

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

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|--|---|----------------------|
| Service Employees International Union, |) | |
| Local 73, |) | |
| |) | |
| Charging Party |) | |
| |) | Case No. L-CA-10-070 |
| and |) | |
| |) | |
| City of Chicago, |) | |
| |) | |
| Respondent |) | |

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On June 1, 2010, the Service Employees International Union, Local 73 (Charging Party or SEIU), filed a charge with the Illinois Labor Relations Board’s Local Panel (Board) alleging that the City of Chicago (Respondent or City) engaged in unfair labor practices within the meaning of Section 10(a)(4) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2010), as amended. The charge was investigated in accordance with Section 11 of the Act and on September 20, 2010, the Board’s Executive Director issued a Complaint for Hearing. A hearing was conducted on February 21, 2013, in Chicago, Illinois, at which time SEIU presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

1. At all times material, the City has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the City has been subject to the jurisdiction of the Local Panel of the Board pursuant to Section 5(b) of the Act.
3. At all times material, SEIU has been a labor organization within the meaning of Section 3(i) of the Act.

4. At all times material, SEIU, along with the International Brotherhood of Electrical Workers, Local 21, has jointly represented a single bargaining unit of City employees known as Unit II.
5. In or around February 2011, the parties agreed to set one day aside per month for arbitration between SEIU and the City, beginning August 2011 through December 2012.

II. ISSUES AND CONTENTIONS

There are two issues in this case. The first is whether the City violated Sections 10(a)(4) and (1) of the Act when it refused to pay half of arbitrators' cancellation fees when SEIU withdraws grievances within the cancellation period, allegedly in violation of Section 8 of the Act.¹ The second is whether the City violated Sections 10(a)(4) and (1) of the Act when it allegedly failed and refused to process grievances filed by SEIU or to timely advance such grievances to arbitration.

SEIU argues that the City violated Sections 10(a)(4) and (1) of the Act because Section 8 mandates that parties share the costs of arbitration and the City refused to pay half of the arbitration cancellation fees assessed upon SEIU's withdrawal of grievances. SEIU rejects the City's anticipated assertion that, according to generally-accepted custom and practice, the withdrawing union pays the cancellation fee. Similarly, SEIU rejects the City's assertion that such an alleged custom and practice overrides the plain language of the Act. Further, SEIU asserts that the issue is not moot, even though the parties negotiated a new contract for Unit II which addresses the payment of such cancellation fees. In support, SEIU notes that the duty to bargain is not mooted simply because a respondent complies with its bargaining obligation at a later time. Further, SEIU states that the issue is not moot because one of the grievances arose out of the Historical Unit contract which the parties have not renegotiated and because the union seeks a monetary award. Finally, SEIU requests that the Board order the City to make SEIU

¹ The complaint more broadly alleges that the City violated the Act when it refused to pay its fair share of arbitration fees. However, on brief, SEIU asserts that the parties do not dispute how cancellation fees should be allocated when a party postpones a hearing and that SEIU "does not seek a decision on how the fee should be allocated" in such circumstances. Accordingly, only the treatment of the cancellation fees incurred from SEIU's withdrawal of a grievance is discussed below.

whole for the portion of arbitrator's fee paid by SEIU on the City's behalf in the Kimberly Guy matter.

Next, SEIU asserts that the City violated Sections 10(a)(4) and (1) of the Act by repudiating its collective bargaining obligation when it unreasonably failed and refused to promptly schedule grievances for arbitration. SEIU asserts that an employer violates the Act when it delays the arbitration of grievances for months, where the delays are present in multiple grievances, and where the union is able to provide specific evidence of the length of the delays on which the charge is based. Here, SEIU notes that the City has delayed the arbitration of grievances months beyond the timeframes contained in the parties' two contracts and beyond the customary time span for arbitration of grievances filed by members of SEIU's other units. Further, SEIU notes that the parties' mutual effort to reduce the arbitration backlog and the City's evidence concerning the high number of grievances it receives do not serve as a defense to the City's unfair labor practice.

Finally, SEIU rejects the City's assertion that the Board should dismiss this allegation because it involves contract interpretation. In support, SEIU notes that both contracts unambiguously provide time limits within which the parties must arbitrate grievances. In the alternative, SEIU states that it does not ask the Board to interpret the City's obligations under the collective bargaining agreement but rather its obligations under the Act. For the same reason, SEIU asserts that deferral is inappropriate here because contract interpretation is not at the center of the dispute and because arbitration would not proceed expeditiously, would not provide prospective relief, and would make no sense under circumstances where the charge alleges a breakdown of the arbitration process.

