STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Belleville Federation of Teachers, Local 434, IFT/AFT, AFL-CIO,	)	
	)	
Complainant,	)	
	)	
and	)	Case No. 2007-CA-0044-S
	)	
Belleville Township High School District 201,	)	
	)	
Respondent.	)	

OPINION AND ORDER

On May 21, 2007, the Belleville Federation of Teachers, Local 434, IFT/AFT, AFL-CIO ("Federation") filed an unfair labor practice charge. The charge alleged that Belleville Township High School District 201 ("District") violated Sections 14(a)(8) and Section 14(a)(1) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act") by refusing to comply with a binding arbitration award. On June 4, 2007, the Executive Director issued a Complaint and Notice of Hearing, in which he alleged that the District violated Sections 14(a)(8) and 14(a)(1) of the Act by refusing to comply with the award. The Federation requested preliminary injunctive relief pursuant to Section 16(d) of the Act.

The parties have set forth their positions on the Federation's request for injunctive relief through written submissions. We have carefully considered those positions. For the reasons set forth below, we grant the Federation'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 (IELRB Opinion and Order, October 21, 1986), we held that preliminary injunctive relief is appropriate where there is reasonable cause to believe that the Act may have 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. *Cahokia Community Unit School District No. 187*, 11 PERI 1059, Case No. 95-CA-0029-S (IELRB Opinion and Order, June 15, 1995). In this case, we determine that there is a significant likelihood that the Federation will prevail on the merits. Therefore, there is reasonable cause to believe that the Act may have been violated.

Timothy West was employed by the District as an aide and was represented by the Federation. On March 20, 2006, the District terminated West's employment.

The Federation filed a grievance on behalf of West, which proceeded to arbitration. On April 11, 2007, the Arbitrator issued an award.

The facts, as found by the Arbitrator, include the following. In April 2005, West received an oral warning directing him to stay on task and not bring his art work to school or draw while at school. On February 15, 2006, West was orally warned and directed to have no contact with a certain behavior disordered student. On February 24, 2006, he was given a written reprimand for continuing to have contact with the student and again directed to have no contact with her.

During the 2005-2006 school year, West was assigned to work in a class taught by Crystal Nesbit that consisted of educable mentally handicapped students. These are students with IQs between 50 and 70 who also often are lacking in social skills and are judgment-impaired.

On February 27, 2006, West distributed to the students in that class a flyer with a hand-drawn cartoon and a website address. The website address referred to a website maintained by West. Some of the students took this flyer home with them.

Nesbit and other District staff accessed West's website that same day and evening as well as the following day. On February 27, they discovered that the site contained links to pornographic images, particularly images of women with their legs spread and genitals exposed.

West's website contained an image of a woman named April Hunter in a provocative pose clad in a skimpy bikini. This April Hunter image on West's website contained a link to the AprilHunter.com website. The AprilHunter.com website contained pictures or images of scantily clad or nude women, some of whom were

engaged in sexually provocative poses either alone or with other women. Most of West's website was devoted to professional wrestling. A part of West's website was devoted to the text of an interview of April Hunter conducted by Nathan, a former District special education student. The Arbitrator found that there was no other content on West's website as it existed in late February to early March 2006 that contained valid educational material for these students. West caused the April Hunter links to be removed from his website shortly thereafter.

The Arbitrator found that there was no evidence that any of the students actually accessed West's website. The Arbitrator concluded that, in the absence of evidence demonstrating any damage to the students, faculty or school by West, West's misconduct was a "remediable offense."

The Arbitrator determined that progressive and corrective discipline must be used for remediable offenses, and that discharges must be for just cause. The Arbitrator found that the District had imposed discipline in an inconsistent manner when it terminated West while at the same time tolerating other serious misconduct with much milder penalties or even no penalties. The Arbitrator concluded that West's termination was not for just cause and was not consistent with the requirement that the District apply progressive and corrective discipline to remediable offenses.

