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DATE: 3/28/16 TIME: 4:30 pm

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FROM: V. E. Blackwell

RE: 2015-CA-0096-C, EDRDO

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COMMENTS: **PLEASE SIGN AND FAX THIS ACKNOWLEDGEMENT.**

STATE OF ILLINOIS
ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD

Adjunct Faculty Association, IEA-NEA	)	
Charging Party	)	
and	)	Case No. 2015-CA-0096-C
Oakton Community College,	)	
Respondent	)	

EXECUTIVE DIRECTOR'S RECOMMENDED DECISION AND ORDER

I. THE UNFAIR LABOR PRACTICE CHARGE

On May 8, 2015, Charging Party, Adjunct Faculty Association, IEA-NEA (Union or Charging Party), filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) in the above-referenced case, alleging that Respondent, Oakton Community College (College or Respondent), violated Sections 14(a)(1) and 14(a)(5) of the Illinois Educational Labor Relations Act (Act), 115 ILCS 5/1, *et seq.* (2012), as amended. After an investigation conducted in accordance with Section 15 of the Act, the Executive Director adopts the factual findings and contractual interpretations of the arbitrator's award as referenced herein, and issues this dismissal of the statutory issues raised by the Union for the reasons set forth below.

II. INVESTIGATORY FACTS

A. Jurisdictional Facts

At all times material, the College was an educational employer within the meaning of Section 2(a) of the Act and subject to the jurisdiction of the Board. The Union, at all times material, was a labor organization within the meaning of Section 2(c) of the Act and the exclusive representative, within the meaning of Section 2(d) of the Act, of a bargaining unit comprised certain of the Respondent's employees, including those in the job title or classification of Adjunct Faculty Member. At all times material, Chester Kulis (Kulis) was an educational employee within the meaning of Section 2(b) of the Act, employed by the Respondent in the title or classification of Adjunct Faculty Member and was a member of the Union's bargaining unit. At all times material, the Union and the College have been parties to a collective bargaining agreement (CBA) for the unit, which provides for a grievance procedure culminating in arbitration.

B. Facts relevant to the unfair labor practice charge

The CBA between the parties is in effect from 2013 until 2017. In or about 2013, the Illinois General Assembly passed legislation, later amended and codified at 40 ILCS 5/15-139.5, which provides that public Illinois colleges and universities that decide to employ certain individuals receiving an annual annuity under the State University Retirement System (SURS) which exceeds a certain amount—so-called "affected annuitants"—

the CBA when it decided to not re-employ Kulis. Specifically, the arbitrator determined that "the College exercised its contractual right and 'sole discretion' under Section 3.6 of the Collective Bargaining Agreement to not re-employ [Kulis] based upon his status as an Affected Annuitant."

Subsequent to the arbitration, the parties met to bargain the change beginning on or about March 10, 2015. The College submitted its last best offer to the Union on or about July 21, which did not include an agreement to stay or revoke the decision to not re-employ affected annuitants, which went into effect several weeks prior on July 1. The Union, on or about July 29, rejected the College's offer.

III. THE PARTIES' POSITIONS

The Union alleges that an employee's status as an affected annuitant is a job qualification subject to mandatory bargaining, and that the College violated Sections 14(a)(1) and 14(a)(5) of the Act when it unilaterally decided to not re-employ Adjunct Faculty Members due to their status as affected annuitants without first giving the Union notice and an opportunity to bargain the decision. The Union also argues that the College violated Section 14(a)(5) of the Act when it failed to revoke or stay its decision to not re-employ affected annuitants during the parties bargaining over the issue.

The College denies that the complained-of conduct violated the Act. The College does not dispute the issue of whether to re-employ affected annuitants fell within the category of wages, hours, or terms and conditions of employment, nor does it dispute that it did not give the Union notice or an opportunity to bargain the change prior to November 13, 2014. The College, however, asserts that Section 3.6 of the CBA between the parties removed the issue from the bargaining table and that, by agreeing to such language in the CBA, the Union waived its right to bargain what would otherwise be a mandatory subject of bargaining. The College avers that the IELRB should defer to the aforementioned arbitrator's award.

IV. DISCUSSION AND ANALYSIS

First, a point of clarification: the College argues, in its position statement, that the IELRB should both *defer* and *refer* to the arbitrator's award. As the IERLB pointed out in a footnote in its decision in West Chicago School District No. 33, "referral" is appropriate in situations where arbitration awards have not yet been issued (so-called "pre-award" situations), whereas "deferral" describes instances where an arbitration award has been issued (so-called "post-award" situations). West Chicago, 5 PERI 1091 at FN 16, Case No. 86-CA-0061-C (IELRB Opinion and Order, May 2, 1989). This instant matter clearly involves a post-award situation and, thus, the issue becomes whether or not deferral to the arbitrator's award is appropriate in this instance.

