NO. 4-10-0070

IN THE APPELLATE COURT Filed 2/8/11

OF ILLINOIS

FOURTH DISTRICT

THE BOARD OF TRUSTEES OF ILLINOIS STATE UNIVERSITY, Petitioner-Appellant and Cross-Appellee, v. THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, Respondent-Appellee and Cross-Appellee, and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 197, Respondent-Appellee and Cross-Appellant.	))))))))))))	Direct Administrative Review of the Illinois Educational Labor Relations Board No. 2009-CA-0001-S

JUSTICE POPE delivered the judgment of the court.
Justice Turner concurred in the judgment.
Justice Appleton dissented.

ORDER

Held: (1) The Board properly decided the case using summary-judgment procedure where its rules provide for the disposition of cases without hearings.

(2) The Board did not deny the University due process because the University is not an individual and thus is not entitled to the protections of due process.

(3) The Board did not err in affirming the ALJ's conclusions where (a) the University did not claim fraud or undue means in its postarbitration brief; (b) the University failed to make an offer of proof before the arbitrator of the absent witness's testimony; (c) the award was not repugnant to the Labor Act because the arbitrator's decision clearly drew its essence from the parties' collective-bargaining agreement; and (d) no evidence showed the arbitrator exceeded his authority or operated outside the confines of the parties' agreement.

(4) The Board did not abuse its discretion in denying the Union's motion for attorney fees.

Pursuant to Supreme Court Rule 335 (155 Ill. 2d R. 335) and section 16(a) of the Illinois Educational Labor Relations Act (Labor Act) (115 ILCS 5/16(a) (West 2008)), petitioner, the Board of Trustees of Illinois State University (University), seeks direct review of a December 22, 2009, order of the Illinois Educational Labor Relations Board (Board), finding the University violated sections 14(a)(1) and (a)(8) of the Labor Act (115 ILCS 5/14(a)(1), (a)(8) (West 2008)), where it refused to comply with a June 18, 2008, arbitration award issued in connection with a grievance filed by the International Brotherhood of Electrical Workers, Local 197 (Union) on behalf of electricians employed by the University.

The arbitrator found the University violated the collective-bargaining agreement between the Union and the University when the University assigned the replacement of light-fixture lens covers to the University's maintenance employees instead of the electricians. The arbitrator ordered the University to cease giving the work to the maintenance staff and instead assign it to the electricians. The Board affirmed the arbitrator's decision.

The University appeals, arguing (1) the Board improperly decided the case using summary judgment without proper statutory authority and in violation of the Board's rules regard-

ing motions and a proper record; (2) the Board denied the University due process when it improperly denied the University an opportunity to defend itself in a hearing and develop a hearing record; and alternatively (3) if the Board's procedure was proper, the Board erred in affirming the ALJ's conclusions that (a) the arbitrator's procedures were fair and impartial, (b) the award was not procured by fraud or other undue means, (c) the award was not repugnant to the Labor Act, and (d) the arbitrator did not exceed his authority. The Union cross-appeals, arguing the Board erred in denying its request for attorney fees for what it considered frivolous litigation.

I. BACKGROUND

This case arises from a decision by the Board with respect to unfair-labor-practice charges brought by the Union against the University.

A. Collective-Bargaining Agreement

The University and the Union were parties to a collective-bargaining agreement. Article VI of the agreement provides for the arbitration of grievances. According to article VI, the arbitrator's decision "shall be final and binding on the parties."

B. Union's Grievance

In March 2007, the Union alleged the University violated the parties' collective-bargaining agreement by assigning

the task of replacing light-fixture lens covers to the maintenance employees instead of the electricians. Specifically, the Union argued the assignment violated section 2 of article XXI of the agreement, regarding work jurisdiction, and article XXIV, regarding job scope.

C. Arbitration Hearing

On April 18, 2008, an arbitration hearing was held. The arbitrator was chosen from a list of seven arbitrators and agreed upon by both parties. During the hearing, the University presented the issues as stated above. The parties then submitted four joint exhibits.

During its case, the Union gave its opening statement and presented a packet of documents and two witnesses. One of three letters contained in the packet was from Michael Herbert, a business and financial-services manager for the International Brotherhood of Electrical Workers, Local 601 (IBEW), who stated lens-cover replacement at the University of Illinois has always fallen under the jurisdiction of union electricians. The entire text of the letter provided the following:

> "In response to your inquiry regarding, under whose jurisdiction do the fixture lenses fall, at the University of Illinois. This work has always fallen under the jurisdiction of the [IEBW] at the University of

Illinois. This work has never involved any other craft but the [IBEW]."

