No. 125785

IN THE SUPREME COURT OF ILLINOIS

BOARD OF EDUCATION OF THE CITY OF CHICAGO, JANICE JACKSON, Chief Executive Officer, and ILLINOIS STATE BOARD OF EDUCATION,	On Petition for Leave to Appeal from the Appellate Court, First Judicial District, Case No. 1-18-2391
Petitioners,	On Review from a Final Administrative Decision of the Chicago Board of Education
v.	Board Resolution Nos. 18-1024-RS5 18-1024-EX11
DAPHNE MOORE,	Date of Resolutions: October 24, 2018
Respondent.	Supreme court rule which confers jurisdiction upon the Supreme Court: 315

BRIEF OF APPELLEE DAPHNE MOORE

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October 14, 2020

ORAL ARGUMENT REQUESTED

E-FILED
10/14/2020 3:44 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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NATURE OF THE CASE

This case is an administrative review action from the Opinion and Order ("Order") of the Appellant Board of Education of the City of Chicago ("Board"). In the Order, the Board decided not to dismiss tenured teacher Appellee Daphne Moore, following a hearing on charges seeking Moore's dismissal. Instead of dismissal, the Board imposed on her a "a 90-day time-served suspension to be deducted from her net back pay." Moore seeks administrative review of this penalty in the Order, as contrary to the School Code's mandate that, "if the teacher or principal charged is not dismissed based on the charges, he or she must be made whole for lost earnings, less setoffs for mitigation." 105 ILS 5/34-85(a)(2).

This case does not involve the verdict of a jury or a question raised on the pleadings. Citations to the Record on Appeal are in the same form as in Appellant's brief, with the addition that citations to "SA__" refer to pages of the Supplemental Appendix attached to this Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

At the conclusion of a tenured teacher termination proceeding where the teacher is not dismissed, does the Board have authority to impose a time-served suspension to be deducted from the teacher's net back pay entitlement, such that the teacher is not made whole for lost earnings?

STATEMENT OF FACTS

I. The Board's Dismissal Charges and Specifications

Daphne Moore has been employed as a teacher by the Board since 1994 at a number of its schools. In 2013, she began working at the Board's Goodlow Magnet School, and continued working in the same building after a merger changed the school in the building to Earle STEM Academy ("Earle") (R107-108).

On April 25, 2017, the Board sent Moore dismissal charges with a cover letter stating that the charges were "pursuant to Section 34-85 of the School Code of Illinois." The charges alleged that Moore failed to appropriately respond to a student's apparent overdose of medication on or about September 13, 2016. (SA001-SA005.)

II. Proceedings Before the Hearing Officer.

On April 27, 2017, based on her rights as a tenured teacher under 105 ILCS 5/34-85 ("Section 34-85") of the School Code, Moore requested a hearing before a mutually selected hearing officer (SA006). Pursuant to Section 34-85 of the School Code, the parties mutually selected Hearing Officer Brian Clauss, notifying him by letter of June 5, 2017 (SA007). The hearing proceeded before that Hearing Officer on March 8, 2018 (SA010).

At the hearing Moore, submitted a letter from the Illinois Department of Child and Family Services confirming that there had been a "complete investigation" of the events occurring in September 2016 at Earle, but that "no credible evidence of child abuse or neglect was found." (SA008-SA009.)

III. The Findings of the Hearing Officer, Which the Board Accepted in Part and Rejected in Part

In his Recommended Decision of September 7, 2018 ("Decision"), the Hearing Officer concluded that the Board had not shown cause to dismiss Moore, generally concluding that she had in fact alerted the administration to the student's overdose and that she had not lied (SA022). On October 24, 2018, the Board issued its Order that:

> partially rejects and partially adopts his recommended findings of fact, reinstates Moore, effective October 24, 2018, and issues Moore a separate Warning Resolution and reduces Moore's net back pay by 90 working days.

(A31.) In the Order, the Board identified specific issues where it disagreed with the Hearing Officers factual findings. The Board contended that the facts as it found them justified imposing a 90-school-day reduction in Moore's backpay and a issuing her a warning resolution, as follows:

1. The Board rejected the Hearing Officer's conclusion that Moore used the intercomm to notify the office of the emergency, finding that Moore's testimony that she used the intercomm but no one answered was implausible. (SA019; A27-28.)

2. The Board rejected the Hearing Officer's conclusion that the student took pills in a lunchroom rather than during Moore's class, because the student herself testified she took the pills during the class (A28). The Board's Opinion does not explain how the location where the student took the pills is relevant to Moore's performance as a teacher.

3. The Hearing Officer concluded that there was nothing in the record about what some fellow students told Moore, but the Board rejected that, holding that Moore covered this in her testimony, saying that a student identified as "N." reported what had happened. (SA020; A28.)

4. The Hearing Officer concluded that Moore had taken prompt action and was not negligent. The Board rejected this, on the basis that student Zamaria herself testified otherwise and because other students left the class to speak to the school's security guard, indicating some delay. (SA019; A28-29.)

The Board's Order does not address and thus appears to accept the Hearing Officer's Decision on all other allegations, including the Decision's finding that Moore's contradictory statements during the Board's investigation were the result of mistake and confusion, not an intentional effort to mislead. (SA022.)

Because the Board found some negligence in Moore's handling of the apparent overdose, however, it reinstated Moore subject to "a 90-day time-served suspension to be deducted from her net back pay." (A31.)

IV. The Appellate Court's Opinion

Moore filed for administrative review of the Board's Order, contending that "the suspension and reduction in her back pay are unauthorized by law." (A13.) The Appellate Court agreed with Moore and reversed the Board's decision, because the School Code states that teachers who are suspended without pay pending a hearing, but not ultimately dismissed, "must be made whole for lost earnings." (A17, A21.) The Appellate Court held that this plain language prohibited the retroactive unpaid suspension the Board imposed on Moore when it chose not to dismiss her. (A18.)

ARGUMENT

The Board's action in reducing Moore's net backpay should be reversed. The Board is prohibited by Section 34-85 of the School Code from granting less than a complete make whole remedy when it decides not to dismiss a tenured teacher. Section 34-85 states plainly that teachers who are not dismissed "*must* be made whole for lost earnings, less setoffs for mitigation" (emphasis added). Thus, setting Moore's backpay at an amount less than what would make her whole is simply prohibited by statute, as the

use of the word "must" is mandatory on the Board. None of the Board's arguments even address this clear statutory mandate. Because this statutory mandate is clear from the plain language of the School Code, the Board's order should be reversed.

I. The 2011 Amendment to the School Code Took Away the Board's Right to Suspend Teachers at the End of a Dismissal Proceeding.

The key fact of this case is an amendment to the School Code in 2011. Public Act 097-0008 amended paragraph (a)(2) of Section 34-85, to add this sentence:

> Pending the hearing of the charges, the general superintendent or his or her designee may suspend the teacher or principal charged without pay in accordance with rules prescribed by the board, provided that if the teacher or principal charged is not dismissed based on the charges, he or she must be made whole for lost earnings, less setoffs for mitigation.

105 ILS 5/34-85(a)(2); Public Act 097-0008 (2011) (emphasis added).

It is undisputed that, in this case, the Board decided not to dismiss Moore, and simultaneously decided to make her less-than-whole for the period of the unpaid suspension she was under pending the hearing officer's decision, by issuing her a 90-school-day unpaid suspension as discipline.

The Appellate Court held that this violated the plan terms of Section 34-85. After all, the Board made Moore less-than-whole, by 90 school days' of pay. The Board's brief to this Court evades the key issue rather than addressing it. As detailed below, the Board cites pre-2011 cases allowing it to impose suspensions, ignoring that the General Assembly changed the law in 2011. The Board cites cases about the interaction of Section 34-85 with other sections of the School Code, but none of those cases address this language stating that Moore "must be made whole." Nor are policy arguments properly brought to this Court; rather, any practical difficulties with the

School Code's plain terms should be addressed by the General Assembly.

A. The Plain Language of the 2011 Amendment States "Must" and the Board Is Simply Ignoring That the Statute Requires This.

