

FOURTH DIVISION
Order filed September 30, 2013
Modified upon denial of rehearing November 7, 2013

No. 1-11-1972

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HARRIET WALCZAK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 CH 15122
)	
BOARD OF EDUCATION OF THE CITY OF)	
CHICAGO; MICHAEL S. JORDAN, Hearing Officer,)	
RON HUBERMAN, Chief Executive Officer, MARY R.)	
RICHARDSON-LOWRY, President, ARNE DUNCAN,)	
former CEO of the Chicago Public Schools,)	Honorable
)	Peter Flynn,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court’s judgment denying administrative review of a decision to terminate a tenured Chicago Public Schools teacher is affirmed. The Chicago Board of Education did not violate plaintiff’s due process rights when, after an

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administrative hearing, it made findings that were contrary to the findings and recommendation of the Hearing Officer because the Board's findings did not depend upon the demeanor of the witnesses and the manner in which they testified.

¶ 2 Plaintiff Harriet Walczak appeals from a circuit court judgment dismissing her complaint for administrative review of a decision by defendant the Board of Education of the City of Chicago (the Board) to terminate her employment as a tenured teacher in the Chicago Public School system. After the Board issued its order and resolution dismissing Walczak from her employment with the Board, Walczak filed an amended complaint for administrative review in the circuit court seeking an order reversing the Board's decision. The trial court affirmed the Board's decision and Walczak filed this timely appeal.

¶ 3 In this appeal, Walczak argues: (1) the Board violated her right to due process when it disregarded the findings of the Hearing Officer and substituted its own findings; (2) her remediation process was defective as a matter of law; (3) the Fresh Start program under which she received remediation was void at the time of implementation; and (4) the Board erred in rejecting the testimony of her expert witness. For the reasons set forth below, we confirm the Board's decision and affirm the circuit court.

¶ 3 BACKGROUND

¶ 4 Harriet Walczak was a licensed and tenured teacher who had been employed by the Chicago Public School system for 30 years until her employment was terminated. Her last teaching assignment before her termination was at Wells Community Academy High School (Wells). At that time she primarily taught English to juniors and seniors, although she had

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teaching endorsements in other areas. During the remediation period, Walczak taught three classes: two involved a curriculum for struggling readers taught in a double period and one period of American Literature. On November 27, 2007, the principal of Wells, Nichole Jackson, gave Walczak a notice of unsatisfactory teacher performance. Teachers are allowed a period of remediation prior to termination under procedures agreed to by the Board and the teachers' exclusive representative, the Chicago Teachers Union (CTU). As a result of Walczak's unsatisfactory rating, Walczak became subject to remediation. Walczak was given two choices: (1) to proceed through a remediation process set forth in Amendment # 6 to the collective bargaining agreement (CBA) or (2) "to participate in the Tenured Teacher Intervention Program ***."

¶ 5 Walczak chose the remediation process set forth in Amendment # 6 to the CBA. The "Fresh Start" program became applicable to tenured teachers during the 2007-08 school year pursuant to Amendment # 6 to the parties' CBA. Under the Fresh Start program, any tenured teacher who received an unsatisfactory rating is assigned to work with a mentor-coach during a remediation period which is designed to improve teaching skills. The mentor first meets with the teacher and principal to develop a plan for remediation. Thereafter, the mentor is to meet with the teacher, observe the teacher, confer with the teacher regarding the mentor's observations, and perform model teaching or co-teaching. The mentor and teacher are also to talk about the teacher's strengths and weaknesses, and the mentor is to give suggestions for improvement. As part of the process, the principal is required to make a preremediation observation, an observation during the remediation period, and a postremediation observation, at which time the

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principal makes a recommendation regarding the teacher's future employment by the Board, with the right to a hearing by an Illinois State Board of Education Hearing Officer (Hearing Officer) if discharge is recommended.

¶ 6 Walczak's mentor was Ellen Kelly. The remediation period was twenty weeks between December 2007 and May 2008. In early December 2007, principal Jackson, Kelly, and Walczak developed a written remediation plan. The remediation plan identified specific weaknesses in Walczak's teaching performance that needed to be corrected during the remediation: that Walczak (1) lacks skill in planning; (2) fails to exercise appropriate classroom management and control; and (3) fails to demonstrate appropriate personal characteristics and professional responsibility in that she fails to adhere to accepted policies and procedures of the Chicago Public school system.

¶ 7 At the conclusion of the remediation program, Jackson determined Walczak had not satisfactorily met the remediation goals and recommended her discharge. The chief executive officer of the Chicago Public Schools notified Walczak she would receive an administrative hearing before a Hearing Officer pursuant to section 34-85c of the Illinois School Code (105 ILCS 5/34-85c (West 2006)). Retired Cook County circuit court judge Michael Jordan was selected as the independent Hearing Officer from a list maintained by the Illinois State Board of Education of nine qualified hearing officers. Both the Board and Walczak were represented by legal counsel.

¶ 8 At the hearing, Jackson testified she was hired as principal of Wells for the 2006-07 school year. During that year she observed Walczak's classroom more than 10 times. Jackson

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determined that Walczak was not adequately prepared to teach. Jackson testified that Walczak did not engage students or teach them necessary skills. When Jackson walked the halls, she was frequently disturbed by noise coming from Walczak's classroom. Jackson directed Walczak to establish clear classroom rules and to assign seats to make it easier to take attendance and identify students who were causing problems. Walczak did not follow her directions. Jackson had to go into the classroom to get Walczak's students on task.

¶ 9 Based upon her observations during the previous year, in the 2007-08 school year Jackson reduced Walczak's teaching assignment from five classes to three, and reduced the number of her students by about half. In October 2007, Jackson observed that Walczak was not adequately prepared. Jackson testified that Walczak's questions did not motivate the students but only required them to recall information, which is a basic level of knowledge. Jackson testified that good teachers present lessons in more than one way--not just by lecturing. They use visual materials or handouts they can adjust for the variety of learning styles. Walczak was lecturing in the front of the classroom, not allowing student interaction. She had not assigned seats.

¶ 10 In November 2007 Jackson met with Kelly and Walczak to establish the goals of the remediation plan. Jackson testified that under the remediation plan Walczak was required to: (1) adequately prepare for class; (2) set high expectations for all students; (3) use a variety of instructional strategies, such as lecture, small group instruction and peer group interaction; (4) ask questions that require students to use different types of thinking--analytical, practical, creative and research-based; (5) implement strategies and interventions for special needs students; and (6) consistently respond to disruptive behavior in ways that demonstrate respect

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and enforce discipline.

¶ 11 Kelly testified that prior to mentoring Walczak, she received extensive training on the Fresh Start teacher-evaluation rubric. In 2006-07, she mentored 14 probationary nontenured teachers for 40 hours each. After evaluating their teaching, she recommended that all 14 receive teaching contracts. Walczak was the first tenured teacher Kelly mentored. During Walczak's remediation, Kelly regularly visited Walczak and coached her in areas needing remediation. Kelly provided more hours of coaching than were required under the Fresh Start agreement. Kelly spent 52 hours observing Walczak's classrooms, modeling appropriate teaching and classroom-management techniques, and assisting Walczak with lesson planning and presentation. Most of Kelly's classroom visits began in the middle of a class period. Kelly testified that she observed Walczak's students address her as "b*tch" and that the students regularly told Walczak to "f**k off." Kelly also testified that Walczak was taunted by her students when Kelly entered the room with the students saying to Walczak: "[Kelly's] here to fire your ass."