The Arbitrator stated:

> Pulling the elements of this matter together, I find that the Grievant engaged in highly irresponsible and serious misconduct when he distributed his website address to cognitively limited and judgment impaired special education students, for his website was utterly devoid of relevant educational content and specifically contained an easily accessible link to sexually objectionable and inappropriate material. At the same time, I find that the Employer, for reasons best known to it, has engaged in a lengthy disciplinary practice of not terminating employees even when they have engaged in serious misconduct. Accordingly, I find that the District's termination of the Grievant was not consistent with Article IX of the CBA, and his termination should be replaced with lesser discipline.

The Arbitrator further stated that "[t]he Grievant's irresponsible behavior with special education students on February 27 indicates he is in need of vigorous wake-up call."

The Arbitrator issued the following award:

> For the reasons expressed above, I find that the District did not terminate Grievant Timothy West in accordance with Article IX of the collective bargaining agreement. At the same time, I find that the Grievant engaged in serious misconduct which merits lesser discipline. As a result, this grievance is sustained in part and denied in part.
>
> Turning to the appropriate remedy, the District is directed to rescind its termination of the Grievant, and to reinstate the Grievant to an aide position as soon as is practicable and no later than April 30, 2007, with no loss of seniority. The Grievant is not entitled to any back pay or benefits. The Grievant's time away from work will be converted to a disciplinary suspension.

I will retain jurisdiction for the sole purpose of resolving any remedy implementation problems.

The District acknowledges that it has not complied with the award.

Section 14(a)(8) of the Act prohibits educational employers and their agents or representatives from "[r]efusing to comply with the provisions of a binding arbitration award." 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." In deciding whether an employer has violated Section 14(a)(8), the IELRB considers 1) whether the award is binding, 2) what is the content of the award, and 3) whether the employer has complied with the award. *Board of Education of Du Page High School District No. 88 v. IELRB*, 246 Ill.App.3d 967, 187 Ill.Dec. 333, 617 N.E.2d 790 (1st Dist. 1993); *Board of Education of Danville Community Consolidated School District No.118 v. IELRB*, 175 Ill.App.3d 347, 125 Ill.Dec. 34, 529 N.E.2d 1110 (4th Dist. 1988).

There is a significant likelihood that the Federation will be able to show that the District has refused to comply with the a binding arbitration award, in violation of Section 14(a)(8) and, derivatively, Section 14(a)(1) of the Act. There is no dispute concerning the fact that the District is refusing to comply with the award or concerning the content of the award. Rather, the District contends that the award is not binding on the basis that it violates public policy.

Review of arbitration awards is extremely limited. *AFSCME v. Department of Central Management Services*, 173 Ill.2d 299, 219 Ill.Dec. 501, 671 N.E.2d 668 (1996) ("*AFSCME II*"); *AFSCME v. State*, 124 Ill.2d 246, 124 Ill.Dec. 553, 529 N.E.2d 534 (1988) ("*AFSCME I*"). If possible, arbitration awards must be construed as valid. *AFSCME I*. There is a presumption that an arbitrator did not exceed his/her authority and, if he/she acted in good faith, the award is conclusive. *National Wrecking Co. v. Sarang Corp.*, 366 Ill.App.3d 610, 303 Ill.Dec. 600, 851 N.E.2d 787 (1st Dist. 2006), *citing Colmar, Ltd. V. Fremantlemedia North America, Inc.*, 344 Ill.App.3d 977, 280 Ill.Dec. 72, 801 N.E.2d 1017 (2003). If an award is not upheld, the parties are deprived of the benefit of their agreement to submit disputes to arbitration. *See National Wrecking*. Moreover, Section 10(c) of the Act explicitly provides that arbitration shall be binding.

An arbitration award that conflicts with paramount public policy concerns is not enforceable. *AFSCME I, supra*. However, this exception to the enforcement of arbitration awards is a narrow one. *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000); *AFSCME. II*. In order for the public policy exception to apply,

the conflict with public policy must be clearly shown. *AFSCME II*. "[T]he public policy must be 'well-defined and dominant' and ascertainable 'by reference to the laws and legal precedents and not from generalized considerations of supposed public interests,'" *Id.* at 307, 219 Ill.Dec. at 506, 671 N.E.2d at 673, *quoting W.R.. Grace & Co. v. Local Union No. 759*, 461 U.S. 757, 766 (1983); *see United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987), *quoting W.R. Grace; AFSCME I, quoting W.R. Grace*. In evaluating whether a public policy exists, the Illinois constitution, statutes, judicial decisions and the constant practice of government officials are to be considered. *AFSCME II*.

