2017 IL App (1st) 161932-U
Order filed: August 11, 2017

SIXTH DIVISION

No. 1-16-1932

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BOARD OF EDUCATION OF HARLEM SCHOOL DISTRICT 122, Petitioner, v. THE STATE OF ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD; PAULA HURLEY-WHITEAKER; and ANDREA WAINTROOB, JUDY BIGGERT, GILBERT O'BRIEN, MICHAEL PRUETER, and LYNNE SERED, in their official capacities as members of The State Of Illinois Educational Labor Relations Board, Respondents.	)	On Direct Appeal from an Opinion and Order of the Illinois Educational Labor Relations Board No. 2015-CA-0015-C

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman concurred in the judgment.
Justice Delort concurred in part, and dissented in part.

ORDER

¶ 1 *Held*: Decision of the Illinois Educational Labor Relations Board, finding that a school district violated the Illinois Educational Labor Relations Act, is confirmed, where: (1) jurisdiction is proper, as the respondent teacher was not an unprotected "short-term employee, (2) the issues in contention were not improperly expanded by the administrative law judge assigned to this matter, (3) the school district's substantive challenges to the finding that it committed a statutory violation are either unfounded or waived, and (4) the remedy imposed was neither statutorily impermissible nor an abuse of discretion.

¶ 2 Petitioner, the Board of Education of Harlem School District 122 (Harlem), appeals from an opinion and order entered by respondents, the State of Illinois Educational Labor Relations Board, and Andrea Waintroob, Judy Biggert, Gilbert O'Brien, Michael Prueter, and Lynne Sered, in their official capacities as members of the State of Illinois Educational Labor Relations Board (collectively, the Board). The Board granted relief after finding that Harlem impermissibly took adverse employment action against respondent, Paula Hurley-Whiteaker (Whiteaker), for having engaged in protected activity under the Illinois Educational Labor Relations Act (Act). 115 ILCS 5/1 *et seq*. (West 2014). Based on the following, we confirm the Board's decision.

¶ 3 I. BACKGROUND

¶ 4 In September 2014, Whiteaker—a substitute teacher employed by Harlem—filed a charge with the Board alleging that Harlem had committed an unfair labor practice prohibited by the Act. Whiteaker specifically contended that Harlem had improperly rescinded an offer of full-time employment in retaliation for Whiteaker's conduct at two meetings held in August 2014, at which she and others objected to changes Harlem was instituting with respect to its employment of substitute teachers.

¶ 5 On May 4, 2015, after an investigation, the Board's executive director filed a formal unfair labor practice complaint against Harlem based upon Whiteaker's charge. An amended complaint was subsequently filed on June 9, 2015.

¶ 6 The operative amended complaint generally alleged that Harlem was an educational employer and Whiteaker was an educational employee under the Act, and set forth the following additional assertions. On both August 1 and 4, 2014, Whiteaker "publicly supported and openly advocated for the organization formation of a bargaining unit of substitute teachers, to be

represented by a labor organization for purposes of collective bargaining," activity protected by the Act.

¶ 7 Moreover, while Whiteaker had applied for full-time employment with Harlem in August 2014, and had been offered a position by one of Harlem's principals on August 5, 2014, that employment offer was rescinded the following day. The rescission of this offer was taken in retaliation for Whiteaker's actions on August 1 and 4, 2014, in violation of the Act. Thereafter, in September 2014 and May 2015, Whiteaker was "excluded" from substitute teaching at two of Harlem's schools. Harlem took this action in retaliation for Whiteaker's filing of the initial unfair labor practice charge with the Board, also in violation of the Act.

¶ 8 Harlem filed an answer denying the material allegations of the amended complaint and an affirmative defense contending that because Whiteaker was a "short-term employee" as defined by the Act, she was not entitled to any of the Act's protections. See 115 ILCS 5/2(b), (q) (West 2014). Respondents also filed a motion to dismiss the amended complaint on the same basis, contending that the Board did not have jurisdiction over this matter. The administrative law judge (ALJ) assigned to this matter withheld ruling on respondent's motion to dismiss until after the hearing on the amended complaint.

¶ 9 That hearing was held on July 20, 2015. At the hearing, a host of documents were introduced into evidence and nine witnesses testified. We need not restate all of the evidence presented at the hearing to resolve the issues raised on appeal.

¶ 10 It is sufficient to note that the evidence established that Whiteaker was originally hired by Harlem as a full-time teacher in 1999. After she was laid off in a staffing reduction, she began working for Harlem as a substitute teacher in 2001. She worked every year thereafter, including over 100 days in both the 2013-2014 and 2014-2015 school years. While substitute teachers had

to complete a formal application process in their first year, they merely had to indicate their willingness to substitute teach in subsequent years in order to be eligible to be employed in that capacity by Harlem. Prior to 2014, Whiteaker had received one "exclusion" in her time as a substitute. An exclusion indicates that a particular principal in the school district had requested that a particular teacher no longer serve as a substitute at a particular school. If a teacher received three such exclusions, she would no longer be eligible to serve as a substitute teacher for Harlem.

