2016 IL App (1st) 133534-U

SIXTH DIVISION
Order Filed: February 26, 2016

No. 1-13-3534

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BOARD OF EDUCATION OF THE CITY OF CHICAGO, Respondent, Appellant, Cross-Appellee, v. ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, LYNNE O. SERED, Board Chairman; Board Members, RONALD F. ETTINGER, GILBERT O'BRIEN, MICHAEL H. PRUETER, MICHAEL K. SMITH, and COLLEEN HARVEY, Administrative Law Judge, Respondents, and RAYMOND GORA, Petitioner, Cross-Appellant.	)	Petition for Review of Order of the Illinois Educational Labor Relations Board No. 2011-CA-0058-C

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the Illinois Labor Relations Board is affirmed, where (1) it did not violate the CBE's due process rights by deciding that the CBE had committed an unfair labor practice by denying the petitioner employment at its driver education program at Prosser Vocational High School; and (2) the petitioner failed to show that the CBE was motivated by antiunion animus when it reduced his hours as a driver education teacher and reassigned him from his positions as technology coordinator and attendance coordinator at Roosevelt High School.

¶ 2 The petitioner, Raymond Gora, filed a complaint before the Illinois Educational Labor Relations Board (Board) against the respondent, the Board of Education of the City of Chicago (CBE), alleging that the CBE committed unfair labor practices under the Illinois Educational Labor Relations Act (Act) (115 ILCS 5/1 *et seq.* (West 2010)) by engaging in a series of retaliatory acts against the petitioner after he filed grievances against it. Following a hearing, the Board found that the CBE violated sections 14(a)(3) and 14(a)(1) of the Act by refusing to hire the petitioner in a teaching position at its driver education facility at Prosser Vocational High School (Prosser) in retaliation for his grievance activity. The Board dismissed the petitioner's remaining claims, including, in relevant part, his claim that he was improperly removed from his positions as a driver education teacher, attendance coordinator, and technology coordinator at Roosevelt High School (Roosevelt). The CBE now appeals, alleging that the Board violated its due process rights by finding that it committed an unfair labor practice by denying the petitioner employment at the Prosser driver education site, and alternatively, that those findings were against the manifest weight of the evidence. The petitioner cross-appeals, arguing that the Board's determination that he failed to make a *prima facie* showing that his removal from the positions at Roosevelt was motivated by antiunion animus was against the manifest weight of the evidence. For the reasons that follow, we affirm.

¶ 3 The petitioner has been employed by the CBE at Roosevelt since 1995. He is a member of a bargaining unit of the Chicago Teachers Union (Union). On January 5, 2011, the petitioner

filed a charge with the Board pursuant to section 15 of the Act (115 ILCS 5/15 (West 2010)) alleging, in relevant part, that the CBE made decisions adverse to his employment in retaliation for a grievance filed on his behalf by the Union on October 5, 2010. The Board investigated the charge and then issued a complaint and notice of hearing against the CBE.

¶ 4 On September 18, 2011, the Board issued an amended complaint (complaint), the allegations of which are set forth as follows. Beginning in the 2000-01 school year, the petitioner's primary position was as Roosevelt's technology coordinator, although he also taught mathematics or information technology on some evenings. In December of 2002, the petitioner was additionally appointed as an instructor in the CBE's driver education program at Roosevelt, where he taught classes at night and on Saturday mornings. In the 2010-11 school year, the petitioner was assigned to a position as Roosevelt's attendance coordinator.

¶ 5 On Saturday, September 25, 2010, the petitioner arrived for his regularly-scheduled driver education class, but was informed by the Roosevelt site director, Steven Carlson, that he would not be working that day. Later in the day, Carlson notified the petitioner that his hours were being "cut" at the Roosevelt site. On September 27, 2010, the petitioner made an informal complaint to Roosevelt's principal, Ricardo Trujillo, about the incident, and shortly thereafter, notified Trujillo that he intended to file a grievance about the occurrence. On October 25, 2010, the Union filed a formal grievance on the petitioner's behalf disputing the "termination" of his teaching position at the Roosevelt site.

¶ 6 The complaint alleged that, as a result of the petitioner's grievance activity, the CBE subjected him to a series of ongoing retaliatory and discriminatory acts during the period of October 8, 2010, through June of 2011. These acts included, in relevant part: cutting the petitioner's hours at Roosevelt and then "never restoring him to his position as a teacher in the

CBE's driver instruction program;" removing him from his position as technology coordinator on or about October 15, 2010; removing him from his position as attendance coordinator on or about October 18, 2010; and initiating disciplinary actions against him. Accordingly, the complaint charged the CBE with unfair labor practices under sections 14(a)(3) and (a)(1) of the Act (115 ILCS 5/14(a)(3), 14(a)(1) (West 2010)), for discriminating against the petitioner as a result of his decision to file grievances and interfering with the exercise of his rights under the Act.

