

FIFTH DIVISION  
JUNE 30, 2016

No. 1-14-2501

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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BOARD OF EDUCATION OF THE CITY OF CHICAGO,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	Appeal from the
	)	Illinois Educational
THE ILLINOIS EDUCATIONAL LABOR RELATIONS	)	Labor Relations Board
BOARD	)	
	)	
Respondent,	)	
and	)	No. 12 CA 0016C
	)	
CHICAGO TEACHERS UNION, LOCAL 1	)	
	)	
Respondent-Appellee	)	

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JUSTICE BURKE delivered the judgment of the court.\*  
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

ORDER

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\* This case was recently reassigned to Justice Burke.

*Held:* We affirm the judgment of the IELRB rescinding Ham's "unsatisfactory" rating and reinstating him as a teacher at Kenwood where the IELRB's decision was not against the manifest weight of the evidence nor clearly erroneous.

¶ 1 On October 14, 2011, Appellee Chicago Teachers Union (Union) filed a charge with Appellee Illinois Educational Labor Relations Board (IELRB), alleging that appellant Board of Education of the City of Chicago (Board) committed an unfair labor practice by dismissing one of its Union members, Kurt Ham, a teacher at Kenwood Academy High School (Kenwood). The Union alleged that Kenwood principal Elizabeth Kirby dismissed Ham because he was involved in activities protected by the Illinois Educational Labor Relations Act (Act). 115 ILCS 5/14 (West 1996). The Union also alleged that on October 24, 2011, Ham was removed from his position at Kenwood and reassigned to a Network Office in retaliation for engaging in activities protected under the Act. Following a hearing, an Administrative Law Judge (ALJ) determined that Kirby's decision to dismiss Ham was motivated by antiunion animus, and that her proffered reasons for his dismissal were pretextual. Accordingly, the ALJ determined that the Board violated sections 14(a)(1) and (a)(3) of the Act. The Board sought review of that decision before the IELRB and the IELRB affirmed the ALJ's findings. For the reasons that follow, we affirm the decision of the IELRB.

## ¶ 2 I. BACKGROUND

### ¶ 3 A. Administrative Hearing

#### ¶ 4 1. The Union's Case in Chief

¶ 5 The following has been gleaned from the record on review, which consists in part of testimony before an ALJ and various documents and exhibits. Ham was a tenured school teacher at Kenwood and had taught in the social studies department at that school since 1998. He generally taught World Studies, but also taught African American History, European History,

and Anthropology, and was endorsed in French and Spanish. In accordance with the School Code, the principal of Kenwood, as Ham's supervisor, was required to periodically observe Ham's teaching performance. The principal would document her observations on a form, noting Ham's strengths and weaknesses, and assign him a rating of unsatisfactory, satisfactory, excellent, or superior. At the hearing before the ALJ, Ham testified that he was rated either excellent or superior from 1998 to 2008. Kirby was named principal of Kenwood in 2005, and in 2006 and 2008 rated Ham as excellent.

¶ 6 Ham further testified that in the spring of 2010, he became the Union delegate at Kenwood. He testified that following the election, Kirby tried to rescind his appointment because the election was not properly publicized throughout the school. The Union held a second election at her request, and Ham was again elected as the delegate. As Union delegate, Ham testified that it was his responsibility to make sure the school's administration was following Chicago Public Schools (CPS) policies. Ham subsequently established the Professional Problems Committee (PPC) to facilitate communication between Kenwood teachers and the administration.

¶ 7 Ham testified that prior to becoming Union delegate and forming the PPC, his relationship with Kirby was "cordial and professional," and he was initially enthused about her being named principal at Kenwood because he previously worked with her in the social studies department. He testified, however, that after becoming the Union delegate and forming the PPC, their relationship began to "sour." Ham testified that Kirby would insinuate that the issues raised by the PPC were personal issues of the PPC's members and not issues shared by the rest of Kenwood's teachers.

¶ 8 In November 2010, the PPC distributed a survey to Kenwood's teachers to show that the opinions of the PPC regarding the administration were shared by the whole staff. Even though

Ham was the head of the PPC, another member of the committee, Michael Shea, presented the results to Kirby and the rest of the administration because Ham believed they would not be received in an un-prejudiced manner if he presented them. In January 2011, Ham testified that Kirby issued him an unsatisfactory rating and began a 90-day E-3 remediation period as outlined in the School Code. 105 ILCS 5/24A-5 (West 2010).

¶ 9 Ham testified that Kirby was not helpful during his remediation, even though she offered suggestions on how he could improve his teaching. She suggested how Ham could bring more structure to his class and how to improve his instructional strategy by placing an agenda on the chalkboard and breaking the class up into 10 to 15 minute intervals. Ham testified that his remediation continued until October 2011, when he received a final unsatisfactory rating resulting in his dismissal from Kenwood. Ham believed that he received an unsatisfactory rating and was dismissed because of his Union activities, and not because of his teaching ability. He subsequently sent an email to the entire Kenwood staff, including Kirby, stating that his remediation process had concluded that he would be removed from the building. The subject line of the email read "I have been fired," and in the body of the email he asked members of the staff to send written statements to his personal email address to help him at the discharge hearing.

¶ 10 On cross-examination, Ham stated that during the school year, he taught two or three classes each semester at Lake Forest College and College of DuPage. He never considered lowering the amount of college courses he taught during remediation because he believed he could handle both jobs. He also stated that in 2008, Kirby dropped his rating from "superior" to "excellent" and he refused to sign the evaluation because he believed his rating should have been "superior."

¶ 11 Joseph McDermott testified that he was a field representative for the Union, and that he

filed grievances against Kirby on behalf of Ham after the remediation process began. The grievances alleged that Kirby gave Ham an unsatisfactory rating in retaliation for Ham's Union activities, rather than based on his actual teaching performance. McDermott believed Kirby was retaliating against Ham based on her conduct following Ham's election as Union delegate where she protested his election and required the Union to hold a second election. McDermott testified that the principal has no role in Union elections, and the Union has its own process for dealing with how elections are conducted.

¶ 12 McDermott further testified that he spoke to Kirby in January 2011 regarding Ham's remediation process. He told her to "be careful," but Kirby told him that she could not discuss anything about the remediation process with him. McDermott testified that he did not threaten her, but told her to "dot all [her] i's and cross all [her] t's" because he was going to catch any mistakes she made regarding Ham's procedural rights during remediation. McDermott further testified that after Ham's dismissal, Kirby refused to let him enter the school for a Union meeting. McDermott told Kirby that if she continued to refuse Ham entry, he would file more grievances against her on Ham's behalf. A hearing officer for the Labor Relations Board held a hearing on the three grievances McDermott filed against Kirby on Ham's behalf, and the IELRB subsequently dismissed each grievance. On cross-examination, McDermott stated that he had no personal knowledge that Kirby contested Ham's election as Union delegate.