¶ 12 Kelly addressed two main issues during the remediation period: (1) controlling student behavior and, (2) lesson planning and presentation. Kelly asked Walczak to email her lesson plans to her or place them in her mailbox at Wells. During the first week of remediation, Walczak told Kelly she did not have any time during the next week to review lesson plans. During the second week, she told Kelly she did not have time to meet because she was overwhelmed with paperwork. In mid-January 2008, Walczak said she would have no time to meet with Kelly the following week because she was overwhelmed with finals and report cards.

¶ 13 Kelly testified that Walczak did not understand how to implement lesson plans which had

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been prepared cooperatively with other teachers in her department. Kelly asked to meet with Walczak and her colleagues so Walczak could understand the intent of the plans. Walczak declined this request. Kelly then encouraged Walczak to create her own plans so Walczak could understand and deliver them with confidence.

¶ 14 During Kelly's second observation, only 2 of Walczak's 11 students were on task. The others were using cell phones to take pictures, sleeping, listening to music, and crawling on the floor. When Kelly observed Walczak's classroom in late January, 3 of the 15 students were making friendship bracelets, 1 was listening to music on her cell phone, 4 were coloring in coloring books. The students ignored Walczak's request to put away their bracelets. When Kelly walked near them, they complied. Kelly repeatedly urged Walczak to walk around the room to monitor the students' work and to enforce her rules. The Fresh Start rubric requires teachers to circulate regularly through the classroom and actively engage students.

¶ 15 At Walczak's request, Kelly modeled one-on-one monitoring. Kelly selected a student Walczak battled every day. When Kelly began to talk to him about the assignment, he turned off his iPod. Kelly praised his work and asked questions to encourage his thinking. He finished the assignment and did not put his headphones back on for the rest of the period. As Kelly continued walking around, other students began to work on the assignment as well. After observing Kelly's monitoring, Walczak said she would try it.

¶ 16 At the end of January, Kelly asked Walczak to re-teach the students her rules of classroom conduct and to follow through with the consequences she had established. Kelly made the same request in mid-February. Walczak told Kelly she sometimes felt sorry for the students

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and wanted to give them another chance. Kelly told Walczak that she would build her students' trust and respect if she were consistent.

¶ 17 On February 20 and March 5, Kelly asked Walczak to address all of her students' off-task behavior and disrespectful remarks. Kelly consistently noted that Walczak did not provide direction or instruction, but simply read to the students, asked a few basic recall questions, then assigned the students to work independently.

¶ 18 In early March, Kelly noted that Walczak did not seem to understand that assigning students to read independently and then answer questions was not teaching. She asked Walczak to teach a "focus lesson" addressing the skill highlighted in her lesson plan. Kelly broke down the components of instruction, including building up the background of a story, reviewing vocabulary, breaking the reading into parts and leading discussions to ensure the students understood the text, and monitoring and coaching the students while they worked independently.

¶ 19 At the end of March, Kelly co-taught with Walczak and special education teacher Ms. Marzen. Walczak called security to remove a student who cursed at Kelly.

¶ 20 During the first week of April, Walczak ignored Kelly's repeated requests to meet. When they did meet, Walczak told Kelly the co-teaching had been very helpful. Walczak refused to meet with Kelly the following week because she was preparing for mid-term exams.

¶ 21 Kelly testified that Walczak was not concerned with her lesson plans and Walczak did not provide them to Kelly to review. On April 25, Walczak told Kelly she had no time to meet that week, so Kelly observed her classroom instead. Walczak talked to each student, asked about their work and encouraged them. She gave a writing assignment without providing any direction.

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Kelly testified that the students initially participated in the assignment but then began to use their phones and walked around. Walczak tried to positively address this misbehavior and her interventions worked about half the time. When Walczak encouraged one student to do her work, the student responded “shut up.” Walczak went to the door to call security but did not follow through.

¶ 22 Kelly testified that on May 6, 2008, nine days before the remediation ended, the lesson plan Walczak posted was one month old. Walczak had three questions written on the blackboard. Walczak answered the first question--the author’s age. Kelly pointed out that the questions in Walczak’s lesson plan called for higher order thinking but the questions Walczak wrote on the board sought only basic recall. Three days before the remediation ended, Walczak did not have any lesson plans outlined and Kelly again referred her to the online lesson plans, but Walczak was not interested. On the last day of remediation, Walczak still had not outlined her lesson plans nor had she read the story she was planning to teach. Kelly explained to Walczak that it was important for the teacher to read the story before teaching the class so she could decide how to present the lesson.

¶ 23 The disciplinarian for Wells, Howard Frye, testified that there were worse students in the school than those in Walczak’s classroom. He testified that police were regularly called to the school to deal with gang fights. Frye testified that Walczak referred more students to him for misconduct than any other teacher. He testified that other teachers who had the same students did not refer them to him as often.

¶ 24 Retired Chicago Public Schools (CPS) teacher Carlene Blumenthal testified for Walczak.

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Walczak offered Blumenthal as an expert witness. The Board's attorneys objected to Blumenthal testifying as an expert. The Hearing Officer allowed Blumenthal to testify as an expert.

Blumenthal retired in 1996 after 37 years' teaching. Blumenthal does not have a school-administrator's certificate and has never been responsible for formally rating a CPS teacher. Blumenthal did not observe Walczak during the remediation period. Her testimony in this case is based on reading Kelly's testimony, logs, and from observing Walczak during two 50-minute classes in 2003-04. Blumenthal testified she had only "scanned" Kelly's mentor logs.

¶ 25 Blumenthal opined that Kelly was not qualified to mentor Walczak and was a detriment to the remediation process. Blumenthal criticized Kelly for spending only 21 hours observing Walczak's classroom during the remediation period. Blumenthal never observed Walczak teaching during the 2007-08 school year.

¶ 26 Blumenthal opined that Kelly's entries into the classroom in the middle of the period were disruptive. Blumenthal opined that Kelly failed to note that the student's in Walczak's class were English as a Second Language (ESL) and special education students. These students have learning and behavioral disabilities which Kelly did not take into account. Blumenthal testified that Jackson removed a special education teacher from Walczak's classroom.

Blumenthal opined that a special education teacher would have helped to modify the lesson plans to accommodate and account for the individual differences of the students.

¶ 27 Blumenthal opined that it was unconscionable that Kelly did not get the lesson plans to properly judge Walczak. Blumenthal testified that she was never in a classroom as a teacher, cooperating teacher, or supervisor without first picking up a copy of the lesson plans in the office

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from the substitute folder and having them photocopied the have them in class. Blumenthal opined that Kelly did not do her job as required to help Walczak and to determine if her lesson plans were properly being implemented.