The City argues that it did not violate Sections 10(a)(4) and (1) of the Act when it refused to pay half of the arbitration cancellation fees when SEIU withdrew grievances within the cancellation period because Section 8 of the Act does not require the parties to share costs when the parties never held an arbitration hearing. Second, the City asserts that it is the custom in the labor law community that the cancelling party pays the cancellation fee. Third, the City argues that even though the parties' contract is silent on the matter of cancellation fees, the Board should not address this issue because an arbitrator might find a latent ambiguity concerning the parties' cancellation fee payment obligations. Finally, the City argues that the issue is moot

because the parties have bargained the parties' obligation concerning the payment of cancellation fees and have memorialized it in their most recent Unit II contract.

Next, the City argues that its arbitration scheduling practices did not repudiate the parties' collective bargaining agreement because the contracts contain no time limits for processing the grievances at issue. In particular, the City notes that the Unit II contract provides that the arbitrator must select an arbitration date within ninety days of being notified of his selection, but that it does not require the arbitrator hear the case within that time frame. In the alternative, the City argues that the Board lacks jurisdiction to interpret the meaning of the parties' contracts, to the extent that they are ambiguous.

Further, the City argues that it did not repudiate the collective bargaining process because its failure to adhere to any stated time limits constitutes a mere breach. In support, the City notes that it never refused to arbitrate any of SEIU's grievances; it scheduled the majority of SEIU's grievances less than a year in advance; it made attempts to resolve grievances short of arbitration; it put forth its best efforts to hold the arbitration hearings within a reasonable amount of time; it substituted other grievances into the hearing dates of the settled cases; it scheduled significantly more arbitration dates for SEIU's grievances since SEIU's attorneys complained about the arbitration backlog; it set aside one day per month for SEIU's arbitrations; and it informed SEIU's attorneys that it would prioritize time-sensitive grievances if SEIU so identified them.² Finally, the City explains that its delays in scheduling are caused by its low staffing levels, the high volume of grievances it receives, and the difficulties inherent in scheduling, given the parties' and the arbitrators' availability.

III. FINDINGS OF FACT

The Labor Division of the City of Chicago represents the City as employer. The Corporation Counsel heads the City's law department. The Labor Division is divided into the non-traditional labor section, headed by the Deputy Corporation Counsel, and the traditional labor section, headed by the Chief Labor Negotiator. The Deputy Corporation Counsel oversees the Chief Assistant Corporation Counsel, Senior Counsel, and Assistant Corporation Counsels who perform work on employment discrimination and disciplinary matters before the Chicago

² The City also notes that the Board should consider the timeframe between when the hearing date is confirmed and the actual hearing date rather than the timeframe between when the parties select the arbitrator and the hearing date.

Police Board and the Human Resources Board. The Chief Labor Negotiator oversees the Assistant Chief Labor Negotiator Cicely Porter Adams, Associate Chief Labor Counsel, and five Assistant Corporation Counsels who handle grievance arbitrations, matters before the Board and matters filed at the Department of Labor including wage claims, cases under the Personnel Records review Act, OSHA violations, and ESA claims. Both traditional labor attorneys and nontraditional labor attorneys handle employment discrimination cases before the Chicago Commission on Human Relations, the Illinois Department of Human Rights, and the EEOC. Traditional labor attorneys handle most arbitrations. The Assistant Chief Labor Counsel and the Assistant Chief Labor Negotiator primarily supervise their subordinates but they also handle arbitrations on occasion.

The City employs approximately 33,000 workers. Approximately 89 percent of the City's work force is unionized. The City has collective bargaining agreements with approximately 44 units. SEIU represents two City units, Unit II³ and the Historical Unit which is part of the Coalition of Unionized Public Employees (COUPE). The SEIU-represented employees in Unit II comprise 6% of the City's represented workforce. The Historical Unit constitutes .3% of the City's represented workforce.