¶ 13 Michael Shea testified that he was a teacher in the social studies department at Kenwood and had worked with Ham since 2001. Shea testified that throughout his time at Kenwood, he was rated either "excellent" or "superior." He testified that Kirby appointed him chair of the Social Studies Department in 2008 or 2009. He further testified that he was a member of the PPC with Ham and that after Ham became a Union delegate and formed the PPC, Ham's relationship

with Kirby became strained. Shea further testified that he had observed Ham teaching and found his instruction to be "normal." He testified that Ham used a variety of teaching styles and was a good teacher because he brought his experiences travelling the world into the classroom. Finally, Shea acknowledged that he had been disciplined by Kirby for using profane language at a student.

¶ 14 Paul Brush testified that he was a teacher at Kenwood and had always received "excellent" or "superior" ratings. He testified that he was briefly the interim department chair for the history department while Kirby was principal. Before he became the department chair, he testified that his relationship with Kirby was "cordial," but after he stood up to her on a few occasions as the department chair, his relationship with her "turned sour." Brush acknowledged that in 2010 he was disciplined by Kirby for using abusive language at a student.

¶ 15 Brush further testified that he observed Ham teaching two or three times, most recently in 2007 while Ham was teaching an Anthropology class. Brush conducted an informal observation of the class and observed Ham teaching for five to ten minutes. He testified that during his observation he believed Ham was doing "great" and that his class was "rigorous." Finally, Brush testified that since Kirby left Kenwood in 2012, the environment has been "drastically different" and that staff is not afraid of the administration anymore.

¶ 16 Danielle Sales testified that she had been an English teacher at Kenwood since 2002 and has been rated as "excellent" or "superior" in her performance evaluations. She also served on the PPC from the time Ham formed it 2010 until it was disbanded after Ham was removed from the school. Kirby appointed Sales chair of the English Department in 2006. Sales testified that interactions between Ham and Kirby at PPC meetings were "contentious." When Ham presented Kirby with issues, she would imply that they were Ham's personal issues and not shared by the

rest of the faculty.

¶ 17 Sales further testified that while Kirby was principal of Kenwood, the school had a "sick environment" because teachers were scared of retaliation from the administration. Sales testified that after Kirby left Kenwood, the environment at the school was calmer, and there was no fear of retribution among the staff. On cross-examination, Sales stated that while she was a member of the PPC, Kirby raised her teacher evaluation rating from "excellent" to "superior."

¶ 18 2. Board Case in Chief

¶ 19 Kirby testified that she taught at Kenwood in the social studies department from the fall of 1999 until 2003 when she became an assistant principal at a different school. During that time, she and Ham had an "amicable" relationship. Kirby returned to Kenwood in July 2005 as the principal, and left in January 2012 when she was promoted to chief of high schools for the southwest side of Chicago. She testified that when she started at Kenwood, her goal was to improve the school's reputation. The previous principals either gave every teacher a superior rating or "no rating," and there was very little Union activity at the school. She testified that in the fall of 2010, Shea, not Ham, approached her about starting the PPC and she thought it was a good idea because there was an expectation in the district that every school should have a PPC.

¶ 20 Kirby further testified that on June 1, 2006, she lowered Ham's rating from "superior" to "excellent" because in her observations of Ham's classes, she observed that he did not use differentiated instructional strategies, did not use multiple ways to check for student understanding, did not actively engage his students, and had failed to submit his student attendance logs. When Kirby presented Ham with the evaluation reflecting his lowered rating, he refused to sign it. On January 25, 2008, Kirby sent Ham a notice of a pre-discipline hearing for failing to attend a professional development meeting. When Kirby presented Ham with the

notice, he became very frustrated and "stormed out of the room" in the middle of their conversation. Kirby issued Ham a written reprimand for failing to attend the meeting, which Ham attempted to appeal. His appeal was denied, however, because written reprimands are not appealable.

¶ 21 In December 2009, a parent contacted Kirby to complain that Ham had sent an email to several parents with a list of students who were failing his course. Kirby discussed the breach of student confidentiality with Ham, but did not punish him. Less than one month later, in January 2010, Ham again sent out an email to parents with a list of students who were failing his class. Following this second breach of student confidentiality, Kirby recommended that Ham be suspended for two days, which was approved by the Board and upheld on appeal.

¶ 22 On March 18, 2010, Kirby issued Ham an E-1 Notice indicating that she was lowering his rating from "excellent" to "satisfactory." She noted that the reasons for his lowered rating were lack of rigor in the classroom, poor classroom routines, and ineffective instructional strategies. Kirby testified that at the time she issued this notice to Ham, he was not a Union delegate, had not filed any grievances against her, and was not engaged in any activity with the PPC. On October 4, 2010, Kirby conducted an informal observation of Ham's U.S. History Class. On her evaluation form, she noted that his objective for the class was not specific enough, the chalkboard was hard to read, the focus of his lecture was unclear, and that the students were not actively participating in the class. She suggested that Ham have a clear objective and agenda for his classes and make sure his lesson plans corresponded with his lectures. She shared her evaluation with Ham, but he did not have any comments or questions regarding what she suggested and observed.

¶ 23 Kirby conducted a formal observation of Ham's Anthropology class on November 16,



2010. On her evaluation form, Kirby again noted that it was difficult to read what Ham had written on the chalkboard, that there was no clear objective for the class, and that there were issues with clear instruction and student engagement. Kirby observed that Ham sat at his desk and lectured for the entire class period and that students were working on assignments for other classes during the lecture. She also noted that many of the students did not speak or participate in the class and that Ham did not ensure that students understood the content of his lecture by reviewing the material during class.

¶ 24 Kirby further noted that most of questions Ham posed to his students were at the lowest level of Bloom's Taxonomy.<sup>1</sup> Kirby testified that the administration had been pushing teachers to ask students challenging questions at the higher level of Bloom's Taxonomy to help them develop academic skills required for college. Kirby further noted that Ham employed only one instructional strategy which consisted of him sitting at his desk and calling out basic recall questions from the textbook. Kirby testified that the questions were not challenging and it was very easy for the students to be off task because there was no structure to the lesson. Kirby shared her observations with Ham in a formal post-observation conference. Ham again indicated that he had no questions or concerns with her evaluation, but refused to sign the document.

¶ 25 Kirby conducted a second formal observation of Ham's Anthropology class on December 15, 2010. Kirby used her evaluation from November 16, 2010, to determine if Ham had made any improvement in his instruction. Kirby testified that Ham did not make any improvements. She noted that she observed the same deficiencies in Ham's instruction including limited student participation, lack of structure, and lack of varied instructional styles. Kirby again held a formal post-observation conference with Ham and reviewed her suggestions for him to improve his

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<sup>1</sup> Bloom's Taxonomy is a system that rates the level of student engagement required to answer a question from lowest (basic recall or recitation of memorized facts) to highest (analysis or synthesis and evaluation).

instruction. Ham again indicated that he had no questions or concerns with her evaluation and refused to sign the document. Following these two observations, Kirby decided to issue Ham an E-3 unsatisfactory evaluation notice on January 14, 2011, because she observed no change in his instructional practice even after she and her assistant principals had given him very specific feedback for how he could improve. Kirby testified that she expected to see some improvement in Ham's instruction and was disappointed on her second visit when everything was the same.