The other two letters related electricians replaced lens covers at Southern Illinois and Western Illinois Universities.

After the Union rested, the University presented its case. The University's case consisted of its opening statement, the testimony of three witnesses, and exhibits. During its opening statement, the University stated its intention to call the labor-relations director from the University of Illinois, who would testify that "journeymen do not do this simple lens removal and replacement in their Facilities Management operation" and that it is "done by a less than journeyman classification."

Following the testimony of its third witness, the University requested a five-minute recess because its fourth witness had not yet arrived. The following colloquy took place:

"MR. KOMBRINK [(attorney for the University)]: Could we have another five-minute break?

THE ARBITRATOR: Do what?

MR. KOMBRINK: Could we have a five-minute break?

THE ARBITRATOR: Well, how many more witnesses?

MR. KOMBRINK: One.

THE ARBITRATOR: One? Okay. Then talk to with your witness and we'll stay here. Okay? We're not going to adjourn. Go ahead and talk with your witness.

MR. KOMBRINK: My witness is coming from Champaign and has not arrived quite yet.

THE ARBITRATOR: Okay. Then five minutes."

After the break, the following exchange took place:

"THE ARBITRATOR: Do you have another witness?

MR. KOMBRINK: I have one final witness. He's driving over here from Champaign. He's the witness I mentioned in my opening statement, Corbin Smith the Labor relations director. I just reached him by phone. He's about ten minutes away right now. I--I don't want to delay the hearing. I know you want to get going. But I would either ask for a stipulation that if in fact Corbin Smith testified, he would say that classification--

THE ARBITRATOR: Now wait a minute. Okay? We are in your case-in-chief.

MR. KOMBRINK: Right.

THE ARBITRATOR: Yeah. Now we have just finished a witness. Now are you going to call another witness?

MR. KOMBRINK: I would like to call another witness, but he's not here right now. He's ten minutes away. We finished up our case, you know, before I anticipated. So I would either ask that we wait ten minutes for him, if that's possible.

MR. REECE [(representative for the Union)]: We had all of our witnesses and that, everybody we needed here in a timely manner.

THE ARBITRATOR: I'm inclined to say, you know, if you can't go ahead like right now, no. Okay. Okay. Now do you have any more testimony of any kind?

MR. KOMBRINK: No."

The University did not pursue further the issue of stipulated testimony or make an offer of proof. Thereafter, the arbitrator asked the Union if it had any more witnesses it wished to call. The Union indicated it did not and the arbitrator stated for the record the parties were resting. The parties then agreed to file posthearing briefs.

D. Arbitration Award

In June 2008, the arbitrator found the University violated both section 2 of article XXI and article XXIV of the collective-bargaining agreement. He stated he gave considerable weight to evidence of like-work assignments from other universities. This evidence included the letter the Union presented from Michael Herbert. Specifically, the arbitrator stated the following:

> "In deciding the issue, the Arbitrator reviews Articles XXI, Section 21.02 Par. 4. Employees covered by this agreement perform duties particular to their trade following recognized procedures and techniques for such work and including new technologies and equipment as introduced.
>
> And, Article XXIV. Employees covered by the Agreement perform all duties peculiar to and normally required in the electrical trade, following recognized procedures and techniques for such work.
>
> In deciding the issue, the Arbitrator gives considerable weight regarding the work assignment at other Universities where the replacement of lenses [is performed] which includes among others, a letter from Michael

> Herbert, Business and Financial Secretary for the International Brotherhood of Electrical Workers, Bloomington, Illinois, dated February 18, 2008[,] regarding the practice at the University of Illinois where it states: In response to your inquiry regarding, under whose jurisdiction do the fixtures [*sic*] lenses fall, at the University of Illinois. This work has always fallen under the jurisdiction of [IBEW] at the University of Illinois. This work has never involved any other craft but [IBEW]."

The arbitrator ordered the University to cease giving the work to the maintenance staff and instead assign it to the electricians.

On July 17, 2008, the University notified the Union it would not comply with the arbitration decision.