1. Arbitration Cancellation Fees

a. Relevant contractual provisions

i. Unit II (2003-2007) Contract

The parties' contract which covers Unit II, effective July 1, 2003 through December 31, 2007, has a fee-splitting provision which states that "the fee and expenses of the arbitrator shall be borne equally between the Union and the Employer."

ii. Unit II (2007-2010) Contract

The parties' contract which covers Unit II, effective July 1, 2007 through December 31, 2010, has a "loser pays" provision which states that "the fee and expense of the arbitrator shall be borne by the party whose position is not sustained by the arbitrator. In cases of split decision,

³ International Brotherhood of Electrical Workers, Local 21, also represents some employees in Unit II.

the arbitrator shall determine what portion each party shall be billed, based upon which party, if any, substantially prevails.”

iii. Unit II (2011-2016) Contract

The parties’ contract which covers Unit II, effective January 1, 2011 through June 30, 2016, has a “loser pays” provision and has language that states that the cancelling party pays the cancellation fee. Specifically, it provides the following:

Section 7.2(a) Grievance Procedure

Arbitrators will advise the parties of their fees and expenses prior to selection and will be expected to charge such fees and expense. The fee and expenses of the arbitrator shall be borne by the party whose position is not sustained by the arbitrator. In cases of split decision, the arbitrator shall determine what portion each party shall be billed, based upon which party, if any, substantially prevails. In the event that either party cancels or postpones a scheduled hearing date (including instances where the cancellation of hearing resulted from the Union’s unilateral withdrawal of the grievance), and a fee is assessed by the arbitrator as a result of said cancellation or postponement, the canceling or postponing party will pay the arbitrator’s fee, unless the parties mutually agree otherwise.

iv. Historical Unit Contract

The parties’ contract which covers the Historical Unit, effective July 1, 2007 through June 30, 2017, provides that “arbitrators will advise the parties of their fees and expenses prior to selection and such fees and expenses shall be borne equally between the Union and the Employer.”

b. The parties’ dispute concerning cancellation fees

Arbitrators usually assess cancellation fees if a party cancels a hearing within 30 days of the scheduled hearing. SEIU typically withdraws a grievance within the cancellation period because it does not receive information from the City prior to the time when the cancellation period begins and is therefore not able to assess the merits of the grievance before the beginning of the cancellation period. SEIU makes information requests six months in advance of the hearing. However, the City only assigns attorneys to cases two months before the hearing. In the meantime, the City places the information request into the case file and forwards it to the

City department at issue in the grievance. SEIU withdraws the grievance once it receives the requested information and determines the grievance lacks merit.

On April 29 2010, Porter Adams received an email from Arbitrator Peter Feuille informing the City that SEIU withdrew its grievance concerning a Unit II member and was cancelling the arbitration hearing date. The arbitrator assumed that SEIU would pay the cancellation fee. He stated “because the Union has withdrawn this grievance, I assume the Union is responsibility [sic] for my cancellation fee.”

That same day, SEIU counsel Annie Varkey responded that the parties should split the cancellation fee because the matter was to be arbitrated under the 2003-2007 contract which provided that the parties split the costs of arbitration. Porter Adams responded less than an hour later stating that SEIU should bear the cost of the cancellation fee. She noted that, contrary to Varkey’s assertion, the arbitration at issue was covered by the parties 2007-2010 contract which does not provide that the parties share fees and instead has a loser pays provision.⁴ Porter Adams did not assert that SEIU was required to pay the cancellation fee pursuant to the parties’ loser pays provision. Rather, she stated that SEIU should pay because SEIU had cancelled the dates.

SEIU General Counsel Susan Matta replied that the contract’s loser pays provision did not apply in this instance since the arbitrator never made a determination on the merits of the grievance and, as such, there was no loser. Matta further asserted that the “loser pays” language did not apply in circumstances where a party withdraws a grievance. As a result, Matta concluded that the parties should split the cancellation fee.

Porter Adams replied a couple hours later. She agreed that there was no contract language that required the City to pay the cancellation fee when SEIU withdraws a grievance.⁵ However, she reiterated that SEIU should pay the cancellation cost because SEIU cancelled the hearing dates.

⁴ Porter Adams noted that Side Letter 29 of the parties’ agreement provides that the contract applies to arbitrations where the first date of hearing was to commence on or after the effective date of the contract. Here, Porter Adams stated that the arbitration at issue was scheduled for May 4, 2010 and was therefore covered by the 2007-2010 contract.

⁵ Porter Adams also noted that “it would be entirely different if the parties settled this matter, and as a term of settlement, agreed to share the fee.”