¶ 26           The E-3 notice meant that Ham would begin a 90-day remediation period where he would be assigned a consulting teacher to help improve his teaching performance. If his teaching performance did not improve after 90 days, Ham would be dismissed from the school. After Kirby issued Ham the unsatisfactory notice, McDermott came to her office and told her to be "careful." He said that the Union protects its members, but did not mention procedure or paperwork. Kirby believed that McDermott was threatening her and that the Union would retaliate against her by disparaging her reputation. Kirby sent a letter to the Central Office about the exchange indicating that she no longer felt comfortable having McDermott at the school. Kirby testified, however, that the interaction with McDermott did not deter her from pursuing the remediation with Ham.

¶ 27           As part of the remediation process, Kirby was required to select a consulting teacher to work with Ham throughout the 90-day remediation period. Kirby selected Sarah Shields from a list of qualified consulting teachers provided by the Union. Kirby, Shields, and Ham met to discuss and formulate a remediation plan. Kirby allowed Ham to have input on the remediation plan, but he did not provide any input and refused to sign the remediation plan. The remediation plan had specific objectives for Ham's instructional methodology, classroom management, lesson planning, student progress, and his non-instructional performance, such as community and

school relations and professional responsibility.

¶ 28 On February 14, 2011, Kirby conducted her first formal visit of Ham's classroom as part of the remediation process. During her observation, Kirby noted that Ham had an objective written on the chalkboard, but that it was too broad. Accordingly, she suggested that he use a more specific objective. She also noted that very few of the students were participating in the class, and that Ham stood in front of the class lecturing the entire class period. Kirby testified that she and Ham had previously discussed using "proximity" when teaching to assess students' understanding and ensure that they stay on task. She further noted that Ham continued to ask his students questions calling for basic recall of information rather than questions that required students to analyze and evaluate the material. She testified that she provided Ham with samples of such questions, but that he did not consistently implement them into his lessons.

¶ 29 On March 18, 2011, Kirby issued Ham a notice that his performance was still unsatisfactory after 30 days of remediation. Kirby, Shields, and Ham met again to discuss Ham's progress after 30 days. Kirby alerted Ham to her concerns regarding his teaching and repeated the deficiencies she observed during her formal observation. Kirby conducted a second formal observation of Ham's classroom on March 24, 2011. Kirby testified that she observed some improvement from Ham compared to her previous observations. She noted that Ham used an outline to guide his students through the material, but that his objective was still vague. Kirby testified that the objective is important because it is the key assessment of what the students learn in class that day. She again shared her evaluation from her formal observation with Ham at a post-observation conference.

¶ 30 On April 25, 2011, Kirby conducted her third formal observation during remediation of Ham's classroom. She testified that during this observation she noted that Ham "kind of went

back on the progress with [his] class in terms of instructional improvement." Kirby noted that although an objective was posted in the classroom, it was again vague. Kirby further noted that Ham lectured for 40 minutes straight despite her instructions to teachers to vary their instructional methods during class. Kirby observed that there was very little student interaction throughout the lecture and only 5 of the 17 students present participated in the class. Kirby also observed that Ham's outlines for his lectures included grammatical and spelling errors that the students were copying into their notes.

¶ 31 Kirby noted that Ham continued to ask basic recall questions and one of the students was sleeping on her desk. Kirby testified that the reason she urges teachers to practice "proximity" is to keep students active and engaged and prevent them from sleeping at their desks. Kirby further testified that merely lecturing is not an effective teaching method for student engagement and instruction in a high school setting. Kirby explained that high school students need additional support to ensure that they understand the material being covered and that they are paying attention. Accordingly, Kirby testified that high school teachers should do more than lecture during class and should actively check that the students understand the material. Kirby further testified that Ham's classes had a high failure rate.

¶ 32 On May 11, 2011, Kirby sent Ham a notice to inform that his performance was still unsatisfactory after 60 days of remediation. On his 60-day evaluation review form, Kirby listed Ham's strengths as "makes proper use of professional preparation periods, is regular in attendance, [and] practices fairness in teacher pupil relationship." Kirby identified Ham's weaknesses as failure to perform in the areas of instructional methodology and classroom management and failure to prepare lesson plans and assess student progress. Kirby, Shields, and Ham met to discuss Ham's progress after 60 days, but Ham did not have any questions or

comments regarding Kirby's observations.

¶ 33 On May 18, 2011, Kirby conducted another formal observation of Ham's classroom. Kirby noted that the strengths she observed during this observation were that the students were collaborating on an assignment during class and that Ham was walking around the room to check for participation. She testified, however, that the specific instructional goal of the class and the assignment was unclear. Kirby also listed one of Ham's weaknesses as failure to adhere to the rules of the Board of Education and policies of the Chicago Public Schools because on May 13, 2011, Ham had again sent a "blast e-mail" about students' grades to a group of parents. This mirrored the two previous incidents where Ham had sent a list of failing students to parents in December 2009 and January 2010. Kirby testified that she did not punish Ham for this third breach of student confidentiality because she knew he was under pressure from the remediation process, but thought that it was unprofessional for him to repeatedly make the same mistake after he had previously been suspended.

¶ 34 On June 3, 2011, Kirby gave Ham a formal end-of-the-year evaluation indicating that his performance was still "unsatisfactory." On the evaluation form, she listed his strengths as making proper use of professional preparation periods, regular attendance, and practicing fairness in pupil relationship. Kirby identified Ham's weaknesses as instructional performance, instructional methodology, classroom performance, lesson planning, school relations, community relations, and professional responsibility.

¶ 35 Ham's remediation continued into the following school year and on September 19, 2011, Kirby conducted her final formal observation of Ham's instruction during his U.S. History class. Kirby observed that there was no objective posted and Ham lectured for the majority of the class. Kirby testified that it was the same type of instruction she had observed over the course of the

remediation period including basic recall questions, notes with grammatical and spelling errors, and lack of differentiated instructional strategies. Kirby noted that Ham had not implemented any of the suggestions she had made throughout remediation with regard to reviewing the material at the end of the class using sound professional judgment.

¶ 36 On October 13, 2011, Kirby and Shields met to discuss the end of Ham's remediation. Shortly thereafter, Kirby met with Ham to discuss her final determination of the remediation process. Kirby informed Ham that he had failed to meet the requirements for remediation, that his performance was still unsatisfactory, and that she would be submitting requests for his dismissal. Kirby testified that she believed Ham was an unsatisfactory teacher because he did not improve in the areas she identified throughout remediation. She believed that his instruction on day 90 of the remediation was the same as it had been on day one.