E. Administrative Proceeding

On July 24, 2008, the Union filed an unfair-labor-practice charge with the Board, alleging the University violated section 14(a)(8) of the Act by refusing to comply with the arbitration award. The Board investigated the charge and issued a complaint and notice of hearing alleging the University violated section 14(a)(8), and derivatively section 14(a)(1) of the

Act in refusing to comply with the award. The University filed an answer admitting it refused to comply with the award but denied the award was final and binding. The matter was referred to a Board administrative law judge (ALJ).

In its December 30, 2008, prehearing memorandum, the University argued as contested material facts the following: (1) the Union submitted a false statement to the arbitrator, *i.e.*, the Herbert letter; (2) the arbitrator relied on that statement in reaching his decision; (3) the arbitrator refused to grant a short delay to allow the University's witness to testify; and (4) a hearing deficiency or other medical problem affected the arbitrator's ability to conduct a fair hearing.

On January 21, 2009, the Union filed a "Summary Dispositive Motion," arguing (1) the University presented legal arguments or factual issues it could have raised with the arbitrator; (2) the award draws its essence from the agreement, and (3) no evidence exists to show the award was the product of fraud or collusion. As a result, the Union maintained the award should be enforced.

On February 6, 2009, the University filed a motion to strike the Union's summary dispositive motion, arguing it had presented valid legal arguments the award was not binding and it was entitled to a hearing on the matter. Specifically, the University contended the arbitration award was not binding

because (1) the award was not rendered in accordance with the procedures set out in the collective-bargaining agreement; (2) the award was repugnant to the Act; and (3) the award is not enforceable under the Uniform Arbitration Act (710 ILCS 5/1 (West 2008)).

In support of its motion to strike, the University submitted affidavits from the University of Illinois at Champaign-Urbana's (1) director of maintenance, (2) supervisor of building services, and (3) manager of labor relations. Each affidavit stated nonelectrician employees have changed the light-fixture lens covers at that University. In addition, the University submitted the labor-electrician-series civil service class specifications.

On February 11, 2009, the Union filed a motion for attorney fees, arguing the University's arguments were insufficient as a matter of law and intended to prolong the litigation. The University replied, arguing the Union failed to show it had engaged in frivolous litigation.

On April 8, 2009, the ALJ ordered the parties to file a stipulated record and to waive an evidentiary hearing. The University filed a response to the ALJ's order, stating (1) it had previously submitted a list of joint exhibits and exhibits it considered relevant in its prehearing memorandum, (2) the parties did not agree on a stipulated record, and (3) an evidentiary

hearing was necessary. On April 29, 2009, the Union filed a "stipulated" record, to which the University did not agree.

F. ALJ's Recommended Findings

On July 2, 2009, the ALJ issued an amended recommended decision and order. In the decision, the ALJ stated he determined there were only issues of law and no issues of fact that needed to be decided. As a result, the ALJ found the matter could be decided without having testimony before the ALJ. The ALJ stated the three motions submitted by the parties included sufficient supporting memoranda, affidavits, the collective-bargaining agreement, the arbitration award, and the transcript of the arbitration to rule on the summary dispositive motion without a hearing.

The ALJ granted the Union's summary dispositive motion and found the University violated section 14(a)(8), and derivatively section 14(a)(1) of the Labor Act by failing to comply with the arbitration award. While the ALJ acknowledged the Board may award attorney fees as a sanction for frivolous litigation, the ALJ found the University sincerely believed its arguments were valid and found the arguments of the type usually made by a party when trying to vacate an arbitration award. As a result, the ALJ denied the Union's motion for fees. Following the issuance of the ALJ's recommended decision and order, the University filed an exception to the ALJ's finding it violated the Act.

The Union also filed an exception to the ALJ's denial of its request for attorney fees.

G. Board's Opinion

The Board accepted the ALJ's recommendations in a written opinion issued on December 22, 2009. The Board agreed there were no genuine issues of material fact and it was appropriate for the ALJ to decide the case as a matter of law. The Board also affirmed the ALJ's denial of the Union's motion for attorney fees.

This appeal followed.

II. ANALYSIS

On appeal, the University contends (1) the ALJ's ruling on summary judgment and the Board's decision to uphold the ALJ's ruling were improper because the Labor Act and Illinois Educational Labor Relations rules and regulations (administrative rules) (80 Ill. Adm. Code 1120, 40 (2009)) do not provide for the resolution of unfair-labor-practice complaints by summary judgment and (2) it was deprived of due process where, in the absence of a stipulated record, it was denied its right to a hearing. Alternatively, the University argues, if the Board's procedure was proper, the Board erred in affirming the ALJ's conclusions that (1) the arbitrator's procedures were fair and impartial, (2) the award was not procured by fraud or other undue means, (3) the award was not repugnant to the Labor Act, and (4) the arbitrator

did not exceed his authority.

