

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No.3-10-0435
(Consolidated with No. 3-10-0442)

Order filed May 23, 2011

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

RIVER VALLEY METRO MASS TRANSIT DISTRICT,)	
)	
Petitioner-Appellant,)	On Direct Appeal from the
)	Decision of the Illinois Labor
)	Relations Board
v.)	
)	
THE ILLINOIS LABOR RELATIONS BOARD, STATE)	
PANEL; JACALYN J. ZIMMERMAN, Chairperson of)	No. ILRB Case No.:
the State Panel; MICHAEL COLI, MICHAEL HADE, and)	S-CA-09-037
ALBERT WASHINGTON, Members of the State Panel;)	
FIRST TRANSIT, INC.; and CHRISTINE JOHNSON,)	
)	
Respondents-Appellees.)	
)	
<hr/> FIRST TRANSIT, INC.,)	
)	
Petitioner-Appellant,)	
)	
v.)	
)	
THE ILLINOIS LABOR RELATIONS BOARD, STATE)	
PANEL; JACALYN J. ZIMMERMAN, Chairperson of)	
the State Panel; MICHAEL COLI, MICHAEL HADE, and)	
ALBERT WASHINGTON, Members of the State Panel;)	
RIVER VALLEY METRO MASS TRANSIT DISTRICT;)	
and CHRISTINE JOHNSON,)	
)	
Respondents-Appellees.)	

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment
Justice McDade concurred in part, dissented in part.

ORDER

Held: The Illinois Labor Relations Board properly found the River Valley Metro Mass Transit District failed to show that extraordinary circumstances existed to allow for late filing of its answer to the complaint for unfair labor practices and properly denied the District's request for a variance to allow the District additional time to file an answer to the complaint.

The River Valley Metro Mass Transit District (District) is a political subdivision created to provide public transportation within the District's political boundaries. The District contracted with Laidlaw Services, Inc., who subsequently sold its business and assigned the contract to First Group, plc, a parent corporation of First Transit, Inc. (First Transit), to provide public transportation within the District. Christine Johnson was a bus driver, employed by First Transit, whose route operated out of the District's Bourbonnais facility.

On June 13, 2008, Johnson was terminated from her employment as a bus driver. Johnson filed timely charges of unfair labor practices with the Illinois Labor Relations Board (Board). After investigating the charges, the Board issued a complaint on May 11, 2009, and served the complaint on the attorney for the District, Louis Cainkar. Cainkar forwarded the complaint to First Transit's attorney, informing him that they had a contractual duty to defend the District against this complaint and had to file an answer within 15 days.

Johnson filed a motion for default when the District missed the filing date. The

Administrative Law Judge (ALJ) denied the District's motion for leave to file a late answer and its separate motion for a variance from the 15-day filing rule, and recommended a default order be entered against the District with many recommended conditions. The Board adopted the recommendations of the ALJ and ordered the District to comply with specific directives. We affirm the decision of the Board.

BACKGROUND

The River Valley Metro Mass Transit District is a local mass transit district created under the Local Mass Transit District Act (70 ILCS 3610/1 *et seq.* (West 2008)), and operates public bus transportation services within the District's boundaries. At all times relevant to this case, Attorney Cainkar has been the attorney of record for the District.

In 2007, the District contracted with Laidlaw Transit Services, Inc. (Laidlaw), to provide public transit services within the boundaries of the District. Subsequently, "First Group, plc", who owned First Transit, Inc., purchased Laidlaw and combined Laidlaw's operations with First Transit. After purchasing Laidlaw, First Transit assumed the contractual duties of providing public transportation for the District under the Laidlaw contract.

Respondent Christine Johnson was employed as a bus driver at the District's facility in Bourbonnais, Illinois (Bourbonnais facility) until the date her employment was terminated on June 13, 2008. At the time of her termination, Johnson was also a member of the newly-formed Amalgamated Transit Union Local 1745 (Local 1745). The complaint at issue indicates that Johnson actively participated in the organization of Local 1745.

The National Labor Relations Board (NLRB) certified Local 1745 on May 19, 2008. The new union, Local 1745, then began contract negotiations with First Transit on behalf of the bus

drivers to establish the terms of the employees' contracts. On June 13, 2008, Johnson was discharged from her employment as a bus driver at the District's Bourbonnais facility.

On July 30, 2008, Johnson filed an unfair labor practice charge with the NLRB alleging her employer, "First Transit/River Valley Metro," subjected Johnson to false discipline in retaliation for organizing labor activities which ultimately led to her discharge from employment. On August 25, 2008, while Johnson's complaint was still being investigated by the NLRB, Johnson also filed a timely unfair labor practice charge against "First Transit/River Valley Metro" with the Illinois Labor Relations Board (ILRB). Johnson alleged a violation of section 10(a)(1) and (2) of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/10(a)(1),(2)(West 2008)) and her complaint listed Louis F. Cainkar as her "employer's representative."

After receiving Johnson's unfair labor practice charges, the ILRB served "First Transit/River Valley Metro" with a copy of Johnson's charge along with a notice to file a response within 15 days, by sending the complaint and notice to the District's Bourbonnais address and to the District's attorney, Mr. Cainkar. As part of the ILRB investigation, the District was given the opportunity to respond to Johnson's charges.

On October 24, 2008, the NLRB decided that it lacked jurisdiction over "River Valley Metro" (the District) because "River Valley Metro" was a political subdivision of Illinois and, as such, was not an employer for purposes under the federal Labor Relations Act. Consequently, the NLRB dismissed Johnson's complaint against "River Valley Metro." With respect to Johnson's NLRB charges involving First Transit, the NLRB concluded it had jurisdiction over the charges against First Transit finding Johnson was an employee of First Transit. Nonetheless, the NLRB found that there was "insufficient evidence" to establish that First Transit's discipline

of Johnson constituted an unfair labor practice. First Transit's attorney submitted a copy of that decision letter to the ILRB on December 9, 2008, contending that this decision superceded any Illinois proceedings and relieved First Transit, as Johnson's employer, of any potential liability.

