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NO. 4-16-0801

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Carla Bender
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IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

BOARD OF EDUCATION OF A-C CENTRAL COMMUNITY UNIT SCHOOL DISTRICT 262, Petitioner-Appellant, v. THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, and A-C CENTRAL EDUCATION ASSOCIATION, IEA-NEA, Respondents-Appellees.	))))))))	Direct Review of The Illinois Educational Labor Relations Board No. 2013-CA-0007-S

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Harris and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the union's challenge of a teacher's 2012 performance evaluation was not moot, (2) the Board's finding that the school district engaged in unfair labor practices by retaliating against a union officer was not clearly erroneous, and (3) the Administrative Law Judge committed no procedural errors requiring reversal.

¶ 2 In August 2012, respondent, A-C Central Education Association, IEA-NEA (Association), filed with corespondent, the Illinois Educational Labor Relations Board (Board), a complaint for unfair labor practices against the petitioner, the Board of Education of A-C Central Community School District 262 (District). The allegations arose when a teacher within the District, Diane Sieving, received an uncharacteristically low evaluation shortly after she took on the role of Association president. The complaint proceeded to a hearing, and the administrative law judge (ALJ) subsequently issued a recommendation in Sieving's favor. The Board later adopted the ALJ's factual findings and recommendation.

¶ 3 The District appeals, arguing (1) the Association's cause of action is moot, (2) the Board's finding that the District committed unfair labor practices was clearly erroneous, and (3) the procedural errors during the hearing deprived the District of due process and caused substantial harm. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2012, the Association filed an unfair labor practices charge under sections 14(a)(1) and (a)(3) of the Illinois Educational Labor Relations Act (Act) (115 ILCS 5/14(a)(1), (a)(3) (West 2012)) with the Board. The charge alleged, since February 2012, the District discriminated and retaliated against Sieving due to her position as the Association president. Specifically, the charge stated the Board issued Sieving an overall summative performance evaluation rating of satisfactory in 2012 in retaliation for her representation of bargaining unit members in grievances and disciplinary matters, and the evaluation rating increased her chances of being laid off due to a reduction in force (RIF). Further, the charge alleged, since August 2012, the District imposed more onerous working conditions on Sieving than on other tenured teachers by seeking to review her work more frequently. In part, the Association sought relief requiring the Board to (1) cease and desist its illegal conduct, (2) rescind Sieving's satisfactory summative evaluation rating and replace it with an "outstanding" or "excellent" rating consistent with her 11 most recent performance evaluations, (3) post appropriate notice to employees, and (4) make Sieving whole for any lost wages or benefits, with interest, resulting from the District's illegal conduct.

¶ 6 A. The Association's Prehearing Memorandum

¶ 7 In November 2015, the Association filed a prehearing memorandum pursuant to section 1105.140(a) of the Illinois Administrative Code (Code) (80 Ill. Adm. Code. 1105.140(a)

(2014)). With respect to Sieving, the memorandum stated she would provide "[t]estimony regarding her representation of union members, [and] reactions to that representation from administration."

¶ 8 B. The District's Motion To Dismiss

¶ 9 In March 2016, the District filed a motion to dismiss, asserting the case was moot because Sieving's 2016 evaluation controlled her RIF status. Accordingly, the District asserted the 2012 evaluation no longer had any legal effect that could support a remedy. When the ALJ issued its decision, it denied the District's motion to dismiss, finding "[t]he passage of time does not change the fact that the District took these actions and does not resolve the issue of whether, in taking these actions, the District violated the [Act]."

¶ 10 C. The ALJ's Decision

¶ 11 Following a hearing, in June 2016, the ALJ filed a lengthy recommended decision and order.

¶ 12 1. *The ALJ's Findings of Fact*

¶ 13 a. June 2011 Meeting with Principal Dan Williams

¶ 14 In June 2011, Sieving met with her principal, Dan Williams, in her capacity as Association president to represent the interests of another Association member. During the meeting, Sieving told Williams she would provide representation to all Association members because that was one of her duties as Association president. Williams responded that she was a more aggressive and confrontational Association president than other Association presidents he had worked with in the past.

¶ 15 b. Contract Negotiations in Summer 2011

¶ 16 The Association's collective-bargaining agreement with the District expired in June 2011, and Sieving was part of the Association's bargaining team. During one of the bargaining sessions in the summer of 2011, Sieving suggested the District give advance notice to Association members who were being administratively transferred to another position. The superintendent of the District at the time, Rebecca Canty, told Sieving that not all Association members deserved representation and that defending against every grievance was not cost-effective for the District.

¶ 17 c. Public Meeting Regarding Consolidation

¶ 18 On February 8, 2012, the District held a joint public meeting to discuss the possibility of merging with another school district. Sieving, in her role as Association president, spoke in favor of consolidation. Although Sieving testified her position was not well received by the District, the District disputed that characterization. In a footnote, the ALJ stated it need not make any credibility determinations with respect to this incident because the findings would not impact the outcome of the case.