The IELRB will adopt an arbitrator's factual findings and interpretations of the contract when "the arbitration proceedings have been fair and regular." Taylorville Community Unit School District 3, 11 PERI 1015, Case No. 93-CA-0032-C (IELRB Opinion and Order, January 19, 1995). Here, the Union does not dispute that the Kulis arbitration proceedings were fair or regular. Thus, I adopt the arbitrator's factual findings

will, generally, be required to contribute to SURS an amount "equal to 12 times the amount of the gross monthly retirement annuity" paid to affected annuitants. 40 ILCS 5/15-139.5(e).

On or about April 14, 2014, the College informed Kulis, an Adjunct Faculty Member deemed by the College to be an affected annuitant, that it had determined not to re-employ him due to his status as an affected annuitant. The Union, on Kulis's behalf, filed a grievance over the decision (the Kulis Grievance), contending that the decision to not re-employ Kulis due to his status as an affected annuitant was in violation of the CBA. The Union advanced the matter to arbitration.

On or about November 13, 2014, the College's Executive Director of Human Resources, Mum Martens (Martens), e-mailed a notice to all affected annuitants and informed them that, due to what it termed "significant financial penalties" for continuing to employ affected annuitants, the College had decided not to re-employ all affected annuitants effective July 1, 2015. Prior to this decision being made, the College did not provide the Union notice or an opportunity to bargain the decision. Subsequently, on or about February 13, 2015, the Union sent a letter to Martens wherein it asserted that the decision of whether or not to re-employ affected annuitants was a mandatory subject of bargaining under the Act and requested that the College rescind its decision and made its demand to bargain over the issue. The College replied on or about February 25, 2015 and denied that the decision was one that needed to have been bargained; specifically, it pointed to Section 3.6 of the CBA, which provides, in full, that:

> Nothing herein shall prevent Oakton from permanently not reemploying an adjunct faculty member for reasons which it deems, in its sole discretion, not directly involving teaching performance, including, but not limited to such reasons as repeated unexcused failure to attend course or intentional failure to follow College policies or directives or which it deems, in its sole discretion, to be irremediable, including, but not limited to sexual harassment, carrying a weapon, on College premises or conduct that is injurious to the health, safety and welfare of the students or other college employees. The above does not deny an adjunct faculty member the right to appeal a discharge or disciplinary action as identified in Article VII below.

The College asserted that Section 3.6 made clear that its decision to not re-employ Adjunct Faculty Members classified as affected annuitants—a reason it believed did not directly involve teaching performance—was within its managerial discretion and, thus, not a subject over which it was required to bargain with the Union before implementing. The College further offered to bargain with the Union "the decision and the impact of its decision," but made clear that it would do so "notwithstanding [its] management and contractual rights to discontinue the employment of adjunct faculty who are SURS annuitants and the AFA's untimely bargaining demand."

Meanwhile, the Kulis Grievance was heard before an arbitrator on February 18, 2015. On or about May 26, 2015, the arbitrator issued his Opinion and Award. Therein, he determined that the College did not violate

and interpretations of the parties' CBA. I next consider "whether the arbitrator's factual findings and contractual interpretations allow the [IELRB] to resolve the statutory issues" alleged by the Union in the instant unfair labor practice charge. Id. If the IELRB determines such findings and interpretations do resolve such statutory issues under the Act, it will defer to the award, but resolve the statutory issues *de novo*. Id.

The Union raises three statutory issues: first, it alleges that the College's decision to not re-employ certain Adjunct Faculty Members based on their status as affected annuitants was a unilateral alteration of a mandatory subject of bargaining; to wit, job qualifications, and that such a change was done without giving Union notice or an opportunity to bargain. The alleged unilateral change was implemented during the effective period of the CBA, thus, this is a situation involving midterm bargaining. Rock Falls Elementary School District No. 13, 2 PERI 1150, Case No. 85-CA-0052-C (IELRB Opinion and Order, November 12, 1986). However, as the IELRB in Rock Falls made clear, "midterm bargaining is required over mandatory subjects of collective bargaining which are neither fully negotiated *nor the subject of a clause in an existing collective bargaining agreement.*" Id. (emphasis added). The College argues that Section 3.6 is such clause, and that the Union thus waived its right to bargain over decisions to not re-employ Adjunct Faculty Members for reasons other than teaching performance when it agreed to its language. It is settled that "[a] waiver in a collective bargaining agreement must be established by clear and express contractual language." Central City Educ. Ass'n, IEA-NEA v. IELRB, 149 Ill. 2d 496, 530 (1992). Here, adopting the arbitrator interpretation of the contract, it is clear that Section 3.6 of the CBA permits the College to exercise sole discretion on whether or not re-employ employees on the basis of their status as affected annuitants. Thus, the College was not obligated to bargain, midterm, the issue of re-employment of affected annuitants, the subject of a clause in the existing CBA. Further, The Union, in agreeing to Section 3.6's inclusion in the CBA, therefore waived its right to bargain over such an issue. Thus, I find that the College did not violate Section 14(a)(5) of the Act by unilaterally deciding to not re-employ Adjunct Faculty Members properly classified as affected annuitants. With respect to this issue, I defer to the arbitration award and dismiss this portion of the Union's unfair labor practice charge.