I. ILRB Complaint

On May 11, 2009, the ILRB concluded its on-going investigation of Johnson's charges of unfair labor practices filed on August 25, 2008. The director of the ILRB issued a Complaint for Hearing (ILRB Complaint) against the party-respondent identified by the ILRB complaint as "First Transit/River Valley Metro" ("respondent" in the ILRB Complaint) charging that alleged unfair labor practices occurred. The ILRB Complaint contained the following allegations: respondent was a public employer under the Act; respondent was a unit of local government subject to the ILRB's jurisdiction; Johnson was a member of the Local 1745 union, which was a labor organization as defined in the Act and was certified by the NLRB on May 19, 2008; Johnson played a significant role in the organization of the labor union; respondent and Local 1745 were still negotiating their initial employment contract at the time of Johnson's termination on June 13, 2008; and respondent terminated Johnson because she engaged in protected concerted activity.

The ILRB served a copy of its complaint, by certified mail, on "First Transit/River Valley Metro" at the District's Bourbonnais address on May 14, 2009, and on the District's attorney, Louis Cainkar, Ltd., on May 13, 2009. Attorney Joseph Cainkar, on behalf of the District, then sent an email to First Transit's attorney, with the ILRB Complaint as an attachment, advising First Transit that they had a contractual duty to defend the District against this complaint issued by the ILRB and that an answer to the complaint had to be filed on behalf of the District within

15 days.

First Transit did not file an answer to the ILRB Complaint by June 1, 2009, on behalf of either First Transit or on behalf of the District. The District did not file an answer by June 1, 2009. Consequently, Johnson filed a motion for default on June 5, 2009, after an answer was not filed by the filing date.

On June 8, 2009, the District mailed a motion for leave to file an appearance and answer *instanter* with the ILRB. The ILRB received the District's appearance and answer on June 15, 2009. In the District's proposed answer, it admitted that it was a public employer, but denied that it was Johnson's employer. The District asserted, in its proposed answer, that it was served with the ILRB Complaint, First Transit had a contractual duty to defend the District against the ILRB's complaint and prove that no unfair labor practices occurred, and First Transit failed to file a timely answer. The District's answer further denied that Johnson's union, Local 1745, could be considered a labor organization under the Illinois Labor Relations Act because Local 1745 represented First Transit's private employees, not the District's public employees. The District further denied that it engaged in any collective bargaining negotiations with Local 1745 or that the District terminated Johnson's employment as a bus driver.¹

II. ALJ's Order to Show Cause

The ILRB's Administrative Law Judge (ALJ) issued an Order to Show Cause to a singular "respondent" referred to as "First Transit/River Valley Metro." The order directed this respondent to explain why a default judgment should not be entered against "First Transit/River

¹ According to record, First Transit terminated Johnson's employment as a bus driver in Bourbonnais, but offered to transfer her to a different job at another location.

Valley Metro” for failing to file its answer within the 15 days as mandated by Rule 1220.40(b) of the ILRB’s rules. 80 Ill. Admin. Code § 1220.40(b), amended at 27 Ill. Reg. 7436, eff. May 01, 2003. In the order to show cause, the ALJ found that “First Transit/River Valley Metro” had been served with the complaint on May 14, 2009, therefore “First Transit/River Valley Metro’s” answer was due by June 1, 2009.

The District filed its response to the ALJ’s order to show cause on June 26, 2009, reasserting the facts included in its proposed answer, and further claiming that Attorney Cainkar had been served on behalf of the District, but First Transit was a separate entity which was not served with the complaint. The District asked the ALJ to, first, grant the District leave to file a late response “due to extraordinary circumstances,” or, in the alternative, to grant a variance from the 15-day filing requirement for the District’s untimely answer.

First Transit also responded to the ALJ’s order to show cause on June 29, 2009, and asked the ALJ to dismiss the complaint against First Transit for want of jurisdiction because it was not a public employer under the Act.

III. The ALJ’s Decision

On October 5, 2009, the ALJ submitted a written “Administrative Law Judge’s Recommended Decision and Order.” This order noted that the ILRB Complaint served on the District contained a specific clause that the party must file an answer to the complaint within 15 days of service, which provided: “Failure to specifically respond to an allegation shall be deemed an affirmative admission of the facts or conclusions alleged in the allegation. Failure to timely file an Answer shall be deemed to be an admission of all material facts or legal conclusions alleged and a waiver of hearing.”

The ALJ found that the District failed to file its answer within 15 days of service and that the District presented no grounds or special circumstances that existed for granting a variance from that 15-day rule, citing *Metz v. Illinois State Labor Relations Board*, 231 Ill. App. 3d 1079 (1992). The ALJ noted in her recommendations that the District, in its response to the Order to Show Cause, identified itself as “River Valley Metro Mass Transit District.”² Consequently, since the District did not file a timely answer, the ALJ found that the District had admitted all of the allegations in the ILRB Complaint claiming that the District had violated sections 10(a)(1) and (2) of the Act. 5 ILCS 315/10(a)(1),(2)(West 2008) The ALJ recommended that an order be issued reinstating Johnson “to her former position” with back pay.

IV. Exceptions to ALJ’s recommendation

The District filed exceptions to the ALJ’s recommendations on October 28, 2009, arguing: (1) First Transit’s breach of its contractual duty to defend the complaint constituted extraordinary circumstances to permit the District to file a late answer pursuant to ILRB Rule 1220.40(b)(4); (2) the ALJ’s order cannot be enforced against the District because the District does not employ the bus drivers, nor did it employ Johnson; and (3) the ALJ’s order should not be adopted because the District met the requirements for being granted a variance because the relevant ILRB rule is not statutorily mandated, that no party would be injured by a variance, and strict application of the rule is unreasonable and unnecessarily burdensome.