Matta swiftly replied to acknowledge that a party requesting a continuance must pay the cancellation fee. However, she also asserted that a unilateral withdrawal of a grievance did not attach the same responsibility and that SEIU's position followed the parties' past practice.

On May 12, 2010, Porter Adams replied to Matta's email and stated that past practice did not support SEIU's contention that the City was required to pay half of the cancellation fees when SEIU unilaterally withdraws its grievance without a settlement. Matta replied a few minutes later to disagree with Porter Adams's assertion concerning past practice and stated that "in the very few circumstances where the Union has withdrawn a case it has not paid the full fee." In support of her position, Matta forwarded Porter Adams an email dated June 22, 2008, referencing a case in which the Union withdrew its grievance. The forwarded email stated that "as per the parties' CBA, the cancellation fee is to be split equally between the Union and the City."

Matta testified that, based on her nine years experience as counsel for SEIU, the Union and employers of SEIU bargaining unit members have split the arbitration cancellation fee equally when the Union has canceled a hearing and withdrawn a grievance. She noted that no employer had ever objected to that practice.

The City introduced a bill from Arbitrator Feuille concerning a Unit II employee's grievance arbitration. In that case, both parties had asked to continue the hearing at separate times without providing the arbitrator with the requisite 30 days notice. The bill assessed a cancellation fee to each party for their respective untimely requests to continue the hearing. The parties did not split the cancellation/continuation fee.

On May 13, 2010, Susan Matta sent an email to Porter Adams demanding to bargain over the manner in which the parties handle the payment of cancellation fees when SEIU withdraws a grievance, cancels a hearing, and the arbitrator applies a cancellation fee.

On May 17, 2010, Porter Adams both maintained that the City had no duty to bargain and proposed the following language: "In the event that either party cancels or postpones a scheduled hearing date, which includes the Union's unilateral withdrawal of a grievance, and a fee is assessed by the Arbitrator as the result of said cancellation or postponement, the canceling or postponing party will pay the Arbitrator's fee, unless the parties mutually agree otherwise. The Arbitrator assessing said fee shall have jurisdiction to resolve any dispute arising out of his/her fee allocation for the cancellation or postponement."

On May 18, 2010, SEIU counsel Tyson Roan submitted a counterproposal which provided that “the costs of arbitration not set forth in the collective bargaining agreement shall be borne equally by the employer and the employee organization.” Roan also noted that SEIU determined that the cancellation fee issue was a permissive and not a mandatory subject of bargaining. Roan did not expressly state that SEIU was withdrawing its demand to bargain.

On May 19, 2010, Porter Adams wrote an email to Roan stating that it was her understanding that the Union had withdrawn its demand to bargain. Porter Adams reiterated that the City disagreed with SEIU’s position that an arbitrator’s fees should always be split regardless of which party cancels or postpones. She also noted that such a position was “contrary to the customary practice in labor arbitration – including the parties’ own practices – and is also contrary to common sense.” She concluded that “we will therefore not belabor this issue further” and that “it seems that the parties will agree to disagree.”

SEIU did not contradict Porter Adams’s stated understanding SEIU had withdrawn its demand to bargain. Matta testified that she did not reply to Porter Adams’s email because it stated that the parties were “going to agree to disagree.” Matta explained that she accordingly believed that SEIU and the City would not resolve their dispute through further discussion. SEIU did continue its efforts to resolve the matter after it filed the instant charge.

The cancellation fee issue arose again later in 2010 with respect to two other grievances, one concerning Kimberly Guy (Historical Unit) and the other concerning Jennifer Jurcak (Unit II). On October 5, 2010, Varkey wrote an email informing the arbitrator of Guy’s grievance that “if the City of Chicago refused to pay for half the cost of the cancellation fee, the Union will submit payment for the entire cost of the cancellation so that you are not harmed due to the City’s failure to pay.” SEIU maintained that, in doing so, it was “not waiving its right to pursue any and all remedies available through the unfair labor practice proceedings.” On October 13, 2010, Melissa Sobota responded on behalf of the City that “it is the City’s position that it is the Union’s responsibility to pay the cancellation fee when it unilaterally cancels a hearing.” Sobota requested that the arbitrator send the entire cancellation bill to SEIU. The arbitrator did so and SEIU paid the full cost of the cancellation fee.