¶ 19 d. Sieving's 2012 Evaluation

¶ 20 Also on February 8, 2012, Williams conducted an in-class observation of Sieving for purposes of completing her biennial evaluation. This was the first evaluation Sieving received since becoming Association president. Prior to the 2012 evaluation, Sieving had received excellent summative ratings on her evaluations dating back to 1994.

¶ 21 On February 13, 2012, Williams and Sieving met to review a proposed copy of the evaluation. Under one of the subcategories of "domain 4"—meeting professional expectations in her interactions with faculty, staff, and administration—Sieving received a dual-

rating of satisfactory and unsatisfactory. In the comment section, Williams commented on three instances where Sieving was confrontational that justified a lower marking.

¶ 22 First, Williams stated Sieving entered another teacher's classroom and discussed an expectation of that teacher when students were present. Second, the evaluation noted a December 2011 incident where Sieving confronted office staff about a bill to repair damages to her son's school laptop (laptop incident). Third, Sieving sent an e-mail to the entire middle school staff about a bussing issue rather than e-mailing the person responsible for that issue. Sieving disputed all three incidents, and Williams agreed to investigate further. During the meeting, Williams again commented that Sieving was the most aggressive Association president he had ever worked with.

¶ 23 Williams and Sieving met again the next day to discuss Williams's investigation into the three incidents. Williams spoke with the teacher who had reported that Sieving confronted him in class, and the teacher recanted his original statement. Williams therefore agreed to remove the comments that pertained to the incident with the teacher. Additionally, Williams removed comments relating to the bussing e-mail. However, he refused to remove the laptop incident from the evaluation. During the hearing, Williams admitted he did not mention the laptop incident to Sieving at the time it occurred because he did not want the office staff member who reported the behavior to feel uncomfortable. Williams could not recall which other witnesses he spoke with about the incident. Sieving was not issued a reprimand or otherwise disciplined for this incident. When asked for documentation of his investigation, Williams testified he did not place any notes about the incident in Sieving's personnel file; rather he kept notes for his own personal reference.

¶ 24 Despite removing two of the three negative comments on Sieving's evaluation, Williams continued to give Sieving a dual-rating of satisfactory and unsatisfactory on the subcategory of "domain 4," and he gave her an overall summative rating of satisfactory. Williams gave her a summative satisfactory rating rather than an excellent rating because the unsatisfactory rating on "domain 4" precluded him from giving her a summative rating of excellent.

¶ 25 e. February 2014 Evaluation

¶ 26 In February 2014, Sieving received an overall summative rating of proficient in an evaluation conducted by a new principal, Bob Sanders. Due to an overhaul in the evaluation process, a proficient rating was the most common rating for teachers, and was commensurate with a satisfactory rating.

¶ 27 f. Prior Incidents of Misconduct

¶ 28 The ALJ also noted a prior instance of alleged misconduct involving Sieving. In February 2009, Sieving received a written reprimand after she had a confrontation with a construction worker in her classroom. Although the District highlighted this action during the hearing, the ALJ noted the confrontation with the construction worker was not mentioned or used against Sieving in her 2010 evaluation.

¶ 29 g. Pending Grievances

¶ 30 On February 24, 2012, Sieving filed a grievance regarding the 2012 summative evaluation. The status of the grievance was unknown at the time of the hearing.

¶ 31 In May 2012, Sieving filed another grievance following a dispute over coverage for a class. When a group of teachers complained to Sieving that they had been assigned to share an additional class, Sieving, in her capacity as Association president, told Williams the teachers

were exercising their contractual rights to decline the extra class. Williams immediately assigned Sieving to the extra class, and the District refused to rescind the assignment until after Sieving filed a grievance.

¶ 32 2. *Rulings on Objections*

¶ 33 The ALJ also noted the District's objections raised during the hearing. The District objected to Sieving testifying about (1) her 2012 evaluation, (2) Canty's statements made during the bargaining sessions, and (3) Sieving's statements made during the District's consolidation meeting because the Association failed to include that information in a prehearing memorandum. See 80 Ill. Adm. Code 1105.140(a)(3) (2014). The ALJ overruled the objection, concluding the Association's prehearing memorandum encompassed the aforementioned testimony.

¶ 34 The District also objected to Sieving testifying about statements made by the mediator during the summer 2011 bargaining session, in which the mediator allegedly reprimanded Canty for saying not all Association members deserved representation. The District argued the statements were outside the scope of the prehearing memorandum and also constituted hearsay. The ALJ found the statements were within the scope of the prehearing memorandum but declined to address the hearsay argument because it did not consider the mediator's comments in reaching a decision.