¶ 28 Blumenthal testified that she reviewed Walczak's lesson plans and found them adequate. Blumenthal opined that Kelly had no basis to judge or assist Walczak because she had no training or experience in the areas Walczak taught. Further, Blumenthal opined that Kelly did not offer anything that would enable Walczak to improved her style of teaching, her method of teaching or her relationships with the students. Blumenthal testified Kelly had no relevant experience to judge or assist Walczak. Blumenthal conceded that the Fresh Start agreement does not require the mentor to have the same subject matter knowledge as the teacher under remediation. Blumenthal opined that Jackson could not adequately observe Walczak's progress when there were just two students present during Jackson's final classroom observation.

¶ 29 Walczak testified that she was assaulted six times in seven weeks by students during the remediation period. Walczak testified that she attempted to control the students' behavior by sending them to the school disciplinarian, Howard Frye, a recent hire by Jackson. Frye merely sent the students back to Walczak's classroom without meting out any discipline whatsoever. Walczak testified Jackson made a classroom visit at the mid-point of the remediation period on March 4, 2008. Walczak testified that during the visit, Jackson asked her students whether she was too old to teach. Jackson visited the classroom again on May 15, 2008, when only two students were in the classroom, then conducted a post-visitation conference with Walczak and informed her that her performance did not meet expectations.

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¶ 30 After the hearing, the Hearing Officer issued a written recommendation report to the Board. The Hearing Officer wrote in a 234-page posthearing report that the hearing examined the classroom operations of Walczak, the school dynamics, interplay with the union and the Board, local Chicago politics, all interfaced with the educational process, the ability to teach and the ability to remediate. The report found: “Many of the requirements [of the Fresh Start agreement] were just barely met, barriers were raised, and obstacles manufactured to hinder the remediation process for this grievant. *** As the balance of these findings concludes, the totality of the evidence here does show that Principal Jackson’s findings and conclusions were wrong, flawed, and invalid.”

¶ 31 The report further found that Jackson was under severe political pressure from the local alderman, who actively sought to have a Hispanic in the position of principal at Wells and opposed Jackson’s continued service at the school. Jackson is an African-American woman in her early 30s, who began as Wells’ principal in 2006--her first assignment as a principal. In 2007-08, Jackson rated four tenured teachers, including Walczak, as unsatisfactory. None of the four teachers were Hispanic. At the close of Walczak’s period of remediation, Jackson was transferred from her position as principal and reassigned to another school as an assistant principal for the following school year. Jackson’s new position was created for her pursuant to a settlement reached between her and the Board in an effort to dispose of litigation regarding her claims of racial harassment by various school officials.

¶ 32 The report further found that Walczak was unable to properly defend herself against the unsatisfactory teaching charge because the assistant principal of Wells only allowed her 15

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minutes to vacate the premises. Walczak was unable to gather her materials and evidence to use in defense of the charges against her. In addition, the Hearing Officer found that during Jackson's tenure as principal of Wells there were unattended discipline problems and chaos in the school.

¶ 33 In respect to mentor Kelly, the report found:

“Kelly appears to be a well-intentioned person with little relevant teaching experience. She was assigned to mentor the grievant, an experienced credentialed teacher. Kelly had a gap in her own education with a late start in attaining her formal higher education. She had trained to be a religious person, a nun, and did much service for her church.

Kelly was merely and barely ‘paper-qualified’ to serve as a mentor/coach under the law, rules and procedures governing the Board and this program, but she was only barely qualified and no more than barely qualified ***. This was Kelly's first experience as a mentor coach and the grievant was her first assigned tenured teacher. Kelly had no professional teaching endorsements or certification for high school teaching. Her education and experience in the areas of grievant's assignments were limited or absent. In fact, at the time of the remediation, her own teaching certification was not recorded. This could well be considered a fatal flaw in meeting the requirements of the process. In the totality of circumstances with all of the many other deficiencies, this fact has weighed against the merits of the Board's case as well. It is not a major factor. Her lack of fundamental life experience is significant.”

¶ 34 The Hearing Officer's report found that Kelly's mid-class visits distracted the students and resulted in many going off-task. According to the Hearing Officer, on one occasion, a

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student or students tried to block Kelly's entrance into the classroom--clearly disrupting the class and hindering the efforts at remediation. The report found that the Board's charge that Walczak was not amenable to remediation was unproven. The Hearing Officer found Walczak would have met all expectations if she had the assistance of a more experienced principal, mentor, and special education assistant, more ideal students and a more ideal school setting. The Hearing Officer concluded that the remediation program itself was flawed, therefore, Walczak should not be discharged.

¶ 35 After reviewing the report, the Board rejected the findings and recommendation to reinstate Walczak. In a written opinion, the Board wrote: "It is difficult to distinguish actual 'findings of fact' and 'conclusions of law' from the meandering recitations in the first 200 pages in the Hearing Officer's recommended decision." The Board noted that the Hearing Officer found Kelly "paper qualified" to mentor Walczak and that he exceeded his authority when he added additional requirements, such as requiring the mentor to have the same amount of teaching experience, at the same grade level and in the same subject matter, as the unsatisfactory teacher. The Board rejected the Hearing Officer's finding that there was a "suggestion" that principal Jackson's unsatisfactory rating of Walczak was motivated by her race or age.

¶ 36 The Board found that the "Individual Educational Plans" of the special education students assigned to Walczak did not require a special education teacher or assistant. The Board also stated there is no evidence to support Hearing Officer's finding that the well-behaved students were removed and replaced with poorly-behaved special education students. The Board rejected the Hearing Officer's finding that Jackson was an inexperienced and ineffectual administrator as

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speculative and without basis in the record, making a finding itself that Jackson was and is a competent school administrator. The Board also rejected the Hearing Officer's legal conclusion that Jackson had an obligation to act in a supportive role in evaluating and helping Walczak remedy her teaching. The Board made a finding that Jackson had no statutory obligation to act in a supportive role in evaluating Walczak, or to help her improve her teaching performance; this is solely the role of Kelly, the mentor/coach. The Board concluded Jackson's role was to evaluate Walczak's performance to determine whether or not it had become satisfactory through the remediation process.

¶ 37 The Board rejected the Hearing Officer's finding that Blumenthal was qualified to give expert testimony in the area of adolescent psychology and further rejected any opinion testimony she offered in that area. The Board found that Blumenthal lacked any degree or credential in the field of psychology, and was therefore unqualified to render an expert psychological opinion.

¶ 38 The Board then addressed Blumenthal's criticisms of Kelly. The Board noted that the Hearing Officer found Blumenthal had "great credibility" in her criticisms of the deficiencies Kelly noted in her testimony and logs regarding Walczak's performance. The Board further noted that the Hearing Officer acknowledged that he based his opinion, that Jackson was wrong in her evaluation of Walczak, upon Blumenthal's testimony.