² The ALJ noted that, in its response, the District admitted it is a local mass transit district created under the Local Mass Transit District Act; that it contracted with Laidlaw Transit Services, Inc., on July 1, 2007, to provide transit services within the district; Laidlaw was purchased by First Group, plc, after the execution of the Laidlaw contract; and that First Group (who merged Laidlaw with First Transit) assumed all rights and duties under the Laidlaw contract.

Solely on its own behalf, First Transit also filed separate exceptions to the ALJ's recommendations on November 6, 2009, arguing that First Transit was not a governmental entity, therefore, the ILRB had no jurisdiction over it, jurisdictional defects could be raised at any time, and any orders entered without subject matter jurisdiction were void.³ Additionally, First Transit argued that the ILRB lacked jurisdiction over both First Transit and the District because Johnson was employed by First Transit, a private employer, and that the NLRB's decision, which made similar findings, pre-empted that ILRB's decision. First Transit asked the ILRB to conduct a hearing to address jurisdictional issues and whether the NLRB order pre-empted the ILRB's order.

V. ILRB's Decision

The ILRB issued its decision on May 5, 2010. In its Order, the ILRB found that Johnson filed an unfair labor practice charge with the ILRB. After investigating the charges, the ILRB's executive director issued a "Complaint for Hearing" alleging that the "respondent," identified by the ILRB as "First Transit/River ValleyMetro" was a public employer under section 3(o) of the Illinois Labor Relations Act (Act) (5 ILCS 315/3(o)(West 2008)) and a unit of local government under section 20(b) of the Act (5 ILCS 315/20(b)(West 2008)) and subject to the ILRB's jurisdiction. In this order, the ILRB notes that "Johnson filed similar charges with the NLRB, but on October 24, 2008, the NLRB Regional Director dismissed her charge stating the 'River Valley Metro' was a political subdivision and thus the NLRB lacked jurisdiction."

³The Director did not serve First Transit, Inc., or its officers with the complaint but sent a copy of the complaint to "First Transit/River Valley Metro" at the District's Bourbonnais office by certified mail and served the District's attorney by regular mail. First Transit did not file a petition to intervene in the ILRB's hearing or this appeal.

In its May 5, 2010, decision and order, the ILRB found that the ILRB Complaint “specifically warned, in bold type, that failure to timely file an answer would be an admission of all material facts and legal conclusions alleged.” The ILRB found that the complaint was issued on May 11, 2009, and properly served on the named employer, “First Transit/River Valley Metro,” and the employer’s representative, Attorney Louis Cankar. The certified mail receipts verified that Cankar received that complaint on May 13, 2009, and First Transit/River Valley Metro received the complaint at its Bourbonnais facility on May 14, 2009, thus requiring the respondent (District) to file its answer to the complaint by June 1, 2009. After the charging party moved for a default judgment on June 5, 2009, the ALJ issued an order to show cause on June 15, 2009, the same day the ILRB received the respondent District’s leave to file an appearance and answer *instanter*. The ILRB decision noted the ILRB received First Transit’s motion for leave to file an answer on June 8, 2009.

The ILRB’s order stated that the District presented the three aforementioned substantive exceptions to the ALJ’s recommendations. The order also noted that First Transit filed similar exceptions to the ALJ’s findings and raised a jurisdictional issue.

This order noted that the District conceded that the ILRB has strictly enforced its rules of default against parties whose attorneys negligently or inadvertently failed to file timely answers in the past, but the District claimed extraordinary circumstances existed to allow for a late filing in this case. In response to the District’s argument, the ILRB held that the circumstances raised by the District were not extraordinary and were common to many default situations: the “failure of the party’s legal representative (in this case, contractually provided through its contract with First Transit) to meet a filing deadline.” The ILRB’s order found that “[c]onsiderable authority

supports entry of default under such circumstances,” citing *Wood Dale Fire Protection District v. Illinois Labor Relations Board*, 395 Ill. App. 3d 523 (2009), and *Board of Education of Thornton Township High School District No. 205 v. Illinois Labor Relations Board*, 235 Ill. App. 3d 724 (1992).

The ILRB order further noted that the District asserted additional extraordinary circumstances in that it could not comply with the ALJ’s recommendations because it did not employ the bus drivers and could not, therefore, reinstate Johnson. The ILRB found that, since the District claimed it had a meritorious breach of contract claim against First Transit for its failure to defend the complaint by neglecting to file an answer on behalf of the District, it also had the “means of influencing its contractual partner to help facilitate full compliance.” The ILRB held that any of these potential difficulties could be addressed in compliance proceedings rather than requiring the vacation of the default findings.

The May 5, 2010, ILRB order next addressed the District’s argument regarding a variance from the 15-day rule. The ILRB order found that the District met only one of three pre-requisites for a variance, that the ILRB’s 15-day requirement for filing an answer was not statutorily mandated. The ILRB held that the District failed to demonstrate that no party would be injured by granting the variance or that the time limit for filing the answer was unreasonable or unnecessarily burdensome.

Specifically, the ILRB found that, to support the contention that Johnson would not be injured by the variance, the District merely stated that Johnson would not be damaged by the delay because she did not seek to expedite the proceedings after she moved for default. The ILRB found this reasoning flawed because Johnson’s motion for default was the best resolution

for a speedy resolution of the complaint. The ILRB further found it likely that any delay in resolving the unfair labor practices that led to Johnson's unemployment would result in injury to Johnson. Thus, the ILRB held that failure for the District to meet this criterion alone warranted denial of the variance.

The ILRB found that the District also failed to meet the unreasonable or burdensome prerequisite to the granting of the variance. The ILRB found that the District received timely service of the complaint, clearly understood its import, and took a single, initial step toward filing an answer by instructing First Transit to file a timely answer as required by their contract. The ILRB found that the District was "less than fully diligent." Additionally, the court noted that the District was not diligent in responding to Johnson's motion for default by responding 20 days after receiving the request for a default order.