2. Scheduling of arbitrations

a. Relevant Contractual Provisions

i. Unit II (2003-2007) Contract

The parties' contract which covers Unit II, effective July 1, 2003 through December 31, 2007, contains the following relevant language:

Section 7.3

Arbitrators shall select a date for arbitration within ninety (90) days of notice that a grievance is ready for arbitration and submit their decision within thirty (30) days following such hearing.

ii. Unit II (2007-2010) and (2011- 2016) Contracts

The parties' contract which covers Unit II, effective July 1, 2007 through December 31, 2010, and the subsequent Unit II contract, effective January 1, 2011 through June 30, 2016, contain the following relevant language:

Section 7.2(a) Grievance Procedure

Arbitrators shall select a date for arbitration within ninety (90) days of notice that a grievance is ready for arbitration and submit their decision within thirty (30) days following such hearing.

...

Upon a Step IV request for arbitration, arbitrators will be designated by the parties in alphabetical rotating order and subsequently contacted to obtain an arbitrator's commitment to arbitrate the respective grievance within the stated time limit within seven (7) days from the date the grievances are submitted to the arbitration process. If an arbitrator is not available to hear the case, the next arbitrator in rotating alphabetical order will be chosen.

Section 7.2(b) Procedures for Arbitrations of Suspensions of Over Thirty (30) Days and Discharges

The Terms of Step IVB and Step IVC of Section 7.2(a) above shall also apply to arbitration of suspensions of over thirty (30) days and discharges, except only that the arbitrator shall conduct a hearing within (60) days of being notified by the parties of his/her selection, and the arbitrator shall submit his/her decision within thirty (30) days following the close of hearing, unless the parties mutually agree otherwise. If an

arbitrator informs the parties that he/she is unable to comply with said time frames, the parties will select another arbitrator, unless the parties mutually agree otherwise.

iii. Historical Unit Contract

The parties' contract which covers the Historical Unit, effective July 1, 2007 through June 30, 2017, contains the following relevant language:

The panel of arbitrators submitted must agree as a whole to commencement of a hearing within sixty (60) days of selection and that they will render a decision within thirty (30) days of the close of hearing. Any extension of those time limits must be by written consent of the Union and the Employer. The failure of either side to agree to an extension of time shall not be disclosed to the arbitrator.

b. Background and Events Related to Arbitration Scheduling

The City receives between 50 and 350 arbitration demands each month. The exact number of demands fluctuates. The City has received as many as 200 demands for arbitration on a single day. However, only approximately a third of the cases scheduled for arbitration proceed to hearing.

SEIU directs its arbitration demands to Porter Adams via email, and follows the email with a hard copy letter. Upon receiving the demand, Porter Adams contacts the Union for more information if the demand does not state the nature of the grievance or the department at issue. She then contacts the City department at issue to ask for background information on the grievance and to determine whether the matter can be settled. If the City department informs Porter Adams that a settlement is desirable, then Porter Adams conveys a settlement offer to SEIU. She also informs SEIU if she discovers that the grievant no longer works for the department.

Porter Adams proposes an arbitrator to SEIU if the parties cannot settle the grievance. If SEIU agrees to the City's proposal, Porter Adams asks her assistant, Jo Ann Garrett George, to request hearing dates from the arbitrator. The arbitrator then responds with hearing dates and Porter Adams determines whether the City is available on the offered dates.

The City considers a number of factors to determine how many arbitrations it will schedule per month including the number of workdays in a month (approximately 20), the number of City attorneys who handle traditional labor matters, and the attorneys' case loads in

other forums. The City weighs these factors and schedules, at maximum, between 15 and 17 arbitrations per month.⁶

If the arbitrator suggests dates in a month in which the City has already scheduled its maximum number of arbitrations, Porter Adams informs SEIU and the arbitrator that the City is unavailable. If the City has scheduled fewer than 15-17 arbitrations in the month in which the arbitrator offered dates, then the City accepts the arbitrator's dates. Once the City agrees to dates, George places the case on the City's calendar and Porter Adams assigns the case to an attorney.

Matta testified that employers of SEIU-represented employees, other than the City of Chicago, typically schedule arbitration hearings approximately four to six months after the parties request hearing dates from the arbitrator. In contrast, the City of Chicago schedules hearing dates approximately one year away from the date on which the parties contacted the arbitrator for dates. No other employer of SEIU-represented employees takes so long to set cases for arbitration. The arbitrator issues his award approximately six months to a year after the hearing.