¶ 37 Shortly after Kirby issued Ham his final unsatisfactory evaluation, Ham sent a "blast e-mail" to all faculty and staff at Kenwood. The subject line of the email read "I have been fired," and in the body of the email Ham stated that he had been fired, although "the board terminology is 'dismissed.'" Ham then clarified that he had actually been suspended pending hearings before the Board. Ham asked the recipients of the email to send written statements to his personal email address to help him at the discharge hearing. Kirby testified that she was disappointed when she saw Ham's email because she believed that it was disruptive to the educational environment for the students. Accordingly, she contacted Thomas Krieger, assistant director of the Office of Employee Engagement and asked him to remove Ham from the building. Shortly thereafter, the Office of Employee Engagement reassigned Ham to a network office and removed him from Kenwood.

¶ 38 Kirby further addressed Ham's testimony that she interfered with his election as Union

delegate. Kirby testified that she did not know the rules regarding Union elections and she never became involved in Ham's election. She further testified that she did not require any type of second election to occur and, in any event, Ham would have been elected as a delegate because there were only two people running for two delegate positions.

¶ 39 Kirby further testified that during her time as principal, she sought the dismissal of only one other teacher, Ellen Cronin, for making disparaging comments about students in her classroom. Cronin made a series of negative statements toward several students including telling them that they would never amount to anything or be accepted into college. Kirby initiated a discipline process against Cronin for the comments, but Cronin ultimately resigned. Kirby testified that Cronin was not engaged in any Union activity.

¶ 40 On cross-examination, Kirby stated that she gave Ham "no rating" at the end of the 2009-2010 school year, which she believed meant that his previous "satisfactory" rating carried over to the next year. Kirby explained that teachers receive "no rating" when the principal does not have enough information to rate the teacher's performance or if the principal believes that the current rating that the teacher has is sufficient. Kirby further stated that she listed "rigor" as one of Ham's strengths in his 2006 evaluation, but noted that "rigor" was one of his weaknesses in his 2008 evaluation.<sup>2</sup> Kirby stated that her evaluation changed because she observed him asking only questions from the low end of Bloom's Taxonomy, which did not challenge his students to think or apply knowledge. Finally, Kirby stated that after the incident with Cronin occurred, she was allowed to remain in her position at Kenwood until she was suspended without pay.

¶ 41 Sarah Shields testified that she had been a teacher since 2002 and was selected by Kirby as the consulting teacher for Ham's remediation on January 14, 2011. Shields testified that her

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<sup>2</sup> Kirby stated that "rigor" meant that students were given challenging assignments and were "engaged in rigorous work."

role as a consulting teacher was to support Ham throughout the remediation and observe him in the classroom for approximately three hours each week. Shields further testified that she was a Union member and did not know Ham or Kirby before starting the remediation process. Shields testified that Ham was given the opportunity to have input in his remediation plan, but he declined to do so.

¶ 42 Shields further testified that her first meeting with Ham during the remediation took place on January 26, 2011, where they talked about the remediation process. Shields testified that she initially focused on addressing some "easy wins" that Ham could improve immediately. Shields noted that that there was no student work hanging in the classroom and that the chalkboard was difficult to read. Shields then translated her observations into suggestions for how Ham could improve. Ham told Shields that he was not going to "deviate from what [he] normally" did.

¶ 43 Shields first observed Ham's class on January 27, 2011, and took copious notes regarding Ham's instructional style and her observations in his classroom. Shields sent an e-mail to Ham the next day with some suggestions for improvement including posting an agenda on the chalkboard to help structure the class along with a measurable daily objective. She also suggested that Ham review the material at the end of each class period to determine if the students completed that objective. Finally, Shields suggested that Ham post examples of frequently assigned assignments around the classroom.

¶ 44 On February 7, 2011, Shields sent an email to her supervisor with an update on Ham's remediation. Shields indicated that Ham had not sent her any lesson plans or a syllabus and that there were no examples of student work hanging in the classroom. Shields also commented that the chalkboard was still difficult to read. Shields further testified regarding her observation of Ham's classroom on February 9, 2011. Shields noted that Ham did not post a measurable daily



objective and that most of students were not engaged. Shields also observed that Ham did not ensure that the students understood the material and that only a few students participated in the class discussion. Shields noted that Ham had sent her a lesson plan for this class and she sent him a template and a sample lesson plan for him to use for future lesson plans. Shields testified that she asked Ham to send her lesson plans each week during remediation, but he never sent her any lesson plans after receiving the template and sample lesson plan in February.

¶ 45 Shields and Ham met with each other throughout his remediation to discuss her observations and suggestions, but Shields testified that these meetings were not "very effective." She explained that she felt like she was struggling to direct his attention to things she wanted to discuss. On February 23, 2011, Shields sent Ham a "Remediation Plan Reflection" document that listed the areas Ham would be evaluated on during his remediation. She asked him to complete the document by identifying the areas he needed to improve and the areas he believed he did not need to improve. However, Ham did not complete the document.

¶ 46 Shields continued to observe Ham's classes throughout remediation. She observed one class period where students were supposed to present an assignment, but when none of the students volunteered to present, Ham lectured instead. When students did volunteer to present their assignment, their presentations were often very short and contained limited information. She also observed that the other students were inattentive and distracted while other students were presenting and Ham did nothing to remedy that situation. Shields talked with Ham about structuring the students' presentations and holding them accountable so the assignments would be more rigorous. Shields also observed a class period where Ham showed pictures from his travels. Shields found the pictures interesting, but did not know what the students were supposed to be learning from the instruction. Ham asked the students to take notes, but Shields testified

that it was unclear what he wanted them to write down.

¶ 47 As Ham's consulting teacher, Shields was required to model several class periods for him. Shields used these opportunities to model additional strategies for reviewing information with the class and developed model lesson plans for Ham to use. On March 4, 2011, Shields sent Ham an email with sample unit plans, sample planning guides, and sample exams. Shields testified that she sent Ham sample exams because the exams he was using were "not aligned to learning outcomes." Shields also sent Ham a bi-weekly planning guide and a sample essay scoring guide. Shields and Ham then developed a professional growth guide that was based on the remediation plan.

¶ 48 On April 8, 2011, Shields and Ham met to discuss Ham's remediation. Shields noted that she was concerned because she did not observe Ham making many of the changes she suggested. She testified that she gave him very specific instructions for things she would like him to do differently, such as structure for presenters and audience during presentations and asking questions along the entire spectrum of Bloom's Taxonomy.

¶ 49 On June 10, 2011, Shields provided Ham with her thoughts on their work together during the first year. Shields suggested that Ham not let bureaucratic barriers effect the quality of his instruction. Shields testified that she made that suggestion because Ham would assert that he could not implement some of Shields' suggestions because he did not have access to certain resources. Shields directed him to focus on the resources he did have and the factors that he could control in order to help students be more effective learners. Shields also suggested that Ham should maintain higher expectations for his students. Shields noted that students were allowed to opt out of assignments and she did not think his class was very rigorous. She noted that he did not have clear expectations for students and did not hold them to a standard of

completion for their assignments.