¶ 11 Just prior to the beginning of the 2014-2015 school year, Harlem held two meetings for substitute teachers who would be available to teach during the upcoming year. Those meetings, held on August 1 and 4, 2014, were designed to apprise the substitutes regarding a number of changes to how they would be employed and compensated. Whiteaker attended both meetings, and was one of a number of substitutes that vociferously expressed unhappiness with the proposed changes. Among the many concerns expressed by the substitutes, a concern that was pursued by Whiteaker, was concern as to how the changes would apply to retired former full-time teachers, some of which were elderly and had medical issues.

¶ 12 When the teachers at the first meeting indicated that they "wanted answers," Whiteaker asked the human resources employee conducting the meeting, Lindsey Kinney, who was responsible for the changes. Kinney indicated that it was Harlem's human resources director, Danielle Hopkins. Whiteaker asked that Hopkins come to the meeting to answer the substitutes' questions. That did not ultimately occur, nor did Lindsey's representation that Hopkins would attend the second meeting prove accurate. Some other substitutes, but not Whiteaker, spoke of the possibility of forming a union of substitute teachers at the meetings.

¶ 13 Prior to the August 2014 meetings, Whiteaker had applied for a number of full-time teaching positions with Harlem. On August 5, 2014, one of Harlem's principals, Larry Smith,

informed Whiteaker that he was recommending her for a full-time position in his school. That recommendation was conditioned upon his submission of the recommendation to the district's human resources department and the superintendent's forwarding of the recommendation for final approval by Harlem's board. Whiteaker presented evidence suggesting that such approval was a mere formality, while Harlem presented evidence that such approval was not guaranteed and was subject to significant additional scrutiny. Shortly after Smith forwarded the recommendation, he was informed that it would not be presented to Harlem's board, and he then informed Whiteaker of that fact.

¶ 14 At the hearing, the evidence established that the decision not to forward Smith's recommendation to Harlem's board was made by Hopkins and Julie Morris, Harlem's superintendent. While neither attended the August 2014 meetings, they were made aware of Whiteaker's conduct and questioning. Both acknowledged that her conduct at the meetings, which they described as antagonistic and unprofessional, played a role in that decision. Other teachers who did attend the meetings disputed this characterization of Whiteaker's conduct.

¶ 15 After she did not obtain a full-time teaching position, Whiteaker continued to serve as a substitute during the 2014-2015 school year. In September 2014 and May 2015, Whiteaker was "excluded" from substitute teaching at two other Harlem schools.

¶ 16 A motion for a judgment in favor of Harlem was made at the conclusion of Whiteaker's case, premised upon Whiteaker's purported failure to sustain her burden of establishing a *prima facie* case with respect to the allegations contained in the amended complaint. The ALJ indicated that he would rule on the motion in the written order which would be issued following the hearing.

¶ 17 On January 29, 2016, the ALJ issued his recommended decision and order. Therein, the ALJ rejected Harlem's contention that Whiteaker was a short-term employee unprotected by the Act and, therefore, denied Harlem's motion to dismiss for a lack of jurisdiction. In reaching this conclusion, the ALJ concluded—*inter alia*—that Whiteaker had a "reasonable expectation" of being rehired by Harlem to work as a substitute teacher.

¶ 18 With respect to Whiteaker's allegations of unfair labor practices, the ALJ first concluded that Harlem had improperly retaliated against Whiteaker for her actions at the August 1 and 4, 2014 substitute teacher meetings. In so ruling, the ALJ rejected Harlem's argument that the evidence did not establish that, as alleged in the amended complaint, Harlem retaliated against Whiteaker when it "rescinded" an offer of full-time employment because she "publicly supported and openly advocated for the organization formation of a bargaining unit of substitute teachers." Concluding that this issue was not "dispositive," the ALJ instead found that the evidence established that Harlem retaliated against Whiteaker "when it refused to recommend [her] for a full-time teaching position to the District's Board" because she "engaged in protected concerted activity during both the August 1 and August 4 meetings." On this same basis, the ALJ denied Harlem's motion for a judgment in its favor, which contended that Whiteaker failed to sustain her burden of establishing a *prima facie* case with respect to the specific allegations contained in the amended complaint.

¶ 19 However, after concluding that there was no evidence that the two exclusions entered against Whiteaker in 2014 and 2015 were improperly motivated by her activity at the August 2014 substitute teacher meetings, the ALJ rejected Whiteaker's assertion that those exclusions constituted improper retaliation under the Act.