¶ 35 3. *The ALJ's Decision*

¶ 36 The ALJ found that Sieving presented a *prima facie* case after showing, by a preponderance of the evidence, that (1) she engaged in union activity, (2) the District was aware of the activity, and (3) the District took adverse action against her due to her Association activity or that her Association activity was a substantial or motivating factor. As to the third factor, the

ALJ found that changing Sieving's work schedule, even if it was later rescinded, and giving her a lower evaluation rating were adverse actions. Further, the District expressed hostility toward unionization where (1) Canty told Sieving that not all members deserved representation, and (2) Williams commented on numerous occasions about Sieving's aggressive behavior as Association president.

¶ 37 The ALJ also highlighted the District's disparate responses to two incidents involving Sieving. In 2009, Sieving was involved in an unprofessional confrontation with a construction worker in her classroom that resulted in a written reprimand. However, the incident, which Williams deemed more serious than the laptop incident, did not negatively impact Sieving's 2010 evaluation. Conversely, the laptop incident, which occurred during Sieving's Association presidency, resulted in a negative evaluation despite the lack of any official investigation or written reprimand. Under the circumstances, the ALJ found the action to be retaliatory in nature.

¶ 38 Once Sieving established a *prima facie* case, the burden shifted to the District to demonstrate, by a preponderance of the evidence, that it had a legitimate business reason for its actions and that the employee would have received the same treatment absent her union activity. Given the close relationship between the adverse actions against Sieving and her Association presidency, the ALJ found the District failed to meet its burden of demonstrating a legitimate basis for its actions and that Sieving would have been treated the same if she were not the Association president. Accordingly, the ALJ found in favor of Sieving and concluded the District violated sections 14(a)(1) and (a)(3) of the Act. The ALJ therefore recommended the District (1) cease and desist retaliation against Sieving and others for their Association activities; (2) cease and desist interfering with, restraining, or coercing its employees in the exercise of

their rights under the Act; and (3) expunge Sieving's 2012 evaluation and post notice of its actions for employees to see.

¶ 39 The ALJ also denied the District's motion to dismiss for mootness, finding, despite the passage of time rendering her less vulnerable, the District took adverse actions against Sieving that, for at least a brief period, rendered her subject to a RIF.

¶ 40 D. The District's Exceptions

¶ 41 In June 2016, the District filed exceptions to the ALJ's recommended order, including the issues raised in this appeal.

¶ 42 E. The Board's Order

¶ 43 In October 2016, the Board filed its opinion and order adopting the ALJ's recommendations. The Board expressly adopted the ALJ's findings of fact and credibility determinations. The Board agreed with the ALJ that Sieving's evaluation was not moot despite an intervening 2016 evaluation because, without action from the Board, the 2012 evaluation would remain in Sieving's personnel file and could be used against her in the future.

¶ 44 The Board found the District engaged in adverse action against Sieving when it assigned her an extra class and gave her negative marks on her 2012 evaluation. With respect to the extra class, the Board found evidence of an adverse action where Sieving was assigned the extra class within hours of representing teachers—in her capacity as Association president—who declined to take the extra class. Further, the District did not reassign the class position until Sieving filed a grievance, finding that the later correction of conduct does not eliminate the violation, but merely affects the remedy. According to the Board, the record also failed to reflect that it would have been more suitable for Sieving to take the additional class rather than other teachers.

¶ 45 The Board also highlighted Williams's and Canty's hostility toward Sieving's actions as Association president. According to the Board, the timing of Sieving's negative evaluation was suspicious, as it arose shortly after she spoke in favor of consolidation in her capacity as Association president. Prior to becoming Association president, Sieving received excellent summative ratings, despite having a written reprimand for the 2009 incident involving the construction worker. The Board determined the District's actions, such as holding the laptop incident against Sieving without an investigation or written reprimand, demonstrated a lack of a legitimate business reason for the lower evaluation.

¶ 46 Accordingly, the Board found the District violated sections 14(a)(1) and (a)(3) of the Act.

¶ 47 This appeal followed.

¶ 48 II. ANALYSIS

¶ 49 On appeal, the District asserts we should reverse the Board's decision, as (1) the case is moot, (2) the Board's finding the District violated sections 14(a)(1) and 14(a)(3) of the Act was clearly erroneous, and (3) the District was substantially harmed by procedural errors made during the hearing that resulted in a denial of due process.

¶ 50 A. Mootness

¶ 51 The District first asserts the Board erred by denying its motion to dismiss for mootness.

¶ 52 "An appeal is considered moot if no actual controversy exists or if events have occurred that make it impossible to grant the complaining party effectual relief." *Fisch v. Loews Cineplex Theatres, Inc.*, 365 Ill. App. 3d 537, 539, 850 N.E.2d 815, 818 (2005). Whether an

issue is moot is a question of law we review *de novo*. See *In re Rita P.*, 2014 IL 115798, ¶ 30, 10 N.E.3d 854.

¶ 53 Because Sieving has undergone new evaluations since the 2012 evaluation that now control her likelihood of a RIF, the District argues the Board's decision is moot. The Board disagrees, arguing the District may use Sieving's past evaluations in determining future discipline, so the issue is not moot.