¶ 50 Shields further suggested that Ham needed to create stronger structures and routines in the classroom. Shields testified that she was concerned about student engagement and noted that Ham would inconsistently enforce classroom and school rules, such as allowing students to put their heads down during class. Shields also noted that Ham needed to set clear and specific goals for learning and then identify the instructional steps required to reach those goals. Shields testified that she wanted Ham to have a clear idea of what he wanted the students to learn from his lessons and to identify all of the steps required to reach that goal. Shields also sent Ham a list of suggested resources that he could use to accomplish her suggestions.

¶ 51 Shields observed Ham's class again on September 27, 2011. She testified that he had implemented some of the suggestions they had discussed. She observed that there was more structure to the course and there was an agenda posted on the chalkboard. Shields noted, however, that Ham lectured the entire period until the bell cut him off and that the students were acting merely as passive recipients of information rather than participating. She testified that students were copying information that was written on the board and there was no evidence that the students were engaged in the lesson. Shields observed that three students had their heads down and that Ham did not address them.

¶ 52 Shields conducted her final observation of Ham's classroom on October 5, 2011. Shields modeled the first class period for Ham and then observed as he taught the rest of the class periods for the day. During her observation, Shields noted that instead of showing students how to complete an assignment, he would give the students verbal instructions, which were often hard to follow. Shields testified that her overall impression of Ham's teaching was that it was very casual and there was not a lot of intentional or instructional planning, despite her requests that he

develop such plans. On cross-examination, Shields stated that Ham implemented some of her suggestions during remediation, such as hanging examples of student work, cleaning the chalkboard and having a student write the agenda legibly on the chalkboard because Ham had poor handwriting.

¶ 53 Thomas Krieger testified that he was the assistant director of the Office of Employee Engagement and he processes grievances from unionized employees. He testified that a written reprimand is the lowest form of employee discipline and is not appealable. He also testified regarding Ham's repeated violation of student confidentiality by sending emails to parents with a list of students who were failing his class. He testified that Ham could have been suspended for up to 15 days for such conduct and that Kirby's recommended suspension of two days was "very low."

¶ 54 Krieger also testified to his involvement following Ham's "I have been fired" email. He testified that the email was sent to 40 or 50 people and the subject line was inflammatory and unrelated to a proper educational purpose. He further testified that he feared what action Ham might take next because of the results of his remediation. He finally testified that the Human Resources Office, not the principal, makes the final determination of whether to remove a teacher from the school.

¶ 55 On cross-examination, Krieger stated that he believed the email was disruptive because all of Ham's coworkers became involved in his personal, confidential employment situation. Krieger sent a letter to Ham on October 21, 2011, telling him that he would be reassigned to an area office pending the results of an investigation. Krieger acknowledged, however, that no such investigation ever took place and Ham was sent to an area office until the Board suspended him without pay.

¶ 56 Michael Boraz testified that he was an assistant principal at Kenwood from 2004 until 2010. He testified that when Kirby came to Kenwood, her mission statement was to prepare students for college through rigorous instruction. Boraz further testified that Ham had a "passive" teaching approach in which he sat at his desk while having his students work on independent assignments. Boraz testified that he observed Ham's classroom on September 28, 2009. During that observation, Boraz observed an incident where Ham called a student dumb twice. Ham then asked the students to read out of the textbook the whole period. Boraz testified that he did not believe this was adequate teaching. He discussed his observations with Ham and suggested that he facilitate classroom discussion about key issues in the text and review the main points of the lesson to address any misunderstandings among the students.

¶ 57 Boraz further testified that he conducted several more informal observations of Ham's classroom and observed him engage in the same sort of instructional style. He noted that Ham would sit at his desk while the students were working quietly and independently out of the textbook. Boraz testified that before Kirby issued Ham his remediation notice, Ham was identified as a weak teacher by the administration because of his teaching performance, not his Union activity. On cross-examination, Boraz stated that during his observations of Ham's classes, the learning objective for the lessons was not clear.

¶ 58 Aileen Murphy<sup>3</sup> testified that she started at Kenwood in 2000 as a teacher and Kirby selected her to be an assistant principal in 2007. Murphy testified that she had been a member of the Union throughout her career. In October 2008, she issued Ham a cautionary notice for failing to submit lesson plans. In October 2009, she sent an email to Ham notifying him that she had not yet received his syllabus or lesson plans for the courses he was teaching that year. Murphy sent

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<sup>3</sup> Murphy is occasionally referred to in the briefs and in the record by her married name, Aileen Gamez.

another email to Ham in September 2010 informing him that his course map for Anthropology was the same one he submitted in 2008 and was out of date and not in the proper format.

¶ 59 On September 26, 2010, Murphy conducted an informal observation of Ham's classroom. She noted that there was no objective written on the chalkboard and that Ham's questions asked for basic recall of information while the students were reviewing for an exam. She asked two students what they were doing in class that day and they told her that they had "no idea." Several other students indicated that they were unclear about the learning objective that day. Murphy observed Ham teaching again in October 2010. She again noted that he did not post a specific objective for the class and that his teaching style was inadequate. She testified that Ham was reviewing for an exam by sitting at his desk, flipping through the course textbook, and asking the students questions that called for only basic recall of information. She sent an email to Ham with her observations and suggested that he implement review strategies that challenged students to think critically by connecting facts and comparing events rather than merely hunting for information.

¶ 60 Murphy further testified as part of her job as assistant principal, she would meet with Kirby to discuss teachers who needed to improve their instructional strategies. Ham was identified as one of those teachers during the summer before the 2009-2010 school year. Murphy testified that Ham's overall teaching performance could have been improved because he was not communicating information to the students in the best way. She observed that students were asked to do mostly low level activities and that Ham was not engaging with his students or getting them to connect with the material. On cross-examination, Murphy stated that many teachers failed to follow the requirements for submitting lesson plans.

¶ 61 3. Union Rebuttal

¶ 62 In rebuttal, Ham testified that he was never punished for failing to submit lesson plans after the initial incident described by Murphy. He further testified that he did not call a student dumb, as Boraz testified, but rather was calling her actions dumb. He explained that Boraz observed his students reading quietly out of the textbook on the date of his observation because on that day, Ham was meeting with students individually to discuss assignments and make sure they would pass the class.

¶ 63 Ham also addressed the three incidents in which he sent a list of students who were failing the class to several parents in the class. Ham described these incidents as a "mistake" and attributed the errors to the manner in which the school's email software handled emails sent to multiple recipients. Ham further addressed Kirby's formal evaluation of his classroom on February 4, 2011. During that observation, Kirby noted that Ham stood in front of the class lecturing the entire period, few students were engaged or participated, and Ham asked questions calling only for basic recall of information. Ham testified that he did not agree with Kirby's observation notes and that the weaknesses she listed were "not true." Ham testified that he believed that was a "good lesson."