The ILRB held that the "instant case presents no circumstances which justify mitigation or demand an easing of the Rules." Since no answer was filed, the facts pled in the complaint were deemed to be true and supported the conclusion that the District participated in unfair labor practices. The ILRB affirmed the ALJ's "Recommended Decision and Order," and adopted it in its entirety. The ILRB ordered "First Transit/River Valley Metro, its officers and agents" to comply with orders in the decision. The ILRB neither addressed nor responded to First Transit's exceptions or motion for leave to file an answer.

Both River Valley and First Transit filed separate direct appeals with this court to address separate issues from the ILRB's decision entered May 2010, pursuant to section 11 of the Act (5 ILCS 315/11 (West 2008)) and section 113 of the Administrative Review Act (735 ILCS 5/3-113 (West 2008)). This court consolidated the two separate appeals.

ANALYSIS

On appeal, both the District and First Transit have submitted separate briefs as appellants without objections from the appellee. In its separate brief, First Transit contends the ILRB order is void and unenforceable against First Transit because the ILRB did not address First Transit's jurisdictional exceptions before issuing the May 5, 2010 order. The ILRB contends that First Transit, Inc., was not named or served as a party to the ILRB Complaint. In addition, the ILRB contends that First Transit did not file to intervene as a party to the complaint and the conditions set out in its May 5 order did not name or require First Transit to comply with any conditions. Consequently, the ILRB contends a response was not necessary because First Transit, Inc., was not a party to the hearing before the ALJ or the ILRB.

We first address the issue of whether First District can be considered to be a proper party to this appeal. The NLRB did not issue a complaint against First Transit after finding, although it had jurisdiction over the employment controversy between Johnson and First Transit, there was "insufficient evidence" presented to convince the NLRB that Johnson's discipline constituted an unfair labor practice. Consequently, the NLRB dismissed Johnson's complaint against "First Transit/River Valley Metro."

Unlike the NLRB, the ILRB *did* issue a complaint after investigating Johnson's charges against the *single* respondent, identified by the ILRB as "First Transit/River Valley Metro." The Board served the only-named respondent, "First Transit/River Valley Metro," at the District's facility in Bourbonnais, Illinois, and served attorney Cainkar, separately. The Bourbonnais facility is owned by the District and Attorney Cainkar is the legal representative for the District, and not First Transit.

On appeal, the District concedes the District was served and does not challenge the misnomer in the complaint. In contrast, First Transit refused to stipulate that First Transit received proper service necessary to become a named party to the complaint. First Transit did not move to intervene in the matter, either. Nonetheless, even though First Transit desired to be heard on its own behalf during the ILRB hearing, First Transit was not subject to the ILRB's subject matter jurisdiction as a private employer. First Transit has not explained its failure to file a timely answer for the District, but agrees the ILRB does not have jurisdiction over First Transit, individually, since it is a private employer.

In this case, the record establishes that First Transit was not served by the ILRB, did not have an obligation to answer, was not the subject of the ILRB's directives, and did not request leave to either intervene during the ALJ hearing or request leave from this court to participate as an interested party to this appeal based on a contractual relationship with the District.

It is unclear why the ILRB elected to ignore First Transit's pleadings rather than issue a formal directive informing First Transit it was not the subject of the ILRB's complaint. Nonetheless, it is clear that First Transit was not named or served as the respondent by the ALJ or ILRB, and we do not have subject matter jurisdiction over First Transit as a party to this appeal. Thus, we have no authority to consider First Transit's contentions of error, on its own behalf. Therefore, this court *sua sponte* is striking the briefs filed by First Transit and its appeal, No. 3-10-0442, *First Transit, Inc., v. Illinois Labor Relations Board, et al.* (2010) are dismissed. See Ill. S. Ct. R. 366(a) (eff. Feb. 1, 1994).

The District's Appeal
No. 3-10-0435

Having determined that First Transit is not a party to this appeal, we next consider the two issues raised by the District for our consideration in this appeal. The District asserts that the ILRB erred in ruling that extraordinary circumstances did not exist to allow the late filing of its answer to the complaint. Additionally, the District challenges the ILRB's ruling denying a variance from the rule requiring a 15-day deadline for filing an answer to the complaint. In response, the ILRB argues it correctly entered a default judgment against the District because the District did not show diligence in filing its answer and there were no extraordinary circumstances that existed warranting an extension of the filing deadline and the District did not meet the requisites to grant a variance.

Judicial review of a decision by the ILRB is governed by the Illinois Public Labor Relations Act (Act) (5 ILCS 315/11(e) (West 2008)). The standard of review applicable to the review of an agency decision depends upon whether the issues involve questions of fact, questions of law, or mixed questions of fact and law. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008). Mixed questions of fact and law typically arise when the historical facts are not in dispute and the issue involves a determination of whether the established facts satisfy the statutory standard. *Cinkus*, 228 Ill. 2d at 210; *Village of Hazel Crest v. Illinois Labor Relations Board*, 385 Ill. App. 3d 109, 113 (2008).

An agency's findings and conclusions on questions of fact are deemed *prima facie* true and correct and will not be overturned unless they are against the manifest weight of the evidence. *Cinkus*, 228 Ill. 2d at 210; *Village of Hazel Crest*, 385 Ill. App. 3d at 113. An agency's interpretation of its own rules and regulations and its long-standing interpretation of the provisions of its enabling statute are given deference, because they flow from the agency's

expertise; however, an agency's resolution of questions of law are not binding on a reviewing court. *Cook County State's Attorney v. Illinois State Labor Relations Board*, 292 Ill. App. 3d 1, 6 (1997).