In evaluating whether an arbitration award conflicts with public policy, a two-step analysis is employed. *AFSCME II*. The first step is to determine whether there is a well-defined and dominant public policy. *Id.* The second step is to determine whether the arbitrator's award, as reflected in his/her interpretation of the collective bargaining agreement, violates the public policy. *Id.*

There is a significant likelihood that the District will be able to show that there is a well-defined and dominant public policy against distributing pornography to minors. Section 11-21(b) of the Illinois Criminal Code, 720 ILCS 5/11-21(b), provides:

> A person is guilty of distributing harmful material to a minor when he or she:
> (1) knowingly sells, lends, distributes, or gives away to a minor, knowing that the minor is under the age of 18 or failing to exercise reasonable care in ascertaining the person's true age:
> (A) any material which depicts nudity, sexual conduct or sado-masochistic abuse…and which taken as a whole is harmful to minors….

Section 11-21(a) of the Illinois Criminal Code, 720 ILCS 5/11-21(a), defines "harmful to minors" as

> that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when, taken as a whole, it (i) predominately appeals to the prurient interest in sex of minors, (ii) is patently offensive to prevailing standards in the adult community in the State as a whole with respect to what is suitable material for minors, and (iii) lacks serious literary, artistic, political, or scientific value for minors.

Section 11-21(d) of the Illinois Criminal Code, 720 ILCS 5/11-21(d), provides:

> The predominant appeal to the prurient interest of the material shall be judged with reference to average children of the same general age of the child to whom such material was sold, lent, distributed or given, unless it appears from the nature of the matter or the circumstances of its dissemination or distribution that it is designed for specially susceptible groups, in which case the predominant appeal of the material shall be judged with reference to its intended or probable recipient group.

Section 11-21(e) of the Illinois Criminal Code, 720 ILCS 5/11-21(e), states that distribution of harmful material in violation of Section 11-21 is a Class A misdemeanor, and that a second or subsequent offense is a Class 4 felony.

The Illinois statute regulating sexually explicit video games, 720 ILCS 5/12B-1 et seq., which is also cited by the District, is inapplicable here. There is no indication that West distributed sexually explicit video games. The federal statutory language on special education and the Illinois regulation cited by the District, 20 U.S.C. § 1401(9) and 23 Ill. Admin. Code 226.50, are also inapplicable. This language does not address the distribution of potentially harmful material to students.

We next consider whether the Arbitrator's award, as reflected in his interpretation of the collective bargaining agreement, violates the possible public policy we have identified. We conclude that there is a significant likelihood that the District will not be able to show that the Arbitrator's award violates that public policy.

The question to be answered in analyzing whether an arbitration award violates public policy is not whether an individual's conduct violates public policy, but whether his/her reinstatement does so. *Eastern.* As in *Eastern*, the award here does not does not condone West's conduct. Indeed, the Arbitrator noted that West had engaged in "highly irresponsible and serious misconduct." The Arbitrator imposed on West a suspension of over one year without back pay or benefits.

Arbitration awards have been upheld against challenges based on public policy where the arbitrator finds that the discharged employee is amenable to discipline. *City of Harvey v. AFSCME, Council 31*, 333 Ill.App.3d 667, 267 Ill.Dec. 311, 776 N.E.2d 683 (1st Dist. 2002); *State v. AFSCME, Council 31*, 321 Ill.App.3d 1038, 255 Ill.Dec. 371, 749 N.E.2d 472 (5th Dist. 2001) ("*AFSCME III*"); *University of Illinois Board of Trustees*, 15 PERI 1111, Case Nos. 98-CA-0036-C et al. (IELRB, September 28, 1999), *aff'd sub nom. Illinois Nurses Association v. Board of Trustees of University of Illinois*, 318 Ill.App.3d 519, 251 Ill.Dec. 836, 741 N.E.2d 1014 (1st Dist. 2001). It is not required that the arbitrator expressly state that the employee is amenable to discipline. *AFSCME III*; *Illinois Nurses Association*.