Under paragraph (a)(2) of Section 34-85, if a teacher "is not dismissed based on the charges, he or she must be made whole for lost earnings, less setoffs for mitigation." The Board did not dismiss Moore. Thus, under the plain terms of that statute, Moore "must be made whole for lost earnings, less setoffs for mitigation." The use of "must" makes the statute mandatory. Since the Board chose not to dismiss Moore, then it has no choice but to make her whole by giving her full backpay. It may not give her only part of what would make her whole.

Section 34-85 entitles Moore to administrative review of the Board's decision. 105 ILCS 5/34-85(a)(8). Illinois courts sitting on administrative review will reverse administrative decisions that are "based upon an erroneous, arbitrary, or unreasonable construction of a statute." *Harrisburg-Raleigh Airport Auth. v. Department of Revenue*, 126 Ill. 2d 326, 331 (1989). Accord, *People ex rel. Margolis v. Robb*, 225 Ill. App. 3d 843, 847 (4th Dist. 1992). This includes where the statutory authority is derived from the School Code. *Beggs v. Board of Educ. of Murphysboro Community Unit School Dist. No. 186*, 2016 IL 120236 ¶ 63 (decisions on terminating tenured teachers subject to reversal where arbitrary or unreasonable); *East St. Louis Fed'n of Teachers, Local 1220 v. East St. Louis Sch. Dist.*, 311 Ill. App. 3d 987, 991 (5th Dist. 2000) (financial oversight panel's decision to hire outside contractors overturned by court where School Code did not grant that authority), appeal denied 189 Ill. 2d 657 (2000).

"The plain language of a statute is the most reliable indication of the legislature's

objectives in enacting that particular law, and when the language of the statute is clear, it must be applied as written without resort to aids or tools of interpretation." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006) (internal citation omitted). Where a statute uses the word "must," that "is generally regarded as mandatory." *Andrews v. Foxworthy*, 71 Ill. 2d 13, 21 (1978). Accord, *Moon Lake Convalescent Center v. Margolis*, 180 Ill. App. 3d 245, 255 (1st Dist. 1989), appeal denied 545 N.E.2d 114 (1989). Here the statute uses "must," which means that the step, task, or obligation is "mandatory." *Foxworthy*, 71 Ill. 2d at 21.

For this simple reason, the Board's decision is invalid. The Board did not dismiss Moore. Thus, Section 34-85 plainly directs that "she must be made whole for lost earnings, less setoffs for mitigation." Section 34-85(a)(2) (emphasis added). The Board's action here flies directly in the case of the statute because the Board has expressly decreed that it plans to make Moore less than whole. Accordingly, the Board should be reversed because its decision is based on an erroneous interpretation Section 34-85. *Harrisburg-Raleigh Airport Auth.*, 126 Ill. 2d at 331. The only possible interpretation is that full make-whole compensation is required.

The use of "must" as a mandatory directive is clear enough. But if somehow it were not, it is clarified further by the maxim of *expressio unius est exclusio alterius*, which mean that "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions, despite the lack of any negative words of limitation." *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 442 (1992). See also *Metzger v. DaRosa*, 209 Ill. 2d 30, 44 (2004). Here, Section 34-85 in two places permits reduction to backpay for a teacher not dismissed:

- A teacher not dismissed "must be made whole for lost earnings, less setoffs for mitigation." Section 34-85(a)(2).

- "In the event that the board declines to dismiss the teacher or principal after review of a hearing officer's recommendation, the board shall set the amount of back pay and benefits to award the teacher or principal, which shall include offsets for interim earnings and failure to mitigate losses." Section 34-85(a)(7).

This statutory reference to "mitigation" does not include penalties or other offsets unrelated to the teacher's efforts to earn other income during the back pay period. This is made clear in Section 34-85(a)(7), which addresses directly the process for ascertaining the make whole amounts:

> In the event that the board declines to dismiss the teacher or principal after review of a hearing officer's recommendation, the board shall set the amount of back pay and benefits to award the teacher or principal, which shall include offsets for interim earnings and failure to mitigate losses. The board shall establish procedures for the teacher's or principal's submission of evidence to it regarding lost earnings, lost benefits, mitigation, and offsets.

Section 34-85 accordingly makes clear that offsets from full back pay are for interim earnings and the teacher's failure to mitigate losses by seeking interim employment. The Act allows for submission of such evidence only by the affected teacher (or principal), and it makes no reference to offsets based on the Board's own determination of some lesser culpability.

It is mitigation alone that Section 34-85 allows as a basis to reduce backpay. Section 34-85 omits mention of any other reasons for reducing backpay. Thus, those "omissions should be understood as exclusions, despite the lack of any negative words of limitation." *Burke*, 148 Ill. 2d at 442. Specifically, the Board cannot rely on its opinion that Moore's conduct was to some degree negligent as a basis to reduce backpay. Section 34-85 provides for mitigation to reduce backpay, but its plain language does not

allow for a disciplinary suspension to reduce backpay.

B. The Board Never Addresses the Key Language That the General Assembly Added to Section 34-85 in 2011.

The Board's brief contains ten pages of argument. In all those pages, the Board's arguments never once address the clear statutory directive that Moore "must be made whole for lost earnings." 105 ILCS 5/34/85(a)(2).

The Board does not even try to reconcile its treatment of Moore with this provision of the School Code. Instead, the Board evades. The Board cites cases that pre-date that statute, but the entire point of amending a statute is to change the law. The Board looks to other sections of the School Code, but it cannot now change the bases for its decision. The Board cites cases about other unrelated sections of the School Code, which having nothing to do with the "must" provisions at issue here. The Board makes policy arguments about what the School Code might best say, but the question for this Court is what the School Code *does* say. The Appellate Court should be affirmed, because the Board presents no arguments for any other way to address the statutory provision that Moore

1. Pre-2011 Cases Are Not Relevant Where Overruled by Statute.

The Board argues that the Appellate Court took an "incorrect reading" of *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389 (1987). But in doing so, the Board evades the relevant analysis. The question is not one of a school board's general authority to issue suspensions to teachers. The question is whether the Board can make a teacher less-than-whole at the end of a dismissal proceeding where the

teacher is not dismissed. As addressed above, the Board cannot.

Spinelli did not involve a suspension resulting at the end of a tenure teacher dismissal process. It instead involved a "suspen[sion] without pay for five days." *Id.* at 394. Nor did the opinion in *Spinelli* consider the mandatory "must" language of this section of the School Code. Indeed, it could not consider that language because the *Spinelli* opinion issued in 1987 and the language dictating that teachers "must be made whole for lost earnings" was added to Section 34-85 in 2011. Public Act 097-0008 (eff. date June 13, 2011) (amending 105 ILCS 5/34-85).

The Board says "nothing suggests that [the] legislature intended" to take away the power to impose a suspension at the end of a tenure teacher dismissal proceeding where the teacher is not dismissed based on the charges. But once again the Board is evading, rather than addressing, the General Assembly's amendment to the School Code in 2011. As addressed above, the General Assembly placed new language in the School Code in 2011 stating that a teacher who, like Moore, is not dismissed "must be made whole for lost earnings, less setoffs for mitigation." 105 ILS 5/34-85(a)(2); Public Act 097-0008 (2011). Thus, there absolutely *is* something to suggest that the legislature intended to take away the Board's power to impose suspensions on teachers in Moore's situation: the General Assembly amended the School Code so that the School Code would say that the Board cannot impose this sort of suspension.

The Board cites to *Lake Cnty. Bd. of Review v. Property Tax Appeal Bd.,* 119 Ill. 2d 419 (1988), and *Wilson v. Illinois Dept. of Prof'l Regulation*, 317 Ill. App. 3d 57 (1st Dist. 2000), for the argument that it may accomplish in detail what is generally authorized. Again, the Board evades the question at hand. The question is not the

general authority to run the schools, but rather whether this particular penalty of a suspension is statutorily barred. The Board makes no argument that Section 34-85(a)(2) would allow this suspension. This Court has been clear that agencies may not impose penalties of a type disallowed by their governing statutes. *Chicago v. Fair Employment Practices Com.*, 65 Ill. 2d 108 (1976) (penalty of attorneys' fees not allowed where not authorized by statute); *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 552-55 (1977) (penalty of suspending a vendor not allowed where not authorized by statute). Whether the Board would be allowed to make Moore less-than-whole without Section 34-85(a)(2) is a purely academic question. The simple fact is that the plain language of Section 34-85(a)(2) requires the Board to make Moore whole in this particular situation.