¶ 54 In support of its argument that the issue is moot, the District relies on two cases: *National Jockey Club v. Illinois Racing Comm'n*, 364 Ill. 630, 5 N.E.2d 224 (1936), and *Edwardsville School Service Personnel Ass'n v. Illinois Educational Labor Relations Board*, 235 Ill. App. 3d 954, 600 N.E.2d 910 (1992). In *National Jockey Club*, the plaintiff challenged the 1936 racing schedule, but by the time the case reached the supreme court, the racing season was over. *National Jockey Club*, 364 Ill. at 631, 5 N.E.2d at 225. Because the racing season was over, the supreme court concluded the issue was moot, as it could grant no effective relief to the parties. *Id*. at 632, 5 N.E.2d at 225.

¶ 55 The District argues, like *National Jockey Club*, it would be impossible to grant Sieving any relief because her 2012 evaluation can no longer be used to make her more susceptible to a RIF. As the Board points out, the present case is distinguishable. In *National Jockey Club*, the 1936 racing season was over by the time the case reached the supreme court, so it was impossible to afford the plaintiff any relief with respect to scheduling that season. Here, however, Sieving's 2012 evaluation remains in her personnel file, meaning it could be considered by the District in making future decisions about Sieving's employment.

¶ 56 We similarly find the District's reliance on *Edwardsville* misplaced. In *Edwardsville*, the petitioner had been the exclusive bargaining representative for the school

district. *Edwardsville*, 235 Ill. App. 3d at 955, 600 N.E.2d at 912. Members of the school district sought to split into separate bargaining groups, a move to which the petitioner objected. *Id*. at 955-56, 600 N.E.2d at 912. The Board found the employees should be permitted to vote on the severance, and the employees subsequently voted to remain in their current bargaining unit. *Id*. at 956, 600 N.E.2d at 912. Nevertheless, the petitioner appealed the Board's finding, asserting the employees should not be permitted to vote for separate units. *Id*. at 957, 600 N.E.2d at 913. Because the bargaining unit remained intact with petitioner as the exclusive bargaining representative, the appellate court determined the issue was moot, as petitioner's legal position as the exclusive bargaining representative had not changed. *Id*. at 958, 600 N.E.2d at 914.

¶ 57 Although *Edwardsville* pertains to litigation involving a school district and the Board, the case does not address a personnel situation such as the one at issue in this case. Here, the contents of Sieving's personnel file—including her 2012 evaluation—remain in her file throughout the duration of her career. We note that during the proceedings below, the parties referenced Sieving's evaluations dating back to 1994 to establish her history of excellent summative rating as well as a written reprimand regarding the 2009 incident with the construction worker. Thus, the record establishes the ongoing effect of evaluations and other contents of District personnel files.

¶ 58 Moreover, the District overlooks the overarching purpose for the case brought before the Board—to address Sieving's claims that the District's 2012 evaluation was an act of discrimination and retaliation against her due to her role as Association president. The Association sought redress for the District's discrimination as reflected in the evaluation, not just

for a subpar evaluation score. As a result, an active controversy remains and it was not impossible for the Board to grant relief. The issue is therefore not moot.

¶ 59 We now turn to the merits of the appeal.

¶ 60 B. Sufficiency of the Evidence

¶ 61 The District next argues the Board erred in concluding the District committed unfair labor practices under the Act (115 ILCS 5/14(a)(1), (a)(3) (West 2012)). We utilize three standards of review when analyzing administrative decisions. "An administrative agency's findings of fact are deemed to be *prima facie* true and correct." *Chicago School Reform Board of Trustees v. Illinois Educational Labor Relations Board*, 315 Ill. App. 3d 522, 527, 734 N.E.2d 69, 73 (2000). We will not disturb the Board's factual findings unless they are against the manifest weight of the evidence. *Id*. To the extent the Board made findings on an issue of law, our review is *de novo*. *Id*. However, where there is a mixed question of law and fact, we will overturn the Board's decision if it is clearly erroneous. *Id.* at 528, 734 N.E.2d at 73. Because the present case involves a mixed question of law and fact, we employ the clearly erroneous standard of review.

¶ 62 The Association's charge of unfair labor practices alleged violations of sections 14(a)(1) and 14(a)(3) of the Act (115 ILCS 5/14(a)(1), (a)(3) (West 2012)). Under section 14(a)(1) of the Act, educational employers are prohibited from "[i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act." 115 ILCS 5/14(a)(1) (West 2012). Under section 14(a)(3), educational employers are prohibited from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization." 115 ILCS 5/14(a)(3) (West 2012).