¶ 20 As a remedy, the ALJ recommended that Harlem: (1) cease and desist from retaliating against employees for exercising rights protected by the Act, (2) expunge from its files any references relating to Whiteaker's attendance at the August 2014 meetings, (3) post a notice to its employees of its violation and the ordered remedial actions, and (4) report its compliance to the Board.

¶ 21 Both Whiteaker and Harlem filed written exceptions to the AJL's recommended order. Whiteaker challenged the ALJ's conclusion that the two most recent exclusions entered against her were not violations of the Act and also sought additional relief, which included lost wages. Harlem asserted, *inter alia*, that the ALJ improperly: (1) rejected its argument that Whiteaker was a short-term employee unprotected by the Act, and (2) inappropriately modified the issues and allegations contained in the amended complaint to Harlem's surprise and prejudice.

¶ 22 On June 17, 2016, the Board issued its final written opinion and order. Therein, it largely adopted the ALJ's findings of fact, conclusions of law, and recommended remedy. It also rejected the argument that the ALJ had improperly expanded the issues beyond the amended complaint, finding that the issues addressed by the ALJ were "fully and fairly litigated."

¶ 23 However, noting that Whiteaker was entitled to be returned to the position she would have obtained had the illegal conduct not occurred, and concluding that she would have been hired had she been recommended to Harlem's board, the Board ordered Harlem to provide the following as additional remedies: (1) offer Whiteaker a full-time teaching position, (2) pay her for lost wages from the time she would have been appointed until the time that she is offered such a position, along with interest, and (3) post a revised notice reflecting the additional remedy the Board had ordered.

¶ 24 Harlem filed a timely appeal from the Board's decision. While the Board denied Harlem's request that the Board's order be stayed pending the outcome of this appeal, this court granted a similar request in an order entered on August 17, 2016.

¶ 25 II. ANALYSIS

¶ 26 Respondents raise a number of issues on appeal, each of which we address in turn.[1]

¶ 27 A. Standard of Review

¶ 28 The Act provides that, pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2014)), a final order of the Board is subject to judicial review directly by the appellate court (115 ILCS 5/16(a) (West 2014)). Under the Administrative Review Law, the scope of judicial review encompasses all questions of law and fact presented by the record. 735 ILCS 5/3-110 (West 2014). The applicable standard of review depends on whether the issue presented is one of law, fact, or a mixed question of law and fact. *Board of Education of City of Chicago v. Illinois Educational Labor Relations Board*, 2015 IL 118043, ¶ 14.

¶ 29 For questions of law, this court reviews the Board's conclusion *de novo*. *Id*. ¶ 15. When the interpretation of a statute is at issue, a reviewing court is not bound by the Board's interpretation of the relevant statute. *Id*. Nevertheless, the Board's interpretation is relevant where there is a reasonable debate about the meaning of the statute. *Id*. In contrast, "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct." 735 ILCS 5/3-110 (West 2014). A reviewing court, therefore, will not reweigh the evidence, or substitute its judgment for that of the Board; instead, the court simply determines whether the findings of fact are against the manifest weight of the evidence. *Board of Education of City of Chicago*, 2015 IL 118043, ¶ 15. Where the issue is a mixed question of law and fact

[1] Whiteaker has not filed a cross-appeal and, therefore, the claims she raised below regarding the most recent "exclusions" are not at issue on appeal.

asking the legal effect of a given set of facts, a reviewing court must determine whether the established facts satisfy the applicable legal rules. *Id*. ¶ 16. We review the Board's conclusion on a mixed question of law and fact for clear error. *Id*. "Review for clear error is significantly deferential to an agency's experience in construing and applying the statute that it administers." *Id*. ¶ 18. Thus, the Board's decision will be found to be "clearly erroneous" only when the reviewing court has a definite and firm conviction that a mistake has been committed. *Id*. ¶ 16.

¶ 30 B. Jurisdiction

¶ 31 We first address Harlem's contention that the Board improperly denied its motion to dismiss, as Whiteaker was an unprotected "short-term employee" under the Act and, therefore, the Board had no jurisdiction over this matter.

¶ 32 An administrative agency, such as the Board, exercises purely statutory powers and as such it only has those powers specifically conferred on it by statute. *American Federation of State, County & Municipal Employees (AFSCME), Council 31 v. Illinois Labor Relations Board, Local Panel*, 2017 IL App (1st) 160960, ¶ 8. It is undisputed that the Board "has no jurisdiction over individuals who are not educational employees." *Big Hollow Federation of Teachers, Lake County Federation of Teachers, Local 504, IFT-AFT, AFL-CIO, Complainant, and Big Hollow School District No. 38, Respondent*, 32 PERI ¶ 59.[2] Educational employees are generally defined by the Act to include those—such as Whiteaker—who are employed by a public school district,

[2] In this order, we appropriately cite to a number of final administrative decisions issued by the Board. See *Illinois Council of Police v. Illinois Labor Relations Board*, 387 Ill. App. 3d 641, 660 (2008) ("Our courts have repeatedly held a reviewing court must give deference to the administrative agency's interpretation of the statute it was created to enforce."); *Macomb Educational Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 265 Ill. App. 3d 194, 201 (1994) (Noting that reviewing courts "are to give some deference to the precedent of the previous decisions of the Board unless they are definitely wrong.").

but the Act also specifically provides that "short-term employees" are not included among those educational employees protected by the Act. 115 ILCS 5/2(a), (b) (West 2014).