The closest the Board comes to authority for its suspension is the dissenting opinion in *James v. Bd. of Educ.*, 2015 IL App (1st) 141481, ¶ 28, which suggested that "some form of discipline short of discharge" might have been appropriate for a tenured teacher. But this dissenting opinion never considered the mandatory make whole requirement of Section 34-85(a)(2). Nor did it suggest that the alternative discipline would be to make the teacher less-than-whole. Perhaps more importantly, dissenting opinions are not precedent or authority. *Howard v. Firmand*, 378 Ill. App. 3d 147, 150 (1st Dist. 2007) ("We fail to see the relevancy of a dissenting justice's opinion in any context."); *In re Jonathan C.B.*, 386 Ill. App. 3d 735, 750 (4th Dist. 2008) (dissenting opinion "is not precedential"), aff'd 2011 IL 107750.

The Board's brief cites a number of other pre-2011 cases: *Kearns v. Bd. of Educ.*, 73 Ill. App. 3d 907 (1st Dist. 1979); *Stutzman v. Bd. of Educ.*, 171 Ill. App. 3d 670 (1st Dist. 1988); *Sweeney v. Bd. of Educ.*, 746 F. Supp. 758 (N.D. Ill. 1990); *Bd. of Educ. of*

Rockford v. Ill. Educ. Labor Rels. Bd., 165 Ill. 2d 80 (1995). But as with *Spinelli*, none of these cases bear on the crucial issue here, which is the new language that the General Assembly added to Section 34-85(a)(2). The reason they cannot deal with that language is, of course, that they were decided years before the General Assembly passed that amendment. Accordingly, they cannot be authority on the question presented to the Court in this case.

The Board's brief may ignore the statutory amendment in 2011. But this Court should not. The Board's own cited cases acknowledge that where the General Assembly makes a change to a statute, "it is presumed that the legislature intended to change the law in that effect." *Chicago Teachers Union v. Bd. of Educ. of the City of Chicago*, 2012 IL 112566, ¶ 21. Nor can the new language added in 2011 be waved away as meaningless, because statutes should not be interpreted in a way that would make some provisions superfluous. *Moore v. Bd. of Educ. of the City of Chicago*, 2016 IL App (1st) 133148, ¶ 33. Rather, the plain language of the amended School Code should be enforced as written. *DeLuna*, 223 Ill. 2d at 59.

2. The Board Cannot Now Change Which Section of the School Code It Relies on to Justify Moore's Suspension.

The Board claims it had authority to suspend Moore when it chose not to dismiss her, because 105 ILS 5/34-18 ("Section 34-18") gives the Board powers that are "requisite or proper" for running the schools. But this new statutory basis cannot be raised in administrative review, when it was not what the Board relied on below. Further, Section 34-18 gives only those powers which are "not inconsistent with" the rest of the

School Code. As detailed above, the Board "must" make Moore whole when it chose not to dismiss her, so any claim of residual power to suspend Moore would necessarily conflict with Section 34-85(a)(2)'s requirement that the Board make her whole.

a. The Board Cannot Change the Basis for Its Decision on Administrative Review.

The Board argues that it can suspend Moore under Section 34-18 of the School Code, because that section allows it "other powers" that "may be requisite or proper for the maintenance and the development of a public school system, not inconsistent with the provisions of this Article or provision of this Code." 105 ILS 5/34-18. But the Board cannot change the basis for its decision mid-way through administrative review in the courts.

In this administrative review case, the Board is bound to the legal basis cited in its original Order. *Department of Central Management Services v. Illinois Labor Relations Board, State Panel*, 2018 IL App (4th) 160827 ¶37. It "is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* A court " may not accept appellate counsel's *post hoc* rationalizations for agency action." *Central Management Services*, 2018 IL App (4th) 160827, ¶37, citing *Motor Vehicle Manufacturers Ass'n of the United States*, 463 U.S. 29, 50 (1983).

It is clear from the record in this case that the Board always relied on Section 34-85 during the administrative proceeding, and is relying on Section 34-18 only now in administrative review:

- The Board sent Moore a cover letter with the dismissal charges stating that the charges were issued subject to Section 34-85 (SA001).

- When the Hearing Officer was selected, the Board told him that he would be hearing a proceeding under Section 34-85 (SA007).
- The Board's Order cites Section 34-85 in explaining its authority to dismiss teachers and to warn them of conduct that may lead to dismissal (A24, A29).

Thus, it is clear from the record that the Board intended all along to proceed under Section 34-85. At no point prior to administrative review in court did the Board rely on some other section of the School Code for this retroactive suspension and backpay reduction.

In addition, another statutory change in 2011 makes it appropriate to limit the Board to the reasons stated in its Order, even if earlier cases allowed otherwise. In addition to the addition of the key language in Section 34-85 discussed above, Public Act 97-0008 also added subsection (a)(8) to Section 34-85. Section 34-85(a)(8) now includes the phrase: "The teacher may seek judicial review of the board's decision *in accordance with the Administrative Review Law*, which is specifically incorporated in this Section." Pub. Act 097-0008 (eff. date June 13, 2011) (amending 105 ILCS 5/34-85) (emphasis added). Thus, Public Act 097-0008 now statutorily imposes administrative review standards onto the review of the Board's decision on tenure teacher dismissal.

b. Section 34-85's Specific Terms Prevail Over the General Terms of Section 34-18.

Whatever discretion the Board may have to suspend teachers as a general matter, this directive in Section 34-85 is clear. To the extent that the Board's general power to suspend is in conflict with this specific directive to make Moore whole at the end of the dismissal process, the more specific directive must prevail. *Vill. of Chatham v. County of*

Sangamon, 216 Ill. 2d 402, 431 (2005). "[W]here there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision must prevail." *Id.*

The Board's reliance on Section 34-18 is also misplaced, just based on the plain terms of Section 34-18 itself. Section 34-18 gives the Board "all other powers that they may be requisite or proper for the maintenance and the development of a public school system, not inconsistent with the other provisions of this Article or provisions of this Code which apply to all school districts." But a key limitation is contained within this general grant of powers. Section 34-18's general grant of powers is limited to actions which are "*not inconsistent with* the other provisions of this Article or provisions of this Code." 105 ILCS 5/34-18 (emphasis added). As detailed above, the suspension issued to Moore is, in fact, inconsistent with another provision of School Code, specifically, Section 34-85 which states that Moore "*must* be made whole for lost earnings, less setoffs for mitigation" when the ultimate decision was not to dismiss her. 105 ILCS 5/34-85(a)(2) (emphasis added).

3. The Board's Cited Cases Addressing Interaction Between Sections of the School Code Do Not Bear on Section 34-85, Which Is in Question Here.

The Board notes that the Appellate Court and the Supreme Court have at times considered the interaction between Section 34-85 and other sections of the School Code. But none of those cases involve the specific mandatory language that is at issue here: that the Board "must" make whole teachers who it ultimately does not dismiss. 105 ILCS 5/34-85(a)(2). Indeed, none of the cases even consider anything similar to the

mandatory language of "must" from Section 34-85(a)(2) that is at issue in this case.

The Board cites to *Land v. Bd. of Educ.*, 202 Ill. 2d 414 (2002), which allows the Board to lay off tenured teachers under Section 34-8.1 of the School Code, 105 ILCS 5/34-8.1, without giving the individual teachers the benefit of the procedures set forth in Section 34-85. *Land*, 202 Ill. 2d at 424. But the Court in *Land* noted that this was because the General Assembly had given "the Board the authority to formulate and implement its own rules and procedures regarding layoffs rather than binding the Board to a legislatively mandated procedure." *Id.* Here, of course, the General Assembly imposed a specific mandate in Section 34-85, by use of the word "must."