SEIU introduced an exhibit into evidence which lists 21 relevant⁷ grievances and the date on which the parties selected an arbitrator⁸ as compared to the scheduled date of the arbitration. Thirteen of those grievances were filed by members of Unit II; eight of those grievances were filed by member of the Historical Unit. In two of those cases, the parties scheduled arbitration approximately seven months from the date on which they selected the arbitrator. In two cases, the parties scheduled arbitration approximately eight months from the date on which they selected the arbitrator. In two cases, the parties scheduled arbitration approximately nine months from the date on which they selected the arbitrator. In eight cases, the parties scheduled arbitration approximately 10 months from the date on which they selected the arbitrator. In four cases, the parties scheduled arbitration approximately 11 months from the date on which they selected the arbitrator. In one case, the parties scheduled arbitration approximately 12 months from the date on which they selected the arbitrator.

⁶ The City has scheduled approximately 15 to 17 arbitrations a month since 2004. The City sometimes schedules more than 17 arbitrations in a single month.

⁷ The list contains a total of 22 grievances, but one of those is not considered here because both the scheduling of the hearing and the hearing date occurred prior to six months before SEIU filed its charge.

⁸ The dates reflect either the date on which the parties agreed upon a date for arbitration or the date on which the Union notified the City of its intent to select an arbitrator.

The exhibit does not include data concerning discharge grievance arbitrations. Porter Adams estimated that between 2009 and 2012, the City received 5 to 10 demands to arbitrate discharge grievances. The City sets discharge cases for arbitration between one and three months after the parties select an arbitrator, as provided by the parties' contract.⁹

Matta testified that SEIU encounters problems when the City schedules arbitrations so far from the date on which the parties select an arbitrator. First, such a delay hampers SEIU's ability to effectively represent its members. Evidence may be lost over time, memories fade, and it gives SEIU's members the impression that SEIU is not representing them effectively.

For example, in a case concerning Tyre Evans, the City disciplined Evans for recording an incident during roll call. Evans, in his grievance, asserted that discipline was not warranted because he made the recording inadvertently. SEIU believed that the tape recording would support Evans's assertion because it also recorded Evans using the bathroom and making a personal note to himself which he would likely not want others to hear. However, the tape recording was lost prior to arbitration.¹⁰

In another case, the City disciplined detention aide Darius Daniels after a detainee had hung himself because Daniels allegedly failed to make the required 15-minute checks. At the time of the incident, Daniels stated definite times at which he had performed those 15-minute checks. However, a year later at the arbitration hearing, Daniels stated he had performed those checks at different times. The City used Daniels's shifting statements as evidence of his dishonesty. However, SEIU asserted that Daniels's memory had faded after a year such that it was difficult for him to pinpoint the times when he performed the 15-minute checks.

Second, SEIU's members must tolerate alleged continuing violations for a longer period of time when the arbitration hearing date is delayed. For example, in one case, the City changed detention aide employees' schedules from a fixed start time to flex schedules. Under the new system, the City required employees to start work between one- to one half-hour earlier than usual and the City would give employees notice of the change only the day before it was to occur. The complained-of schedule remained in effect while the parties waited for the arbitration

⁹ Porter Adams also testified that the Union's list was missing a grievance concerning Chris Crosby scheduled on April 30, 2013, for which the City received a demand in November 2013.

¹⁰ SEIU can gather evidence that it needs to defend the grievance close to the time of its filing, but it can preserve only the evidence that it has in its possession.

hearing date. Similarly, in another case, SEIU alleged that the City violated the contract by assigning bargaining unit work to non-bargaining unit members. The City continued its complained-of practice while the parties waited for the hearing date.

Matt Brandon, secretary-treasurer chief of staff of SEIU, testified that bargaining unit members who receive undeserved suspensions suffer while their case is pending because the suspensions adversely affect their seniority during that time. Brandon explained that the City hires individuals in groups. Thus, when the City suspends a member of that hired group, that employee's seniority changes and it negatively affects his standing with respect to others in the hired group. Seniority affects promotions, recall after layoff, and choice of vacation times.