Here, the Arbitrator may have implicitly found that West was amenable to discipline when he determined that West's conduct was remediable and that the suspension would give him a "vigorous wake-up call." This case is similar to *University of Illinois*, 15 PERI 1111 at IX-407, where the arbitrator imposed a 30-day suspension with the purpose of causing the grievant to "recognize the importance of the need to avoid repeating such conduct." In addition, the Arbitrator found that West had caused the April Hunter links to be removed from his website shortly after February 27, 2006. An arbitrator's finding of an employee's amenability to discipline is a factual determination which cannot be questioned or rejected by on review. *AFSCME II*. In *AFSCME II*, 219 Ill.Dec. at

518, 671 N.E.2d at 685, the court quoted with approval *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1213 (9th Cir. 1989) (plurality opinion) as follows:

> [o]rdinarily, a court would be hard-pressed to find a public policy barring reinstatement in a case in which an arbitrator has, expressly or by implication, determined that the employee is subject to rehabilitation and therefore not likely to commit an act which violates public policy in the future.

For the above reasons, we conclude that there is a significant likelihood that the District will not be able to show that the arbitration award is not binding. Thus, there is reasonable cause to believe that the Act may have been violated.

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 Act; 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. *Johnston City Community Unit School District 1*, 9 PERI 1048, Case No. 93-CA-0026-S (IELRB Opinion and Order, February 5, 1993). Preliminary injunctive relief should be limited to those cases in which the alleged violations are serious and extraordinary. *Id.*

Here, there will be irreparable harm if the District is not ordered to immediately comply with the arbitration award. The Illinois Appellate Court has repeatedly ruled that "'irreparable harm' does not mean injury that is beyond repair or compensation in damages but, rather, denotes transgressions of a continuing nature," *Lucas v. Peters*, 318 Ill.App.3d 1, 16, 251 Ill.Dec. 719, 731, 741 N.E.2d 313, 325 (1st Dist. 2000) (failure to provide individual assessments to criminal defendants found not guilty by reason of insanity prior to placement); *see, e.g., Wilson v. Illinois Benedictine College*, 112 Ill.App.3d 932, 68 Ill.Dec. 257, 445 N.E.2d 901 (2nd Dist. 1983 (refusal to allow a student to graduate). Here, the District is continuing to deprive West of the reinstatement to which he is allegedly entitled under the arbitration award rendered pursuant to a grievance arbitration procedure which was required by Section 10(c) of the Act. The District has continued to engage in this conduct since April 30, 2007. This constitutes irreparable harm.

In addition, there may be a chilling effect on other employees who seek to file grievances if the District is not ordered to immediately comply with the award. This is also a form of irreparable harm, which cannot be addressed through the IELRB's ordinary remedies. Because there will be irreparable harm if the District not ordered

to immediately comply with the award, injunctive relief is necessary to prevent frustration of the basic remedial purposes of the Act, and it is necessary to immediately restore the status quo ante

In addition, the public interest will be harmed if the District is not required to immediately comply with the arbitration award. As we have recognized, the public has an interest in the integrity of the collective bargaining process, which includes compliance with binding arbitration awards. *Crete-Monee School District 201-U*, 19 PERI 145, Case No. 2004-CA-0009-C (IELRB, August 20, 2003); *Johnston City*. In addition, the Illinois Supreme Court has stated that there is a public policy that requires finality in arbitration awards. *AFSCME I.*