¶ 33 A short-term employee is defined in the Act as "an employee who is employed for less than 2 consecutive calendar quarters during a calendar year and who does not have a reasonable expectation that he or she will be rehired by the same employer for the same service in a subsequent calendar year." 115 ILCS 5/2(q) (West 2014). "Section 2(q) imposes one test based on length of employment (the first prong) and a separate test based upon the relationship between the employer and employee (the second prong)." *William Rainey Harper Community College 512 v. Harper College Adjunct Faculty Ass'n, IEA/NEA*, 273 Ill. App. 3d 648, 654 (1995). For an employee to be classified as short-term, both prongs of the test must be satisfied. *Id.* at 652; *Laborers' International Union of North America, Local 508, Petitioner and Elverado Community Unit School District 196, Employer*, 19 PERI ¶ 141 ("where an employee meets only one of the Section 2(q) tests, the employee is not a short-term employee, but is rather an educational employee").

¶ 34 Furthermore, statutory exclusions from the definition of an "educational employee" are narrowly interpreted because they preclude the employee from exercising the rights provided by the Act. *American Federation of State, County & Municipal Employees, Council 31 v. Illinois Labor Relations Board,* 2014 IL App (1st) 132455, ¶ 31; *Waubonsee College Adjunct Faculty Association, IEA-NEA, Petitioner, and Waubonsee Community College, Employer*, 22 PERI ¶ 173. As Whiteaker's employer, Harlem had the burden of proving that the short-term employee exclusion applied in this matter. *Id*.

¶ 35 In their briefs, the parties spend considerable effort addressing whether the Board correctly determined that Whiteaker was employed for two consecutive calendar quarters during

a calendar year, such that she did not satisfy the first prong of the above test. We need not address this question, as this issue may be more expeditiously resolved on the basis of the second prong.

¶ 36 "An 'expectation' is an employee's subjective belief that he will be rehired." *Harper College*, 273 Ill. App. 3d at 652. Being repeatedly rehired by the same employer to perform the same work has been recognized as satisfying this standard, even where an employer neither promises future employment nor obligates itself to provide future employment. *Id.* at 652-53; *Waubonsee*, 22 PERI ¶ 173.

¶ 37 Here, the evidence established that Whiteaker had been substitute teaching for Harlem every year since 2001, including teaching over 150 days in the academic year prior to August 2014, when Harlem allegedly violated the Act. Moreover, while Whiteaker had to formally apply to be a substitute teacher in her first year of employment, in every year thereafter she merely had to indicate her willingness to serve again as a substitute. And, at the time Harlem allegedly violated the Act in the first week of August 2014, the new 2014-2015 educational year was to begin within the month. Whiteaker had just attended two meetings specifically held for those that *would be* serving as substitute teachers during that new educational year. Her first substitute teaching assignment in the new educational year occurred on August 19, 2014.

¶ 38 On this record, it is apparent that—at the time of the only alleged unfair labor practice at issue on appeal—Whiteaker had a reasonable expectation that she would be rehired by Harlem as a substitute teacher for the upcoming 2014-2015 educational year. At the very least, with the burden on Harlem to establish the exclusion applied and with the exclusion narrowly interpreted, the Board's conclusion that the second prong of the test for short-term employees was not satisfied was not clearly erroneous.

¶ 39 While Harlem has raised a number of challenges to such a conclusion on appeal, all of them fundamentally rely upon authority interpreting a prior version of the statutory exclusion found in section 2(q) of the Act, one which required an employee to have a "reasonable assurance" of being rehired in order to be considered an educational employee. See Pub. Act 92-748 (eff. Jan. 1, 2003) (amending section 2(q) to provide that a "reasonable expectation" of rehiring, rather than a "reasonable assurance," is required to show that an employee is not a short-term employee under the second prong). The applicable tests for establishing reasonable assurance are significantly different than to establish reasonable expectation (*Harper College*, 273 Ill. App. 3d at 652-53; *Waubonsee*, 22 PERI ¶ 173) and, therefore, Harlem's citations to this authority and its arguments are simply irrelevant to the analysis actually applicable here.

¶ 40 We, therefore, conclude that the Board properly denied Harlem's motion to dismiss, as its conclusion that Whiteaker was not an unprotected "short-term employee" under the Act was not clearly erroneous and, therefore, the Board had jurisdiction over this matter.