We apply the clearly erroneous standard of review to issues involving mixed questions of law and fact. *Cinkus*, 228 Ill. 2d at 210-11; *Village of Hazel Crest*, 385 Ill. App. 3d at 113 (citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392 (2001)). An agency decision is clearly erroneous only where, based on the entire record, the reviewing court is “left with the definite and firm conviction that a mistake has been committed.” *Village of Hazel Crest*, 385 Ill. App. 3d at 113 (citing *AFM Messenger*, 198 Ill.2d at 395, quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948)).

In the case at bar, the issues presented by the District involve mixed questions of law and fact. We must apply the undisputed facts of record to first determine whether the District has satisfied the “extraordinary circumstances” requirement of section 1220.40(b) of the ILRB’s rules. 80 Ill. Admin. Code § 1220.40(b) amended at 27 Ill. Reg. 7436, eff. May 01, 2003.

I. Extraordinary Circumstances

The Illinois Labor Relations ILRB has established rules to promulgate its purpose as detailed in the Administrative Code. Section 1220.40(b) addresses the requirements of filing an answer to a complaint issued by the director of the ILRB, which, in relevant part, provides:

“(b) Whenever the Executive Director issues a complaint for hearing, the respondent shall file an answer within 15 days after service of the complaint and deliver a copy to the charging party by ordinary mail to the address set forth in the complaint. Answers shall be filed with the ILRB with attention to the designated

Administrative Law Judge.

* * *

3) Parties who fail to file timely answers shall be deemed to have admitted the material facts and legal conclusions alleged in the complaint. The failure to answer any allegation shall be deemed an admission of that allegation. Failure to file an answer shall be cause for the termination of the proceeding and the entry of an order of default. Filing of a motion will not stay the time for filing an answer.

Illinois courts have held that the ILRB's default rule "does not impinge a party's right to due process where the ILRB's insistence on strict compliance with the 15-day rule is reasonable, because the rule is triggered by a party's own inaction." *Wood Dale*, 396 Ill. App. 3d at 528; *Metz*, 231 Ill. App. 3d at 1093-94.

However, the rules only allow for late filings due to extraordinary circumstances by providing, "[l]eave to file a late answer *shall only* be granted by the Administrative Law Judge if the late filing is due to *extraordinary circumstances*." (Emphasis added.) 80 Ill. Admin. Code § 1220.40(b)(4), amended at 27 Ill. Reg. 7436, eff. May 01, 2003. The rule provides examples of extraordinary circumstances, listing examples such as "fraud, act or concealment of the opposing party, or other grounds traditionally relied upon for equitable relief from judgments." 80 Ill. Admin. Code § 1220.40(b)(4), amended at 27 Ill. Reg. 7436, eff. May 01, 2003.

In the instant case, the District claims extraordinary circumstances existed because attorney Joseph Cainkar sent an informal email reminding the attorney for First Transit, Attorney Avery, that his client had a contractual duty to defend the District regarding this ILRB Complaint. Thereafter, the District assumed Attorney Avery would file a timely answer for the

District until the District received Johnson's motion for default filed on June 5, 2009.

Significantly, the District does not allege fraud, concealment by the opposing party, or other grounds traditionally relied upon for equitable relief from judgments were the extraordinary circumstances that caused them to rely on Avery's decision accepting responsibility to defend. Instead, the District asserts that extraordinary circumstances existed because Avery, an attorney, simply missed the filing deadline for the District, so the District should not be punished for Avery's error.

We agree with the ILRB's finding that the failure of the District's self-determined legal representative, First Transit, to meet a filing deadline resulted from simple inattentive legal counsel. Consequently, we agree the missed deadline was not attributable to fraud, collusion, or any other extraordinary circumstances other than a careless oversight of a finite filing deadline. Without an extraordinary reason, the ILRB could not justify the late filing of the answer which would have been contrary to well-established precedent supporting entry of default under such circumstances as were present in this case.⁴

II. Variance

In the alternative, the District argues that the facts support the granting of a variance from the Board's 15 day filing rule in this case. However, the Board denied the request for a variance.

Generally, a court will not interfere with a discretionary decision by an agency unless the agency has exercised its discretion in an arbitrary or capricious manner or the decision is against the manifest weight of the evidence. *Cook County*, 292 Ill. App. 3d at 6; *Wood Dale*, 395 Ill.

⁴ The ILRB order cited *Wood Dale Fire Protection District v. Illinois Labor Relations Board*, 395 Ill. App. 3d 523 (2009) and *Board of Education of Thornton Township High School District No. 205 v. Illinois Labor Relations Board*, 235 Ill. App. 3d 724 (1992).

App. 3d at 530. “Agency action is arbitrary and capricious if it contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation so implausible that it runs contrary to agency expertise.” *Cook County*, 292 Ill. App. 3d at 6. An agency commits an abuse of discretion when it imposes a sanction that is unduly harsh in light of mitigating circumstances. *Cook County*, 292 Ill. App. 3d at 6.

Section 1200.160 of the Code provides the criterion for the ILRB’s granting of a variance from the 15-day filing requirements, as follows:

“The provisions of this Part or 80 Ill. Adm. Code 1210, 1220 or 1230 may be waived by the ILRB when it finds that:

- a) The provision from which the variance is granted is not statutorily mandated;
- b) No party will be injured by the granting of the variance; and
- c) The rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome.” 80 Ill. Admin. Code § 1200.160, amended at 27 Ill. Reg. 7365, effective May 01, 2003.

In the instant case, a timeline of events is helpful. The deadline for filing an answer was June 1, 2009. The District did not mail a motion for leave to file a late appearance and answer *instanter* until June 8, 2009,⁵ after receiving notice of a motion for default. The District first claimed extraordinary circumstances existed because First Transit did not act in a timely fashion in spite of a contractual duty to defend the District against the charge even though Attorney Cainkar provided the complaint and deadline information to Attorney Avery prior to the deadline.

⁵ The ILRB received the District’s motion on June 15, 2009.