On November 25, 2009, Matta contacted Porter Adams via email and objected to the fact that the City had scheduled hearing dates for Chris Logan's arbitration more than one year from the date on which the City received the arbitration demand. Matta also sought to consolidate Logan's three grievances into a single arbitration and suggested that the parties and their attorneys meet to try and resolve outstanding issues related to those grievances. On December 1, 2010, Porter Adams responded to Matta's email, stating that a meeting was a good idea. However, Porter Adams declined Matta's request to consolidate the grievances.

On December 2, 2009, Matta sent Porter Adams a list of grievances pending at arbitration. Matta expressed a desire to meet with the City to try and settle them.

On January 22, 2010, Matta, Porter Adams, and other representatives from the City and SEIU, met to try and resolve the grievances listed in Matta's December 2, 2009 email. Some of those cases were pending at arbitration with set dates. The parties resolved a number of them. Porter Adams suggested that the City could substitute other cases in the place of the settled ones to fill the vacant arbitration dates. Matta declined the offer. The City canceled the hearing dates for the settled cases.

On May 11, 2010, Matta sent an email to Porter Adams again objecting to the City's one-year delay in setting arbitrations for hearing. Matta referenced the January 22, 2010 settlement meeting and noted that SEIU had been motivated to settle in part because SEIU believed that multiple settlements would "resolve the need for the City to schedule hearings so far into the future." Matta remarked that the City was still informing SEIU that it was not available to schedule arbitrations for a year despite the settlements. Matta stated that SEIU would file a charge over the City's failure to reasonably participate in the arbitration process.

On May 12, 2010, Porter Adams responded to Matta's email and stated that when the parties met on January 22, 2010 to resolve the grievances she suggested that the parties could hold the scheduled dates open for other cases but that Matta had refused that option. At hearing, Matta admitted that she told Porter Adams to cancel the arbitration hearings of the cases that the parties had resolved. However, she explained that it seemed to be an exercise in futility to request that the City try and fit other cases into the open hearing dates since parties had previously tried to do so but that Porter Adams would always inform her that the City's witnesses were unavailable.

In May 2011, the parties agreed that the City would set aside one day per month to hear SEIU arbitrations.¹¹ They asked arbitrators to offer them one date each month and intended to fit cases into those dates as the cases arose. The parties also agreed that if a case settled within 45 or 60 days prior to the date of the arbitration, the parties would substitute another case for the settled one so as not to lose the arbitration date. The parties implemented this arrangement for five months in 2011 and for all of 2012.

In late October or early November 2011, Roan and Matta asked Porter Adams to set aside additional dates each month for SEIU hearings and stated that the one day that the City had reserved per month was insufficient to meet SEIU's needs. Porter Adams stated that the City could not justify reserving more hearing dates per month for SEIU's arbitrations given the small percentage of the City's unionized workforce that SEIU represented in comparison to the percentages of the City's unionized workforce represented by other unions. In addition, Porter Adams remarked that between August 2011 and December of 2011, the City and SEIU only went to hearing on three of the ten scheduled arbitrations but that SEIU did not substitute other cases into the scheduled dates.¹² Porter Adams also noted the City did not wish to set aside two days a month for SEIU arbitrations because SEIU expressed that it would not withdraw the instant charge even if the City did make such an accommodation.

After that conversation, Porter Adams, Matta, and Roan agreed to have another meeting to try and settle other cases pending at arbitration. The meeting took place on December 8, 2011 and the parties resolved some of the cases.

¹¹ SEIU asked the Board to hold the instant charge in abeyance during this time.

¹² The parties settled five of those cases.

SEIU and the City also met in 2012 and in early 2013 to try and resolve cases pending at arbitration.

SEIU may take advantage of COUPE expedited hearings with respect to grievances filed by members of its Historical Unit. Expedited arbitration hearings are designed for less complicated cases. There is no court reporter, there are no briefs, and there is a limit on the number of witnesses who can be called. Often, the arbitrator hears two or three cases in a single day. The arbitrator issues his decision in such cases quickly. The City sets aside one day a month for COUPE expedited hearings.¹³ However, the City and SEIU must agree to set a case for expedited arbitration.

Porter Adams has also informed SEIU counsel that they should tell her if SEIU has a time-sensitive case because Porter Adams would then try and work with SEIU to schedule the case for hearing sooner. Porter Adams testified that SEIU has never specifically informed her of a case that had to be heard in short order.