Similarly, the Union, in its Response to the College's Supplemental Position Statement, alleges that the College violated Section 14(a)(5) of the Act when it failed to maintain the *status quo* during the parties' bargaining over the College's decision and its impact. Specifically, the Union alleges that College was obligated to revoke or stay its decision to not re-employ affected annuitants in order to maintain the *status quo* during bargaining. It is well-settled, as the Union concedes in its position statement, that "an educational employer must maintain the status quo *as to mandatory terms and conditions of employment* during contract negotiations until the parties have reached impasse or executed a new agreement." Kewanee Community Unit School Dist. 229, 4 PERI 1136, Case No. 86-CA-0081-C (IELRB Opinion and Order, September 15, 1988); Vienna School Dist. No. 55, 3 PERI 1008, Case No. 86-CA-0001-S (Opinion and Order, December 17, 1986),

aff'd., 162 Ill. App.3d 503 (4th Dist. 1987) (emphasis added). But, as noted above, when the Union waived its right to bargain over the non-employment of Adjunct Faculty Members based on non-performance related reasons, the issue ceased to be a mandatory subject of bargaining and, instead, became a permissive subject. The Union has pointed to no case law to suggest the College is under an obligation to maintain the *status quo* with respect to permissive subjects of bargaining. In fact, unlike a mandatory subject, a party may not insist that a permissive subject be bargained to impasse or as a condition of agreement. University of Illinois (Chicago), 8 PERI 1014, Case No. 91-CA-0008-C (IELRB Opinion and Order, December 26, 1991). What is more, the College, as the arbitrator concluded, has the sole discretion under the CBA to determine whether or not to select an affected annuitant Adjunct Faculty Member for re-employment. An employer is under no duty to bargain so-called matters of inherent managerial authority, including the selection and direction of employees. 115 ILCS 5/4; see also Central City, 149 Ill. 2d 496. Thus, because the College was not required to maintain a *status quo*—without reaching what precisely constituted such a *status quo* in the instant matter—when bargaining this permissive subject, I find that it did not violate Section 14(a)(5) of the Act by refusing to revoke or stay the decision to not re-employ affected annuitants during the parties' bargaining over the issue. Again, with respect to this issue, I defer to the arbitration award and dismiss this portion of the Union's unfair labor practice charge.

The Union finally alleges that the decision to not re-employ affected annuitants and the College's subsequent refusal to rescind such decision interfered with the collective bargaining rights of Adjunct Faculty Members under the Act in violation of Section 14(a)(1). Such an argument is untenable. Adjunct Faculty Members, in exercising their collective bargaining rights, determined that Section 3.6 merited inclusion in their collective bargaining agreement. It is tortured logic to hold that a party to a collective bargaining agreement may agree to remove an issue from the bargaining table and then claim that a subsequent refusal by the other party to bargain the issue interferes with its collective bargaining rights. Thus, I find that the College did not violate Section 14(a)(1) of the Act, and with respect to this issue, I also defer to the arbitration award and dismiss this portion of the Union's unfair labor practice charge.

V. ORDER

Having resolved the statutory issues *de novo*, the instant charge is hereby dismissed in its entirety.

VI. RIGHT TO EXCEPTIONS

In accordance with Section 1120.30(c) of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code §§1100-1135, parties may file written exceptions to this Recommended Decision and Order together with briefs in support of those exceptions, not later than 14 days after service hereof. Parties may file responses to exceptions and briefs in support of the responses not later than 14 days after service of the exceptions. Exceptions and responses must be filed, if at all, with the Board's General Counsel, 160 North LaSalle Street, Suite N-400, Chicago, Illinois 60601-3103. Pursuant to Section 1100.20(e) of the Rules, the exceptions sent to

the Board must contain a certificate of service, that is, "a written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service." If any party fails to send a copy of its exceptions to the other party or parties to the case, or fails to include a certificate of service, that party's appeal will not be considered, and that party's appeal rights with the Board will immediately end. See Sections 1100.20 and 1120.30(c) of the Rules, concerning service of exceptions. If no exceptions have been filed within the 14 day period, the parties will be deemed to have waived their exceptions, and unless the Board decides on its own motion to review this matter, this Recommended Decision and Order will become final and binding on the parties.

Issued in Chicago, Illinois, this 28th day of March 2016.

STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

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