¶ 39 The Board noted Blumenthal never held an administrative Type 75 state certificate that would qualify her to evaluate a teacher, nor has she ever been responsible for formally evaluating any teacher's performance. The Board further noted that Blumenthal never observed Walczak's classroom during the remediation. Blumenthal admitted that she did not have any firsthand

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knowledge about Walczak's performance, or how Wells operated, during the relevant school year. She also admitted that she never trained or assisted a Fresh Start teacher, or worked in a Fresh Start school. Blumenthal testified that her expert opinion was based on her review of Kelly's testimony in this matter and her review of Kelly's daily logs. However, Blumenthal admitted that she did not carefully review the logs, but rather only "skimmed through them."

¶ 40 The Board noted that one of Blumenthal's most damning criticisms of Kelly was that she never had copies of Walczak's lesson plans while she was observing Walczak's teaching. However, on cross-examination Blumenthal was forced to concede that Kelly repeatedly referred to Walczak's lesson plans in her mentor logs. The Board found this admission undermined one of Blumenthal's most critical criticisms of Kelly. Additionally Blumenthal insisted on direct examination that it was indefensible for Kelly not to have requested rosters of Walczak's students. However, she admitted on cross-examination that Kelly noted in her logs her review of Walczak's student roster. The Board rejected Blumenthal's criticisms of Kelly's performance, as they were contradicted by Blumenthal's own testimony. The Board also rejected as "sheer speculation" the Hearing Officer's findings that Walczak would have met all expectations if she had the assistance of a more experienced principal, mentor, and special education assistant, more ideal students and a more ideal school setting.

¶ 41 The Board rejected the Hearing Officer's findings and recommendation and issued its own opinion and order terminating Walczak's employment. The Board found that although Jackson saw some improvement in Walczak's performance, in Jackson's opinion this improvement was not sufficiently significant or consistent to determine that Walczak had

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successfully remediated her performance deficiencies.

¶ 42 Walczak appealed the Board’s decision to the circuit court of Cook County. The circuit court entered an order affirming the decision of the Board.

¶ 43 This appeal followed.

¶ 44 ANALYSIS

¶ 45 In administrative review cases, we do not review the decision of the Hearing Officer or the circuit court; rather, we review the decision of the Board. *Ahmad v. Board of Education of the City of Chicago*, 365 Ill. App. 3d 155, 162 (2006); *Hearne v. Chicago School Reform Board of Trustees of the Board of Education for the City of Chicago*, 322 Ill. App. 3d 467, 478 (2001).

On review of an administrative decision to discharge an employee, we must first determine whether the Board’s findings of fact and decision were against the manifest weight of evidence, then we determine whether those findings sufficiently support the Board’s conclusion that cause for discharge exists. *Charlene Raitzik v. Board of Education of the City of Chicago*, 356 Ill. App. 3d 813, 823 (2005).

¶ 46 A reviewing court will not reverse an agency’s findings unless they are against the manifest weight of the evidence. *Ahmad*, 365 Ill. App. 3d at 162. An agency’s findings are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Id.* Ultimately, the Board’s finding of cause for dismissal can be overturned only if it is “arbitrary and unreasonable or unrelated to the requirements of service.” *Raitzik*, 356 Ill. App. 3d at 831 (quoting *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 312 (1992)). Regardless of the reasoning provided by an agency for its decision, this court may affirm an agency’s decision on

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any basis appearing in the record. *Id.*

¶ 47 1. Validity of the Fresh Start Program

¶ 48 We first consider Walczak's claim that the Board's decision to dismiss her is void because her remediation was invalid. Walczak argues that the Fresh Start program had not been adopted for tenured teachers at the time of her remediation and, therefore, her due process rights were violated when she was subjected to remediation under the Fresh Start program.

Specifically, Walczak argues that the Fresh Start remediation was void because (a) Amendment # 6 to the collective bargaining agreement applied the Fresh Start program to tenured teachers, (b) the Board and the teachers' collective bargaining unit agreed that Amendment # 6 would become void if the General Assembly did not adopt legislation to permit the Board and teachers to agree to create a pilot program to apply Fresh Start to tenured teachers by a date certain, and © the General Assembly did not adopt the amendments by that date; therefore Amendment # 6 is void and the Board cannot apply Fresh Start to tenured teachers.

¶ 49 Walczak argues the Fresh Start program was not formally adopted until December 2007 after her remediation had begun. Walczak argues that the Board could not incorporate Amendment # 6 into the subsequent collective bargaining agreement by reference because incorporation by reference "cannot breath life back into something which is void." She also argues that her union did not have blanket authority to bind her to an expired agreement, and her own acquiescence to participation in the program is not a significant action to show consent or an intent to be bound to Amendment # 6.

¶ 50 The Board and the CTU entered into Amendment # 6 to the 2003--07 CBA. Amendment

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#6 allowed the Fresh Start program to apply to tenured teachers for the first time.

Representatives from the CTU and the Board signed the Fresh Start agreement on July 25, 2006.

Illinois school law needed to be amended to allow the fresh start program to apply to tenured teachers. Because there was a need for legislative action, there is a provision in the agreement that states that “in the event legislation to authorize the agreement, sections 34-85c and 24A-1 *et seq.* of the Illinois School Code (105 ILCS 5/34-85c, 24-1 *et seq.*), is not enacted by January 1, 2007, the agreement is void in its entirety.” However Section 34-85c was not enacted until August 27, 2007.

¶ 51 The Board and the CTU approved the CBA on August 28, 2007. According to testimony from Marc Wigler, vice president of the CTU, the Fresh Start agreement was subsequently incorporated by reference into the 2007--12 CBA. The Board asks this court to take judicial notice of the fact it and the CTU executed an agreement to amend the CBA to include the Fresh Start agreement on December 19, 2007, retroactive to the start of the 2007-08 school year. A certified copy of the amendment was filed with the Illinois State Board of Education on May 5, 2008. Walczak did not object in her reply brief, and this court will take judicial notice of the document. Wigler testified that the CTU members at Wells voted to approve the Fresh Start program at their school, with Walczak present, with a positive vote of 95% while only a superapproval vote in excess of 80% was required to initiate the program. Walczak did not seek to transfer from Wells after the Fresh Start program was approved at Wells despite the opportunity to do so.

¶ 52 Walczak concedes the parties to a collective bargaining agreement do not need to reduce

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their agreement to writing to give it legal and binding effect. Rather, “[a]ll that is required is conduct manifesting an intention to abide and be bound by the terms of an agreement.” (Internal quotation marks omitted.) *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration, Inc.*, 385 F. 3d 761, 766 (7th Cir. 2004) (quoting *Spurgin-Dienst v. United States*, 359 F. 3d 451, 453 (7th Cir. 2004)). Walczak argues that the CTU does not have carte blanche authority to bind its members to unsigned agreements. In support of this argument, she cites the facts from *Bricklayers*, where an employer was considered bound to an unsigned agreement only after the court determined that his seven-year course of conduct, including the company’s regular monthly contributions, payment of union wages, remission of union dues, failure to challenge jurisdictional authority created by the collective bargaining agreement, and other activities consistent with such conduct, manifested an intent to be bound by the terms of the agreement. *Bricklayers*, 385 F. 3d at 768-69.