The Union cross-appeals, arguing the ALJ and the Board erred in denying its request for sanctions in the form of attorney fees.

A. Standard of Review

> "'Review of [a Board] decision on an unfair[-]labor[-]practice charge must be sought in the appellate court rather than in the circuit court. [Citation.] In such cases, Supreme Court Rule 335(h) (134 Ill.2d R. 335(h)) states that certain provisions of the Administrative Review Law [citation] apply. Among these is section 3-110, which describes the scope of our review as follows:
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> > "The hearing and determination shall extend to all questions of law and of fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the

> administrative agency on questions of fact shall be held to be *prima facie* true and correct."
>
> [Citation].

When operating under this statute, a reviewing court will defer to the agency's factual conclusions, reversing only if the agency's determination is against the manifest weight of the evidence, *i.e.*, no rational trier of fact could have reached the challenged conclusion when looking at the evidence in the light most favorable to the agency; in discretionary matters, reversal may occur only if the agency has exercised its discretion in an arbitrary or capricious manner. [Citation.] If the question raised is purely legal, such as statutory construction, an agency's interpretation should receive deference because it flows from its experience and expertise [citation], but our review is *de novo*.'" *Central Community Unit School District No. 4 v. Illinois Educational Labor Relations Board*, 388 Ill. App. 3d 1060, 1068, 904 N.E.2d 640, 646-47 (2009) (quoting

Board of Education of Du Page High School District No. 88 v. Illinois Educational Labor Relations Board, 246 Ill. App. 3d 967, 973-74, 617 N.E.2d 790, 793-94 (1993)).

In this case, the parties submitted their dispute to binding arbitration. As a result, they are bound by the arbitrator's view of the facts and his interpretation of the collective-bargaining agreement. *Board of Education of Harrisburg Community Unit School District No. 3 v. Illinois Educational Labor Relations Board*, 227 Ill. App. 3d 208, 211, 591 N.E.2d 85, 87 (1992). We note judicial review of an arbitration decision is very limited and a court of review must, if possible, construe an award as valid. *Board of Education of Danville Community Consolidated School District No. 118 v. Illinois Educational Labor Relations Board*, 175 Ill. App. 3d 347, 353, 529 N.E.2d 1110, 1114 (1988). A court of review may not reverse the arbitrator's interpretation of the collective-bargaining agreement, even if it is different from the court's view of the agreement. *County of De Witt v. American Federation of State Employees, Counsel 31*, 298 Ill. App. 3d 634, 637, 699 N.E.2d 163, 165-66 (1998). We recognize "'[t]he [Board's] review of an arbitration award is similarly constrained.'" *Central Community*, 388 Ill. App. 3d at 1068, 904 N.E.2d at 647 (quoting *Du Page High School*, 246 Ill. App. 3d at 974, 617 N.E.2d at 794). While we are reviewing the

finding of an unfair labor practice and not deciding whether to affirm an arbitration award, the University has raised, as a defense, the issue of whether the award is binding as a result of alleged irregularities at both the arbitration and administrative proceedings.

B. Board Procedure

The University argues (1) the Board improperly decided the case using summary judgment and (2) it was deprived of due process where, in the absence of a stipulated record, it was denied its right to a hearing. Specifically, the University contends, (1) the ALJ's ruling on summary judgment and the Board's decision to uphold the ALJ's ruling is improper because the Labor Act and the administrative rules do not provide for the resolution of unfair-labor-practice complaints by summary judgment and (2) the Board denied the University due process when it improperly denied the University an opportunity to defend itself in a hearing and develop a hearing record.