When the deadline for a timely answer passed and an answer to the ILRB Complaint had not been filed, the ALJ issued an order to show cause against a singular “respondent,” on June 15, 2009, giving the respondent the opportunity to show cause why it did not file a timely answer. The District filed a response to the order to show cause on June 26, 2009, wherein it again raised the extraordinary circumstances argument, and also asked the Board to create a variance from the 15-day deadline for the District. This response came nine days after the order to show cause was issued by the ALJ.

The first requirement for consideration of a variance focuses on whether the Board’s rule is statutorily mandated and, if not, a variance may be allowed. 80 Ill. Admin. Code § 1200.160(a), amended at 27 Ill. Reg. 7365, effective May 01, 2003. Here, the 15-day default rule by the ILRB is not statutorily mandated, therefore, the District has satisfied the first criterion for a variance under the Act.

The second criterion for a variance is whether any party would be injured by granting the variance. 80 Ill. Admin. Code § 1200.160(b), amended at 27 Ill. Reg. 7365, effective May 01, 2003. The ILRB, in its order, found that the District failed to satisfy this consideration. The ILRB felt the District did not demonstrate that Johnson would be uninjured by a further delay in the proceedings resulting from the variance. The District claimed that, since Johnson failed to request an expedited ILRB proceeding, time was not an issue and Johnson would not be injured by the District’s requested variance and resulting delay.

The ILRB rejected this view and found that Johnson was attempting to reach a speedy resolution of her case by requesting a default order and she did not need to additionally request expedited proceedings. Further, the Board noted that since Johnson claimed she was wrongfully

discharged from her position, and presumably was unemployed after that event, the ILRB concluded that “any delay in resolving alleged unfair labor practices that led to Johnson’s loss of employment would damage her.”

We agree the second consideration for a variance was not established by the District. In the instant case, Johnson lost her position on June 13, 2008. She filed her complaint with the NLRB within two months of that termination and with the ILRB within three months of her termination. She did nothing to unduly delay or interfere with the proceedings before either the NLRB or the ILRB. The ILRB then had to investigate Johnson’s complaint and the executive director decided to file the ILRB Complaint on May 11, 2009. When the District failed to file an answer to the complaint, Johnson acted quickly, filing a motion for default, in an attempt to resolve the ILRB Complaint in a speedy manner. The ALJ and the ILRB both determined that the District did not show diligence in filing its original untimely answer or in requesting a variance 26 days after the filing deadline.

There is limited case law addressing a variance under similar circumstances and not one of those cases address the issue of whether a variance would result in an injury to the employee seeking reinstatement, which was the basis for the Board’s decision to enforce the procedural rule and 15-day deadline for the answer in this case. See: *Cook County*, 292 Ill. App. 3d 1; *Wood Dale*, 395 Ill. App. 3d 523; and *Village of Bolingbrook v. Village of Bolingbrook Firefighters Association, Local 3005*, 347 Ill. App. 3d 434 (2004)(vacated by supervisory order in *Village of Bolingbrook v. Bolingbrook Firefighters Ass'n*, 209 Ill. 2d 575 (2004).

The *Cook County* case, relied on by the District, is distinguishable from the instant case because that answer was filed three hours after the 15-day deadline and the *Cook County* court

rightfully found that no prejudice arose from that delay. *Cook County*, 292 Ill. App. 3d at 13. The facts in the *Wood Dale* case are most similar to the instant case. *Wood Dale*, 396 Ill. App. 3d 523. In *Wood Dale*, the second district held that the individual charging an unfair labor practice dispute through an administrative hearing has an interest in seeing his or her case speedily litigated to its conclusion and any delay would prejudice that interest to some degree. *Wood Dale*, 396 Ill. App. 3d at 532.

All deadlines are harsh but, unless strictly enforced, deadlines become meaningless. We agree with the *Wood Dale* court and conclude, in this case, Johnson would sustain additional prejudice or injury caused by the loss of her position as bus driver if the District's request for a variance, filed 26 days after the deadline for a timely answer, was allowed.

The third requirement for a variance is that strict compliance with the default rule was an unreasonable or unnecessarily burdensome result under the circumstances. 80 Ill. Admin. Code § 1200.160(c), amended at 27 Ill. Reg. 7365, effective May 01, 2003. The District asks us to apply the test from the *Cook County* case to review the third criterion wherein the court applied a standard that was similar to the standard used in a request to vacate a judgment under section 1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). *Cook County*, 292 Ill. App. 3d at 11. According to that court, the defaulted party may be entitled to relief after establishing: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim in the original action; and (3) due diligence in filing the petition for relief. *Cook County*, 292 Ill. App. 3d at 11. The ILRB asks us to focus on the due diligence of the respondent when measuring whether the ILRB abused its discretion by denying the District's request for a variance.

Once the District received the default notice from the ILRB, the District requested leave to file their answer on June 8, 2009, seven days after the June 1 deadline. Moreover, it was not until after the ALJ initiated an order to show cause, on June 15, 2009, that the District then requested the Board to consider allowing a variance from the Board's filing deadline. This request for a variance was filed 26 days after the filing deadline of June 1, 2009. The District has not offered any explanation to this court for the delay in filing the request for variance.

Here, the District was given unequivocal notice of the 15-day deadline date and a clear explanation regarding the consequences for an untimely answer but did not show diligence in complying with the ILRB's rules. Merely forwarding the complaint to the District's contractual service provider along with an informal electronic request for First Transit to prepare a timely answer on the District's behalf, without further action, did not convincingly demonstrate diligence by the District. Consequently, we conclude that the ILRB did not apply the variance rule in an arbitrary or capricious manner in this case. Accordingly, the ILRB did not abuse its discretion in denying the District's request for a variance.