¶ 64 Ham further testified that he met with Kirby after her observations throughout remediation, but she would not listen to his comments or allow him to explain why he disagreed with the weaknesses she identified. He testified that he eventually stopped offering comments during these meetings because he felt that Kirby was not listening to him. During his meetings with Shields, however, he would bring up the lack of resources available at Kenwood. Ham testified that he would often complain to the administration, including Shea, and about the lack of resources. Ham further testified that he kept track of student participation and misbehavior in his grade book and students would lose points for not participating during class. He testified that

he would stand near the front of the class for the majority of the class period because he had to interact with the computer to record student participation or change the PowerPoint slide during his lectures.

¶ 65 He acknowledged that he lectured "quite a bit," but asserted that his lectures were not "standardize[d]" because he would have PowerPoint slides behind him. He testified that he did not teach his college students and his high school students using the same tactics, but would modify his classes based on the ages of the students. As an example, he testified that he would ask basic recall questions of younger students and higher order thinking questions for older students. Finally, Ham testified that he did adjust his instruction style based on Shields' suggestions, such as lecturing less and breaking up the class into 10-15 minutes intervals.

¶ 66 4. Board Surrebuttal

¶ 67 In surrebuttal, Kirby testified that Ham was given an opportunity to respond to her suggestions during remediation and she never denied him the opportunity to submit written responses to her suggestions and observations.

¶ 68 B. Administrative Law Judge's Recommended Decision and Order

¶ 69 The ALJ found that Ham engaged in activity protected by the Act, serving as a Union delegate in 2010 and 2011 and serving as chairperson of the PPC. The ALJ further found that Kirby was aware of Ham's role as Union delegate and his involvement with the PPC. The ALJ determined that Kirby took an adverse action against Ham when she issued him the final unsatisfactory rating and reassigned him to the Network Office. The ALJ found, therefore, that the only issue was whether Kirby took these adverse actions against Ham because he was engaged in a protected activity.

¶ 70 The ALJ determined that the timing of Kirby's actions against Ham supported an



inference that she took the adverse actions against him because he was engaged in protected activity. The ALJ found that prior to Ham engaging in the protected activities, Kirby and Ham's relationship was amicable, and it was only after Ham became Union delegate and formed the PPC that their relationship became contentious. The ALJ further found that although there was testimony that administrators noted weaknesses in Ham's performance as early as 2006, Kirby did not rate him as unsatisfactory or place him on remediation until after he engaged in the protected activities.

¶ 71 The ALJ further found that Kirby expressed hostility against Ham's protected activities and the protected activities of other teachers. The ALJ noted that Kirby contested Ham's election as Union delegate and caused a second election to be held. The ALJ also noted that Kirby's interactions with Brush and McDermott were further evidence of her antiunion animus. The ALJ determined that Kirby's view that McDermott's statements constituted physical threats was unreasonable and evidence of her antiunion animus. The ALJ further noted that Kirby's favorable treatment of Shea and Sales did not disturb its decision because they were not similarly situated to Ham with regard to their levels involvement in a protected activity. The ALJ found that Ham served a more significant role than either Shea or Sales because he was chairperson of the PPC and a Union delegate.

¶ 72 The ALJ further determined that Kirby provided inconsistent reasons for her decision to remove Ham from the school after he sent the "I have been fired" email. The ALJ noted that Ham sent the email only to faculty, not students. Accordingly, the ALJ did not credit Kirby's testimony that she wanted Ham removed from the school because she believed that the email was disruptive to the education environment for the students. The ALJ further noted that the email did not pose a safety risk, there was no evidence that the email created any disruption at

Kenwood, and, although Krieger testified that an investigation was supposed to be conducted, no such investigation took place. The ALJ also found that Ham was treated differently from Cronin who was allowed to stay at her position in the school until the disciplinary investigation was completed. The ALJ determined that although Krieger made the ultimate decision to remove Ham from school, and there was no evidence he was aware that Ham engaged in any protected activities, the fact that Kirby recommended his removal did not absolve the Board of liability.

¶ 73 Accordingly, the ALJ concluded that the Union established a *prima facie* case that Kirby violated the Act when she rated Ham's performance as unsatisfactory and subsequently removed him from the school. Further, the ALJ determined that the Board's proffered legitimate business reasons for Ham's dismissal were pretextual. The ALJ found that the testimony of Shea and Brush showed that Ham's teaching was adequate, that Kirby did not issue him an unsatisfactory rating until after Ham became Union delegate and formed the PPC, and that Ham's teaching performance did improve during remediation. The ALJ further found that there was evidence that Kirby did not want Ham to improve during remediation because Ham testified that she was not helpful and did not listen to his concerns during their meetings. Accordingly, the ALJ found that the Board failed to rebut the Union's *prima facie* case, and, therefore, found that the Board violated Sections 14(a)(3) and (14)(a)(1) of the Act.

¶ 74 C. IELRB Decision

¶ 75 The Board filed a number of exceptions to the ALJ's decision and sought review before the IELRB. The IELRB adopted the ALJ's factual findings and affirmed the ALJ's decision finding that Kirby expressed hostility toward Ham's involvement in protected activities during PPC meetings and through her reaction to Ham's election as Union delegate. The IELRB found the "[m]ost telling" factor of Kirby's antiunion animus was that she did not rate Ham as

unsatisfactory or issue him an E-3 remediation notice until after he became active in the Union and the PPC. The IELRB also affirmed the ALJ's decision that the Board's proffered legitimate business reasons for Ham's dismissal and subsequent removal from the school were pretextual. The Board filed a petition for review of the IELRB's order in this court.

¶ 76

## II. Analysis

¶ 77

### A. Standard of Review

¶ 78

On review of the IELRB's decision, it is not our function to reweigh the evidence or make independent determinations of fact. *Bd. of Educ. of Rockford School Dist., No. 205 v. Illinois Educ. Labor Relations Bd.*, 258 Ill. App. 3d 859, 867 (1994), *aff'd* 165 Ill. 2d 80 (1995). Rather, the findings and conclusions of law by the IELRB on questions of fact are considered *prima facie* true and correct and this court may not interfere with the discretionary authority of the agency unless it is exercised in an arbitrary and capricious manner or is against the manifest weight of the evidence. *General Service Employees Union, Local 73 v. Illinois Educ. Labor Relations Bd.*, 285 Ill. App. 3d 507, 515 (1996), citing *Board of Educ. of Schaumburg Cmty. Consol. School Dist. No. 54 v. Illinois Educ. Labor Relations Bd.*, 247 Ill. App. 3d 439, 453-54 (1993). An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Rockford School Dist.*, 258 Ill. App. 3d at 867, citing Ill. Rev. Stat. 1991, ch. 110 ¶ 3-110, now 735 ILCS 5/3-110 (West 1994).