1. *Summary Judgment*

The University argues the Board does not have the authority to render a decision without a hearing. We disagree. An administrative agency can only act pursuant to its statutory authority and any action beyond such authority is void. *Larrance v. Human Rights Comm'n*, 166 Ill. App. 3d 224, 231, 519 N.E.2d 1203, 1208 (1988). Section 5 of the Labor Act directs the Board

to "adopt, promulgate, amend, or rescind rules and regulations" it deems necessary to carry out its duties under the Labor Act. 115 ILCS 5/5(i) (West 2008). In this case, the Board's authority to render a decision without a hearing is derived from section 1105.100(d) of its administrative rules, which provide the following:

> "(d) Motions shall be directed to the [ALJ], or, in the event that an [ALJ] has not been named, to the Chief [ALJ]. All such motions or requests must be in writing, must state with specificity the reasons or grounds for the motion, and must be served on all parties simultaneously with their filing with the [ALJ]. *Motions that would preclude a hearing, such as a motion to dismiss or to refer the matter to arbitration, should be filed with the Answer.* However, such a motion may be filed at any time with the permission of the [ALJ] or chief [ALJ]." (Emphasis added.) 80 Ill. Adm. Code §1105.100(d) (2009).

Thus, section 1105.100(d) of the Board's administrative rules provides the Board the authority to entertain a summary dispositive motion, *i.e.*, a motion which would preclude a hear-

ing. If the drafters of the rule intended to limit the motions to only motions to dismiss or to refer the matter to arbitration, they would have so stated. They did not. Instead, the rules were drafted broadly to encompass other such motions which would preclude a hearing. As a result, the University's argument fails.

2. *Due Process*

The University also contends it was deprived of due process where the Board denied the University an opportunity to defend itself in a hearing and develop a hearing record. We disagree.

"The fundamental requirements of due process are notice of the proceeding and an opportunity to present any objections." *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201, 909 N.E.2d 783, 796 (2009). However, "[t]he due process clauses of the fifth and fourteenth amendments were enacted to protect 'persons,' not States." *People v. Williams*, 87 Ill. 2d 161, 166, 429 N.E.2d 487, 489 (1981). The State is not a "person" and cannot benefit from due-process protection. *Williams*, 87 Ill. 2d at 166, 429 N.E.2d at 489.

We recognize the First District in *Niles Township High School District 219 v. Illinois Educational Labor Relations Board*, 369 Ill. App. 3d 128, 136, 859 N.E.2d 57, 64 (2006), held the Board violated a school district's "procedural due process"

rights by making a decision in a case without first conducting an evidentiary hearing. However, we disagree with the First District that a school district, as a political subdivision of the State (*People ex rel. Taylor v. Camargo Community Consolidate School District No. 158*, 313 Ill. 321, 325, 145 N.E. 154, 155 (1924)), has a right to "procedural due process." The Supreme Court of Illinois has held "a school district, in its capacity as a political subdivision of the state, has no due process rights." *Henrich v. Libertyville High School*, 186 Ill. 2d 381, 405, 712 N.E.2d 298, 310 (1998).

The Supreme Court of the United State has likewise held a state and the political subdivisions of a state have no constitutional right to due process, because they are not persons within the meaning of the due-process clause of the fifth amendment (U.S. Const., amend. V). *South Carolina v. Regan*, 465 U.S. 367, 394 (1984); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). The same would seem to hold true of the due-process clause of the fourteenth amendment (U.S. Const., amend XIV). Thus, we conclude Illinois State University--as a political subdivision of the State--is not entitled to the protections of due process.

Assuming, *arguendo*, the University was entitled to due process, the fundamental requirements of due process were met in this case because the University had notice of the proceedings

and an opportunity for its arguments to be heard, a point the University appears to concede in its brief on appeal. The record also shows the University presented its arguments to the ALJ in motions and in its response to the ALJ's order to submit a stipulated record. As part of its response, the University attached three affidavits it argued directly contradicted the assertions in the Herbert letter.

C. Board's Determination

Alternatively, the University argues if the Board's procedure was proper, the Board erred in affirming the ALJ's conclusions where (1) the arbitrator's procedures were not fair and impartial, (2) the award was procured by fraud or other undue means, (3) the award is repugnant to the Labor Act, and (4) the arbitrator exceeded his authority.

Section 14(a)(8) of the Labor Act prohibits educational employers from "[r]efusing to comply with the provisions of a binding arbitration award." 115 ILCS 5/14(a)(8) (West 2008). The proper procedure for the Board to follow in determining whether an employer has violated section 14(a)(8) requires consideration of the following factors: (1) whether there exists a binding arbitration award, (2) what the content of that award is, and (3) whether the employer has complied with that award. *Central Community*, 388 Ill. App. 3d at 1066, 904 N.E.2d at 645 (citing *Danville Community*, 175 Ill. App. 3d at 349-50, 529

N.E.2d at 1112).