¶ 53 We cannot say *Bricklayers* supports Walczak’s argument. Rather, *Bricklayers* refutes Walczak’s claims. According to the record, the Fresh Start program initially was to be tested during a 5-year period. The Fresh Start pilot program for tenured teachers’ evaluation began during the 2007-08 school year. Wells was one of eight schools in the pilot program. Prior to the program beginning at Wells, Walczak was given an opportunity to transfer to another school not covered by the Fresh Start program--she declined to do so. She also signed the “FS School Program Remediation Plan.” She agreed to participate in the her remediation plan, then went through 20 weeks of remediation. We conclude Walczak manifested an intent to be bound by the Fresh Start remediation program. *Bricklayers*, 385 F. 3d at 768-69. Therefore, based on the

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record before us, we find that the Fresh Start program was not void at the time of Walczak's remediation.

¶ 54

2. Defective Remediation Claim

¶ 55 Walczak next argues that the remediation process was defective. The Fresh Start program requires mentors to be “willing and able to make good faith evaluations of tenured teachers' performance.” Walczak argues her remediation is invalid because the Hearing Officer found that Kelly is not able to make good faith evaluations of her performance. The Fresh Start program also requires the teacher's principal to observe the teacher during the remediation period. At the end of the remediation period, the principal must evaluate the teacher's performance in accordance with the guidelines established in the Fresh Start agreement and make a determination of whether the teacher's performance is meeting expectations. Walczak argues that her entire remediation process is void because the Hearing Officer's findings demonstrate that Jackson did not evaluate Walczak's performance “from the objective standpoint envisioned and embodied in the ‘criteria and rubrics’ under the Fresh Start program.” Specifically, Walczak argues that the Hearing Officer found that Jackson was biased, and the environment in which Walczak was to be remediated was not fair because Walczak did not have a legally mandated special education teacher or advisor to assist her in the classroom. Walczak asserts that the failure to provide a qualified mentor, or to evaluate her performance in a fair environment, were failures or omissions in the requirements of the remediation process which substantially affected her rights.

¶ 56 Walczak cites *Chicago Board of Education v. Smith*, 279 Ill. App. 3d 26, 28 (1996), in

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support of her claim that a termination is void when there is a failure to strictly adhere to the requirements of the remediation program and those failures or omissions substantially affect the teacher's rights. In *Smith*, a teacher was discharged for failure to successfully complete remediation. *Smith*, 279 Ill. App. 3d at 28. At the end of the remediation period the teacher was not given an evaluation or a rating by the principal as required by the statute. Instead the teacher was given a form which stated that the teacher had failed to comply with "the following items," then listed "almost verbatim" the remediation plan. *Id.* at 35. The *Smith* court found that "[i]f the hearing officer correctly determined that Smith did not receive an evaluation as mandated under the School Code, the Handbook, and the CBA, the dismissal was void." *Smith*, 279 Ill. App. 3d at 32. The court found that the form given to the teacher at the end of the remediation could in no way be construed as an evaluation and a rating. *Id.* Therefore, the teacher's written discharge was void due to a failure to follow the procedural steps in the disciplinary process. *Id.*

¶ 57 *Smith* is inapplicable to this case because Walczak has not pointed to any omissions from or failures to comply with any of the procedural requirements set forth in the School Code or the Fresh Start agreement. *Smith*, 279 Ill. App. 3d at 31. In this case, Walczak does not argue the Board skipped any procedural steps in her disciplinary process; rather, she argues that because (1) the Hearing Officer's report found Kelly was unqualified to be a mentor to a tenured teacher or make evaluations; and (2) the report found principal Jackson was biased against Walczak, the process was defective.

¶ 58 In regard to the mentor Kelly, the Board made a finding that Kelly was qualified. The qualifications to be a mentor are set forth with specificity in the Fresh Start agreement. The

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record supports the finding that Kelly has all the credentials required to be a mentor under the Fresh Start agreement. Moreover, we note the Hearing Officer's report stated that Kelly is "paper qualified." Accordingly, we find that Kelly was qualified to be a mentor to Walczak. Therefore, her appointment to be Walczak's mentor did not violate any procedural rules.

¶ 59 The Board also rejected the Hearing Officer's conclusion that Jackson was biased due to Walczak's race and age because it was not supported by the record. Walczak argues on appeal that the Hearing Officer's findings constitute a general finding of bias, rather than a specific bias against teachers of Walczak's race or age. The Hearing Officer found that much of Jackson's "actions reported by other witnesses in their testimony, her own testimony, and her conduct at the hearing suggests a bias against this grievant and a less than supportive role in evaluating the grievant or helping the grievant in the remediation process." The Hearing Officer did not find that any biases tainted the evaluation of Walczak's performance, the report only suggests that biases may have hindered Walczak's ability to remediate her performance to a satisfactory level. Because Jackson's role in the remediation process was not to correct Walczak's performance, only to evaluate her performance, the Hearing Officer's conclusions regarding Jackson's alleged bias are irrelevant.

¶ 60 There is no requirement that Kelly and Jackson be supportive. To the extent the Hearing Officer's recommendation suggests that Jackson's alleged bias led to "a less than supportive role in evaluating the grievant or helping the grievant in the remediation process," the Board rejected any conclusion that Jackson had that obligation to Walczak. The Board's finding that Jackson had no legal obligation to support or assist Walczak, but only to evaluate her performance, is

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found in the language of the Fresh Start agreement. Nothing in the School Code provides that the evaluating principal must be a cheerleader for a teacher undergoing remediation. The rules merely require that an evaluator must be capable of issuing a fair evaluation. The issue of whether Jackson was biased against Walczak would go to her credibility as a witness. However, in this case, Walczak does not argue that the decision of the Board is contrary to the manifest weight of the evidence. She also does not point to any rule or statute which would disqualify an evaluator.

¶ 61 The evidence submitted at the hearing that Walczak did not comply with the requirements of the remediation plan was largely uncontradicted and there were no procedural steps that were not followed as was the case in *Smith*. Therefore, we do not find the process was deficient.

¶ 62 3. Due Process Claim

¶ 63 We next consider Walczak's claims that the Board violated her constitutional right to due process when it substituted its own factual determinations for those made by the Hearing Officer. A public employee, who may be terminated only for cause, has a property interest in her employment within the meaning of the due process guarantees of the United States and Illinois constitutions. *Prato v. Vallas*, 331 Ill. App. 3d 852, 867 (2002). The employer may not terminate such an employee--thereby depriving her of this property interest--without due process of law. *Id.* at 868. Walczak cites *Hearne*, 322 Ill. App. 3d 467, for the proposition that it is inappropriate for the Board to make its own credibility and factual determinations, and must base its decision only on the facts found by the Hearing Officer. *Id.* at 479-80. Walczak argues *Homefinders Inc. v. City of Evanston*, 65 Ill. 2d 115 (1976), supports her reading of *Hearne*.