¶ 7 On November 30, 2012, the petitioner sought leave to file a second amended complaint, adding new allegations of retaliatory and discriminatory acts by the CBE between June of 2011 and June of 2012 while proceedings on his complaint in the instant case remained pending. The proposed complaint also alleged that, on October 3, 2012, the petitioner was informed that an application he had submitted to teach driver's education at Prosser was being denied "because of the outstanding litigation that he is currently involved in with the Chicago Public Schools." The administrative law judge denied leave to file the second-complaint on the basis that it contained "additional allegations that are unrelated to the instant charge and have not been investigated pursuant to Section 15 of the Act."

¶ 8 The following evidence was adduced at the administrative hearing held on February 13, 2013. The CBE's driver education program is offered at approximately 20 sites throughout Chicago. The director and overseer of the program is Calvin Davis, and serving under Davis is James Artese. Artese is the site monitor for the program's 10 sites on the north side of Chicago, which encompasses the Roosevelt and Prosser facilities. Each individual site has a director, who is responsible for scheduling driver education teachers and maintaining the budget for his or her site. It was undisputed that Davis's office, or the "central office," had the ultimate authority to

retain driver education teachers and set their schedules for each of the 20 sites, based upon the allocation of funding for each site. However, according to Davis, the site directors were given significant input into which teachers were hired and scheduled for the program at their respective sites. Davis stated that part of Artese's job was to act as a liaison between the central officer and the site directors.

¶ 9 Carlson had been the site director at Roosevelt since 2008. He testified that, prior to 2010, the petitioner had regularly worked Saturdays at the Roosevelt facility. However, on Saturday, September 18, 2010, when the petitioner arrived for work, Carlson informed him that he was not scheduled to work that day. Carlson testified that Chuck Wood, a retired teacher, was teaching at the facility that day. According to Carlson, it was customary to employ retired teachers at Roosevelt if they requested work and could obtain the requisite certification. Carlson testified that he normally had between four and six instructor slots available on a given day. With regard to scheduling, Carlson testified that it was his practice to send an email to all of his certified driver education teachers inquiring about their availability to work, and then schedule them on a "first come, first served" basis. Carlson testified that he had sent such an email to all his teachers, including the petitioner, seeking instructors for September 18 and 25.

¶ 10 Later on September 18, 2010, Roosevelt's assistant principal, Jennifer Farrell, was opening the school building, when the petitioner approached her. Farrell testified that the petitioner was extremely upset and was yelling that he had not been scheduled for driver education hours that weekend and that there were "people taking money out of his pocket." Farrell notified Trujillo of the petitioner's concerns and subsequently met with the petitioner several times regarding the issue. However, she testified that she informed the petitioner that the

administration generally was not involved with the driver education program. Rather, the program was controlled through the central office, and also by Carlson at the Roosevelt site.

¶ 11 When the petitioner appeared for work on September 25, Carlson informed him that he was not scheduled until the following Monday. According to Carlson, the petitioner became angry that he had not been scheduled and that Wood was working before him. The petitioner "showed his disgust" by "swearing" and "yelling" at Carlson in front of students and other teachers who were present at the facility. Carlson testified that, as the petitioner was leaving, he said that he was going to complain to Trujillo and "get [me] fired."

¶ 12 Later in the day on September 25, Carlson sent an email to the petitioner, with a copy to Artese, informing the petitioner that he decided to "cut" his hours at the driver education facility because of budget concerns and "due to the events of today Saturday Sept. 25." Carlson's email suggested that the petitioner contact any of the CBE's other driver education site directors and attempt to obtain hours at one of their facilities. When asked specifically what he meant by the statement "the events of today," Carlson testified that he was referring to the fact that the petitioner came into the trailer on the Roosevelt lot yelling and swearing at him. On cross-examination, Carlson testified he did not consider the reduction of the petitioner's hours to be a complete removal of the petitioner from his position as an instructor at the Roosevelt site.

¶ 13 Carlson testified that the driver education budget had been almost cut in half for the 2010-11 school year, and he was compelled to reduce the hours of all his employees. Carlson stated that, because of the budget constraints, Davis had advised site directors to award work hours to the teachers who were better performers and more trustworthy. According to Carlson, he had recently reported many complaints concerning the petitioner, including that he had removed

and tampered with a computer from the trailer, left food in the cars, and hollered at students during driver instruction.

¶ 14 Davis corroborated Carlson's testimony that the budgets for all sites had been reduced for the 2010-11 school year. Davis testified that he and Carlson had discussed Carlson's decision to reduce the petitioner's hours in September 2010. According to Davis's recollection, the decision was based upon the reduction in funding and also friction between Carlson and the petitioner.

¶ 15 Artese testified that, at some point in September 2010, Carlson told him that he was having "problems" with the petitioner tampering with the computers at the Roosevelt site. However, Artese denied ever directing Carlson to terminate the petitioner, stating that he had nothing against him.