¶ 41 C. Restatement of Whiteaker's Allegations

¶ 42 Harlem next notes that the amended complaint specifically alleged that Harlem retaliated against Whiteaker when it "rescinded" an offer of full-time employment because she "publicly supported and openly advocated for the organization formation of a bargaining unit of substitute teachers." Harlem contends that the ALJ improperly and "unilaterally modified the issues for hearing" by actually finding that Harlem retaliated against Whiteaker "when it refused to recommend [her] for a full-time teaching position for the District's Board," and not because she advocated for a union but rather because she "engaged in protected concerted activity during both the August 1 and August 4 meetings." We disagree.

¶ 43 "Administrative complaints are not required to state the charges with the same precision, refinements, or subtleties as pleadings in a judicial proceeding." *Vuagniaux v. Department of Professional Regulation*, 208 Ill.2d 173, 195 (2003). Indeed, "charges filed before an administrative agency 'need only be drawn sufficiently so that the alleged wrongdoer is reasonably apprised of the case against him to intelligently prepare his defense.' " *Id*. at 196 (quoting *Siddiqui v. Department of Professional Regulation*, 307 Ill. App. 3d 753, 757 (1999)). Variation between 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. *Board of Education of the City of Chicago, Respondent, Appellant, Cross-Appellee, v. Illinois Educational Labor Relations Board*, 32 PERI ¶ 135.

¶ 44 Here, the Board rejected this very argument below, concluding that "it was clear from the evidence Hurley-Whiteaker presented in her case what the issues were, and those issues were fully and fairly litigated." There is significant evidence in the record to support this conclusion, where: (1) Whiteaker's original charge specifically indicated her belief that she was "being retaliated against for raising issues of hours and work and compensation, [and] discussing it with co-workers and management," (2) Harlem responded to those specific assertions in a "Position Statement" it filed in response to the charge, (3) in both her pre-hearing and post-hearing written filings, Whiteaker specifically complained that the retaliation took the form of Harlem's refusal to submit her as a recommended candidate for full-time employment to Harlem's board, (4) in her post-hearing written argument, Whiteaker specifically discussed the fact that she had raised questions at the substitute teacher meetings on behalf of all the substitute teachers, and (5) at the

hearing, Harlem took the opportunity to both present evidence and conduct cross-examination with respect to these issues.

¶ 45 Moreover, even if we were to find that the ALJ and the Board improperly considered issues and evidence beyond the scope of the allegations contained in the amended complaint, the Administrative Review Law provides:

> "Technical errors in the proceedings before the administrative agency *** shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her." 735 ILCS 5/3-111(b) (West 2014); see also *McCleary v. Board of Fire & Police Comm'n of the City of Woodstock*, 251 Ill. App. 3d 988, 993 (1993) ("the appellate court may reverse an administrative ruling only if there is error which prejudiced a party in the proceeding").

In asserting it was prejudiced, Harlem merely asserts in a conclusory fashion—as it did in its exceptions to the ALJ decision below—that "[h]ad it known that the ALJ would modify the issues for hearing, [it] would have called additional witnesses and elicited different testimony." However, Harlem has never—either below or on appeal—provided any specifics as to what additional evidence it would have presented or how it was prejudiced by the fact that such evidence was not presented at the hearing.

¶ 46 Therefore, we find that Harlem has not sufficiently demonstrated prejudice such that we should reverse the Board's administrative decision.

¶ 47 D. *Prima Facie* Case

¶ 48 We next address Harlem's contention that Whiteaker failed to sustain her burden of establishing a *prima facie* case of a violation of the Act, either with respect to the specific

allegations contained in the amended complaint or with respect to the evidence actually presented at the hearing. This assertion is partially a reprise of the argument made in Harlem's motion for a judgment in its favor, which was made at the conclusion of Whiteaker's case, taken under advisement, and which was ultimately denied in the ALJ's recommended decision. We find this argument to be both irrelevant and waived.

¶ 49 First, to the extent that this argument continues to focus on whether a *prima facie* case was established based upon the specific allegations and issues contained in the amended complaint, it has essentially been rendered irrelevant in light of our rejection of Harlem's argument that the ALJ improperly and "unilaterally modified the issues for hearing."

¶ 50 Second, to the extent that this argument focuses on whether a *prima facie* case was established based on the evidence presented at the hearing, it has been waived. "In cases in which there is a recommended decision, the parties may file exceptions to the Administrative Law Judge's recommendation and briefs in support of those exceptions." 80 Ill. Adm. Code 1120.50(a) (2011). "Exceptions shall specify each finding of fact and conclusion of law to which exception is taken." 80 Ill. Adm. Code 1105.220(b) (2004). If a timely, specific exception to a finding of fact or conclusion of law is not filed, it is waived. 80 Ill. Adm. Code 1120.50(a) (2011); *Pierce v. Illinois Educational Labor Relations Board*, 334 Ill. App. 3d 25, 32 (2002).