Here, the only disputed issue is whether the arbitration award is binding. In determining whether an award is binding, the Board examines the following factors: (1) whether the award was rendered in accordance with the applicable grievance procedure, (2) whether the procedures were fair and impartial, (3) whether the award conflicts with other statutes, (4) whether the award is repugnant to the purposes and policies of the act, and (5) any other basic challenge to the legitimacy of the award. *Central Community*, 388 Ill. App. 3d at 1066-67, 904 N.E.2d at 645-46. The University maintains the Board erred where (1) the arbitrator's procedures were not fair and impartial, (2) the award was procured by fraud or other undue means, (3) the award is repugnant to the Labor Act, and (4) the arbitrator exceeded his authority.

1. *Fair or Impartial Proceedings*

The University argues the arbitrator failed to provide fair and impartial proceedings where the Union's package of documents containing the three letters regarding practice at Southern Illinois University, Western Illinois University, and University of Illinois was never admitted into evidence and, therefore, it was improper for the arbitrator to rely on those exhibits.

While the University argues the Herbert letter was

never admitted into evidence and therefore should not have been considered by the arbitrator, the University has forfeited this argument by failing to include it in its postarbitration brief. "[The f]ailure to present an issue before an arbitrator waives the issue in an enforcement proceeding." *National Wrecking Co. v. International Brotherhood of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993); see *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 336, 399 N.E.2d 1322, 1326 (1980) (finding arguments waived where the claimant failed to raise them before the arbitrator). In its postarbitration brief, the University argued only (1) the packet of documents containing the Herbert letter was hearsay, (2) it did not have the opportunity to cross-examine the persons making the statements in the letters, and (3) the statements were inherently biased because the authors were affiliated with the Union. Because the University failed to raise the issue that the letter was never properly introduced in its postarbitration brief, that claim is forfeited.

The University also contends the arbitrator failed to provide fair and impartial proceedings when he denied the University's request for a delay of the proceedings to allow its fourth witness to arrive and testify. The University contends that witness's testimony would have refuted the contents of the Herbert letter.

However, it is undisputed the University failed to make

an offer of proof before the arbitrator of the testimony intended to contradict the letter. "Generally, a party who fails to make an offer of proof as to the evidence it intended to introduce waives any claim that the evidence was improperly excluded." *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 653, 801 N.E.2d 18, 26 (2003). In this case, the University did not attempt to make an offer of proof. Instead, it attempted to read into the record "stipulated" testimony. Such testimony would require the agreement of the Union, which the University did not have. As a result, the University has forfeited any claim the testimony was improperly excluded by failing to make an offer of proof. In addition, in its postarbitration brief, the University made no contention that the refusal to delay the proceedings was unfair, merely noting it rested its case after presenting three witnesses.

2. *Fraud or Undue Influence*

An arbitration award may be set aside only if the arbitrator commits fraud, is corrupt or partial, or engaged in another form of misconduct. See *Board of Education of Chicago v. Chicago Teachers Union, No. 1*, 86 Ill. 2d 469, 474, 427 N.E.2d 1199, 1201 (1981). While the University argues the Herbert letter contained false statements, it does not allege the *arbitrator* committed fraud. Instead, the University is arguing the award was procured by undue means because the Union presented a

letter containing a false statement.

However, the University did not claim fraud or undue means in its postarbitration brief and may not raise the issue for the first time at the enforcement stage; thus, the issue is forfeited. See *National Wrecking*, 990 F.2d at 960; see also Thomas, 78 Ill. 2d at 336, 399 N.E.2d at 1326. Forfeiture aside, we note the arbitrator did not exclusively base his decision on the Herbert letter. Instead, the arbitrator stated he gave "considerable weight regarding the work assignment at other Universities where the replacement of lenses [is performed] which include[d] *among others*, a letter from Michael Herbert." (Emphasis added.)

3. *Repugnancy*

To determine whether an award is repugnant to the Labor Act, this court reviews whether the award draws its essence from the collective bargaining agreement. *American Federation of State Employees, AFL-CIO v. State of Illinois*, 124 Ill. 2d 246, 254-55, 529 N.E.2d 534, 537-38 (1988). The arbitrator expressly stated he considered articles XXI (regarding work jurisdiction) and XXIV (regarding job scope) of the agreement in making his determination. Thus, the arbitrator's decision clearly draws its essence from the parties' agreement. An award must be upheld where the arbitrator acts within his jurisdiction and the award draws its essence from the agreement. *American Federation*, 124

Ill. 2d at 254, 529 N.E.2d at 537.