¶ 16 On his own behalf, the petitioner testified that he had been informed by Carlson on September 24, 2010, that he was scheduled to teach driver education on September 25. However, after he reported for his shift on that day, he observed that he had been displaced by Wood. The petitioner testified that he asked Carlson why he was being displaced by a retired teacher; however, Carlson simply looked at him. He then told Carlson that he and five other teachers were going to be filing a grievance. Although the petitioner admitted speaking very loudly to driver education students, he denied that there was any swearing or yelling in his discussions with Carlson or Farrell. On September 26, 2010, the petitioner responded to Carlson's September 25 email, writing that his displacement by the retired teacher on two occasions "opened the door for grievance procedures."

¶ 17 Trujillo, a former Union member, became Roosevelt's principal in August 2010, and shortly thereafter, selected the petitioner for the position of attendance coordinator. The petitioner performed these duties along with those of his longstanding position as technology

coordinator. The petitioner did not have any teaching responsibilities at the beginning of the 2010-11 school year.

¶ 18 On October 5, 2010, the petitioner sent an email to Trujillo stating that he had decided to file a formal grievance regarding his driver education hours. The Union filed grievances against Trujillo on October 13, 2010, and against Davis on October 25, 2010, disputing that budget constraints could be a basis to "cut" the petitioner from the driver education program. Several days later, Trujillo attended a grievance meeting with the petitioner and his Union representative. At the conclusion of the meeting, Trujillo issued a statement dated October 11, 2010, which was introduced into evidence at the hearing. In the statement, Trujillo pointed out that, although Roosevelt hosted the driver education program, his office had no role in the administration of the program or the assignment of work schedules. During the same grievance meeting, Trujillo gave the petitioner a full-time teaching schedule, and informed him that he was now assigned to teach math and was no longer responsible for his duties as attendance and technology coordinators. On October 18, 2010, the petitioner began his new teaching schedule. His salary did not change when he was transitioned to teaching; however, Trujillo admitted that the petitioner's reassignment to the classroom was a demotion.

¶ 19 Trujillo testified that, in mid-October of 2010, he made the decision, along with assistant principals Farrell and Clifford Gabor, to shift the petitioner out of his position as attendance coordinator. According to Trujillo, the petitioner had proven to be unsuccessful in the job, and Roosevelt needed teachers for math classes, a position for which the petitioner was certified. Trujillo testified that, among other things, the petitioner did not follow directives for intervention with students that were skipping classes, failed to consult with parents or to properly report the truancy to the area attendance officer, and neglected to fill out required reports in a timely

manner. Trujillo stated that he, Gabor and other staff members made efforts to train the petitioner regarding the proper performance of the job throughout the two months he held the position. Trujillo also requested the assistance of another staff member, Victor Herrera, to help the petitioner in September 2010 when he began struggling with the position. Correspondence to Trujillo from Shiela Sterling, an area attendance coordinator, was admitted into evidence. It was dated April 13, 2011, and described the petitioner's problems in the attendance coordinator position, concluding with the statement that the petitioner should not have contact with parents or students because he "is always yelling when anything makes him nervous."

¶ 20 Gabor testified that he originally recommended the petitioner for the position of attendance coordinator because he was a hard worker and had an administrative background. Gabor stated that he attempted to talk with the petitioner in early September 2010 concerning his duties in the position, but the petitioner would not listen; instead, he became upset and repeatedly stated "I got it."

¶ 21 With regard to the decision to remove the petitioner as technology coordinator, Trujillo testified that he did not believe the petitioner was performing his function to maintain Roosevelt's technology services and infrastructure. The petitioner was not obtaining necessary computers, and was otherwise failing to purchase equipment in compliance with the CBE's processes. Trujillo characterized the school's "WiFi" system as virtually nonexistent, and stated that the petitioner failed to prepare a report of the school's inventory when requested to do so in August or September of 2011. The CBE introduced into evidence a detailed report prepared by Herrera, the petitioner's eventual successor in the position of technology coordinator. In the report, completed October 12, 2010, Herrera concluded, among other things, that the computers

and other technology equipment at Roosevelt were outdated and electrically unsafe, the surveillance systems were not secure, and the wireless system was largely dysfunctional.

¶ 22 The petitioner's new teaching schedule in October 2010 included two regular geometry classes and three inclusion geometry classes. Inclusion classes combine students from regular education programs and students from special education programs. Typically, there are two teachers assigned to each inclusion class: a regular education teacher and a special education teacher. However, for at least three weeks after the petitioner began teaching the inclusion geometry classes, there were no special education teachers in any of his classes. According to Farrell, there was a city-wide crisis with regard to special education teachers in the fall of 2010 and, as a result, more than 10 inclusion classrooms at Roosevelt did not have a special education inclusion teacher. Although Roosevelt eventually received approval from the CBE to hire one or two more special education teachers, that approval did not come until later in the fall.