¶ 51 Here, the ALJ's recommended decision rejected this very argument, and specifically concluded that a *prima facie* case of discrimination had been established based upon the evidence presented at the hearing. Nevertheless, Harlem did not include that conclusion of law among its exceptions to the ALJ's recommended decision. As such, any exception to that ruling has been waived.

¶ 52 E. Substantive Challenges

¶ 53 We next address Harlem's two remaining substantive challenges to the Board's conclusion that Harlem had violated the Act.

¶ 54 First, Harlem asserts that the Board erroneously concluded that Whiteaker engaged in "protected activity," such that she was entitled to the protections of the Act.

¶ 55 Harlem was found to have violated section 14(a)(1) of the Act, which precludes educational employers such as Harlem from "[i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act." 115 ILCS 5/14(a)(1) (West 2014). One of the rights provided to educational employees by the Act is the right to "engage in lawful concerted activities for the purpose of *** mutual aid and protection." 115 ILCS 5/3(a) (West 2014). "It has been held that section 14(a)(1) refers to adverse action taken against an employee as a result of any protected concerted activity." *Speed Dist. 802 v. Warning*, 242 Ill. 2d 92, 112 (2011).

¶ 56 This court has recognized that employees engage in protected concerted activity "where they invoke a right grounded upon a collective bargaining agreement or the activity is engaged in 'with or on the authority of other employees, and not solely by and on behalf of the employee himself.' " *Board of Education of Schaumburg Community Consolidated School District 54 v. Illinois Educational Labor Relations Board*, 247 Ill. App. 3d 439, 456 (1993) (quoting *Meyers Industries*, 268 NLRB 493, 497 (N.L.R.B. 1984)); see also, *Board of Education, City of Peoria School District No. 150 v. State of Illinois Educational Labor Relations Board*, 318 Ill. App. 3d 144, 150 (2000) (noting that the Board "has applied section 14(a)(1) to prohibit interference with concerted acts of mutual aid or protection, including activity not involving a union"). This standard " 'encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group

complaints to the attention of management.' " *Schaumburg*, 247 Ill. App. 3d at 457 (quoting *Meyers Industries*, 281 NLRB 882, 887 (N.L.R.B. 1986)).

¶ 57 The evidence presented below established that Whiteaker was one of a number of other substitute teachers at the August 2014 meetings who expressed displeasure with the changes Harlem intended to institute with respect to the compensation and work conditions of substitutes in the new school year. The group of teachers at the first meeting "wanted answers," and Whiteaker took the lead in attempting to obtain those answers from Harlem's superintendent. Whiteaker then attended the second meeting in hopes of speaking to the superintendent to obtain answers to those group concerns. One of the concerns raised and pursued by Whiteaker involved the possibility that elderly, retired teachers working as substitutes—a group to which Whiteaker herself did not belong—would have to teach for an excessively long period during a school day. On this record, we conclude that the Board did not commit clear error in finding that the above standard had been met, where Whiteaker clearly engaged in activity with other employees, did not do so *solely* by and on behalf of only herself, and acted to bring truly group complaints to the attention of management.

¶ 58 Harlem next contends that the Board's conclusion that Harlem took adverse action against Whiteaker by refusing to hire Whiteaker as a full-time teacher, based upon the actions of its employees and not based upon any action taken by Harlem's board, was improper both because Harlem's employees had no actual or apparent authority to make hiring decisions and because an improper motive held by its employees cannot be imputed to Harlem's board.

¶ 59 We find these contentions to be unfounded. To establish an adverse action violating the Act, it is not required that Harlem's employees have actual or apparent authority to make final hiring decisions for Harlem's board, nor is it necessary to directly impute any improper motive to

Harlem's board. As the Board recognized in its decision, it has repeatedly recognized that an employer may violate the Act "even though the decisionmakers were not shown to have had an improper motivation, where the employer's decision was based on the recommendation of a supervisor who was shown to have an improper motivation." *Chicago Teachers Union, Local No. 1, IFT-AFT, AFL-CIO, Complainant, and Chicago Board of Education, Respondent*, 31 PERI ¶ 24; *Jacqueline Dellamano, Complainant, and McLean County Unit District 5, a/k/a Board of Education of McLean County Unit District 5, Respondent*, 30 PERI ¶ 207 (same). Here, the Board found that the failure of Harlem's board to act on the recommendation that Whiteaker be hired was directly attributable to the improper motivations of its employees. That is sufficient to establish a violation of the Act.

¶ 60 F. Improper Remedy

¶ 61 Finally, Harlem contends that the Board improperly ordered it to hire Whiteaker as a full-time teacher. We disagree.