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Walczak also cites *Ruther v. Hillard*, 306 Ill. App. 3d 997, 1005 (1999), for the proposition that the Board should have required the participation of the Hearing Officer in the proceedings before making its decision if there was any questions with regard to the findings and where credibility is a key issue.

¶ 64 Under section 34-85 of the School Code, the Hearing Officer acts as the fact-finder. 105 ILCS 5/34-85 (West 2006) (“The hearing officer shall hold a hearing and render findings of fact and a recommendation to the general superintendent.”). “The hearing officer shall *** report to the general superintendent findings of fact and a recommendation as to whether or not the teacher or principal shall be dismissed ***. The board, within 45 days of receipt of the hearing officer’s findings of fact and recommendation, shall make a decision as to whether the teacher or principal shall be dismissed from its employ.” 105 ILCS 5/34-85 (West 2006). In the capacity of fact finder, the Hearing Officer hears the testimony of witnesses, determines their credibility and the weight to be given their statements, and draws reasonable inferences from all evidence produced in support of the charges against the accused. *Ahmad*, 365 Ill. App. 3d at 162; 105 ILCS 5/34-85 (West 2006). The Hearing Officer’s “recommendation” in a cause involving the dismissal of a tenured teacher is just that--a recommendation. The Board is vested with the final administrative decision on teacher removal. *Raitzik*, 356 Ill. App. 3d at 832. Thus, the Board may adopt or reject the Hearing Officer’s recommendation. *Ahmad*, 365 Ill. App. 3d at 162.

¶ 65 In *Hearne*, this court noted that “[d]ue process *** may require sufficient interaction and participation between the hearing officer and the board when the evidence before the hearing officer is in conflict and the resolution of the credibility and weight of the testifying witnesses is

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the determining factor.” *Hearne*, 322 Ill. App. 3d at 479. This court found, “based on this record[,] that the Board failed to comply with procedural due process, when without sufficient interaction and participation of the hearing officer *** it rejected the decision of the hearing officer, made its own credibility determinations, and terminated plaintiff.” *Id.* at 479-80. The *Hearne* court made clear that it made its finding that the record did not reflect sufficient interaction and participation of the Hearing Officer to satisfy due process “in the particular factual context of this case.” *Id.* at 483.

“We are not saying that the hearing officer should participate in the decision making process of the board in every case or that the board should confer with the hearing officer in every case where the board rejects the recommendation of the hearing officer. However, where credibility is the determining factor and where as in this case the final decision making body reverses each and every credibility finding of the hearing officer, we believe the hearing officer should participate in the decision making process and the board should confer with the hearing officer.” *Hearne*, 322 Ill. App. 3d at 484.

¶ 66 In *Hearne*, the credibility of the witnesses was the determining factor because that case “involved a credibility dispute over whether [the] plaintiff allowed gambling in his classroom and acted improperly during [a] field trip.” *Hearne*, 322 Ill. App. 3d at 480. Because the credibility of the witnesses to the conduct at issue “was the determining factor in this case *** it was incumbent on the Board to have conferred with the hearing officer on the issue of credibility.” *Id.* at 483. Instead, the Board reweighed and reevaluated the credibility of the witnesses, then “entirely rejected the hearing officer’s credibility findings.” *Id.* Moreover, it did so without “any substantive discussion on why the Board chose to reject every single factual and

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legal finding that the hearing officer made.” *Id.* at 484. In that case, the Board’s written findings as to the bases of its rejection of the Hearing Officer’s findings only stated that the Hearing Officer erred in finding that a witness adverse to the plaintiff had been rebutted by three student-witnesses who supported the plaintiff’s position, and erred in finding that those three students were credible. *Hearne*, 322 Ill. App. 3d at 483. The Board in *Hearne* offered no explanation for its rejection of the Hearing Officer’s findings other than its conclusory statement. *Id.* at 485 (“The Board’s written findings in this case provides further evidence that the Board acted arbitrarily because the untitled and unsigned document containing those findings lacks any substantive discussion of the evidence and controlling legal principles.”).

¶ 67 Walczak argues the Board had no legal authority to make its own findings of fact and was required to accept the findings of the hearing officer. This argument has no merit and is contrary to law. “The findings and conclusion of the administrative agency on questions of fact shall be held to be *prima facie* true and correct.” 735 ILCS 5/3-110 (West 2006). “In determining whether the Board’s findings of fact are against the manifest weight of the evidence, we examine only the final decision of the Board--the agency charged with the administration and enforcement of the School Code which governs dismissal--not the decision of the trial court, nor that of the hearing officer, which is merely a recommendation to the Board.” *Raitzik*, 356 Ill. App. 3d at 823 (applying Administrative Review Law). “[T]here is no requirement *** that the [administrative agency] rehear the evidence in order to reject its officer’s findings and recommendations. *** [I]t is not bound to accept the findings of the arbitrator; whether or not it disagrees with the arbitrator, the Commission’s findings will not be disturbed on review unless

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contrary to the manifest weight of the evidence. [Citation.]” *Starkey v. Civil Service Comm’n*, 97 Ill. 2d 91, 100-01 (1983). See also *Ball v. Board of Education of the City of Chicago*, 2013 IL App (1st) 120136, ¶ 36 (“it was not arbitrary and capricious to reject the hearing officer’s finding without consultation”).

¶ 68 Here, the Board reviewed and considered the Hearing Officer’s report, ultimately finding that Walczak failed to successfully remediate. There is sufficient evidence in the record to support the finding. Indeed Walczak does not contend that she successfully completed remediation. As a result, we cannot say Walczak’s right to due process was violated.

¶ 69 Walczak claims that the Board failed to follow *Homefinders, Inc. v. City of Evanston*, 65 Ill. 2d 115, 122 (1976), in that it did not consider the evidence contained in the Hearing Officer’s report, did not base its determination on the report, and substituted its findings of fact for those of the Hearing Officer. In *Homefinders, Inc.*, 65 Ill. 2d at 122, our supreme court noted that “[t]he requirements of due process are met if the decision-making board considers the evidence contained in the report of proceedings before the hearing officer and bases its determinations thereon.” *Id.* at 128. The issue in that case was “whether the Fair Housing Review Board acted within the scope of the powers conferred upon it by ordinance when only four of its seven members conducted hearings and issued a report which made findings and imposed fines.” *Id.* Our supreme court held that because three members did not participate, the plaintiffs’ challenge to the composition of the Board and its authority to conduct hearings must be sustained. *Homefinders, Inc.*, 65 Ill. 2d at 126. The court found the weight of authority to be that due process is satisfied if an administrative board’s decision, after administrative proceedings

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conducted by a hearing officer who refers the case for final determination to a board which has not heard the evidence in person, is based on the evidence contained in a report of proceedings conducted by a hearing officer. Based on that finding, our supreme court rejected the argument that “due process requires that only those members of the Board who personally attended the hearings may participate in the determination of penalties.” *Id.* at 128. The court held that due process did not require actual participation, but that “the requirements of procedural due process would be met *** if those members who were not personally present at the hearings base their determination of penalties on the evidence contained in the transcript of such proceedings.”