The reasoning in *Chicago Teachers Union v. Board of Educ.*, 2012 IL 112566, is similar to the reasoning in *Land*. There, this Court noted that the General Assembly had also given the Board the power to confer upon teachers the right to recall following layoff, but also made the grant of any such rights optional. *Id.* at ¶ 23. The Court specifically noted that the section of the School Code governing recall "does not contain any mandatory terms." *Id.* Thus, neither *Chicago Teachers Union* nor *Land* have any bearing here, because they involved statutes where the Board was, in fact, granted discretion. In contrast here, of course, Section 34-85(a)(2) contains the mandatory term of "must."

In *Young-Gibson v. Bd. of Educ.*, 2011 IL App (1st) 103804, the Appellate Court held that the Board can exercise its right under 105 ILCS 5/34-8.3(d)(3) to remove a principal from a school under probation, without going through the procedures of Section 34-85. *Id.* ¶ 45. But that merely means that Section 34-85 does not apply to *principals* in that particular situation. The *Young-Gibson* case says nothing about the proper

interpretation of Section 34-85 to teachers who are issued dismissal charges, but not ultimately dismissed.

The Board's cited case of *Lisa Moore v. Bd. of Educ.*, 2016 IL App. (1st) 133148, if anything, supports Appellee Moore's position here. In that case, the teacher had allowed her teaching certificate to expire. The Board sought to terminate her, but another section of the School Code provides for remediating lapsed certificates. *Id.* ¶ 33. Thus, failure to maintain a certificate was not justification for termination under Section 34-85. *Id.* To the extent the *Lisa Moore* case is relevant here at all, it supports Appellee Moore, because it says that the School Code can limit the Board's authority to discipline.

4. The Board's Policy Arguments Are Out of Place and Should Be Directed to the General Assembly, Not This Court.

The Board argues that it needs the "flexibility in a situation" like Moore's to choose between termination and suspension, at the end of the dismissal process. But the Board is in the wrong place to make arguments about the practical implications of plain statutory language. Such arguments should be taken to the General Assembly with a request that the General Assembly amend the School Code; this Court should enforce the School Code's plain language as written. That said, the Board's asserted need for "flexibility" must be balanced against the tenured teacher's need for job protection. Through the plain language in of School Code, the General Assembly has struck a reasonable balance. This Court should enforce it.

a. The Board Should Direct Its Arguments About Practicality to the General Assembly, Not to the Court.

The Board's practicality-based arguments belong in the General Assembly, not in this Court. As this Court has made clear, "Policy questions concerning the effects caused by such plain language…are for the General Assembly to address, not this court." *Carpentersville v. Pollution Control Bd.*, 135 Ill. 2d 463, 476 (1990). The Appellate Court's opinion here correctly interpreted the plain language of Section 34-85 stating that the teacher "must be made whole" if not dismissed. 105 ILCS 5/34-85(a)(2). If the outcomes of that are unsatisfactory or even arguably harmful, then the Board must seek a change in the School Code from the General Assembly. This Court is not the place to go with complaints about the practical implications of what the School Code plainly says. *Carpentersville*, 135 Ill. 2d at 476.

b. The Board's Arguments about Practicality Are Unfounded as the General Assembly's Statutory Approach Makes Sense.

Further, there is nothing absurd or harmful about Section 34-85(a)(2)'s plain language barring the Board from imposing a retroactive suspension when it decides not to terminate, even as the Board's principals have the power to suspend generally. "A tenured teacher is entitled to a construction of the tenure laws consistent with the prime purpose of providing him with maximum protection." *Jones v. General Superintendent of Schools*, 58 Ill. App. 3d 504, 507 (1st Dist. 1978). It was entirely reasonable for the General Assembly to decide that a teacher who has prevailed over dismissal charges should be protected from the Board clawing back that victory through an unpaid suspension. The plain language of Section 34-85(a)(2) directs that sensible result of

protecting teachers who have prevailed in their cases.

The Appellate Court's opinion in this case does not deprive the Board of its ability to suspend teachers as a form of discipline, as a general matter. School principals have the general power to suspend under 105 ILCS 5/34-8.1 (principal's powers include the power to "suspend with or without pay or otherwise discipline all teachers"). It is simply that the plain language of Section 34-85(a)(2) prohibits the Board from using the specific punishment of a *retroactive* suspension, to reduce backpay due to a tenured teacher who prevailed over dismissal charges. There is nothing implausible about the General Assembly intending to protect a teacher by requiring the Board to choose a disciplinary avenue at the beginning of the process, and then to stick with that choice. Perhaps the School Code could have been written differently, but the plain language directs full backpay.

Nor is it unreasonable to say that the Board may not implement a retroactive suspension at the end of a termination case, even when a school principal could perhaps have chosen to impose a suspension at the outset. Suspension and termination differ in severity and justify different protections for a teacher in processing the discipline. Indeed, in *Spinelli*, the Supreme Court noted that due process for a suspension need not follow the same sequence as due process for a termination. *Spinelli*, 118 Ill. 2d at 406. Enforcing the plain language of Section 34-85(a)(2) to prohibit retroactive suspensions in this particular case is separate from the Board's general power to suspend employees.

II. The Board Improperly Relies on the Unpublished Mohorn-Mintah Order.

The Board cites to *Mohorn-Mintah v. Bd. of Educ.*, 2019 IL App (1st) 182011-U. But that is an unpublished Written Order under Illinois Supreme Court Rule 23(b). Accordingly, it "is not precedential and may not be cited by any party," except in limited circumstances the Board does not claim apply here. Ill. Sup. Ct. R 23(d). The Board's entire discussion regarding the unpublished *Mohorn-Mintah* order should be disregarded, because the Board has itself disregarded Rule 23 in citing to that order.

In any event, the Appellate Court's opinion in this case is better-reasoned than the unpublished order in the *Mohorn-Mintah* case. In *Mohorn-Mintah*, the Appellate Court claimed it could see no " authority for the proposition that the Board may only discipline [Mohorn-Mintah] under the statute that it cites to in the dismissal charges, and we can find no case law to support such a proposition either." *Mohorn-Mintah*, 2019 IL App (1st) 182011-U ¶ 27. But of course that simply overlooks the plain language of Section 34-85(a)(2), as amended in 2011. As detailed above, that plain language states that a teacher who is not dismissed "*must* be made whole for lost earnings." 105 ILS 5/34-85(a)(2) (emphasis added). There is, in fact, statutory authority that the Board may not make a teacher less-than-whole through imposing a retroactive unpaid suspension. The Appellate Court in *Mohorn-Mintah* simply failed to address it in the unpublished order. Thus, the unpublished order should not be followed, even if it could be cited.

CONCLUSION

For the reasons stated herein, the Board's reduction of "Moore's net back pay by 90 working days" should be reversed. The plain language of Section 34-85(a)(2) prohibits the Board from making Moore anything less than whole, if it files dismissal charges against her but then she is not ultimately dismissed. The Board cites numerous cases, but none address the clear mandate of Section 34-85(a)(2). That the section might be written differently, or that the Board might have discretion without this plain language, are irrelevant. The plain language exists and the Board must obey it. The Board's Order should be reversed as contrary to the plain language of the School Code.

Once the Court reverses the Board's decision, the School Code directs that the matter be remanded to the Board to compute lost earnings and benefits, less appropriate offsets, 105 ILCS 5/34-85(a)(8), and this Court should therefore remand the matter in that fashion.