¶ 62 Under the Act, the Board is not only empowered to order a party committing an unfair labor practice to stop the unfair practice, but it may also "take additional affirmative action." 115 ILCS 5/15 (West 2014). The purpose of the Board in fashioning a remedy in an unfair labor practice case is "to order a 'make-whole' remedy that places the parties in the same position they would have been in had the unfair labor practice not been committed. [Citation.] The ISLRB has substantial flexibility and wide discretion to ensure that victims of unfair labor practices be returned to the position that they would have obtained had the illegal conduct not occurred. [Citation.]" (Internal quotation marks omitted.) *Paxton-Buckley-Loda Education Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 304 Ill. App. 3d 343, 353–54 (1999); *Board of*

Education, Granite City Community Unit School District No. 9 v. Sered, 366 Ill. App. 3d 330, 340 (2006) (same).

¶ 63 Harlem's first argument is that the Board's order requiring it to hire Whiteaker as a full-time teacher exceeded its statutory authority and ignored the plain language of section 10-20.7 of the Illinois School Code, which provides local school boards such as Harlem with the power to "appoint all teachers and fix the amount of their salaries." 105 ILCS 5/10-20.7 (West 2014). However, that very section makes a school board's power to hire teachers "subject to limitations set forth" in the School Code. *Id*. One such limitation is contained in section 10-20 of the School Code, which explicitly provides that the powers granted to a local school board "does not release a school board from any duty imposed upon it by [the School Code] or any other law." 105 ILCS 5/10-20 (West 2014). Obviously, one such duty imposed by the Act is to refrain from engaging in unfair labor practices and to comply with any remedial order entered by the Board with respect to a proven claim of unfair practices. 115 ILCS 5/15 (West 2014). Any further doubt that the Board's authority to craft a "make-whole" remedy is within its statutory authority and superior to the hiring authority provided to local school boards by the School Code is resolved by citation to section 17 of the Act, which provides that "in case of any conflict between the provisions of this Act and any other law, executive order or administrative regulation, the provisions of this Act shall prevail and control." 115 ILCS 5/17 (West 2014).

¶ 64 Harlem also asserts that, even if it was a decision within its authority, it was an abuse of discretion for the Board to require Harlem to hire Whiteaker when the record established that she had been "excluded from teaching at three schools in the District" for her performance and activities as a substitute teacher. However, the record is clear that two of these exclusions were entered after Harlem retaliated against Whiteaker by refusing to hire her as a full-time teacher.

As discussed above, the Board's authority to craft a remedy includes substantial flexibility and wide discretion to ensure that victims of unfair labor practices be returned to the same position that they would have obtained had the illegal conduct not occurred. *Paxton*, 304 Ill. App. 3d at 353-54. If she had been hired as a full-time teacher in August 2014, Whiteaker would not have been in a position to receive those two additional substitute teacher exclusions, and they should, therefore, not be cited as a reason not to place Whiteaker in the same position she would have been in had the unfair labor practice not been committed.

¶ 65 Finally, Harlem also appears to contend in its reply brief that it was an abuse of discretion for the Board to require Harlem to hire Whiteaker because this conclusion ignored evidence that Harlem's board "does not merely accept recommendations of the Superintendent to hire particular individuals with any scrutiny."

¶ 66 However, the record reflects that the parties presented conflicting evidence on this issue below and Harlem's arguments on appeal expressly ask this court to reverse a credibility determination made below. However, it is not our place to reweigh the evidence or substitute our judgment for that of the Board (*Board of Education of City of Chicago*, 2015 IL 118043, ¶ 15), and any credibility determination are for an administrative agency such a the Board to make (*Koulegeorge v. State of Illinois Human Rights Commission*, 316 Ill. App. 3d 1079, 1087 (2000). Here, both Smith and a former member of Harlem's board presented testimony tending to indicate that Harlem's board would very likely have simply approved Smith's recommendation of Whiteaker as a full-time employee if it had only been presented. On this record, we do not find the Board's chosen remedy to be an abuse of discretion.

¶ 67 III. CONCLUSION

¶ 68 For the foregoing reasons, the decision of the Board is confirmed.

¶ 69 Confirmed.

¶ 70 JUSTICE DELORT concurring in part, and dissenting in part:

¶ 71 Harlem raises six issues in this appeal. First, it contends that the Board lacked jurisdiction to hear Whiteaker's charge because she was a "short term employee" who fell outside the scope of the Act under the Act. Second, it argues that the Board improperly "modified the issues for hearing" by finding that Harlem retaliated against Whiteaker by refusing to recommend her for a full-time teaching position. Third, Harlem maintains that Whiteaker failed to establish a *prima facie* violation of the Act. Fourth, Harlem argues that the Board's conclusion that Whiteaker engaged in protected activity under the Act was erroneous. Fifth, Harlem argues that the Board's conclusion that Harlem took adverse action against Whiteaker was improper. Sixth, Harlem argues that the Board improperly ordered Harlem to hire Whiteaker as a full-time teacher.