As we recognized in *Crete-Monee*, there is a strong policy favoring arbitration. This policy is expressed in Section 10(c) of the Act, which requires collective bargaining agreements to contain a grievance arbitration procedure. Section 1 of the Act expresses a policy of promoting collective bargaining, and arbitration is a part of the collective bargaining process. *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Chicago School Reform Board of Trustees*, 15 PERI 1037, Case No. 98-CA-0021-C (IELRB Opinion and Order, April 23, 1999). As in *Crete-Monee*, this policy favoring arbitration and compliance with arbitration awards will be undermined if the District is not required to immediately comply with the arbitration award. As the IELRB stated in *Johnston City Community Unit School District*, 9 PERI 1048 at IX-155, Case No. 93-CA-0026-S (IELRB Opinion and Order, February 5, 1993), allowing the employer to refuse to comply with a binding arbitration award pending the IELRB's determination of the merits of the Complaint "would frustrate the purposes of the Act, as well as the general public interest in preventing and eliminating labor strife."

The District argues that, because a refusal to comply with an arbitration award is the only method of obtaining review of the award, the public interest does not require injunctive relief. However, in light of the strong public policy favoring arbitration, the public interest here favors injunctive relief.

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 Federation's request that we seek preliminary injunctive relief pursuant to Section 16(d) of the Act.

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:

1. To prevent the District from refusing to comply with the April 11, 2007 arbitration award pending the outcome of proceedings on the instant unfair labor practice.

2. To order the District to immediately comply with the April 11, 2007 arbitration award pending the outcome of proceedings on the instant unfair labor practice.

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: June 12, 2007
Issued: June 14, 2007
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

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

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Member Lamont, dissenting

Contrary to my colleagues, I would conclude that there is a significant likelihood that the award is not binding on the basis that it violates public policy, and that there is, therefore, not reasonable cause to believe that the Illinois Educational Labor Relations Act may have been violated. Therefore, I respectfully dissent.

A public policy against distributing pornography to minors is expressed in Section 11-21 of the Illinois Criminal Code, 720 ILCS 5/11-21. Even materials that may lead to pornography are against public policy, especially in schools. My colleagues do not deny that this public policy exists. Rather, they argue that there is a significant likelihood it is not violated by the arbitration award in this case. I disagree.

The arbitrator himself found that Timothy West had distributed his website address to "cognitively limited and judgment impaired special education students" and that his website "was utterly devoid of relevant educational content and specifically contained an easily accessible link to sexually objectionable and inappropriate material." While fortunately the arbitrator found that there was no evidence that any of the students actually accessed West's website, this does not negate the fact that West created a situation where especially vulnerable students could be exposed to "sexually objectionable and inappropriate material." Under Section 11-21-(e) of the Illinois Criminal Code, where it appears from the circumstances of the distribution of material that it is designed for a specially susceptible group, material is judged in relation to that group. Here, West distributed his website address to a specially susceptible group—"cognitively limited and judgment impaired special education students."

Schools should be a safe place for students. Employees in public schools are in a position of trust. Here, West abused that trust with respect to the most vulnerable students.

In spite of finding that West had engaged in such "highly irresponsible and serious misconduct," the Arbitrator ordered his reinstatement. In *Board of Education of School District U-46 v. IELRB,* 216 Ill.App.3d 990, 159 Ill.Dec. 802, 576 N.E.2d 471 (4th Dist. 1991), the Illinois Appellate Court found that, where it is the employee's conduct in the course of employment that violates public policy, the employee's reinstatement violates public policy. Here, West's distribution of the flyer occurred while he was functioning in his role as an aide. Thus, his conduct that violated public policy occurred in the course of his employment. While my colleagues rely on the principle of amenability to discipline, the arbitrator did not find in this case that West "[could] be trusted to refrain from the offending conduct," *AFSCME v Department of Central Management Services*, 173 Ill.2d 299, 219 Ill.Dec. 501, 513, 671 N.E.2d 668, 680 (1996). Allowing an employee who engaged in conduct such as West engaged in to be

reinstated would send a message that such conduct is not a serious offense and have a negative impact on the school community. Accordingly, there is a significant likelihood that the District will be able to show that the award directing West's reinstatement violated public policy.

For the above reasons, I conclude that there is not reasonable cause to believe that the Act may have been violated. I would not grant the Complainant's request that the Illinois Educational Labor Relations Board seek preliminary injunctive relief. Accordingly, I respectfully dissent.

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