Robert E. Bloch
Josiah A. Groff
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH
8 S. Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361

Respectfully submitted,

/s/ Josiah A. Groff

October 14, 2020

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

/s/ Josiah A. Groff

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I, Josiah A. Groff, an attorney, hereby certify that, on October 14, 2020, I caused to be served the foregoing Brief of Appellee Daphne Moore, to the following by email and by using the Odyssey eFileIL system:

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/s/ Josiah A. Groff

E-FILED
10/14/2020 3:44 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

No. 125785

IN THE SUPREME COURT OF ILLINOIS

BOARD OF EDUCATION OF THE CITY OF CHICAGO, JANICE JACKSON, Chief Executive Officer, and ILLINOIS STATE BOARD OF EDUCATION,	On Petition for Leave to Appeal from the Appellate Court, First Judicial District, Case No. 1-18-2391
Petitioners,	On Review from a Final Administrative Decision of the Chicago Board of Education
v.	Board Resolution Nos. 18-1024-RS5 18-1024-EX11
DAPHNE MOORE,	Date of Resolutions: October 24, 2018
Respondent.	Supreme court rule which confers jurisdiction upon the Supreme Court: 315

SUPPLEMENTAL APPENDIX TO BRIEF OF APPELLEE DAPHNE MOORE

TABLE OF CONTENTS TO SEPARATE APPENDIX

A. Cover Letter to Dismissal Charges Against Daphne Moore of April 25, 2017 . . . . . SA001

B. Dismissal Charges Against Daphne Moore of April 25, 2017 . . . . . SA003

C. Letter Requesting Hearing on Dismissal Charges of April 27, 2017 . . . . . SA006

D. Letter Notifying Hearing Officer of Selection of June 5, 2017[1]. SA007

E. Letter from Dept. of Child and Family Services of May 17, 2017 . . . . . SA008

F. Hearing Officer's Findings of Fact and Recommendation of March 8, 2018. . . . . .SA010

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[1] This letter was added to the record pursuant to the Appellate Court's order of July 17, 2019, granting Appellant's Motion for Order Supplementing Record Leave to File Supplemental Record.

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10/14/2020 3:44 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

Chicago Public Schools

Forrest Claypool
Chief Executive Officer

42 West Madison, 3rd Floor • Chicago, Illinois 60602

April 25, 2017

Daphne Moore
3255 W 85th Place
Chicago, IL 60652

Dear Ms. Moore:

Pursuant to Section 34-85 of the School Code of Illinois, you are hereby notified that I have approved charges against you alleging conduct unbecoming of a Chicago Public Schools employee. Enclosed please find a copy of the written charges and specifications. If you are dismissed from the Board, you may be permanently barred from future employment with the Board. You are further notified that I am requesting you be suspended, without pay, pending a hearing on the charges approved against you. Prior to the dismissal hearing, you will be afforded a pre-suspension hearing to be held in the Board's Office of Employee Engagement. You will receive notification from the Office of Emnployee Engagement as to the date and time of the pre-suspension hearing.

Pursuant to statute, a dismissal hearing has been tentatively scheduled for **May 25, 2017**. However, you will be dismissed from your employment with the Board of Education of the City of Chicago and no hearing upon the charges will be held unless, within seventeen (17) calendar days after receiving this notice, you request iu writing of the Chief Executive Officer that a dismissal hearing be scheduled on the charges. If you wish to request a hearing on the charges, please direct your written communication to Mr. Ronald L. Marmer, General Counsel, Board of Education of the City of Chicago, Law Department, 1 N. Dearborn Street, Suite 900, Chicago, Illinois 60602.

In addition, you have the right to request a hearing before a hearing officer selected in one of the following ways:

1) A mutually selected hearing officer from a list of nine (9) qualified hearing officers that has been developed in good faith consultation with the Chicago Teachers Union. The cost of such a hearing will be split equally between the parties; or

2) A hearing before a qualified hearing officer that shall be chosen by the Chief Executive Officer of the Board. The cost of this hearing shall be paid by the Board.

You must copy the Illinois State Board of Education on this request for a hearing, addressed to the General Counsel, Illinois State Board of Education, 100 W. Randolph Street, Chicago, Illinois 60601.

Chicago Public Schools

You or your representative should contact James G. Ciesil, Deputy General Counsel, at (773) 553-1700, if you have any questions or concerns in these matters.

Sincerely,

Forrest Claypool
Chief Executive Officer

Enclosure
cc: Ronald L. Marmer
James G. Ciesil

April 25, 2017

APPROVAL OF DISMISSAL CHARGES AGAINST DAPHNE MOORE, A TENURED TEACHER ASSIGNED TO CHARLES W. EARLE ELEMENTARY SCHOOL

THE CHIEF EXECUTIVE OFFICER

Hereby approves the following charges against Daphne Moore, a tenured teacher assigned to Charles W. Earle Elementary School.

DISMISSAL CHARGES

I charge Daphne Moore with:

1. Violating Corrective Action Category "Performance: Negligence/Incompetence – Students," which prohibits the failure to act in the manner of a reasonably prudent educator in the supervision of students.

2. Violating Corrective Action Category "Performance: Failure to Perform Duties," which prohibits failing to perform one's duties.

3. Violating Corrective Action Category "Policy Compliance: Policy Non-Compliance," which prohibits the failure to follow Board policies concerning students.

4. Violating Corrective Action Category: Fraud – Employment Records/Inquiries – Making and intentional false representation in an employment record or inquiry.

5. Violating Corrective Action Category: Fraud – Other – Any other type of misrepresentation.

6. Violating Corrective Action Category: Insubordination – Refusal to carry out a directive from a supervisor.

7. Violation of the Illinois State Board of Education Rules and Regulations Code of Ethics, 22.10-20 of Title 23, which requires Illinois educators to be responsible to:

    a. Students
    b. Self
    c. Colleagues and the Profession
    d. Parents, Families, and Communities; and
    e. Illinois State Board of Education.

8. Violation of the Illinois State Board of Education Rules and Regulations Standards for All Illinois Teachers, 24.130 of Title 23, which outlines the Illinois Professional Teaching Standards.

9. Conduct unbecoming a Chicago Public Schools employee.

SPECIFICATIONS

1. For all relevant time periods you were a teacher assigned to Charles W. Earle Elementary School ("Earle").

2. On or about September 13, 2016, you were alerted by students in your classroom that 13 year-old female student Zamaria C. had "swallowed pills."

3. You took little to no action to ascertain whether Zamaria C. was physically in distress beyond asking her, "You OK?"

4. Despite the fact that Zamaria C. did not respond to your question, you continued to teach.

5. On or about September 13, 2016 you failed to alert the administration or emergency medical personnel that female student Zamaria C. had swallowed pills and/or had failed to respond to your inquiries.

6. On or about October 6, 2016, a Chicago Public Schools investigator interviewed you.

7. During that interview, you provided false statements to the investigator when you stated that Jeriesha Mahone, SECA, was not present during the September 13, 2016 incident with student Zamaria C.

8. Your conduct was unbecoming that of a Chicago Public Schools employee.

Based on the above specifications, dismissal is warranted due to your irremediable conduct. Your dismissal may result in your permanent ineligibility for future employment with the Board.

Respectfully submitted,

Forrest Claypool
Chief Executive Officer

Approved as to legal form:

Ronald L. Marmer
General Counsel

Chicago TEACHERS UNION

April 27, 2017

VIA FAX & U.S. MAIL

Mr. James Ciesil
General Counsel
Chicago Board of Education
42 West Madison
Chicago, Illinois 60602

Re: Daphne Moore
Case#17-04-180(gec)

Dear Mr. Ciesil:

Pursuant to Section 34-85 of the Illinois School Code, 105 ILCS 5/34-85, the Chicago Teachers Union ("the Union"), on behalf of one of its bargaining unit members, Daphne Moore, **hereby requests a hearing** on the charges and specifications brought against her by the Chicago Board of Education.

In accordance with Sections 34-85(a)(1) and 34-85(a)(3) of the School Code, the Union further requests, on Ms. Moore's behalf, that the hearing is before a **mutually selected hearing officer**.

Mr. Graham Hill, Union In-house Counsel, will represent Ms. Moore in this matter.

Sincerely,

Karen GJ Lewis, NBCT
President

KL:GEC/oteg-743/kt
cc: Daphne Moore
Graham Hill, CTU In-house Counsel
General Counsel, Illinois State Board of Education

Board of Education of the City of Chicago
Law Department

Ronald L. Marmer
General Counsel

1 North Dearborn Street, Suite 900
Chicago, IL 60602
Telephone: (773) 553-1700
Fax: (773) 553-1701

June 5, 2017

Via E-Mail
Brian Clauss
310 Busse Highway, Suite 291
Park Ridge, Illinois 60068
brianclauss@claussadr.com
clauss_scheduling@att.net

RE: Daphne Moore Dismissal Hearing

Dear Hearing Officer Clauss:

In accordance with the provisions set forth in Section 34-85 of the Illinois School Code, the parties have selected you to hear the matter involving the dismissal of tenured teacher Daphne Moore. Enclosed is a copy of the letter approving dismissal charges against Ms. Moore, the written dismissal charges and specifications, and a letter from Ms. Moore's representative requesting a hearing pursuant to Section 34-85 of the Illinois School Code.