¶ 63 When the alleged violations of section 14(a)(1) and 14(a)(3) are based on the same conduct, the violation of section 14(a)(1) is considered a derivative action, and we employ the test set forth for cases involving section 14(a)(3). *Bloom Township High School District 206 v. Illinois Educational Labor Relations Board*, 312 Ill. App. 3d 943, 957, 728 N.E.2d 612, 623 (2000). The test under section 14(a)(3) requires the charging party to first present *prima facie* evidence of a violation. *Thornton Fractional High School District No. 215 v. Illinois Educational Labor Relations Board*, 404 Ill. App. 3d 757, 766, 936 N.E.2d 1188, 1197 (2010). "To establish a violation of section 14(a)(3) and section 14(a)(1) of the Act, the charging party must prove (1) the employee was engaged in protected union activity; (2) the employer was aware of that activity; and (3) the employer took adverse action against the employee for engaging in the activity." *Id.* We therefore examine whether the Association met its burden in establishing a *prima facie* case.

¶ 64 1. Prima Facie *Case*

¶ 65 In reaching its decision, the Board relied on the findings of fact by the ALJ. The ALJ determined (1) Sieving, acting as the Association president and a teacher for the District, was engaged in an activity protected under the Act; and (2) the District was aware she was a District teacher and Association president. Those two findings, which address the first two elements of a *prima facie* case, are not at issue. Rather, the District contests the Board's findings as to the third element.

¶ 66 The District argues there was insufficient evidence that it took adverse action against Sieving due to her role as Association president. To establish a *prima facie* case as to the third element, the union must demonstrate the "antiunion animus was a substantial or motivating

factor in the District's decision to make adverse employment decisions." *Id.* at 767, 936 N.E.2d at 1197. Antiunion animus may be inferred from a variety of factors, including:

> "an employer's expressed hostility toward unionization together with knowledge of the employee's union activities, proximity in time between the employee's union activities and his or her discharge, disparate treatment of employees or a pattern of conduct that targets union supporters for adverse employment action, inconsistencies between the proffered reason for discharge and other actions of the employer and shifting explanations for the discharge." *Id.*

¶ 67 First, the District argues Sieving's satisfactory summative rating on the 2012 evaluation was not an adverse action because it did not harm her. In support, the District relies on the Board's decision in *Logan v. City of Chicago*, 31 Pub. Employee Rep. (Ill.) ¶ 129 (IELRB 2015), which stated, "while an action need not necessarily have an adverse tangible consequence under [the Illinois Public Labor Relations Act] provisions, there must be some qualitative change or actual harm to an employee' s terms or conditions of employment." In *Logan*, the charging party asserted his municipal employer filed notice that it was initiating a second predisciplinary hearing against him in retaliation for him filing an unfair-labor-practices complaint. *Id.* The Board found the issuance of notice of a second disciplinary hearing was not an adverse action, as the hearing constituted, at most, a threat of discipline. *Id.*

¶ 68 According to the District, similar to *Logan*, Sieving's satisfactory evaluation caused no qualitative change or actual harm to Sieving's terms or conditions of employment. In making this argument, however, the District minimizes the fact that Sieving had a history of

excellent summative ratings until the 2012 evaluation and, as a result, she was placed at more of a risk for a RIF than she had been in the past. The District points to testimony from the current superintendent, Timothy Page, who stated, despite Sieving's lower 2012 evaluation rating, she would not be subject to a RIF because she still had seniority over most teachers in the District. Page also noted Sieving faced no reduction in wages or benefits, nor had she been remanded since the 2012 evaluation.

¶ 69 However, the District's argument overlooks that the lower evaluation rating also remains in Sieving's personnel file, and could therefore be used against her in future employment proceedings. The Board determined this lower rating was directly correlated with the District's attempts to retaliate against Sieving for her aggressive stances as Association president.

¶ 70 The District further argues the satisfactory rating Sieving received was appropriate, as it identified a need for improvement after Sieving's unprofessional conduct regarding the laptop incident. The District points out that just because it chose not to use a prior instance of misconduct—the 2009 incident with the construction worker—against Sieving in her 2010 evaluation, it was not precluded from using a subsequent instance of misconduct—the laptop incident—in the 2012 evaluation. See *Board of Education of City of Peoria, School District No. 150 v. Illinois Educational Labor Relations Board*, 220 Ill. App. 3d 984, 993, 581 N.E.2d 395, 400 (1991) (a school district could terminate an employee following repeated unprofessional conduct). However, the ALJ—and by extension, the Board—was not required to accept Williams's explanation that a single incident warranted a lower rating on the 2012 evaluation. See *Speed District 802 v. Warning*, 242 Ill. 2d 92, 149, 950 N.E.2d 1069, 1101 (2011) (it is the ALJ's function to determine the credibility of witnesses).