¶ 79

An administrative agency's findings on a question of law, however, are reviewed *de novo*. *City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 205 (1998). Where the administrative agency's decision involves a mixed question of fact and law, we will apply a clearly erroneous standard of review. *Speed Dist. 802 v. Warning*, 242 Ill. 2d 92, 112 (2011); *Bd. of Trustees of Univ. of Illinois v. Illinois Educ. Labor Relations Bd.*, 224 Ill. 2d 88, 97 (2007).

Where evidence exists to support the administrative agency's finding, a reviewing court should not substitute its judgment for that of the agency, and the findings should be affirmed. *North Shore Sanitary Dist. v. Illinois State Labor Relations Bd.*, 262 Ill. App. 3d 279, 286-87 (1994). The agency's decision will be reversed as clearly erroneous only where the reviewing court, based on the entirety of the record, is "left with the definite and firm conviction that a mistake has been committed." *Bd. of Trustees of Univ. of Illinois*, 224 Ill. 2d at 97-98, quoting *AFM Messenger Service, Inc. v. Dep't of Emp't Sec.*, 198 Ill. 2d 380, 395 (2001).

¶ 80 B. Sections 14(a)(1) and (14)(a)(3) of the Act

¶ 81 In this case, the IELRB found that the Board violated sections 14(a)(1) and (14)(a)(3) of the Act. Section 14(a)(1) of the Act provides that educational employers are prohibited from interfering, restraining or coercing employees in the exercise of rights guaranteed under the Act. 115 ILCS 5/14(a)(1) (West 1996). Section 14(a)(3) provides that educational employers are prohibited from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization. 115 ILCS 5/14(a)(3) (West 1996). The supreme court has explained that "section 14(a)(1) refers to adverse action taken against an employee as a result of any protected concerted activity, while section 14(a)(3) refers specifically to discrimination based on union activity." *Speed Dist.* 802, 242 Ill. 2d at 112, citing *Bloom Township High School Dist. 206 v. Illinois Educ. Labor Relations Bd.*, 312 Ill. App. 3d 943, 957 (2000). Where, as here, an alleged violation of sections 14(a)(1) and 14(a)(3) stems from the same conduct, the section 14(a)(1) violation is said to be derivative of the section (14)(a)(3) violation. *Speed Dist.* 802, 242 Ill. 2d at 112-13. Accordingly, we must determine whether a section 14(a)(3) violation occurred. *Id.* at 113. A *prima facie* case of a section 14(a)(3) violation requires proof that the employee was engaged in activity protected

by that section, that the Board was aware of that activity, and that the employee was discharged for engaging in that protected (union) activity. *Id.*, citing *Bd. of Educ., City of Peoria School District No. 150 v. Illinois Educ. Labor Relations Bd.*, 318 Ill. App. 3d 144, 150 (2000).

¶ 82 An employee can establish that he was discharged for engaging in a protected activity if the employee's protected activity was a substantial or motivating factor for the discharge or other adverse action taken against him. *Speed Dist. 802*, 242 Ill. 2d at 113, citing *Hardin County Educ. Ass'n v. Illinois Educ. Labor Relations Bd.*, 174 Ill. App. 3d 168, 174 (1988). Because motive is a question of fact, the administrative agency's finding of motive can be set aside only if it is against the manifest weight of the evidence. *City of Burbank v. Illinois State Labor Relations Bd.*, 128 Ill. 2d 335, 345 (1989). In determining whether an employer has antiunion animus, the administrative agency can consider the employer's expressed hostility toward unionization, the employer's knowledge of the employee's union activities, the proximity in time between the employer's union activities and their discharge, disparate treatment of employees that targets union supporters, and shifting explanations for the discharge. *Id.* at 346, and cases cited therein. Once the charging party has established a case of discharge based in part on antiunion animus, the employer can rebut a finding that it violated the statute by demonstrating that the discharged employee would have been dismissed for a legitimate business reason regardless of any antiunion animus. *Id.* The administrative agency then must determine whether the articulated business reasons are *bona fide* or pretextual. *Id.* at 345.

¶ 83 C. The Board's Management Rights

¶ 84 We first address the Board's argument that the IELRB usurped the Board's management rights to set the standards of service and direct the work of its employees by forcing it to re-employ Ham when Kirby found him to be unsatisfactory. The Board asserts that the IELRB's

decision runs contrary to the Act and the School Code, which are outside the IELRB's purview of authority. This court has held, however, that the IELRB has jurisdiction over matters contained in the Act, including any conduct by an educational employer that is alleged to have violated the Act, such as an unfair labor practice. *Cnty. Unit School Dist. No. 5 v. Illinois Educ. Labor Relations Bd.*, 2014 IL App (4th) 130294, ¶ 52. Moreover, the School Code does not contain language indicating that it controls over the Act. *Id.* In this case, the Union alleged violations of sections 14(a)(3) and 14(a)(1) of the Act, which are matters within the IELRB's purview. *Id.* Contrary to the Board's assertion, the IELRB's decision does not implicate the Board's managerial rights, but rather addresses an alleged violation of the Act. Notwithstanding respondents' arguments regarding forfeiture of the Board's argument regarding its management rights, we find the Board's position unpersuasive.

¶ 85

#### D. Antiunion Animus

¶ 86

We next address the Board's contention that the IELRB erred in finding that Kirby dismissed Ham and had him removed from the school as a result of her antiunion animus and not his poor teaching performance. Because the IELRB adopted and affirmed the factual findings and conclusions of law made by the ALJ, we will address both findings. The parties agree that Ham was engaged in an activity protected by section 14(a)(3) and that the Board was aware of that activity. Thus, the only issue is whether Kirby discharged Ham because he engaged in a protected activity under the Act. The ALJ found, and the IELRB agreed on review, that Kirby took adverse action against Ham and acted with antiunion animus when she rated him as unsatisfactory and sought his dismissal.

¶ 87

In support of its finding, the ALJ and the IELRB relied on a variety of factors. First, the ALJ noted that the timing of Kirby's actions supported an inference that her motives were

illegitimate. The IELRB found the "[m]ost telling" factor of Kirby's antiunion animus was that she did not rate Ham as unsatisfactory or issue him an E-3 remediation notice until after he became active in the Union and the PPC. As the IELRB observed, prior to Ham's involvement in these protected activities, Kirby had always rated Ham as satisfactory or excellent. The Board argues that the evidence adduced at the administrative hearing established that Ham had a long history of poor teaching performance that culminated with his remediation and eventual dismissal. However, the record shows that Kirby noted the same weaknesses in Ham's teaching performance before issuing him the E-3 notice, but did not take adverse action against him until after he became involved in the Union and the PPC. Thus, the record supports the IELRB's determination that the timing of the adverse action gives rise to an inference that the Board acted with antiunion animus.