Ms. Daphne Moore is represented by attorneys Graham Hill & Latoyia Kimbrough, Chicago Teachers Union, 1901 W. Carroll Avenue, Chicago, IL 60612.

We look forward to working with you.

Sincerely,

Peter Brierton
Assistant General Counsel

enclosures
cc: Graham Hill & Latoyia Kimbrough
Chicago Teachers Union, 1901 W. Carroll Avenue, Chicago, IL 60612.
cc: Stephanie Beauregard Donovan, General Counsel, ISBE

Bruce Rauner
Governor

DCFS
Children & Family Services

George H. Sheldon
Director

May 17, 2017

Moore, Daphne
3255 W. 85th Place
Chicago, IL 60652

Re: SCR# : 2263801A
Case Name: Earle Elementary School
Report Date: 09/14/2016

Dear Daphne Moore:

You were previously notified that the Department of Children and Family Services was investigating a report of suspected child abuse or neglect in fulfillment of its duties under the Abused and Neglected Child Reporting Act, 325 ILCS 5/1 *et seq.*

After a thorough evaluation, DCFS has determined the report to be "unfounded." This means that no credible evidence of child abuse or neglect was found during this investigation and that your name will not be listed as a perpetrator of child abuse or neglect on the State Central Register. This does not necessarily mean that an incident did not occur. An incident may have occurred but the evidence did not rise to the level required to indicate for abuse or neglect as dictated by state law and DCFS Administrative Rule.

DCFS will maintain a copy of this investigative report for a period of one to three years depending on the specific allegation(s) that was investigated in accordance with the provisions of the Abused and Neglected Child Reporting Act. The State Central Register is confidential under state law and not available to the general public.

If you believe that an intentional false report was made to DCFS, you have the right to request that DCFS maintain the report as an intentional false report. Your request to have the report maintained as an intentional false report must be in writing and must be postmarked within 10 days from the date of this letter. Your request must be sent to the State Central Register, 406 East Monroe Street, Station 30, Springfield, Illinois 62701-1498.

Respondents Ex. 3

Bruce Rauner
Governor

DCFS
Children & Family Services

George H. Sheldon
Director

You may find further information, including the DCFS administrative rules, on the DCFS website at www.state.il.us/dcfs. If you have additional questions or concerns, you may contact the DCFS Advocacy Office for Children & Families at 800-232-3798 or 217-524-2029.

Sincerely,

Deanna Large, Administrator
State Central Register

DL/lr

State Central Register
406 E. Monroe Street, Sta. 30 • Springfield, Illinois 62701
217-785-4010
www.DCFS.illinois.gov

ILLINOIS STATE BOARD OF EDUCATION
BEFORE BRIAN CLAUSS

IN THE MATTER OF CHARGES FOR DISMISSAL PREFERRED AGAINST DAPHNE MOORE, Respondent, BY THE CHIEF EXECUTIVE OFFICER OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO Petitioner.	)	Daphne Moore, Tenured Teacher Dismissal Hearing

For the Petitioner:
Peter Brierton
Chicago Board of Education Law Department

For the Respondent:
Kurtis Hale
Poltrock & Poltrock

Date of Hearing: March 8, 2018
Location of Hearing: Chicago Board of Education

INTRODUCTION

On April 25, 2017, the Chief Executive Officer of the Chicago Board of Education ("Board") approved charges and specifications seeking the dismissal of Daphne Moore ("Respondent"), as follows:

> The Chief Executive Officer
>
> Hereby approves the following charges against Daphne Moore, a tenured teacher assigned to Charles W. Earle Elementary School.
>
> Dismissal Charges
>
> I charge Daphne Moore with:
>
> 1. Violating Corrective Action Category "Performance: Negligence/Incompetence- Students," which prohibits the failure to act in the manner of a reasonably prudent educator in the supervision of students.
>
> 2. Violating Corrective Action Category "Performance: Failure to Perform Duties," which prohibits failing to perform one's duties.
>
> 3. Violating Corrective Action Category "Policy Compliance: Policy Non-Compliance," which prohibits the failure to follow Board policies concerning students.
>
> 4. Violating Corrective Action Category: Fraud - Employment Records/Inquiries - Making an intentional false representation in an employment record or inquiry.
>
> 5. Violating Corrective Action Category: Fraud - Other - Any other type of misrepresentation.
>
> 6. Violating Corrective Action Category: Insubordination - Refusal to carry out a directive from a supervisor.
>
> 7. Violation of the Illinois State Board of Education Rules and Regulations Code of Ethics, 22.10-20of Title 23, which requires Illinois educators to be responsible to:
>
> a. Students
> b. Self
> c. Colleagues and the Profession
> d. Parents, Families, and Communities; and
> e. Illinois State Board of Education.
>
> 8. Illinois State Board of Education Rules and Regulations Standards for All Illinois Teachers, 24.130 of Title 23, which outlines the Illinois Professional Teaching Standards.
>
> 9 Conduct unbecoming a Chicago Public Schools employee.

Specifications

1. For all relevant time periods you were a teacher assigned to Charles W. Earle Elementary School ("Earle").

2. On or about September 13, 2016, you were alerted by students in your classroom that 13-year-old female student [Z.C.] had "swallowed pills."

3. You took little to no action to ascertain whether [Z.C.] was physically in distress beyond asking her, "You OK?"

4. Despite the fact that [Z.C.] did not respond to your question, you continued to teach.

5. On or about September 13, 2016 you failed to alert the administration or emergency medical personnel that female student [Z.C.] had swallowed pills and/or had failed to respond to your inquiries.

6. On or about October 6, 2016, a Chicago Public Schools investigator interviewed you.

7. During that interview, you provided false statements to the investigator when you stated that Jeriesha Mahone, SECA, was not present during the September 13, 2016 incident with student [Z.C.]

8. Your conduct was unbecoming that of a Chicago Public Schools employee.

Respondent elected to have the matter heard through the procedures of the Illinois State Board of Education for Tenured Teacher Dismissals. The undersigned was selected as a hearing officer pursuant to the procedures of the Illinois State Board of Education for tenured teacher dismissal hearings. At the hearing, the parties provided testimony, documentary evidence, and opening arguments. A court reporter transcribed the proceedings and the parties submitted post-hearing briefs.

FACTS

Matthew Borkowski testified that he is a part time investigator for CPS. He is employed full time as a firefighter with the Chicago Fire Department. He was a patrol officer for the Chicago Police Department prior to joining the Fire Department.

He received an assignment to investigate an incident that occurred at Earle STEM academy on September 13th, 2016. During his investigation he interviewed students and staff, and took notes during the interview. He tendered the notes to his supervisor.

At the conclusion of his investigation, Mr. Borkowski concluded there was credible evidence that: Respondent was alerted by students that student Z.C. had swallowed pills; special education classroom assistant Jeriesha Mahone was alerted by students that student Z.C. had swallowed pills; special education classroom assistant Jeriesha Mahone responded to students with "I don't care" and "Go tell Mrs. Moore"; Respondent continued to teach after receiving no response from student Z.C.; Respondent did not alert anyone that Z.C. took pills; and Respondent lied to the investigator during the interview.

Mr. Borkowski based his conclusions about Respondent's failure to notify staff on his interviews of the students and staff. He based his conclusion that Respondent lied on the conflict between her written account of what occurred and her interview statement. During the interview, Respondent stated that Ms. Mahone was not in the room when the incident occurred, whereas in her written account she stated that Ms. Mahone was in the classroom when the incident occurred.

Z.C. is an eighth grade student in Respondent's science classroom. Respondent had also been her science teacher in sixth and seventh grades. Z.C. testified that she had been bullied at the beginning of the school year. On the day prior to the incident, she and her mother met with the principal about the bullying.

Z.C. testified that her science class was immediately after lunch. At approximately the middle of class, she ingested eight pills that she brought to school in her book bag. After she took the pills, she put her head down on the desk. She sat up at points during the class and did not sit with her head down for the entire class period.