¶ 23 The petitioner stated that, on November 12, 2010, he asked Trujillo when he was going to get help with his inclusion classes. The petitioner testified that Trujillo told him that the administration would try to reschedule some of those students to other classes. However, this never occurred. Eventually, however, Trujillo reassigned inclusion teachers from other jobs to the petitioner's classes. When one of these teachers subsequently became ill and went on medical leave, the petitioner was left without a special education teacher in two classes until March of 2011. The petitioner complained to Trujillo about the situation, and Trujillo responded that he had been unaware of it due to a clerical error. After receiving the petitioner's complaint, however, Trujillo assigned substitute teachers to the petitioner's class.

¶ 24 On January 26, 2011, the Union filed another grievance, claiming that the CBE had retaliated against the petitioner for his "grievance-filing activity." On February 22, 2011, Trujillo responded to that grievance in writing, denying any retaliation against the petitioner.

¶ 25 On March 18, 2011, there was an incident in the petitioner's classroom in which a student allegedly threw a desk at the petitioner. The petitioner wrote up a report pursuant to school procedure, and the student was suspended for 10 days. However, the petitioner testified that Farrell then spoke with the student and decided to rescind the suspension. According to the petitioner, the administration subsequently embarked on a "witch hunt" against him, taking statements from all of the students.

¶ 26 On May 13, 2011, Trujillo issued a notice of a pre-disciplinary proceeding to the petitioner based upon claims that the petitioner had used verbally abusive language in front of students and made inappropriate remarks against special education students. Attached to the notice, which was admitted into evidence, were the statements of three students alleging that the petitioner used inappropriate language during class. The petitioner denied the allegations. A disciplinary hearing was held, after which Trujillo recommended that the petitioner be given a 5-day suspension. The petitioner appealed the suspension, and the matter remained pending as of the hearing in this case.

¶ 27 Craig Folk testified regarding the petitioner's effort to obtain driver education hours at Prosser. He stated that the petitioner had previously taught one session at the Prosser site prior to 2010. Prior to scheduling teachers at Prosser, it was Folk's practice to consult with Artese. Folk testified that, in September of 2011, he had some available hours for a driver education instructor which he could have given to the petitioner. Although he was aware the petitioner had filed a grievance, Folk testified that, at that time, he "didn't know there was a lawsuit, or *** didn't

know the severity of it." However, when he asked Artese whether he could give the petitioner some hours at Prosser, Artese responded that he could not hire the petitioner because of his pending lawsuit against the CBE.

¶ 28 During his testimony, Artese was asked whether he was aware that the petitioner had initiated litigation against the school district. Artese responded that he was aware the petitioner had filed a grievance. Artese denied knowing the nature of the grievance, but stated that he heard "through the grapevine," probably through Carlson, that a grievance had been filed.

¶ 29 According to the petitioner, he began inquiring about a position as a teacher at the Prosser site in June of 2012. He testified that, in October of 2012, the site director, Folk, approached him and said there were some available hours at Prosser. The petitioner said he was interested in applying, and Folk responded that he had to get approval from Artese. The petitioner testified that Folk subsequently informed him that Artese had denied his request due to his "current involvement with the State case."

¶ 30 The ALJ dismissed the petitioner's claims against the CBE pertaining to the denial of driver education hours at Roosevelt, and the removal of the petitioner from his positions as technology coordinator and attendance coordinator. She found that, although the petitioner had engaged in protected activity by filing grievances under the Act, he failed to make a *prima facie* showing that the conduct of either Carlson or Trujillo was motivated by antiunion animus. With regard to the refusal to hire the petitioner at Prosser, however, the ALJ found the CBE had committed an unfair labor practice under section 14(a)(4) and, derivatively, section 14(a)(1) of the Act (115 ILCS 5/14(a)(4), (a)(1) (West 2010)). Specifically, the ALJ found that the decision not to hire the petitioner was based upon the fact that he had filed the instant complaint, constituting a violation of section 14(a)(4). She further noted that, although the complaint

specified a violation of section 14(a)(3), which pertained to retaliation based upon union activity rather than the filing of a complaint, the evidence at the hearing was "sufficiently related" to the allegations in the complaint to have placed the CBE on notice of the need to defend against it.

¶ 31 The Board issued an opinion which affirmed and adopted the decision of the ALJ, including its findings as to witness credibility. The Board determined, however, that the refusal to hire the petitioner at Prosser is more appropriately characterized as a violation of section 14(a)(3) instead of (a)(4) of the Act, because it was motivated by the petitioner's filing of a grievance rather than the instant lawsuit.