Homefinders, Inc., 65 Ill. 2d at 129.

¶ 70 Walczak’s arguments under *Homefinders, Inc.* must fail because the *Homefinders, Inc.* court did not discuss how a board was to construe a hearing’s officer’s report of proceedings. The holding in *Homefinders, Inc.* is not a blanket restriction of an administrative board’s power to accept or reject a hearing officer’s findings of fact. The *Homefinders, Inc.* case does not require a board to adopt the hearing officer’s report. *Homefinders, Inc.* requires the board to base its decision on the record of the proceedings before the hearing officer.

¶ 71 Walczak’s reliance on *Hearne* is misplaced because that case is limited to those situations where credibility is the determinative factor in the final decision of the Board. *Hearne*, 322 Ill. App. 3d at 485 (“based on the totality of the circumstances, the Board in applying section 35–84 of the School Code *** did not sufficiently comply with the principles of due process by failing to confer with the hearing officer where credibility was the determinative factor in the final decision of the Board.”). The court in *Hearne* held due process does not require the board to

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defer to the finding of a hearing officer. *Hearne*, 322 Ill. App. 3d at 479.

¶ 72 The Board may reject the Hearing Officer’s findings if they are not supported by the entire record before the Board. In *Ball v. Board of Education of the City of Chicago*, 2013 IL App (1st) 120136, ¶1, “the Board accepted in part and rejected in part the hearing officer’s findings of fact, conclusions of law, and recommendation to reinstate Ball with a warning.” *Id.* The hearing officer had found that the conduct forming the bases of the allegations against the tenured teacher were “not a pattern of reckless behavior, but a moment of carelessness and neglect.” *Id.* at ¶21. “The Board disagreed with the hearing officer’s conclusion that this was simply a single day of carelessness.” *Id.* at ¶24. The Board terminated the teacher’s employment. *Id.*

¶ 73 In *Ball*, 2013 IL App (1st) 120136, ¶36, this court wrote as follows:

“[I]t was not arbitrary and capricious to reject the hearing officer’s finding without consultation. [Citation.] Unlike *Hearne*, credibility is not the determining factor and the Board did not produce a half-page decision with conclusory findings. [Citation.] Rather, the Board produced an extensive and well-reasoned decision, cited to testimony and video evidence in support of its conclusion, and even agreed with several of the hearing officer’s conclusions. The Board added some fact discussion and presented reasoning for rejecting the hearing officer’s conclusion that Ball *** was not reckless or grossly negligent. The Board’s thoughtful analysis of the facts and the law did not violate Ball’s due process rights ***.” *Id.*

¶ 74 In this case, the Board’s opinion and order states that after reviewing the transcript of the proceedings, documents, arguments, and the Hearing Officer’s recommendation, the Board rejected “certain of the Hearing Officer’s findings of fact and conclusions of law.” Further,

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unlike *Hearne*, the outcome of this case is not dependant on the credibility or demeanor of the witnesses. In *Hearne* the Board's witnesses and the teacher's witnesses gave conflicting accounts regarding whether gambling took place in a classroom. In contrast, in this case the Hearing Officer made certain findings regarding the qualifications of Walczak's evaluators and their biases, based on testimony he heard from the various witnesses at trial. The Hearing Officer made no finding that Walczak did successfully complete remediation. Regardless, the Hearing Officer's findings were not determined by the demeanor of the witnesses as they testified or their credibility, but are conclusions reached by the Hearing Officer after hearing the testimony of the various witnesses.

¶ 75 An example is the issue of whether Kelly was qualified to be a mentor. This is a matter of whether Kelly had the requisite credentials, not credibility. The Fresh Start program did not require Kelly to be certified to teach the same subjects as Walczak and the record shows Kelly was not certified to teach high school students. However, under the Fresh Start program Kelly's job was to help teach Walczak new teaching techniques. Although the Board disagreed with many of the Hearing Officer's findings, those findings were not based on the credibility or demeanor of the witnesses. Therefore the due process concerns raised in *Hearne* are not invoked here. In this case the Board reviewed the record and made findings that were not determined by the credibility and demeanor of the witnesses. Therefore, *Hearne* is not invoked. The Board did not violate Walczak's right to due process.

¶ 76 Nor do Walczak's arguments as to the Board's alleged violation of her right to due process have substantive merit.

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“[W]e may not substitute our judgement for that of the Board, and reversal of the Board’s decision is not justified simply because the opposite conclusion is reasonable or because we might have ruled differently. [Citation.]

Instead, in order for us to find that the Board’s decision is truly against the manifest weight of the evidence, we must be able to conclude that all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous ([citation]) and that the opposite conclusion is clearly evident.” *Raitzik*, 356 Ill. App. 3d at 823-24.

¶ 77 Walczak argues the Board violated her right to due process when it (1) rejected the Hearing Officer’s finding that Jackson lacked experience and maturity and was biased against Walczak; (2) found Kelly qualified to act as Walczak’s mentor despite the Hearing Officer’s express finding to the contrary; and (3) substituted its finding that Walczak’s classroom was *not* “filled” with “poorly behaved special education students” and did *not* require a special education teacher or assistant, for the Hearing Officer’s finding that Walczak struggled due to numerous special needs students without qualified assistance from a special education teacher.

¶ 78 “An agency’s findings of fact are considered *prima facie* true and correct, and we will reverse an agency’s findings only where they are against the manifest weight of the evidence. [Citation.] A finding is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence.” (Internal quotation marks omitted.) *Young-Gibson v. Board of Education of the City of Chicago*, 2011 IL App (1st) 103804, ¶56 (2011). The Board’s finding that Jackson was and is a competent school administrator is not against the manifest weight of the evidence. The

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Hearing Officer's report itself noted Jackson's testimony as to her education and experience. The report notes that Jackson is currently employed as an administrator working with new schools and turnaround schools. The Board's opinion and order states the specific evidence it relied on to find that Jackson "was and is a competent school administrator." The Board's opinion states that if it "believed Jackson was too inexperienced to be a principal, it would not have approved her placement on the Principal Eligibility List, nor would it have agreed to transfer her to an administrative position in a different school." Walczak does not refute any fact forming the basis of this conclusion.

¶ 79 The Hearing Officer speculated as to the factors that may have caused Jackson's alleged bias, but concluded that "this award makes no finding either way regarding those factors." Thus, other than the Board's specific rejection of specific biases, the Hearing Officer made no findings for the Board to reject.

¶ 80 The Board did not contravene the Hearing Officer's findings as to Kelly's qualifications to act as Walczak's mentor. Walczak's arguments that the Board's finding in this regard contradicts the Hearing Officer's finding is refuted by the record. The Board correctly found that the Hearing Officer did find that Kelly was qualified to act as Walczak's mentor/coach. The Board relied on the Hearing Officer's finding that "Kelly was merely and barely 'paper-qualified' to serve as a mentor/coach under the law, rules, and procedures governing the Board and this program, but she was only barely qualified and no more than barely qualified." The Hearing Officer also denied Walczak's motion to strike and disregard all testimony and conclusions by Kelly. Walczak moved to strike Kelly's testimony on the grounds "Kelly was not qualified to

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deliver any of her stated opinions. She was not qualified to help a 32-year experienced teacher with a different license, different grade, different background, different endorsements, and a teacher having a registered license with a superintendent of education as opposed to Kelly who does not have a registered license.”