Z.C. testified that Respondent never inquired about her or spoke to her during the class. Z.C. continued that she told two of her friends, M._ and N._, that she had taken pills. Z.C. said that she saw her two friends approach Respondent and Respondent tell them to return to their seats. Respondent did not come to her to inquire. Z.C. did not see Respondent press the intercom button.

After approaching Respondent, M._ left the room to find Z.C.'s grandmother who worked at the school in the Safe Passage program. A few minutes later, Principal Petties

came into the classroom and approached Z.C. to inquire about her condition. Mr. Petties had an ambulance called for Z.C. and she was taken to a local hospital.

Larry Johnson is a Security Officer at Earle School. He testified that he was at the security desk outside the main office. Female students M._ and T._ approached the desk and told him that Z.C. had taken some pills. Mr. Johnson immediately radioed the main office and alerted them of the situation. Knowing that M._ and T._ were students in Respondent's classroom, he ran up the adjacent stairs to the room.

Mr. Johnson testified that he arrived in the classroom within a few seconds of notifying the office. He entered the room and saw Respondent standing near her desk. The principal arrived shortly thereafter and took control of the situation. Mr. Johnson stepped away from the student. The principal instructed him to call 911. Mr. Johnson left to await the arrival of the ambulance and escorted the paramedics to the classroom.

Mr. Johnson continued that the main office usually notifies him of situations requiring a security officer response. A teacher notifies the office of a situation via classroom intercom and the office in turn notifies Mr. Johnson. In the instant matter, the office did not notify him, rather students from the classroom notified him of a situation.

Mr. Petties testified that he has been with CPS for approximately thirty years. He is the principal at Earle Elementary and knows Respondent. He was in his office on the day of the incident. He learned that a student had ingested pills. He was in the main office when he was alerted that a student in Respondent's classroom had ingested pills. He came out of his office and saw Mr. Johnson. Mr. Johnson looked at the principal and made a hand gesture that indicated a student had ingested something. The principal ran to Mrs. Moore's class short behind Mr. Johnson. Mr. Johnson was the first in the room.

Mr. Petties continued that when he entered the room, Respondent was standing near her desk and student Z.C. was seated at a table near the desk. The room appeared hectic, as if Respondent and Ms. Mahone were attempting to calm the students. Mr. Petties asked Respondent about what had occurred. Respondent replied "I don't know." There was no further discussion with Respondent and no discussion with Ms. Mahone.

Mr. Petties went to Z.C. and she appeared to be in a "comatose" state. He explained that she answered his questions, but was otherwise unengaged and had her head down.

She stated that she did not think she could stand because she felt dizzy. The Chicago Fire Department ambulance responded and removed Z.C. from the school. She was taken to a local hospital and did not return to the school for a week.

Mr. Petties prepared an incident report on the CPS internal reporting system. He requested statements from Respondent and Ms. Mahone about the situation. He also was interviewed by the Board investigator. Mr. Petties believed that Respondent was unaware of the situation happening in her classroom. He did not think she could be trusted if returned to the school.

ISSUE

The agreed upon Issue is:

> Whether Petitioner proved cause to terminate Respondent from her position as a tenured teacher, and whether Respondent's actions were negligent and per se irremediable or irremediable under the Gilliland standard.

SUMMARY OF THE ARGUMENT

The Board

The Board argues that Respondent failed to check on student Z.C., failed to notify the administration of an emergency with student Z.C., and failed to contact EMS about Z.C.'s situation. Respondent was notified by a student that Z.C. took some pills at lunch. Respondent did nothing with that information. Due to Respondent's inaction, a student was forced to leave the classroom. Respondent lied to the investigator about whether an aide was in the room.

The Board continues that the student, the principal, and Security Officer Johnson testified in a reliable and consistent manner. Student Z.C. stated that students notified Respondent and then left the room for the office. Mr. Johnson was notified by a student, alerted the principal, and went to the room. The principal arrived shortly after Mr. Johnson. The principal arrived to find Respondent and Ms. Mahone standing in the classroom and not assisting the student.

The Board continues that it has proven that Respondent should be terminated because her conduct was per se irremediable. A student was in distress, Respondent learned of her situation yet did nothing to assist the student, failed to check on the student, failed to notify administration of the emergency situation, failed to contact EMS, and lied to the investigator about the classroom aide. All of Respondent's conduct shows that she has committed irremediable conduct that is a per se violation requiring termination.

The Board further argues that Respondent's conduct was irremediable under the two part Gilliland test. That analysis requires a showing of harm and showing that it would not have been corrected with warning. The Board maintains that the Gilliland test has been satisfied in the instant matter. The student had ingested pills and required medical care. She was denied that care by Respondent's inaction after being told of the situation by a fellow student. That delay caused harm to the student. Further, Respondent's actions would not have been corrected with a warning. Respondent was aware of the notification requirements for emergencies and ignored those important requirements. A warning would not serve to alter her willful misconduct.

The Board further argues that Respondent lied to the investigator during her interview. She contradicted her written statement, in which she stated that Ms. Mahone was in the room. When interviewed, she stated that no aide was present.

The Respondent

The Respondent counters that it is undisputed that student Z.C. took pills prior to coming to class. It is also undisputed that a student informed Respondent. What is disputed is Respondent's actions after learning that Z.C. had taken pills.

Respondent maintains that the evidence supports her position. She was retrieving computers from the closet when a student told her about Z.C. taking pills. Respondent immediately went to Z.C. and inquired if she was okay. Respondent went to the white board and pushed the intercom button – or thought she pushed the small button. She turned to the aide and told her to take Z.C. to the office. Immediately thereafter, Mr. Johnson and the principal entered the room and took control of the situation. Further,

when later interviewed by the investigator, Respondent mistakenly said that she was not accompanied by Ms. Mahone when the incident occurred.

The Respondent asserts a failure of evidence. The record does not contradict her testimony and corroborates her account of the events. According to Respondent, she acted reasonably based upon the circumstances. The Board has failed to prove that a reasonably prudent educator would have acted differently. Therefore, the Board cannot prove that Respondent's actions in response to the situation was per se irremediable.

The Respondent continues that the two prong test of Gilliland cannot be proven. First, Respondent did not engage in any improper behavior. Second, there was no harm caused to the student or the school by Respondent's behavior. The harm to the student was caused by the student improperly ingesting the pills at lunch. Respondent acted to alleviate the harm and notify the administration. Moreover, even if Respondent's did cause harm, she has been teaching for over twenty years and has an unblemished record. A warning resolution would therefore be appropriate for such an experienced teacher.

ANALYSIS

Section 24-12(d) of the School Code provides that if a dismissal of a teacher in contractual continued service is sought for cause, the board must first approve a motion containing the specific charges. 105 ILCS 5/24-12(d)(1). A tenured teacher may be discharged if, after receiving a warning about remediable misconduct, they continue to engage in that misconduct. *Booker v. Board of Education*, 2016 IL App (1st) 151151, ¶83 (citing 105 ILCS 5/34-85(a)). The tenured teacher against whom dismissal is sought has a right to request a hearing before a mutually selected hearing officer. 105 ILCS 5/24-12(d)(1). The charges supporting dismissal must be proved by the Board by a preponderance of the evidence. See, e.g. *Board of Education of the City of Chicago v. State Board of Education*, 113 Ill. 2d 173, 194 (1986.

The Petitioner bears the burden of proof at hearing to establish by a preponderance of the evidence that the conduct or deficiencies for which dismissal is sought occurred as charged in the specifications or bill of particulars. *Board of Education of City of Chicago v. State Board of Education*, 113 Ill. 2d 173, 497 N.E.2d 984 (1986). If the Petitioner has

not proven the charged conduct, the charges must be dismissed. *Chicago Board of Education v. Box*, 191 Ill.App.3d 31 at 39, 547 N.E.2d 627 at 632.

The Board has not met its burden in the instant matter and has not proven that Respondent acted negligently. The relevant specifications state that although alerted that Z.C. had taken pills, Respondent took no further action beyond asking "you OK," and continued to teach despite receiving no response from student Z.C. Further, the specifications state that Respondent failed to alert administration or emergency personnel and then lied to the investigator about whether the aide was in the classroom.