¶ 71 In support of its finding, the Board highlighted the 2009 incident in which Sieving confronted a construction worker. The Board found—and Williams conceded—the laptop incident was far less serious and resulted in no written or verbal reprimand, yet it was used against Sieving in her evaluation. Although Williams explained he did not include the 2009 incident in Sieving's 2010 evaluation because it occurred during the prior school year, again, the Board was not required to accept Williams's explanation. *Id.*

¶ 72 Second, with respect to the District assigning Sieving an additional class, the District argues that suspicious timing alone is insufficient to support antiunion animus. See *Thornton Fractional High School District No. 215*, 404 Ill. App. 3d at 768, 936 N.E.2d at 1198 (concluding the school district's decision to promote another employee over an employee who recently became a union officer was insufficient to demonstrate antiunion animus); *Hardin County Educational Ass'n v. Illinois Educational Labor Relations Board*, 174 Ill. App. 3d 168, 185, 528 N.E.2d 737, 747 (1988) (abrogated on other grounds by *Board of Regents of Regency Universities v. Illinois Educational Labor Relations Board*, 208 Ill. App. 3d 220, 228, 566 N.E.2d 963, 969 (1991)) (the school board's comments critical of the union made prior to a union steward's termination were too remote and poorly substantiated to support an inference of animus where the employee had a history of misconduct). The District argues Williams testified he and other administrators thought the flexibility in Sieving's teaching schedule would allow her the availability to take on an additional class. Thus, the District asserts the assignment of additional duties was not the result of antiunion animus, but of a practical scheduling matter. The District cites *Board of Education of Schaumburg Community Consolidated School District No. 54 v. Illinois Educational Labor Relations Board*, 247 Ill. App. 3d 439, 462, 616 N.E.2d 1281, 1296 (1993), in arguing the Board failed to consider the reasoning behind Sieving's assignment.

However, as previously noted, the ALJ was in the best position to determine the credibility of the witnesses, and the ALJ found the District's explanation for assigning the class to Sieving lacked credibility, particularly where the District refused to rescind the assignment until after Sieving filed a grievance.

¶ 73 Moreover, the District contends the assignment of additional duties was settled through the grievance process which resulted in Sieving receiving no additional duties and, therefore, the incident cannot be used to demonstrate antiunion animus. However, the parties are not challenging the fairness of the grievance process or arguing about the outcome of that proceeding; the Board relied on the incident only to the extent it demonstrated a pattern of retaliation or discrimination against Sieving. Further, later correction of the conduct does not eliminate the violation, but merely affects the remedy. *Princeville Unit District Education Ass'n v. Princeville Community Unit School District No. 326*, 13 Pub. Employee Rep. ¶ 1115 (IELRB 1997).

¶ 74 The District argues the instances of alleged discrimination individually; however, the Board looked at the entirety of the circumstances for a pattern of discrimination. The Board found the following incidents demonstrated antiunion animus: (1) where Canty told Sieving that not all Association members deserved union representation; (2) the numerous occasions in which Williams commented that Sieving was "the most aggressive" Association president he had worked with, even in the context of speaking with Sieving about her duties as a teacher; (3) the District assigning additional work to Sieving immediately after she represented a group of teachers who declined the additional work; and (4) the District giving Sieving a lower rating in her 2012 evaluation, which was the first evaluation she received since becoming the Association president. The Board also highlighted the disparate treatment between two separate incidents of

misconduct by Sieving. The 2009 incident with a construction worker—prior to Sieving becoming Association president—resulted in a written reprimand, but Williams determined it did not merit a mention in her 2010 evaluation. However, the laptop incident, that Williams deemed less serious and that did not result in either a verbal or written reprimand, featured significantly in Sieving's 2012 evaluation.

¶ 75 These facts demonstrate the Board found a pattern that the District's statements challenging Sieving's role as Association president correlated with Sieving receiving a lower evaluation rating and the assignment of an additional class and resulted in unfair labor practices under sections 14(a)(1) and 14(a)(3). Accordingly, we conclude the Board's finding that the Association presented a *prima facie* case was not clearly erroneous.

¶ 76 2. *The District's Burden*

¶ 77 Once the Association demonstrated a *prima facie* case, the burden shifted to the District to prove, by a preponderance of the evidence, that it had a legitimate business reason for its actions and would have taken the same action regardless of the protected activity. See *Community Unit School District No. 5 v. Illinois Educational Labor Relations Board*, 2014 IL App (4th) 130294, ¶ 66, 12 N.E.3d 120. "Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, for it must be determined whether the reasons advanced are *bona fide* or pretextual. If the suggested reasons are a mere litigation figment or were not relied upon, then the determination of pretext concludes the inquiry." (Internal quotation marks omitted.) *Id.* Whether an employer's articulated reason for its employment decision is pretextual is a question of fact for the Board to decide. See *Irick v. Illinois Human Rights Comm'n*, 311 Ill. App. 3d 929, 936, 726 N.E.2d 167, 173 (2000); *City of*

Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 350, 538 N.E.2d 1146, 1152 (1989).

¶ 78 Here, the Board determined the District failed to demonstrate it had a legitimate business reason for Sieving's lower evaluation score and assigning her an additional class, or that it would have taken the same action if Sieving had not been the Association president. The ALJ heard the testimony and determined the credibility of the witnesses, and the ALJ determined the reasons for the District's employment decisions were pretextual and a means by which it could retaliate against Sieving. The Board agreed with the ALJ's decision, finding the District engaged in a pattern of antiunion animus against Sieving that included assigning her to additional work, giving undue weight to the laptop incident, and remarking that she was overly aggressive in her role as Association president. Based on the evidence presented, such a finding was not against the manifest weight of the evidence.