¶ 32 At the outset, we set forth our standard of review for the issues raised on appeal and cross-appeal. Section 16 the Act (115 ILCS 5/16 (West 2010)) provides that final determinations by the Board are subject to review in accordance with the provisions of the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2010)). On administrative review, our consideration extends to all issues of law and fact presented by the record. *Speed District 802 v. Warning*, 242 Ill. 2d 92, 111 (2011). The standard of review to be applied depends upon whether the question presented is one of fact or law, or is a mixed question of fact and law. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272 (2009). The Board's findings on questions of fact are deemed *prima facie* true and correct and will not be reversed unless they are against the manifest weight of the evidence. *Speed District 802*, 242 Ill. 2d at 111-12. Where there exists a mixed question of law and fact, we review the agency's determination under the clearly erroneous standard. *Exelon Corp.*, 234 Ill. 2d at 273. On purely legal issues, however, the agency's decisions will be reviewed under the *de novo* standard and are not binding on a reviewing court. *One Equal Voice v. Illinois Educational Labor Relations CBE*, 333 Ill. App. 3d 1036, 1041 (2002).

¶ 33 As its first issue on appeal, the CBE argues that the Board violated its right to due process in deciding that it committed an unfair labor practice by denying the petitioner a position as a driver education teacher at Prosser. The CBE points out that the petitioner's complaint was directed only to his termination from the program at Roosevelt and contained no allegation regarding the position at Prosser. In fact, the CBE notes, the ALJ denied the petitioner leave to file his proposed second-amended complaint, which included, among other allegations, the claim regarding his denial of employment at Prosser, on the basis that they were unrelated to the charges in the complaint.

¶ 34 The Board initially responds that due process concerns do not apply to the CBE because it is not a "person" entitled to such rights. We disagree.

¶ 35 It is beyond question that, proceedings before an administrative agency must be conducted in accordance with the constitutional requirements of procedural due process. See, e.g., *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92-93 (1992); see also *Wisam 1, Inc. v. Illinois Liquor Control Comm'n*, 2014 IL 116173. On administrative review, it is this court's duty "to examine the procedural methods employed at the administrative hearing, to insure that a fair and impartial procedure was used." *Abrahamson*, 153 Ill. 2d 76, 92-93 (1992) (citing *Middleton v. Clayton*, 128 Ill. App. 3d 623, 630 (1984)); see also 80 Ill. Adm. Code §1105.120 (hearing officer "shall have the duty to conduct a fair hearing"). Due process is satisfied in an administrative setting when the concerned party has the "opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute." *Wisam 1*, 2014 IL 116173, ¶ 26 (citing *Obasi v. Department of Professional Regulation*, 266 Ill App. 3d 693, 702 (1994)).

¶ 36 The Board has failed to refer us to a case standing for the proposition that a school board, as a stakeholder in an administrative proceeding, is exempt from the right to a fair hearing or similar basic protections of procedural due process. The Board cites the court's supplemental opinion in *Henrich v. Libertyville High School*, 186 Ill. 2d 381 (1998), but that case provides no support for its position, and actually militates against it. There, the issue was whether the most recent version of section 3-108 of the Tort Immunity Act (745 ILCS 10/2-108 (West 1994)), which had been amended to eliminate the defense of complete immunity, could be applied retroactively to permit a plaintiff to assert a claim for willful and wanton conduct against a school district. The court held that it could not fairly be retroactively applied, because the district had a vested right to the complete immunity defense that existed under the prior version of section 3-108, which was effective when the cause of action accrued. *Id.* at 404. Although the court acknowledged that a school district, in its capacity as a political subdivision of the state, generally "has no due process rights" (*id.* at 405), it reasoned that, through the Tort Immunity Act, the legislature had conferred such a right to the district when in the role of a tort defendant. *Id*. We find this reasoning to be analogous to the question here, as our supreme court has imparted the guarantee of due process, as derived from the constitution, to parties in the context of an administrative proceeding. Thus, the Board's argument fails.

¶ 37 The determination of whether the CBE was provided with the requisite due process is a question of law which this court reviews *de novo. Wisam 1*, 2014 IL 116173, ¶ 24. The process required in an administrative proceeding is not necessarily akin to that of a judicial proceeding, as administrative proceedings are less formal and technical. *Id.* ¶ 27. A fair administrative hearing entitles each concerned party to the right to be heard, to cross-examine adverse witnesses, and to impartiality in evidentiary rulings. *Id.* ¶ 26. Further, it is well-settled that the

"charges or complaint in an administrative proceeding need not be drawn with the same precision, refinements, or subtleties as pleading in a judicial proceeding." *Abrahamson*, 153 Ill. 2d at 93. Rather, the complaint need only reasonably apprise the respondent of the charges to enable it to intelligently prepare a defense. *Id.* A minor variation between the charge in the complaint and the proof at the hearing does not warrant reversal of the Board's determination; even an unpleaded issue will support a finding of an unfair labor practice, as long as the matter has been fully and fairly litigated. See *Marlene Industries Corp. v. N.L.R.B.*, 712 F.2d 1011, 1019, n. 9 (6th Cir. 1983) (citing *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 349-50 (1938)); see also *American Federation of State, County and Municipal Employees, Council 31 & McLean County Unit Dist. 5, a/k/a Board of Education of McLean County*, 29 PERI 174 (IELRB 2013) (ALJ may consider allegations outside complaint if "sufficiently related" to original complaint so school board has notice they could be raised, and board has opportunity to present a defense).