The only first-hand testimony of what occurred in the room came from Respondent and Z.C. Respondent stated that after the bathroom break she noticed Z.C. sitting with her head on the table and spoke to her. Respondent attributed Z.C.'s discomfort to a menstrual issue and asked if Z.C's mother should be phoned. Z.C. replied that she was fine.

Respondent continued that the students were having difficulty with some of the computers and she went to the supply closet to retrieve additional laptops. Student N._ assisted her in retrieving the computers. While in the supply closet, Student N._ told Respondent that Z.C. had taken some pills during lunch. Respondent left the closet, walked over to Z.C. and asked if she had taken something at lunch. She received no response. Respondent then walked over and pressed the intercom button and walked back towards Z.C. while telling the aide "Ms. Mahone, can you take Z.C. to the office." Ms. Mahone did not testify.

Respondent stated that Ms. Mahone did not have time to answer because the Principal came into the room and walked immediately over to Z.C. He told Respondent "I've got this – dismiss your class." Class was dismissed. According to Respondent, Z.C. was escorted out of the room by the principal. According to Z.C. and the Principal, she left on a stretcher.

Respondent explained the intercom button as a small, doorbell-sized button located under the Promethean board. She went over to it and pressed it after she asked Z.C. if she had taken something and received no immediate response. The principal came into the room immediately thereafter and took charge of the situation.

The principal stated that he did not hear the intercom when he was in the main office. However, the testimony shows that he was alerted by the office assistant who had been notified by Mr. Johnson. The principal immediately sprang into action and ran up to the room close behind Mr. Johnson.

The testimony indicates that student M_ went to notify Mr. Johnson. The evidence indicates that the student left Respondent retrieving computers in the storage closet with Student N_. Respondent testified that she did not see students leave the room. She could not have seen them leave the room because she went to retrieve the computers. Ms. Mahone was in the room, however, she did not testify and her observations and interactions with the students is unknown.

Respondent's testimony that the Principal entered the room immediately after she pressed the button is unrebutted. The Principal would not have been in the office to hear the intercom buzzing from Respondent's room. The investigator did not interview the office assistant and there is no testimony from the people who could have heard the buzzer. Further, although Z.C. testified that she did not see Respondent press the intercom, that is not sufficient proof that Respondent failed to press it. Z.C. testified that she sat with her head down for part of the class and had it up for part of the class. The evidence suggest that she lifted her head for her brief conversation with fellow students when she disclosed ingesting the pills. However, when Principal Petties and Mr. Johnson entered the room, the student had her head down on the table. With her head down on the table, there is no way Z.C. could have seen whether Respondent pressed the intercom button seconds before the Principal entered the classroom.

Respondent's statement that she pressed the intercom to alert the office is not contradicted. The Board has not shown that Respondent failed to alert administration about student Z.C. The Board cannot show that she acted in a negligent manner.

The specifications also state that Respondent failed to alert emergency services. However, Principal Petties testified that school protocol is to alert the administration. Administration notifies emergency services. The Board has not shown that Respondent failed to alert emergency services about Student Z.C. The Board cannot show that Respondent acted in a negligent manner.

The specifications state that Respondent was alerted that Z.C, had taken pills but took little or no action in response. The record does not support that conclusion. Respondent testified that the only time she was told about the pills was when student N_ told her while they were retrieving computers from the storage closet.

Z.C. testified that students M._ and N._ spoke with her. Z.C. disclosed to them that she had taken pills at lunch. She testified that the students indicated that they were going to inform Respondent. According to Z.C., when they approached Respondent, they were told to return to their seats. Z.C. could not hear what they said or if they said anything to Respondent. One of those students ran to the office shortly thereafter.

Neither of those students testified. There is nothing in the record to indicate what they said to Respondent or if they said anything. The only evidence is Z.C.'s testimony that they approached Respondent and were told to sit down. There is insufficient evidence to establish that anybody other than Student N_ notified Respondent that Z.C. had taken pills. The evidence shows that when notified by Student N._. , Respondent pressed the intercom button and the Principal entered almost immediately because he had already been en route to the classroom after being notified by the office.

The specifications state that Respondent continued to teach after asking Z.C. "you okay" and receiving no response. However, Respondent testified that she approached Z.C. after student N_ told her of the pills and inquired. Receiving no answer, she pressed the intercom and asked Ms. Mahone to take Z.C. downstairs – only to be interrupted by the principal entering the classroom. Further, by Respondent's account, Z.C. gave short answers of "I'm ok" and "no" when asked early in the class session if she was OK or wanted her mother to be phoned. This occurred at the beginning of class. Moreover, by Respondent's account, Z.C. did not answer when Respondent emerged from the storage closet and asked Z.C. if she had taken something at lunch. When Z.C. did not answer, she went to the intercom button and asked Ms. Mahone to take Z.C. to the office. As discussed above, Respondent's testimony is unrebutted and the Board cannot show that she acted negligently.

The specification states that Respondent provided a false statement to the investigator when she stated that Ms. Mahone was not in the classroom when the incident

occurred. The Board has not established that Respondent mislead the investigator. The Respondent testified that the investigator inquired whether Ms. Mahone was in the room. Respondent stated that Ms. Mahone was not in the room. The investigator then confronted her with her written witness statement from shortly after the incident. The following colloquy explains Respondent's position:

> Q. There's been testimony from the investigator about his conversations with you, this summary in his report, about certain statements you made regarding Ms. Mahone not being in the classroom. Did you ever at any point in time in your interview with the investigator state that Ms. Mahone was not in the classroom?
>
> A. Yes.
>
> Q. Why did you say that?
>
> A. Actually, that first six days I had three or four teacher assistants and two days none. So when it was said, I don't remember her coming upstairs with us from the lunchroom, and she prior to that had. So I don't recall her coming upstairs to the bathroom break. So I didn't recall her being in the room.
>
> Q. During that interview with the investigator, did you ever change that statement?
>
> A. Yeah, I did.
>
> Q. When did you do that, at which point?
>
> A. He made the comment, you said she wasn't in the room. Students say she was. He gave me he said, you made a statement that she was. He said, would you like to see it? I said, yes. When I looked at the statement, I looked sort of kind of confused, and I stopped for a moment. I looked at it and didn't remember even writing it. So I sat for a minute. I said, can you give me a minute? Then I said to him, I said, you know what, you're right. She was there. I said, because I asked her to take [Z.C.] to the office. I said, so she had to be there. So I'm sorry. I had it wrong. She was in the room.
>
> Q. So you corrected your previous misunderstanding?
>
> A. Uh-huh.
>
> Q. Yes?
>
> A. Yes.
>
> Q. This statement you're referring to, you did provide a statement?
>
> A. Actually, to be honest, after that, that was pretty much it.
>
> Q. I'm sorry?

A. After that statement and I guess my state of confusion, the investigation kind of ended.

Respondent's testimony that the investigator ended the interview after she corrected herself is unrebutted. She testified, and the documentary evidence corroborates, that she provided a written account of what occurred approximately an hour after the incident. The testimony of Respondent and the investigator indicate that she did not review her written account prior to the interview. The interview occurred months after the event. Respondent's unrebutted statement that she was somewhat confused because the first six days of school had numerous aides, and two days of no aides, in the classroom. She thought that Ms. Mahone had not returned to the classroom after taking students to lunch immediately prior to class.

Respondent testified that when confronted with her prior statement, she thought about the incident and agreed that Ms. Mahone was present. The record indicates that Respondent was mistaken. Mistake is not intentional fabrication. The record does not establish that Respondent intentionally sought to mislead the investigator.

FINDING AND RECOMMENDATION

The Board has not proven that Respondent did not act after being notified that a student had ingested pills.

The Board has not proven that Respondent failed to notify administration or authorities after being notified that a student had ingested pills.

The Board has not proven that Respondent continued to teach after not receiving a response from student Z.C.

The Board has not proven that Respondent lied to a CPS investigator.

The Board has not established cause to dismiss Respondent.

Brian Clauss, Hearing Officer

September 7, 2018