¶ 79 We therefore determine the Board's overall finding that the District violated sections 14(a)(1) and 14(a)(3) of the Act was not clearly erroneous.

¶ 80 C. Procedural Errors

¶ 81 The District next argues the ALJ committed a number of procedural errors requiring remand because those errors resulted in substantial harm and a denial of due process. We first address whether the District has any right to due process.

¶ 82 1. *Due-Process Rights*

¶ 83 Where a party alleges a due-process violation during an administrative hearing, our review is *de novo*. *Board of Education of Valley View Community Unit School District 365-U v. Illinois State Board of Education*, 2013 IL App (3d) 120373, ¶ 40, 1 N.E.3d 905. The District acknowledges this court has previously determined "[a] state and the political

subdivisions of a state have no constitutional right to due process, because they are not 'persons' within the meaning of the due-process clause." *Department of Central Management Services/Illinois Commerce Comm'n v. Illinois Labor Relations Board*, 406 Ill. App. 3d 766, 771, 943 N.E.2d 1136, 1141 (2010) (*CMS*). This extends to school districts, such as the District at issue here. *Id*. In reaching our decision in *CMS*, we relied on *Henrich v. Libertyville High School*, 186 Ill. 2d 381, 405, 712 N.E.2d 298, 310 (1998), in which the supreme court states "a school district, in its capacity as a political subdivision of the state, has no due process rights." See *CMS*, 406 Ill. App. 3d at 771, 943 N.E.2d at 1141. Moreover, the supreme court has held "[t]he due process clauses of the fifth and fourteenth amendments were enacted to protect 'persons,' not States." *People v. Williams*, 87 Ill. 2d 161, 166, 429 N.E.2d 487, 489 (1981).

¶ 84 Nonetheless, the District asks us to reevaluate our position by distinguishing *Henrich* and *Williams* from the present case. Although the factual situations may differ, the law remains the same: school districts have no due-process rights. Accordingly, we decline to reevaluate our holding in *CMS* and continue to hold that school districts lack due-process rights.

¶ 85 2. *Whether the Board Followed its Procedural Rules*

¶ 86 Although the District lacks the constitutional right to due process, it does have the ability to insist upon the Board's compliance with its own procedural rules. *CMS*, 406 Ill. App. 3d at 771, 943 N.E.2d at 1141. An administrative body has broad discretion in conducting its hearings, limited only by the requirement that the ALJ exercise its discretion "judicially and not arbitrarily." *Wegmann v. Department of Registration and Education*, 61 Ill. App. 3d 352, 356, 377 N.E.2d 1297, 1301 (1978). The ALJ's "decision regarding the conduct of its hearing and the admission of evidence is governed by an abuse of discretion standard and is subject to reversal

only if there is demonstrable prejudice to the complaining party." *Matos v. Cook County Sheriff's Merit Board*, 401 Ill. App. 3d 536, 541, 929 N.E.2d 108, 113 (2010).

¶ 87 a. The Prehearing Memorandum

¶ 88 The District first argues the ALJ improperly permitted Sieving to testify regarding information not fully disclosed in the Association's prehearing memorandum. Section 1105.140(a) of the Illinois Administrative Code requires parties to file a prehearing memorandum in Board proceedings that includes "[a] list of proposed witnesses *** and a summary of the matters to which they will testify." 80 Ill. Adm. Code 1105.140(a) (2012). Moreover,

> "[f]ailure by a party to disclose an exhibit or the identity of a witness may be grounds for a motion by an opposing party or by the Administrative Law Judge for exclusion of that exhibit or witness where offered in a party's case-in-chief or, in the alternative, for a continuance to allow the opposing party time to review the exhibit or determine the nature of the witness' testimony and prepare to meet or counter such evidence. Such motions shall be granted only upon a showing that the moving party was surprised and placed at a disadvantage by the failure to disclose in the pre-hearing memorandum. Exhibits and witnesses not listed in the pre-hearing memorandum can be presented for rebuttal or impeachment purposes." 80 Ill. Adm. Code 1105.140(d) (2012).

¶ 89 The District argues the Association disclosed Sieving as a witness but failed to adequately disclose the subjects to which she testified—specifically, her 2012 evaluation. The

ALJ determined the Association's prehearing memorandum, which indicated she would provide "[t]estimony regarding her representation of union members, [and] reactions to that representation from administration," was sufficiently broad to encompass her testimony regarding her evaluation. We agree. Inherent in the brief summary of Sieving's testimony is that she would testify about reactions from administration which, in this case, included giving Sieving a lower summative evaluation rating, assigning her an additional class, and making statements critical of Sieving's role in the Association. Thus, the ALJ properly allowed Sieving to testify about her 2012 evaluation.