¶ 38 In this case, we find no deprivation of the CBE's right to a fair hearing as a result of the Board's decision with regard to the CBE's refusal to employ the petitioner at Prosser. The complaint alleged that, in violation of sections 14(a)(3) and 14(a)(1) of the Act (115 ILCS 5/14(a)(3), 14(a)(1) (West 2010)), the petitioner was removed from his employment as a driver education teacher at Roosevelt and "has never been restored to the CBE's driver education program." There was no dispute that both Roosevelt and Prosser were included in the CBE's driver education program. When Carlson emailed the petitioner that he was reducing his hours at Roosevelt, he suggested that the petitioner seek to obtain hours at other CBE sites. The petitioner testified that he attempted to do just that, by applying to Prosser beginning in June of 2012. Based upon the allegations of the complaint, therefore, the CBE should have expected that

it would have to respond to proof that it turned the petitioner down for driver education hours at Prosser.

¶ 39 Additionally, the CBE had a full and fair opportunity to defend against the Prosser claim at the hearing. It elicited testimony from Davis and Folk concerning their knowledge of the petitioner's disputes regarding the driver education program. It had the opportunity to cross-examine Artese, as well as to present its own evidence, explaining the reason the petitioner was turned down for employment at Prosser. Finally, the CBE cross-examined the petitioner about his application to Prosser and his claims of his mistreatment in the program. The CBE fails to show how it was prejudiced by the fact that the claim concerning Prosser was not specifically referenced in the complaint. See *Gonzalez v. Pollution Control Board,* 2011 IL App (1st) 093021, ¶ 42.

¶ 40 The CBE next argues that the determination that it violated section 14(a)(3) and, derivatively, section 14(a)(1) of the Act (105 ILCS 5/14(a)(3), (a)(1) (West 2010)) when it denied the petitioner employment at Prosser, was against the manifest weight of the evidence. In particular, it maintains that the Board initially accepted the factual findings of the ALJ, but then deviated from those findings to conclude that the CBE's conduct in denying the petitioner employment constituted a violation of section 14(a)(3), rather than 14(a)(4), of the Act.

¶ 41 Under section 14(a)(3) of the Act, employers are prohibited from discriminating against employees with regard to hire or tenure as a means to discourage their membership in "any employee organization." (115 ILCS 5/14(a)(3) (West 2010)). This has been held to include any negative employment decision that is made in retaliation for the employee's participation in "union activity." See *Speed District 802,* 242 Ill. 2d at 112. Section 14(a)(4), in turn, precludes employers from discharging or discriminating against an employee because, in relevant part, he

has filed an affidavit, petition or complaint under the Act. (115 ILCS 5/14(a)(4) (West 2010)). Finally, under section 14(a)(1), employers are barred generally from interfering with or restraining an employee in the exercise of "any rights guaranteed under the Act." Where, as in this case, an alleged violation of sections 14(a)(1) and 14(a)(3) arises out of the same conduct, the section 14(a)(1) violation is said to be derivative of the section 14(a)(3) violation. *Speed District 802*, 242 Ill. 2d at 112-13.

¶ 42 In making her decision that the CBE violated section 14(a)(4) and, derivatively, section 14(a)(1) of the Act, the ALJ relied upon the testimony of Folk that he was instructed by Artese to deny the petitioner employment at Prosser because of the instant "lawsuit" between the petitioner and the CBE. The Board agreed with the ALJ that the denial of employment amounted to an unfair labor practice; however, it interpreted the testimony to show that the decision was based upon the petitioner's having filed a "grievance" against the CBE, and, as such, was more appropriately categorized as a violation of section 14(a)(3). The CBE now argues that the Board's determination not only improperly contradicted that of the ALJ, but was against the manifest weight of the evidence.

¶ 43 Based upon our review of the testimony of Folk, Artese and the petitioner, we agree with the CBE that the petitioner was rejected from employment at Prosser based upon his filing of the instant lawsuit, rather than as a result of his grievances. Folk testified clearly, on more than one occasion, that the reason Artese instructed him to refrain from hiring the petitioner was because of his present involvement in a lawsuit against the CBE. Artese never denied this fact in his own testimony. The petitioner likewise testified that Folk told him Artese had denied his request for employment due to his "current involvement with the State case." Further, we note that, by September 2011, when Artese first instructed Folk not to hire the petitioner, the petitioner no

longer had any grievances pending, only the instant action. Accordingly, the Board's finding that the petitioner was denied hours at Prosser based upon his grievances is against the manifest weight of the evidence.