4. *Arbitrator's Authority*

The University claims the arbitrator exceeded his authority under article VI of the parties' agreement, which provides the arbitrator "shall have no authority to amend, modify, nullify, ignore, add to or subtract from any provision of" the agreement. Specifically, the University contends the arbitrator improperly dispensed "his own brand of justice" by "blatantly" ignoring and omitting important contract provisions when rendering his decision.

The University appears to be arguing that although the arbitrator's decision referenced articles XXI and XXIV but did not specifically reference the article XXIV parenthetical regarding civil-service specifications, the arbitrator exceeded his authority under article VI. The University also maintains, because the arbitrator did not specifically reference article V (management-rights clause) of the parties' agreement in his decision, the arbitrator completely ignored it in his analysis.

In this case, no evidence shows the arbitrator exceeded his authority or operated outside the confines of the parties' collective-bargaining agreement. Moreover, whether the arbitrator failed to correctly interpret the agreement is not for this court to determine. The question is not "whether the arbitrator or arbitrators erred in interpreting the contract; it is not

whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract." *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987). A reviewing court will only inquire into the merits of an arbitrator's interpretation of the parties' agreement to determine whether the award drew its essence from the agreement so as to prevent a manifest disregard of the agreement between the parties. *Water Fire Extension Bureau of Engineering Laborers' Local 1092, v. City of Chicago*, 318 Ill. App. 3d 628, 637, 741 N.E.2d 1093, 1100 (2000) (citing *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union, Local 1600, AFT, AFL/CIO*, 74 Ill. 2d 412, 421, 386 N.E.2d 47, 51 (1979)). Here, the arbitrator found his interpretation of articles XXI and XXIV settled the dispute. As stated, the arbitrator's decision clearly draws its essence from the parties' agreement. Thus, we cannot say the arbitrator disregarded the parties' agreement in rendering his decision.

In this case, the parties underwent *binding* arbitration, *i.e.*, their dispute was settled by an arbitrator instead of by a judge. Moreover, the parties agreed to abide by the arbitrator's view of their contract. Simply because one party disagrees with the outcome is not a reason to set aside the award.

D. Attorney Fees

The Union cross-appeals the ALJ and Board's denial of its request for an award of attorney fees against the University for what it considered frivolous litigation, arguing the University's arguments were insufficient as a matter of law and intended to prolong the litigation.

The decision to impose sanctions under the Labor Act is within the Board's discretion. *Wood Dale Fire Protection District v. Illinois Labor Relations Board, State Panel*, 395 Ill. App. 3d 523, 534, 916 N.E.2d 1229, 1238 (2009). As a result, our review of the Board's determination to deny the Union's request for sanctions is reviewed for an abuse of discretion. *Id.*, 395 Ill. App. 3d at 534, 916 N.E.2d at 1238.

Section 11120.80 of Title 80 of the Administrative Code provides the following:

> "(a) The Board's order may in its discretion also include an appropriate sanction, based on the Board's rules and regulations, if the other party has made allegations or denials without reasonable cause and found to be untrue or has engaged in frivolous litigation for the purpose of delay or needless increase in the cost of litigation. ***
>
> ***

> (c) The sanction may include *** an order to pay the other parties' reasonable expenses including costs and attorney fees ***." 80 Ill. Adm. Code §1120.80 (2009).

In this case, the ALJ denied the Union's request for sanctions and found while the University's arguments "all fail as a matter of law, they are supported by case law and are the type of arguments a party would make when trying to vacate an arbitration award." The ALJ concluded there was "not enough evidence to determine [the University] has engaged in frivolous litigation." The Board affirmed the ALJ's decision finding, "although the University's reasons for refusing to comply with the arbitration award were ultimately not meritorious as a matter of law, the arguments did not constitute 'frivolous litigation' as defined by the [Labor Act] and construed by the Board." While the ALJ, Board, and this court were unpersuaded by the University's arguments, those arguments could reasonably be made when challenging an arbitration award. The Board did not abuse its discretion in denying the Union's motion for attorney fees. We will not substitute our judgment for that of the Board in this area.

III. CONCLUSION

For the reasons stated, we affirm the Board's judgment upholding the arbitrator's decision.

