adverse action against the employee in part because of 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). There is a significant likelihood that the Union will be able to establish a prima facie case.

Here, there is evidence that Nelson participated in the processes of the IELRB when he filed unfair labor practice charges against the District. It can reasonably be inferred that the District was aware that Nelson filed charges.

There is also evidence of the District's unlawful motivation. The court stated in *City of Burbank v. ISLRB*, 128 Ill.2d 335, 538 N.E.2d 1146 (1989).that 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 union 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. Similar factors apply under Section 14(a)(4). These factors are not exclusive. *Effingham Community Unit School District No. 40*, 8 PERI 1013, Case No. 91-CA-0023-S (IELRB, December 30, 1991).

In this case, the timing of the Nelson's transfer may be suspect. Whitledge discussed the transfer with the District's Board of Education 12 days after the issuance of the Administrative Law Judge's Recommended Decision and Order finding that the District had violated the Act. The transfer took place 15 days after the Recommended Decision and Order issued.

Whitledge also stated in the letter transferring Nelson that the transfer was due to Nelson's "overall uncooperative attitude," as well as to his absenteeism. It is well established in the private sector that employer comments about an employee's "attitude" can be evidence of hostility toward union activity. *E.g.*, *SCA Tissue North America, LLC*, 338 NLRB 1130 (2003), *enf'd*, 371 F.3d 983 (7th Cir. 2004); *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998); *MJS Garage Management Corp.*, 314 NLRB 172 (1994). Such comments are often euphemisms for pro-union sentiments. *James Julian*; *MJS Garage*. In *James Julian*, the National Labor Relations Board stated that there was every reason to make such an assessment where there was no evidence of an alternative explanation for the employee's "attitude" problem. Similarly, the District's comment about Nelson's "attitude" could have been a euphemism for his participation in the IELRB's processes. There is no evidence of an alternative explanation for Nelson's claimed "attitude" problem. In addition, the District's stated reasons for transferring Nelson may have shifted when, upon being confronted with the charge in this case, the District abandoned the claim of an "uncooperative attitude" it had stated in Whitledge's letter.

Moreover, there was evidence in the hearing on Nelson's previous charges that, prior to becoming aware of Nelson's unfair labor practice charges, Whitledge told Nelson that he was doing a good job and that it was a pleasure to work with him. Thus, Whitledge's attitude toward Nelson may have changed when

Whitledge became aware of Nelson's previous charges. This evidence also supports a conclusion that Nelson's transfer may have been motivated by his filing of charges.

Where a prima facie case has been established, the burden shifts to the employer to show, by the preponderance of the evidence, that the adverse action would have occurred notwithstanding the employee's protected activity. *Peoria, supra*. A case may be characterized as "pretext" or "dual motive." In a "pretext" case, the employer's suggested reasons for its action are created for the purpose of litigation or were not relied on. In a "dual motive" case, the employer states legitimate reasons for its action and is found to have relied on them in part. The employer must then show that it would have taken the action against the employee notwithstanding his/her union activity. *City of Burbank*.

There is a significant likelihood in this case that the Union will be able to show that Nelson's absenteeism relied on by the District was a pretext, or, at a minimum, that the District will not be able to show that it would have transferred Nelson notwithstanding his protected activity. There is evidence that, prior to becoming aware of Nelson's unfair labor practice charges, Whitledge stated that it was a pleasure to work with Nelson. Moreover, Whitledge expressly stated in his letter that one of the reasons for Nelson's transfer was his "uncooperative attitude," which may have been a euphemism for Nelson's protected activity.

The District argues that its transfer of Nelson was not an adverse action. The District notes that Nelson's benefits, hourly rate of pay and seniority remained the same after he was transferred to the custodial position. However, it is established that a transfer may constitute an adverse action. *Waukegan Community Unit School District #60*, 12 PERI 1085, Case No. 95-CA-0008-C (IELRB, September 24, 1996); *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963); *Clinch Valley Clinic Hospital*, 213 NLRB 515 (1974). In this case, Nelson's transfer resulted in a change to a shift which negatively affected his ability to hold a second job, as well as a change in duties. Under these circumstances, there is a significant likelihood that the Union will be able to demonstrate that the District's transfer of Nelson was an adverse action.

There is a significant likelihood that the Union will prevail on the merits in this case. Accordingly, the requirement that there be reasonable cause to believe that the Act may have been violated has been satisfied.

B. Is preliminary relief "just and proper?"

In determining whether preliminary injunctive relief is just and proper, the IELRB considers whether an injunction is necessary to prevent frustration of the basic remedial purposes of the IELRA; the degree, if any, to which the public interest is affected by a continuing violation; the need to immediately restore the status quo ante; whether ordinary IELRB remedies are inadequate; and whether irreparable harm will result without preliminary injunctive relief. *Chicago Board of Education, supra; Crete-Monee, supra.* Preliminary injunctive relief should be limited to those cases in which the alleged violations are serious and extraordinary. *Chicago Board of Education; Crete-Monee*.

Here, Nelson will suffer irreparable harm if preliminary injunctive relief is not awarded. In *Crete-Monee School District 201-U, supra*, the IELRB found that the effect on a teacher of being required to teach third grade at a certain school, rather than fifth grade at another school, could not be undone later and constituted irreparable harm. The IELRB stated:

> This is not a financial effect, which can be compensated for later, but a requirement to perform duties that the employee does not wish to perform. The IELRB's make whole remedies do not encompass compensation for this type of harm.

19 PERI at 628.

Under these circumstances, ordinary IELRB remedies are inadequate and, in the absence of preliminary injunctive relief, the basic remedial purposes of the Act will be frustrated. Therefore, it is necessary to immediately restore the status quo ante. The public interest is affected by allowing the District to continue an unfair labor practice while an employee continually suffers irreparable harm.

We conclude that preliminary injunctive relief is just and proper under the circumstances of this case. Because there is reasonable cause to believe that the Act may have been violated and because preliminary injunctive relief is just and proper under the circumstances of this case, we grant the Union's request that we seek preliminary injunctive relief pursuant to Section 16(d) of the IELRA.

III.

In view of the foregoing conclusion that preliminary injunctive relief is appropriate under these circumstances, we authorize the IELRB's General Counsel to seek the following injunctive relief:

> To order the District to reinstate Lorenzo Nelson to his prior position as a maintenance employee working a 7:00 a.m. to 3:30 p.m. shift.

IV.

This is not a final order that may be appealed under the Administrative Review Law. *See* 5 ILCS 100/10-50(b); 115 ILCS 5/16(a).

Decided: March 13, 2007
Issued: March 13, 2007
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
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