¶ 44 Regardless, there is no basis for reversal in this case, as we may affirm an agency's decision on any basis appearing in the record. *Younge v. Board of Education of the City of Chicago*, 338 Ill. App. 3d 522, 530 (2003). Section 14(a)(1) of the Act bars any employment decision that is made in an effort to interfere with, restrain, or coerce the employee in the exercise of his rights under the Act. 115 ILCS 5/14(a)(1) (West 2010). In determining whether the CBE's conduct violated section 14(a)(1) of the Act, the test is whether the conduct "may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act." *Board of Education, City of Peoria School District No. 150 v. Illinois Educational Labor Relations Board*, 318 Ill. App. 3d 144, 150 (2000) (quoting *Georgetown–Ridge Farm Community Unit School District No. 4 v. Illinois Educational Labor Relations Board*, 239 Ill. App. 3d 428, 465–66 (1992)). Here, the Board determined that Artese's instruction to Folk not to hire the petitioner constituted improper retaliatory conduct under the Act. The evidence supports the fact that Artese's action was precipitated by the filing of the instant case. As the filing of this case was a valid exercise of the petitioner's rights under section 14(a)(1) of the Act, there was sufficient evidence to sustain the Board's finding of a violation of that section.

¶ 45 On cross-appeal, the petitioner challenges the Board's determination that he failed to make a *prima facie* showing under sections 14(a)(3) and 14(a)(1) of the Act (115 ILCS 5/14(a)(3), 14(a)(1) (West 2010)) that the CBE engaged in retaliatory conduct against him by Carlson's act of excluding him from the driver education program at Roosevelt, and by Trujillo removing him from his positions as technology coordinator and attendance coordinator.

¶ 46 A *prima facie* case of a violation of section 14(a)(3) is established were the employee shows that (1) he engaged in union activity, (2) the employer was aware of that activity, and (3) the employer took adverse action against the employee because he engaged in that protected union activity. *Speed District 802*, 242 Ill. 2d at 113. The third element of the test is proven if the employee's protected activity was a substantial or motivating factor for the adverse action taken against him. *Id.* As motive is a question of fact, a Board's finding on this issue can only be set aside if it is against the manifest weight of the evidence; that is to say, a contrary decision is readily apparent. *Id.*

¶ 47 In this case, the parties do not dispute that the first two elements of the test in *Speed District 802* have been met. The only dispute is whether the CBE's acts in cutting the petitioner's driver education hours at Roosevelt and removing him from his positions as technology and attendance coordinators were motivated by antiunion animus. An employee may prove such motivation by providing circumstantial evidence of: the employer's expressed hostility towards unionization; the proximity in time between the employee's union activities and the adverse employment action; inconsistencies between the proffered reason for adverse action and other actions of the employer, and shifting explanations for the action. *City of Burbank v. Illinois State Labor Relations Board*, 128 Ill.2d 335, 346 (1989).

¶ 48 With regard to the reduction of his hours at Roosevelt, the petitioner contends that the timing of Carlson’s action was highly questionable, because Carlson emailed him about the reduction on September 25, 2010, the same day he had threatened to file a grievance against Carlson. However, as observed by the Board, while the timing of the adverse employment decision is one factor giving rise to an inference of a discriminatory motive, it is insufficient standing alone to establish an unfair labor practice. *Board of Education of Schaumburg*

Community Consolidated School Dist. 54 v. Illinois Educational Labor Relations Board, 247 Ill. App. 3d 439, 462 (1993). The Board accepted Carlson's explanation that the reduction in hours was necessitated by a City-wide budget shortfall that affected all of the driver education sites and all of Carlson's teachers. This testimony was corroborated by other witnesses, including Davis.

¶ 49 Carlson's September 25 email also stated that, in addition to the budgetary concerns, the petitioner's hours were being reduced due to the "events of today." According to the petitioner, this explanation can only be construed as a veiled reference to his threat to file a grievance. We cannot agree. When asked what he meant by "the events of today," Carlson testified that it referred to the fact that the petitioner had walked into his office yelling and swearing in the presence of students. Carlson also testified that the petitioner threatened to have him fired. The petitioner's behavior that day was corroborated by Farrell, who similarly testified that he was yelling and swearing when he approached her to complain about his displacement by Wood when he arrived for his shift. Although the petitioner denied that he had conducted himself in this manner, the resolution of conflicting testimony and the determination as to the credibility of witnesses are matters reserved for the Board. *Prato v. Vallas*, 331 Ill. App. 3d 852, 861 (2002). On administrative review, it is not this court's function to reweigh the evidence or make an independent determination of the facts. *Abrahamson*, 153 Ill. 2d at 88. Further, in addition to his testimony at the hearing, Carlson reported that he had received complaints from students regarding the petitioner's temperament in the vehicles during driver education instruction. Based upon this evidence, the Board could reasonably have concluded that the systemic budget cuts, along with the petitioner's altercation with Carlson on September 25, 2010, were the reasons for his reduction in hours at Carlson's facility.