Affirmed.

JUSTICE APPLETON, dissenting:

I respectfully dissent from the majority's decision because I disagree that the law allows the Board to use a summary-judgment procedure, thereby depriving parties of their statutory right to a live evidentiary hearing on the charges in the complaint.

It is true, as the majority observes, that section 1105.100(d) of the Board's administrative rules (80 Ill. Adm. Code §1105.100(d) (2009)) contemplates filing, "with the Answer," any "[m]otions that would preclude a hearing" and that a motion for summary judgment does aim to "preclude a hearing." Nevertheless, in my opinion, it is too much of a stretch to interpret this rule as contemplating motions for summary judgment, because (1) it would make no sense to require the charging party to file its motion for summary judgment "with the [charged party's] Answer" and (2) the Board's rules do not even begin to specify the essential characteristics of a summary-judgment procedure, such as what kind of documentary evidence counts for purposes of summary judgment and what the nonmovant must do to counter the motion for summary judgment.

Besides, interpreting section 1105.100(d) (80 Ill. Adm. Code §1105.100(d) (2009)) as contemplating a summary-judgment procedure would put this rule on a collision course with section 15 of the Labor Act (115 ILCS 5/15 (West 2008))--and the statute

would win. Statutes prevail over administrative rules (*Holtkamp Trucking Co. v. David J. Fletcher, M.D., L.L.C.*, 402 Ill. App. 3d 1109, ___ (2010), *appeal denied*, No. 111016 (November 24, 2010), ___ Ill. 2d ___, ___ and under the plain and unambiguous language of section 15, the issuance of a complaint creates the right to an evidentiary hearing on the complaint.

The first paragraph of section 15 reads as follows:

> "A charge of unfair labor practice may be filed with the Board by an employer, an individual or a labor organization. If the Board after investigation finds that the charge states an issue of law or fact, it shall issue and cause to be served upon the party complained of a complaint which fully states the charges and thereupon hold a hearing on the charges, giving at least 5 days' notice to the parties. At hearing, the charging party may also present evidence in support of the charges and the party charged may file an answer to the charges, appear in person or by attorney, and present evidence in defense against the charges." 115 ILCS 5/115 (West 2008).

Because section 15 speaks of giving five days' notice of the

hearing, the legislature evidently has in mind a live hearing instead of a written hearing, and holding this live hearing is one of the three things the Board "shall" do after "find[ing] that the charge states an issue of law or fact." The Board "shall" issue a complaint fully stating the charges; the Board "shall" cause the complaint to be served on the charged party; and the Board "shall" "hold a hearing on the charges," giving the parties five days' notice of the hearing. "Shall" is a verb of command (*People v. Thomas*, 171 Ill. 2d 207, 222 (1996)), and the text of section 15 contains no exception to the command that the Board "shall *** hold a hearing on the charges" after issuing and serving a complaint.

The statute does not say that the Board "shall hold a hearing on the charges unless the Board decides that a hearing is unnecessary." Even if such an exception might be a good idea as a matter of public policy, we do not make public policy (*Board of Education of Dolton School District 149 v. Miller*, 349 Ill. App. 3d 806, 811 (2004)), and we should not "deviate from the plain language of the statute by reading into it exceptions, limitations, or conditions that have no basis in the text" (*Gekas v. Williamson*, 393 Ill. App. 3d 573, 579 (2009)). In short, the Board has no power to make an exception to the hearing requirement in section 15 of the Labor Act (115 ILCS 5/15 (West 2008)). "Administrative agencies exercise powers provided strictly by

statute and possess no inherent or common law powers." *In re Abandonment of Wells*, 343 Ill. App. 3d 303, 306 (2003). Thus, the Board has no inherent power to dispense with a hearing that statutory law, in unqualified language, requires.

In the same spirit, I would also fault the proceedings before the arbitrator. There exists an issue between the parties. The evidence concerning that issue was, in part, unsworn before the arbitrator in the form of letters. An opportunity for sworn evidence contradicting those letters was available from an out-of-town witness, who was 10 minutes away from the arbitration hearing, but the arbitrator refused to allow a continuance of a few moments to secure that evidence. Had a judge made the same procedural ruling, there is no doubt this court would have reversed that decision as being an abuse of discretion. At bottom, both parties to their dispute are entitled to a fair hearing before both the arbitrator and the Board, not a process.