Finally, the District argued that the results were unduly harsh or burdensome because it would not be able to comply with the ILRB's order because it was not the agency that hired Johnson or terminated her employment. Addressing the same issue, the ILRB found that, since the District claimed it had a meritorious breach of contract claim against First Transit for its failure to defend the complaint by failing to file a timely answer, it also had the "means of influencing its contractual partner to help facilitate full compliance." Additionally, the ILRB held that any of these potential difficulties could be addressed in compliance proceedings rather than requiring the vacation of the default findings. We agree with the ILRB's resolution of that issue.

CONCLUSION

Accordingly, we affirm the findings and decision of the ILRB upholding the ALJ's finding of default and adopting her recommended decision and order.

Order affirmed.

JUSTICE McDADE, concurring in part, dissenting in part:

The majority has found that we do not have subject matter jurisdiction over First Transit as a party to this appeal. Slip order at 14. I concur in the judgment that we do not have subject matter jurisdiction over First Transit.

The majority has also found that the District has not satisfied the "extraordinary circumstances" requirement of section 1220.40(b) of the ILRB's rules (80 Ill. Admin. Code § 1220.40(b) amended at 27 Ill. Reg. 7436, eff. May 01, 2003.). Slip order at 18. The majority has found that the Board did not abuse its discretion in denying the District's request for a variance under section 1200.160(b) of the ILRB's rules (80 Ill. Admin. Code § 1200.160(b), amended at 27 Ill. Reg. 7365, eff. May 01, 2003.) (slip order at 18), because the District failed to establish that no party would be injured by granting a variance (slip order at 21), and because the District did not demonstrate diligence in filing its request for a variance (slip order at 23). I disagree with the majority's judgment that the District did not satisfy the "extraordinary circumstances" requirement of section 1220.40(b). I would also find that the Board did abuse its discretion in denying the District's request for a variance under section 1200.160(b). Accordingly, I respectfully dissent only from those portions of the majority's judgment.

The majority finds that the District did not allege "other grounds traditionally relied upon

for equitable relief from judgments” (slip order at 17-18) as the “extraordinary circumstances *that caused* them to rely on Avery’s decision accepting responsibility to defend” (emphasis added) (slip order at 18). The majority thus characterizes the “missed *** filing deadline” itself as the alleged “extraordinary circumstance.” Slip order at 18. I would agree with the majority that “a careless oversight of a finite filing deadline” is not, itself, an “extraordinary circumstance” within the meaning of rule 1220.40(b). See slip order at 18. But a simple missed deadline by a party is not what happened here, and is not the “extraordinary circumstance” the District asserted to the Board. The District argued, and I agree, that its *reliance* on “Avery’s decision accepting responsibility to defend” (slip order at 18), coupled with “Avery’s error” (slip order at 18), is an “extraordinary circumstance.”

The Board argued that a third party’s breach of a duty to defend is not a ground traditionally relied upon for equitable relief from judgments because, it claims, Illinois courts have specifically found that attorney negligence is not a sufficient ground to overturn a Board decision denying a variance. *Wood Dale Fire Protection District v. Illinois Labor Relations Board, State Panel*, 395 Ill. App. 3d 523, 530 (2009). But the court in *Cook County State’s Attorney v. Illinois State Labor Relations Board*, 292 Ill. App. 3d 1 (1997), held that “the negligence of counsel may be excused where mitigating circumstances are present.” *Cook County State’s Attorney*, 292 Ill. App. 3d at 12. The court also specifically held that “[t]he *actual notice* to the Board of the *** position and defense should have been considered as a mitigating circumstance, even under a section 2-1401 standard.” (Emphasis added.) *Cook County State’s Attorney*, 292 Ill. App. 3d at 12.

While the courts have not specifically addressed the exact circumstances leading to the late

filing that are present in this case (*i.e.*, attorney negligence), neither did the *Wood Dale Fire Protection District* court foreclose finding that this circumstance is an appropriate one in which to permit a late filing. *Wood Dale Fire Protection District*, 395 Ill. App. 3d at 959, n3. *Wood Dale Fire Protection District* is consistent with the view expressed in *Cook County State's Attorney* that the negligence of counsel must be viewed in light of any mitigating circumstances to determine whether a late filing was due to "extraordinary circumstances" within the meaning of the rule. *Cook County State's Attorney*, 292 Ill. App. 3d at 12.

The existence of mitigating circumstances to excuse a late filing, including a late filing due to attorney neglect, must be determined from all the facts and circumstances of the case to determine whether strict compliance with the rule is reasonable. See *Cook County State's Attorney*, 292 Ill. App. 3d at 12-13. See also *Wood Dale Fire Protection District*, 395 Ill. App. 3d at 528 ("Board's default rule does not impinge a party's right to due process where the Board's insistence on strict compliance with the rule is reasonable"). Mitigating circumstances include, but are expressly not limited to (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim in the original action; and (3) due diligence in filing the petition for relief. *Cook County State's Attorney*, 292 Ill. App. 3d at 11.

I find the District's arguments that the facts and circumstances surrounding its late filing demonstrate extraordinary circumstances within the meaning of rule 1220.40(b) persuasive. Instructive is the rationale in a case cited by the District, *Stehman v. Reichhold Chemicals, Inc.*, 57 Ill. App. 2d 40, 41 (1965). In *Stehman*, "[t]he only issue presented [was] whether the trial court erred in denying defendant Reichhold's petition to vacate the default order and judgment." *Stehman*, 57 Ill. App. 2d at 41. "The petition to vacate alleged that defendant had a meritorious

defense, that the accident was caused solely by the negligence of *** a co-defendant, and that defendant's failure to appear and assert a defense was without negligence." *Id.*, at 42.

The court noted that "the facts surrounding defendant's preparations disclosed that immediately after the accident defendant's insurance company commenced an extensive investigation and forwarded to defendant the police report and photographs of the occurrence.