¶ 50 The petitioner also argues that Carlson was not solely responsible for his reduction in hours, but that Artese, who had manifested antiunion bias by refusing him work at Prosser, also played a role in the decision. The Board found, however, that it was Carlson who made the decision, and we see no basis to disturb that finding. As site director at Roosevelt, Carlson had significant discretion in the hiring and scheduling of hours for the driver education teachers at his facility. Further, Artese emphasized that, while he was aware of Carlson's decision to reduce the petitioner's hours, he gave no instruction to Carlson to do so. Accordingly, we are unable to find that the Board's determination with regard to the petitioner's reduction in driver education teaching hours at Roosevelt was against the manifest weight of the evidence.

¶ 51 The petitioner similarly argues that Trujillo's decision to remove him from his positions as technology coordinator and attendance coordinator coincided suspiciously with the filing of his grievance on October 13, 2010, protesting the reduction in his driver education teaching hours. While we may agree with this statement, our review of the record otherwise fails to reveal sufficient evidence of antiunion animus on the part of Trujillo to warrant reversal of the Board's decision. The petitioner does not dispute that Trujillo's office had no jurisdiction or control over claims arising out of the CBE's driver education program. In addition, there was ample evidence, in the form of testimony and written communication from the petitioner's supervisors and co-workers, to show that he had been struggling in recent months to perform both the job as technology coordinator and that of attendance coordinator. His co-worker, Herrera, attempted to provide support to the petitioner with regard to certain nuances of his job, producing little improvement. Even Gabor, who had recommended the petitioner for the attendance coordinator position, agreed that efforts to assist the petitioner in performing his duties proved fruitless or were brushed aside by the petitioner himself. Such evidence, even

considering the questionable timing, provides support for the Board's conclusion that the petitioner was transferred for reasons other than antiunion animus on the part of Trujillo.

¶ 52 The petitioner nonetheless maintains that Trujillo, after reassigning him to a position as a math teacher, continued to retaliate against him for his grievance activity. In particular, he argues that three of his classes were inclusion classes for which Trujillo purposefully failed to provide him with the necessary support in the form of reliable and qualified special education teachers. However, the Board found that the situation in the petitioner's classrooms was the result of a severe budget shortfall and was not unique. In fact, Farrell testified that there were numerous other classrooms at Roosevelt that were unstaffed with inclusion teachers. The petitioner provides no persuasive evidence to rebut this fact.

¶ 53 As further proof of alleged retaliatory conduct, the petitioner refers us to the disciplinary proceedings brought by Trujillo in May of 2011, ultimately resulting in a 5-day suspension against him. The proceedings were based upon several students' claims that the petitioner used verbally abusive language in class and made discriminatory remarks towards special education students. However, the petitioner disputes the claims, and asserts that they were based upon statements which were "entirely unreliable."

¶ 54 We note that the disciplinary proceedings regarding the petitioner's suspension remain pending and unresolved. Nonetheless, the mere fact of these proceedings, without more, fails to demonstrate antiunion animus or retaliatory action on the part of Trujillo with regard to his decision to reassign the petitioner from his positions as technology coordinator and attendance coordinator. Further, it is not the role of this court to conduct an independent evaluation as to the credibility of the students' statements. See *Abrahamson*, 153 Ill. 2d at 88; *Prato*, 331 Ill. App. 3d at 861.

¶ 55 Finally, the petitioner contends that Trujillo's hostility toward the Union is apparent based upon the testimony of William Malugen, a teacher at Roosevelt and longstanding union delegate. In early September 2010, Trujillo held his first faculty meeting. In the midst of the meeting, Malugen began inquiring about six or seven Roosevelt employees who had been recently laid-off or terminated. According to Malugen, Trujillo "didn't seem too interested *** [and] pushed his hand to me and said stop Mr. Malugen, you're not in a Union meeting" and ordered him to sit down.

¶ 56 We agree with the Board that the above statement, while not the best of decorum, did not amount to proof of animus on the part of Trujillo against the Union. There was no attempt to expressly denounce or question participation in the Union itself, but only to instruct Malugen that a faculty meeting was not the place to discuss the job situation of particular individuals. Accordingly, we find no basis to conclude that the Board's findings that the petitioner failed to show that his removal from the positions of technology coordinator and attendance coordinator were the result of antiunion animus or retaliatory activity, were against the manifest weight of the evidence.

¶ 57 Based upon the foregoing, we affirm the decision of the Board that (1) the CBE violated section 14(a)(1) of the Act (115 ILCS 5/14(a)(1) (West 2010)) by denying the petitioner employment in the driver education program at Prosser; and (2) the petitioner failed to make a *prima facie* showing that the CBE violated sections 14(a)(3) and (a)(1) of the Act in its reduction of his hours in the driver education program at Roosevelt, and its reassignment of the petitioner from his positions as technology coordinator and attendance coordinator.

¶ 58 Affirmed.