IN THE
SUPREME COURT OF ILLINOIS
No. 126082

WESTERN ILLINOIS UNIVERSITY, Petitioner-Respondent, vs. ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, Respondent-Petitioner, and UNIVERSITY PROFESSIONALS OF ILLINOIS LOCAL 4100 IFT-AFT, AFL-CIO, Respondent-Petitioner.	)	On Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0143 There Heard on Direct Administrative Review of the Opinion and Order of the Illinois Educational Labor Relations Board, No. 2018-CA-0045-C

BRIEF OF PETITIONER-RESPONDENT WESTERN ILLINOIS UNIVERSITY

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ISSUES PRESENTED FOR REVIEW

This case presents two issues for review:

(1) Whether the arbitrator exceeded his legal authority when he undertook to determine whether the University complied with his July 2017 award (i.e. whether the authority to determine compliance with an arbitration award is an issue vested in the exclusive primary jurisdiction of the Illinois Educational Labor Relations Board ("IELRB") by Section 14(a)(8) of the Illinois Labor Relations Act, 115 ILCS 5/1 *et seq.* ("Act")); and, if not,

(2) Whether the arbitrator exceeded his contractual authority when he determined in his March 2018 award that the University did not comply with his July 2017 award (i.e. whether the terms of the collective bargaining agreement precluded his decision of that issue).

STATEMENT OF FACTS

The facts necessary to decide this case are limited and undisputed. On July 6, 2017, Arbitrator Dichter issued his labor arbitration award

holding that the University should reconsider its decision to lay off grievant Ogbaharya and make a reasonable effort to determine if there were any openings which grievant Stovall might fill. (E0836.)[1] On September 12, 2017, the University sent Ogbaharya a letter detailing its reconsideration of the decision to lay him off (E0893) and a letter to Stovall describing its efforts to locate available positions for her (E0892).

The Union petitioned Dichter to conduct a second arbitration to determine whether the University complied with his July 6, 2017 award. The University objected on the grounds that: (1) the determination of whether an educational employer has complied with an arbitration award is within the exclusive primary jurisdiction of the IELRB; and (2) Dichter lacked the jurisdiction and authority under the Collective Bargaining Agreement to decide the issue. While noting on the record the University's objection, Dichter conducted a hearing on January 16, 2018, for the express purpose of determining whether the University had complied with his July 6, 2017 award. (E1086.) Shortly prior to the commencement of that hearing,

[1] The Record on Appeal consists of the Common Law Record paginated C0001 through C890 and cited herein as "C___", the Report of Proceedings paginated R001 through R092 and cited herein as "R___", and the Exhibits paginated E0001 through E1287 and cited herein as "E___". The Union's Appendix is paginated A001 through A099 and is cited herein as "A___".

the Union filed an unfair labor practice charge with the IELRB alleging the University failed to comply with Dichter's July 6, 2017 award in violation of Sections 14(a)(8) and (1) of the Act. (E0008.)

On March 5, 2018, Dichter issued a supplemental award declaring the University had not complied with his July 6, 2017 award. (E1245.) On March 18, 2018, the Union amended its unfair labor practice charge to allege the University had not complied with Dichter's March 5 award in violation of Sections 14(a)(8) and (1) of the Act. (E0009.)

Following a hearing, the IELRB issued its Opinion and Order on February 21, 2019, finding the University violated Sections 14(a)(8) and (1) by not complying with Dichter's awards. (A017-A042.)

ARGUMENT

Standard of Review

This case presents two clear issues, both involving the scope of the arbitrator's authority. The first is whether Section 14(a)(8) of Act deprived the arbitrator of jurisdiction to determine if the University complied with his July 2017 award. The second issue is whether the arbitrator's March 2018 award exceeded his contractual authority. Whether an arbitrator has exceeded the scope of his authority is a question of law. *Griggsville-Perry*

Cmty. Unit Sch. Dist. No. 4 v. Illinois Educ. Labor Relations Bd., 2013 IL 113721, ¶ 20. "On issues of law, we review the Board's findings *de novo...." Speed Dist. 802 v. Warning*, 242 Ill. 2d 92, 111 (2011).