*** The defendant *** could reasonably assume no further action was required by it." *Id.*, at 48-49. Ultimately, the court held that "[i]n light of all the circumstances, and in view of the fact that defendant had a meritorious defense and that a petition under Section 72 invokes the equitable powers of the court 'as justice and fairness require,' we are compelled to conclude that the petition to vacate should have been allowed." *Id.*, at 49.

Here, it is undisputed that the District had a valid defense to the claim. First Transit was obligated to defend the District. The District promptly notified First Transit of the existence of the claim and the filing deadlines. Then, the District acted quickly upon learning that First Transit missed the filing deadline. *Cf.*, *Stehman*, 57 Ill. App. 2d at 42. Moreover, the District timely presented its defense to the Board in a position paper. See *Cook County State's Attorney*, 292 Ill. App. 3d at 12. In light of all the facts and circumstances, I would find that the District satisfied rule 1220.40(b).

Next, the majority has found that the Board did not abuse its discretion in denying the District's request for a variance under section 1200.160(b) because the District failed to establish that no party would be injured by granting a variance (slip order at 21). To conclude that "Johnson would sustain additional prejudice or injury *** if the District's request for a variance ** was allowed" (slip order at 22), the majority applies a rule derived from *Wood Dale Fire*

Protection District. There, the Second District did imply that “the individual charging an unfair labor practice dispute through an administrative hearing has an interest in seeing his or her case speedily litigated to its conclusion and *any delay* would prejudice that interest to some degree.” (Emphasis added.) Slip order at 22 (citing *Wood Dale Fire Protection District*, 396 Ill. App. 3d at 52).

I do not agree with the majority’s interpretation and application of the *Wood Dale Fire Protection District* decision in this case. The court has rejected blanket assertions that parties to a labor dispute are necessarily harmed by *any* delay in the proceedings where that assertion is grounded on no more than the “public policy favoring the speedy resolution of labor disputes.” *Cook County State’s Attorney*, 292 Ill. App. 3d at 7. The rule contemplates more than the mere passage of time to determine that a party has been harmed by a delay in the proceedings. See *Cook County State’s Attorney*, 292 Ill. App. 3d at 7. In fact, the *Cook County State’s Attorney* court wrote that:

“[t]he Board cites no authority for the proposition that a[n] urgent need for speed exists here. This court has affirmed the Board’s adoption of procedures that delay Board proceedings, over the objection that such procedures hindered the speedy resolution of public employment disputes.” *Cook County State’s Attorney*, 292 Ill. App. 3d at 7.

The alleged delay in the resolution of Johnson’s complaint would not cause her to suffer any prejudice. See *Cook County State’s Attorney*, 292 Ill. App. 3d at 8 (“the issue is whether a waiver is warranted in this case, not whether a default is proper. Section 1200.160 expressly

includes the lack of prejudice to any party as a factor. Ignoring this factor would be plainly erroneous"). A late answer would have only delayed proceedings an additional seven days, and there was no evidence that any additional harm to Johnson would result beyond the public policy of speedy resolution of such disputes. See generally *Pundy v. Department of Professional Regulation*, 211 Ill. App. 3d 475, 487 (1991) (for an administrative determination to be valid all that is required is that the administrative agency consider the evidence contained in the transcript of the proceeding and base its decision thereon).

Next, the majority applies *Cook County State's Attorney* to determine whether strict compliance with the default rule would be unreasonable or unnecessarily burdensome. Slip order at 22. The majority has found that because “[t]he District has not offered any explanation *** for the delay in filing the request for variance” (slip order at 23), strict compliance with the default rule was not an unreasonable or unnecessarily burdensome result under the circumstances. Slip order at 22. The majority concludes that “[m]erely forwarding the complaint to the District’s contractual service provider along with an informal electronic request *** to prepare a timely answer *** without further action, did not convincingly demonstrate diligence by the District.” Slip order at 23. The majority leaves unsaid what more the District could have done at that point in the process.

The *Cook County State's Attorney* court held that strict adherence to the rule in that case *would* be unreasonably or unnecessarily burdensome, relying in part on the fact that the respondent in that case had filed a position statement that notified the Board of its defenses to the complaint. *Cook County State's Attorney*, 292 Ill. App. 3d at 13. Here, the District timely presented its defense to the Board in its position paper. Although the District did not request a

variance under rule 1200.160 for 25 days after the filing deadline (*cf.*, *Cook County State's Attorney*, 292 Ill. App. 3d at 13 (fact that the late filing was only three hours late was a mitigating factor that satisfied the third factor in rule 1200.160)), during that time it diligently pursued its rights and sought leave to file a late answer under rule 1220.40(b). *Wood Dale Fire Protection District*, 395 Ill. App. 3d at 533, is, therefore, distinguishable, because the delay in this case was not "unexplained." *Wood Dale Fire Protection District*, 395 Ill. App. 3d at 533 (rejecting argument delay should be excused because respondent filed a position statement where the respondent's 24-day delay in taking any steps to secure a variance, after it learned an answer was not filed, was "unexplained").

Lastly, I believe that there may be unjust consequences should the District not be allowed to file a late answer to the complaint. The Board's order requires the District to reinstate a person it may have never employed. The Board attempted to rationalize and justify this inconsistency by finding that the District could exert its "considerable means of influencing its contractual partner to help facilitate full compliance" with the order. One of the consequences of the Board's order is that the District is deemed to have admitted that it employs Johnson, a fact that is arguably contradicted by the Board's own order.

"[E]ven in instances where an administrative body has discretion in its decision, whenever it must choose between justice and speed, it must pick the side of justice." *Gilchrist v. Human Rights Comm'n*, 312 Ill. App. 3d 597, 603 (2000).

I would find that strict adherence to the 15-day filing deadline would be unnecessarily burdensome in this case, and that a default judgment as a result of the failure to file a timely

response to the complaint would be unreasonable. See *Cook County State's Attorney*, 292 Ill.

App. 3d at 13. Therefore, I would find an abuse of discretion in denying the District's request for a variance under section 1200.160(b).