¶ 81 Despite denying the motion, the Hearing Officer stated that the arguments in support of that motion “were used *** to give Kelly’s testimony much less weight.” The Board and the Hearing Officer disagree as to what weight Kelly’s testimony is due, not based on her credibility, but based on her experience. The Board stated its reasons for disagreeing with the Hearing Officer. The Board noted that in reaching his conclusion the Hearing Officer added a requirement to the agreement between the Board and the CTU regarding similarity of experience. The Board also found that the parties agreed Kelly was qualified when the Board and the CTU jointly hired Kelly for the position. The Board did not violate Walczak’s due process rights by rejecting the Hearing Officer’s determination that Kelly’s testimony was entitled to less weight based on her experience as a mentor.

¶ 82 Finally, the Board did not substitute alternate findings of fact for the Hearing Officer’s finding that Walczak struggled due to numerous special needs students without qualified assistance from a special education teacher. The Board rejected the Hearing Officer’s legal conclusion that Walczak’s classroom was required by law to be staffed with a special education teacher or assistant during the remediation period. The Board found that the only evidence that could establish whether such an obligation existed--Walczak’s students’ Individual Educational Plans (IEPs)--did not support that conclusion. See 105 ILCS 5/14-8.02 (West 2008)

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(Identification, Evaluation and Placement of Children); 23 Ill. Admin. Code § 226.200 (“Each school district shall provide special education and related services to eligible children in accordance with their IEPs.”).

¶ 83 On appeal, Walczak admits that the Hearing Officer’s conclusion that her classroom required special education assistance was based on testimonial evidence, but does not refute that any statutory obligation to staff special education teachers can only be determined from the students’ IEPs. The Board did not violate Walczak’s due process rights by construing the legal effect of the evidence. The Hearing Officer further speculated that if the principal was more supportive of Walczak, she could have successfully completed the remediation. We reject the implication that the Hearing Officer’s findings regarding Walczak’s students should lead this court to conclude that with better students she would have met expectations and for that reason, the Board’s decision should be reversed. At the end of the remediation period, Jackson was required to evaluate Walczak’s performance to determine whether her performance was meeting expectations under the evaluation criteria and rubrics established under the Fresh Start agreement. The Board correctly found that the issue before it was whether Walczak actually remediated her teaching, not whether she might be able to do so under different circumstances.

¶ 84 The Board’s findings are reasonable and unbiased. Therefore, we find that the Board’s findings are not against the manifest weight of the evidence.

¶ 85 4. Expert Witness

¶ 86 Finally, Walczak claims the Board violated her right to due process when it rejected the Hearing Officer’s determination that Blumenthal qualified as an expert and rejected

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Blumenthal's opinion as an expert about Walczak's performance and Blumenthal's criticism of Kelly's performance. The experience Walczak relies on to claim that Blumenthal had sufficient knowledge of the education system and the role of an educator to be qualified to testify as an expert in Walczak's case are that Blumenthal: (1) was a teacher, evaluator, and mentor in her roles as a co-department chair and "cooperating teacher for student teachers" who had been in the Chicago Public School system for about 30 years; (2) learned about and practiced pedagogical techniques as a student-teacher supervisor for three years at DePaul University and two to three years at the University of Illinois Champaign-Urbana; and (3) wrote CPS curriculum in 1980.

¶ 87 The Board's opinion states that it "rejects the Hearing Officer's finding that Blumenthal was qualified to give expert testimony in the area of adolescent psychology and further rejects any 'opinion' testimony she offered in that area." Walczak does not identify in her appellate brief any particular opinion offered by Blumenthal in the field of psychology which was rejected by the Board. Thus Walczak's claim is without merit.

¶ 88 Walczak argues that Blumenthal is "highly knowledgeable in terms of pedagogical techniques, the Chicago Public School system, and how to mentor teachers." At the hearing, the Board argued that Blumenthal was not qualified to render an opinion because she had never been an administrator responsible for formally evaluating a tenured teacher's performance. The Board's opinion does not find that Blumenthal was not qualified to testify as an expert in the field of teaching methodology. The Board's opinion does, however, reject Blumenthal's opinions about Walczak's performance as without basis in the record, as well as her criticisms of Kelly's performance as Walczak's mentor as contradicted by Blumenthal's own testimony.

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¶ 89 “An agency is free to make its own decision based on the evidence in the record and may accept or reject the hearing officer’s recommendations. [Citation.] But, a hearing officer’s findings, where demeanor is important, is an element to consider in reviewing whether substantial evidence supports the agency’s decision.” *Serio v. Police Board of the City of Chicago*, 275 Ill. App. 3d 259, 267 (1995). In *Serio*, the hearing officer made an oral report and conferred with the Board before a decision was reached. *Id.* at 266. However, that was not the dispositive fact in the court’s decision. The *Serio* court distinguished *Quincy Country Club v. Human Rights Comm’n*, 147 Ill. App. 3d 497, 500 (1986), which had held that “where credibility is a determining factor in a case, we believe the presiding administrative law judge must participate in the decision.” (Internal quotation marks omitted.) *Id.* (quoting *Quincy*, 147 Ill. App. 3d at 500). Rather, the *Serio* court found that “a compelling array of facts that are not undermined by questions of witness credibility support the Board’s decision ***.” See *Id.* Here, as in *Serio*, the Board’s rejection of Blumenthal’s opinions has nothing to do with her credibility, and her own testimony supports the Board’s decision to reject her opinions on Walczak’s performance and Kelly’s competence. The evidence shows Blumenthal did not observe Walczak’s remediation, but merely offered her opinion about the feasibility of teaching using the methods in the remediation plan. However, the Board determined the methods it wanted teachers to use to educate Walczak’s students. Walczak agreed to adopt the methods outlined in the remediation plan to keep her job. Blumenthal’s opinions about the benefit of these methods is irrelevant. Moreover, the Board noted in its opinion that Blumenthal never observed Walczak’s classroom during the 2007--08 school year and admitted a lack of firsthand knowledge of

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Walczak's performance during that school year, or of how Wells operated. Rather, Blumenthal's opinions were based on reading the transcript of Kelly's testimony and skimming Kelly's mentor logs. The Board also noted that the reasons Blumenthal criticized Kelly's performance--specifically her failure to review lesson plans or student rosters--were unsupportable because Blumenthal admitted that Kelly's logs repeatedly refer to Walczak's lesson plans and note her review of Walczak's student rosters. The Board did not violate Walczak's right to due process when, based on the objective record, it rejected Blumenthal's opinions. *Homefinders, Inc.*, 65 Ill. 2d at 129.

¶ 90

5. Conclusion

¶ 91 For the foregoing reasons, the Board's decision is confirmed and the judgment of the circuit court is affirmed.

¶ 92 Affirmed.