I. Dichter had no jurisdiction or authority to determine whether the University complied with his July 6, 2017 award because that is the "exclusive" function of the IELRB.

An unfair labor practice proceeding before the IELRB is the mechanism by which the statutory duties of educational employers and employee representatives are enforced. The particular unfair labor practice at issue in this case results from an educational employer's "[r]efusing to comply with the provisions of a binding arbitration award." 115 ILCS 5/14(a)(8).

Section 14(a)(8) of the Act reflects the legislative intent "to vest *'exclusive* primary jurisdiction over arbitration disputes' with the Board." *Bd. of Educ. of Warren Twp. High Sch. Dist. 121 v. Warren Twp. High Sch. Fed'n of Teachers, Local 504, IFT/AFL-CIO*, 128 Ill. 2d 155, 163 (1989) (emphasis in original). "Exclusive" means exactly that. Exclusive primary jurisdiction over whether an educational employer has complied with an arbitration award resides with the IELRB. The IELRB does not have the option to punt the issue to the courts, an arbitrator, a mediator, or any other

adjudicative body. Yet that is exactly what the IELRB did when it found Dichter had the jurisdiction to consider whether the University complied with his July 6, 2017 award. That is simply wrong. It violates the plain meaning of the Act as well as this Court's rulings in *Board of Education of Community School District No. 1, Coles County v. Compton*, 123 Ill. 2d 216 (1988), and *Warren Township.*

By confirming Section 14(a)(8) vests the IELRB with exclusive primary jurisdiction over disputes concerning whether an educational employer has complied with an award, this Court preserved the "uniformity which the Act obviously seeks to achieve." *Compton*, 123 Ill. 2d at 222. Allowing arbitrators to determine whether there has been compliance with an award imperils this principle. Not only might arbitrators view a matter differently than the IELRB or a court on administrative review, arbitrators are not bound by *stare decisis*. Consequently, it is not grounds to set aside an arbitration award simply because the same issue has been decided differently. *W.R. Grace & Co. v. Local Union No. 759*, 461 U.S. 757, 765 (1983); *Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 Boston College L. Rev. 275 (1997). To avoid conflicting results of this nature, this Court confirmed that exclusive

primary jurisdiction rests with the IELRB. This concept has served educational employers and representatives of their employees well for over 30 years. This case presents no reason for revisiting the issue.

II. Neither federal labor law, Illinois commercial law, nor Pennsylvania law have any place in deciding the issues in this case.

The IELRB and the Union argue that an arbitrator's retention of jurisdiction is a common arbitration practice, citing to federal labor law, Illinois commercial law, and Pennsylvania law. There are two problems with this argument.

First, neither federal labor law nor Illinois commercial law contains any provision remotely resembling Section 14(a)(8). While Pennsylvania has a similar statutory provision, its Supreme Court, contrary to this Court, has interpreted it to permit direct judicial review of arbitrability. This Court has already noted this distinction -- "Our statute, in contrast, provides for a specific form of judicial review which the legislature apparently intended would exclude all others." *Compton*, 123 Ill. 2d at 223-24. In other words, the Pennsylvania statute permits direct judicial review. The Act, as interpreted by this Court, permits administrative review only after the IELRB has made a ruling under Section 14(a)(8).

Second, "retention of jurisdiction" by an arbitrator means many things. An arbitrator can retain jurisdiction to correct errors in the award or to clarify ambiguities in the award. Neither would conflict with Section 14(a)(8) because neither involves the question of whether an employer has complied with an arbitration award. However, when an arbitrator purports to retain jurisdiction to delve into whether an employer's remedial actions comply with his award, he steps over the line -- that is a function reserved to the exclusive primary jurisdiction of the IELRB by Section 14(a)(8).