¶ 72 I agree with the majority that Harlem's first five claims of error lack merit and, therefore, join ¶¶ 1-59 of the majority opinion. The majority and I part ways, however, with respect to Harlem's claim that the Board improperly ordered Harlem to: (1) offer Whiteaker a full-time teaching position and (2) make Whiteaker whole "for all losses she incurred as a result of the District's failure to appoint her to a full-time position, including interest at a rate of seven percent per annum, calculated from date on which she would have been appointed until she is offered a full-time teaching position." The majority finds this was a proper exercise of the Board's discretion. I respectfully disagree and would instead hold that the Board abused its discretion in imposing these unprecedented remedies, neither of which was recommended by the administrative law judge before whom the witnesses appeared. Accordingly, I respectfully dissent from the portion of the majority's opinion (¶¶ 60-66) affirming that portion of the Board's order.

¶ 73 The Board's order requiring Harlem to hire Whiteaker as a full-time teacher was largely based on the proposition that Whiteaker's promotion to full-time was a *fait accompli* until she engaged in the protected activities. In essence, the Board found that once a Harlem principal recommends hiring an individual, the district superintendent's and the board of education's further review of the candidate is but a mere formality. That conclusion was based on the brief testimony of a single witness: Robert Lockwood.

¶ 74 Lockwood was a school bus driver for Harlem before being elected to the board of education. He served on the board for all of one month. He apparently left his position as a member of the board of education after a school employees union and Harlem settled some dispute. Harlem's counsel objected to virtually every question that was posed to Lockwood. Many of these objections were sustained. And even when an objection was overruled, the administrative law judge nonetheless steered the questioning in a different direction. The end result was that Lockwood was precluded from answering the vast majority of the questions he was asked. That portion of Lockwood's testimony does not address the board of education's hiring role. The entire sum and substance of his testimony regarding Harlem's hiring procedures was as follows:

> "Q. Elected official, okay. My question is, as a board member what is the hiring process for a teacher?
>
> A. Honestly, I was only there a month.
>
> Q. Okay.
>
> A. So, I did not go through any hiring for teachers, I believe it's all through administration. The board has to give final approval, but I don't think they really are hands on. I did do one administrator I believe in the month we were there. And basically

> they presented a facts packet about the teachers. We were able to ask, or about the administrators, we were able to ask questions, which I had a couple questions at the time. And then we either said yes or no to it, but it really, it was already decided I think before us."

¶ 75 As this testimony shows, Lockwood had no personal experience whatsoever as a board member with respect to hiring teachers. Yet, despite its weak, scanty, and equivocal character, the Board relied on Lockwood's testimony to reach the conclusion that "the Board of Education's practice was to accept the administration's hiring recommendations without any independent investigation" and thus found that Whiteaker would have certainly been hired as a full-time teacher had it not been for her protected activities. This finding was unsupported by competent evidence. I would, therefore, find that the Board abused its discretion by ordering Harlem to hire Whiteaker as a full-time teacher.

¶ 76 The Board's decision was incorrect for a second reason: it improperly usurped the board of education's statutory authority to select full-time teachers. See 105 ILCS 5/10-20.7 (West 2014) (school boards are empowered to "appoint all teachers and fix the amount of their salaries"); *Daleanes v. Board of Education of Benjamin Elementary School District 25, DuPage County*, 120 Ill. App. 3d 505, 511 (1983) ("The hiring and firing of teachers pursuant to different sections of the School Code are discretionary and, therefore, nondelegable powers."). A school board's hiring decision must necessarily take into account a number of factors, such as changing enrollment patterns requiring reductions in force or non-replacement of existing staff through attrition, whether a particular candidate is best qualified to teach in any of the positions where vacancies exist, and whether there are existing teaching vacancies. In fact, in its motion for stay

pending appeal, Harlem advised this court that all full-time teaching positions had been filled. The Board's remedy pays no heed to these important considerations.

¶ 77 Finally, the Board's decision violated the well-established principle that remedies should be awarded only insofar as they will make the complainant whole. *Paxton-Buckley-Loda Education Association, IEA-NEA v. Illinois Educational Labor Relations Board*, 304 Ill. App. 3d 343, 353 (1999). Whiteaker was a full-time teacher for Harlem from 1999 to 2001, when she was terminated due to a reduction in force. From that time until 2015, Whiteaker worked for Harlem as a substitute teacher. During that time, Whiteaker was never rehired to a full-time position. Accordingly, the Board's remedial order directing Harlem to rehire Whiteaker as a full-time teacher did far more than make Whiteaker whole; it gave her a virtual windfall and also placed her on track for eventual tenure protections.

¶ 78 For these reasons, I would find that the Board abused its discretion by ordering Harlem to hire Whiteaker as a full-time teacher, vacate that portion of the Board's order, and remand for imposition of a remedy more precisely crafted to making Whiteaker whole and placing the parties in the position they were in before the protected activities took place.