¶ 90 Even if the Association's prehearing memorandum failed to adequately set forth Sieving's testimony, the District is not entitled to relief. We first note that section 1105.140(d) allows an ALJ to exclude witnesses or exhibits that a party fails to disclose in its prehearing memorandum. However, nothing in subsection (d) requires or even discusses the remedy where the full extent of the witness's statement is not disclosed.

¶ 91 Moreover, the District can hardly claim surprise or a disadvantage for the failure to disclose, as the entire proceeding revolved around Sieving's 2012 evaluation. Accordingly, we conclude the ALJ committed no procedural error by allowing Sieving to testify regarding her 2012 evaluation.

¶ 92 b. Rules of Evidence

¶ 93 The District next argues the ALJ failed to apply the rules of evidence throughout the hearing as required by section 1105.190 of the Code. 80 Ill. Adm. Code 1105.190 (2014). Specifically, the District takes exception to the ALJ allowing the introduction of Canty's comment made during contract negotiations that "not all members deserve representation."

¶ 94 Although the ALJ admitted the aforementioned statement, the ALJ specifically noted the Association established its *prima facie* case absent Canty's comment. We agree that the evidence, even absent Canty's comment, was sufficient to establish a *prima facie* case. Evidentiary errors committed at administrative hearings are harmless "where the objecting party fails to demonstrate how the error prejudiced his case." *Lebajo v. Department of Public Aid*, 210 Ill. App. 3d 263, 272, 569 N.E.2d 70, 76 (1990). Because the result would have been the same whether or not the ALJ considered Canty's comment, it is unnecessary to determine whether the admission of the statement was in error. *Id.*

¶ 95 Similarly, to the extent the District asserts the ALJ improperly admitted a statement made by the mediator, the ALJ and the Board specifically noted they did not rely on that statement in reaching a decision. Because the mediator's statement was not considered in reaching the decision, we need not address whether it was properly admitted.

¶ 96 Nevertheless, the District argues these statements, even if not relied on, "clouded" the proceedings and possibly the ALJ's decision. However, the District provides no evidence these statements "clouded" the proceedings or otherwise impacted the decision, so we find this argument unpersuasive.

¶ 97 c. Clear Record

¶ 98 Finally, the District asserts the ALJ failed to ensure that a clear record was created and that the findings of fact were supported by the record. Under section 1105.120 of the Code, the ALJ has "the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order and to ensure development of a clear and complete record." 80 Ill. Adm. Code 1105.120 (2012). The District contends the ALJ refused to make rulings on numerous objections and, instead, told the parties to address many of those objections in a posthearing brief. The

District says this tactic was unsuccessful in preserving a clear and complete record, but the District has failed to provide us with any citations in support of its position. The District has therefore failed to show demonstrable prejudice. See *Matos*, 401 Ill. App. 3d at 541, 929 N.E.2d at 113 (the ALJ's evidentiary decisions are "subject to reversal only if there is demonstrable prejudice to the complaining party.")

¶ 99 Moreover, section 1105.120 specifically states the ALJ must take all necessary actions to avoid delays which, in this case, meant deferring its ruling on some of the objections raised during the hearing in an effort to move the hearing forward at an efficient pace. The objections for which the ALJ deferred its ruling included the admissibility of Canty's statement, Sieving's testimony about her 2012 evaluation, and the mediator's statement, which produced significant argument and research that would have disrupted the flow of the proceedings. Rather than take time away from the hearing, the ALJ chose to move forward and allow the parties time to address their positions in a posthearing motion. The ALJ then addressed its ultimate decisions as to those objections in its order. The result is a clear and complete record.

¶ 100 Under section 1105.160(e) of the Code, the ALJ must base any findings of fact "exclusively on the evidence in the Record and on matters of which official notice has been taken." 80 Ill. Adm. Code 1105.160(e) (2012). The District concedes "the ALJ's findings of fact are mostly based on the evidence in the record," but goes on to say the ALJ's "reasoning for why some testimony was deemed credible and relevant while other testimony was not" is unclear. It was within the ALJ's purview to make determinations as to the witnesses' credibility. See *Koulegeorge v. State of Illinois Human Rights Comm'n*, 316 Ill. App. 3d 1079, 1087, 738 N.E.2d 172, 177 (2000). As to the ALJ's determinations of "relevant" testimony, the District has failed to provide us with specific examples of inconsistency to address; we therefore decline to

scrutinize the record to find examples in support of the District's argument. See *Lindemulder v. Board of Trustees of the Naperville Firefighters' Pension Fund*, 408 Ill. App. 3d 494, 501, 946 N.E.2d 940, 947 (2011) ("The appellate court is not a repository into which an appellant may foist the burden of argument and research.").

¶ 101 III. CONCLUSION

¶ 102 Based on the foregoing, we affirm the Board's decision.

¶ 103 Affirmed.