III. The University reserved to itself in the Collective Bargaining Agreement the right to have the IELRB decide whether it complied with Dichter's July 2017 award.

Section 7.3 of the Collective Bargaining Agreement provides:

> Neither the Union nor the Board [of Trustees] waives the rights guaranteed them under the Illinois Educational Labor Relations Act.

(E0108.) One of the University's rights guaranteed by the Act is its right under Section 14(a)(8) to have the IELRB -- not a court or an arbitrator -- determine whether it has complied with an arbitration award. The IELRB and the Union argue that the rules of the American Arbitration Association, which are incorporated into the Collective Bargaining Agreement by reference, give the arbitrator the power to rule on his own jurisdiction.

However, those rules apply "[e]xcept as modified by the provisions of this Agreement." (E0105.) By contractually reserving to the University the right to have the IELRB review for compliance with Section 14(a)(8), the parties modified the AAA rule which would otherwise provide the arbitrator with that authority.

IV. A party cannot be compelled to arbitrate an issue it has not agreed to submit to arbitration.

Even if Section 14(a)(8) did not deprive Dichter of the authority to determine if the University complied with his July 2017 award, the parties' Collective Bargaining Agreement did.

The Collective Bargaining Agreement confines the arbitrator to the "precise issue" submitted to him:

> Arbitration shall be confined solely to the application and/or interpretation of this Agreement and the precise issue(s) submitted for arbitration. The arbitrator shall have no authority to determine any other issue(s).

(E0105.) The agreed issue submitted to Dichter was:

> ...whether the University violated the Collective Bargaining Agreement when it laid off–and there are ten different individuals that's [sic] listed on the issue statement–as to whether they were laid off properly or not, and if so–what is the appropriate remedy.

(E0676.) Whether the University complied with his award was not an issue

submitted to Dichter. (Nor could it have been, since at the time the parties stipulated the issue there was no award.) Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. *AT&T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 648 (1986). The University did not agree to submit to Dichter the issue of whether or not it complied with his July 2017 award.

V. Because Dichter lacked the jurisdiction and authority to issue his March 5, 2018 supplemental award, the IELRB erred in its refusal to consider the University's contention that it complied with his July 6, 2017 award.

The IELRB did not decide whether the University complied with Dichter's July 6, 2017 award because it wrongfully ceded that determination to Dichter. The IELRB should be directed to make that determination independently. Such a determination can be made only after *de novo* fact-finding, which the IELRB expressly declined to do:

> Nonetheless, under the Act, the Board has the exclusive primary jurisdiction to decide disputes concerning "arbitrability" that have arisen in the context of public education. *Compton, supra; Warren Township High School District 121 v. Local 504,* 131 Ill. 2d 155, 538 N.E.2d 524 (1989). Therefore, the resolution of the issue of substantive arbitrability is the responsibility of the IELRB, a responsibility which cannot be ceded to the arbitrator. Accordingly, the issue of arbitrability should be approached *de novo.*

Western Springs Sch. Dist. 101, 6 PERI ¶ 1091 (1990), 1990 WL 10610831,

aff'd 7 PERI ¶ 1014 (1990), 1990 WL 10610727. In its refusal to make that determination, the IELRB acted contrary to its holding in *Western Springs School District 101* as well as its own established precedent. Consequently, the University's evidence presented at the unfair labor practice hearing in support of its argument that it complied with the July 6, 2017 award should have been fully heard and considered.

CONCLUSION

For the foregoing reasons, the University respectfully requests the Court affirm the Opinion and Order of the Appellate Court.

March 24, 2021 **WESTERN ILLINOIS UNIVERSITY**

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 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 10 pages.

s/Abby J. Clark

CERTIFICATE OF SERVICE

I certify I electronically filed the foregoing with the Clerk of the Illinois Supreme Court on March 24, 2021.

I have served counsel of record by sending a copy of the foregoing by email on March 24, 2021 to the addresses below:

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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.

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