¶ 88 The IELRB and ALJ found further evidence of Kirby's antiunion animus because of her hostility toward those who participated in protected activities. The IELRB noted that prior to Ham becoming Union delegate and forming the PPC, his relationship with Kirby was amicable, but later became "contentious." This finding is supported by the testimony of Brush and Sales who testified that Ham and Kirby's interactions at PPC meetings were contentious. Moreover, the ALJ found Kirby's reaction to McDermott's advocacy on Ham's behalf was further evidence of her hostility toward the Union and its members. The IELRB found that there was nothing in the record to suggest that Kirby reasonably viewed McDermott's statements that she should be careful during Ham's remediation as physical threats. Although Kirby and McDermott testified to different versions of that meeting, the IELRB noted that the ALJ credited McDermott's version of events. It is the agency's function, as the finder of fact, to determine the weight to be given the evidence and to assess the credibility of the witnesses. *Marconi v. Chicago Heights Police*

*Pension Bd.*, 225 Ill. 2d 497, 540 (2006); *Bd. of Regents of Regency Universities v. Illinois Educ. Labor Relations Bd.*, 208 Ill. App. 3d 220, 230 (1991).

¶ 89 The IELRB determined that Kirby further displayed hostility toward those engaged in protected activities when she caused the Union to hold a second election after Ham was elected as Union delegate, even though the Union election was outside of her authority. Although Kirby testified that she was not involved in Ham's election as Union delegate, the ALJ credited Ham and McDermott's testimony that she opposed his election and caused a second election to be held. It is not our function on review to reweigh the evidence or make independent determinations of fact. *Bd. of Educ. of Rockford School Dist.*, 258 Ill. App. 3d at 867, citing *Abrahamson v. Illinois Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 88 (1992). Accordingly, the record supports the IELRB's determination that Kirby expressed hostility toward those engaged in protected activities.

¶ 90 The ALJ further found that the Board provided inconsistent reasons for its decision to remove Ham from school after he sent an email to his coworkers that he had been "fired." Kirby testified that she found the email to be disruptive for the students; however, the ALJ observed that Ham sent the email only to Kenwood staff, and there was no evidence that the email caused any disturbance at the school. The ALJ also noted that although Krieger indicated that an investigation would take place following Ham's removal from the school, no such investigation was conducted. The IELRB found that Kirby provided "shifting reasons" for her actions, first indicating that she wanted to remove Ham because of his poor teaching performance, but then seizing on the email as a justification for his removal from the school. Even though, as the Board points out, Krieger made the ultimate decision to remove Ham from the school, the IELRB found that Kirby's antiunion animus was imputed to the Board.



¶ 91 The IELRB further observed that Kirby treated Ham differently from another teacher who was dismissed for misconduct, Cronin. The ALJ noted that Cronin, who was a member of the Union, but was not active, was allowed to remain at school until the disciplinary investigation was concluded. In contrast, Kirby requested that Ham be removed from the school immediately for sending an email to his coworkers informing them of his dismissal and asking for their help in his upcoming dismissal hearing. The IELRB determined that the combined evidence of the timing of the adverse employment action, Kirby's hostility against those engaged in protected activities, and the inconsistent reasons set forth by the Board for Ham's removal from the school, were sufficient to establish a *prima facie* case of a violation of sections 14(a)(1) and 14(a)(3). Based on the evidence presented at the administrative hearing, we cannot say that the IELRB's findings were against the manifest weight of the evidence or clearly erroneous.

¶ 92 E. Legitimate Business Reasons

¶ 93 Once the charging party has established a *prima facie* case of discriminatory discharge based in part on antiunion animus, the employer can rebut a finding that it violated the Act by demonstrating that the adverse employment action would have occurred for a legitimate business reason. *City of Burbank*, 128 Ill. 2d at 346; see also *Speed District 802*, 242 Ill. 2d at 113 ("[E]ven if a *prima facie* showing has been made, there can be no finding that an unfair labor practice occurred if the employer can demonstrate, by a preponderance of the evidence, that the adverse action would have occurred notwithstanding the protected activity."). Where the employer advances legitimate business reasons for the discharge, and is found to have relied upon them in part, the case is characterized as one of "dual motive," and the employer must demonstrate by a preponderance of the evidence that the employee would have been terminated notwithstanding his union involvement. *City of Burbank*, 128 Ill. 2d at 346-47. Here, the Board

contends that Ham was dismissed solely for his poor teaching performance and that Ham was removed from the school based on the email he sent in October 2011. For many of the same reasons discussed above, the IELRB found that the Board's proffered legitimate business reasons were pretextual.

¶ 94 In regard to Ham's final unsatisfactory rating, the IELRB again noted that Kirby did not rate Ham as unsatisfactory and issue him the E-3 remediation notice until after Ham became active in the Union. The ALJ credited Shea and Brush's testimony that Ham's teaching was adequate, and determined that Kirby issued him the E-3 remediation as a pretext to have him removed from the school. In addition, the IELRB noted that the ALJ found that Kirby did not want Ham to succeed during remediation, crediting Ham's testimony that Kirby was not helpful during remediation and would not listen to his concerns during their post-observation conferences. The IELRB determined that these facts showed that Kirby "seized" on Ham's allegedly deficient performance as a justification for taking action against him for his participation in the Union and the PPC. The ALJ also noted that Ham made improvements during remediation, which Kirby ignored and chose to dismiss him anyway. The ALJ found that during remediation, Ham implemented some of Kirby's suggestions such as putting an agenda on the chalkboard, and some of Shields' suggestions with regard to lesson planning.

¶ 95 Similarly, the IELRB found that there was no evidence that Ham's email posed a safety risk or caused any disruption at Kenwood. The IELRB affirmed the ALJ's finding that it was "telling evidence of pretext that Ham's email to the staff was considered such a significant threat that it warranted his immediate removal from the school, but Cronin's inappropriate comments about students, and made directly to them, were not." The IELRB again noted that although Krieger indicated that an investigation would take place regarding Ham's removal from the

school, the fact that no such investigation took place showed that the Board was seeking any justification to remove Ham from the school and remove him as a Union delegate. Although the Board contends that Krieger made the ultimate decision to remove Ham from the school, the IELRB found that Krieger did not make an independent investigation into any disruption caused by the email and merely relied on Kirby's suggestion to remove Ham from the school. Accordingly, the IELRB determined that this factor did not permit the Board to avoid responsibility for committing an unfair labor practice. Based on the evidence in the record, we cannot say that the IELRB's finding that the Board's proffered legitimate business reasons for Ham's dismissal were pretextual was against the manifest weight of the evidence or clearly erroneous.

¶ 96

### III. Conclusion

¶ 97

Accordingly, we affirm the order of the IELRB rescinding Ham's "unsatisfactory" rating and reinstating him as a teacher at Kenwood.

¶ 98

Affirmed.