IV. DISCUSSION AND ANALYSIS

1. Motion to Amend the Complaint

The complaint alleges that that the City consistently failed and refused to timely advance grievances to arbitration since April 2010. On brief, SEIU sought to amend the complaint to allege that the City engaged in such conduct since December 1, 2009.¹⁴ SEIU's motion is granted.

The Act gives administrative law judges broad discretion to amend complaints. Section 11(a) provides, in relevant part: "Any such complaint may be amended by the member or hearing officer conducting the hearing for the Board in his discretion at any time prior to the issuance of an order based thereon." The Board's case law is more specific, allowing for the amendment of complaints in two distinct instances: (1) where, after the conclusion of the hearing, the amendment would conform the pleadings to the evidence and would not unfairly prejudice any party; and (2) to add allegations not listed in the underlying charge, so long as the added allegations are closely related to the original allegations in the charge, or grew out of the same

¹³ Approximately half of all cases set for COUPE expedited arbitration hearings do not go to hearing.

¹⁴ Notably, only one instance of the City's scheduling delay occurred outside the limitation period, according to SEIU's evidence. SEIU has not moved to amend the complaint to include this instance of The City's conduct.

subject matter during the pendency of the case. See Chicago Park Dist., 15 PERI ¶ 3017 (IL LLRB 1999); City of Chicago (Police Dep't), 14 PERI ¶ 3010 (IL LLRB 1998); City of Chicago (Chicago Police Dep't), 12 PERI ¶ 3013 (IL LLRB 1996); Cnty. of Cook and Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB 1990); Cnty. of Cook, 5 PERI ¶ 3002 (IL LLRB 1988).

However, Section 11(a) of the Act also provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom the charge was made.” 5 ILCS 315/11(a) (2010). The six-month period begins to run once charging party has knowledge of the alleged unlawful conduct, or reasonably should have known of the conduct. Vill. of Wilmette, 20 PERI ¶ 85 (IL LRB-SP 2004); Chicago Transit Auth., 16 PERI ¶ 3013 (IL LLRB 2000), citing Teamsters (Zaccaro), 14 PERI ¶ 3014 (IL LLRB 1998) aff'd by unpub. order, 14 PERI ¶ 4003 (1st Dist. 1999); Ill. Dep't of Central Mgmt. Serv., 16 PERI ¶ 2011 (IL SLRB 2000) citing Moore v. Ill. State Labor Rel. Board, 206 Ill. App. 3d 327, 335, 564 N.E.2d 213, 7 PERI ¶ 4007 (4th Dist. 1990); Am. Fed. of State, Cnty. Mun. Empl., Local 3486 (Pierce), 15 PERI ¶ 2026 (IL SLRB 1999). Accordingly, an ALJ may not amend a complaint if the allegations are untimely and outside the six-month limitation period, even if the other requirements for amendment are met. Vill. of Wilmette, 20 PERI ¶ 85 (IL LRB-SP 2004).

Here, the complaint is properly amended to state that the City failed and refused to advance grievances to arbitration in a timely manner since December 1, 2009 because the amendment conforms to the evidence presented at hearing, includes only instances of the City's conduct that occurred within the six-month limitation period, and would not unfairly prejudice any party. First, SEIU introduced evidence at hearing that the City had engaged in its allegedly objectionable scheduling practices since the referenced date.¹⁵ Second, that date reflects and adheres to the six-month limitation period because SEIU filed its charge on June 1, 2010. Finally, the City is not unfairly prejudiced by this amendment because it was able to address the issues relating to the amendment on brief and its defenses to the allegations remain unchanged. See Forest Preserve Dist. of Cook Cnty., 369 Ill. App. 3d at 746 (no prejudice where Respondent was not precluded from filing an answer to the amendment and was able to address the issue relating to the amendment in its post-hearing brief); Cnty. of Lake, 28 PERI ¶ 67 (IL LRB-SP

¹⁵ Notably, only one instance of the City's scheduling delay occurred outside the limitation period, according to SEIU's evidence. SEIU has not moved to amend the complaint to include this instance of the City's conduct.

2011) (no prejudice where Respondent presented argument on brief which addressed the amendments and where Respondent's defense in the face of the amendments remained unchanged). Thus, SEIU's motion to amend the complaint is granted.

2. The City's Refusal to Pay Half of the Arbitrator's Cancellation Fees When the Union Withdraws its Grievance Within the Cancellation Period

i. Mootness

The issue concerning the City's refusal to pay arbitration cancellation fees upon SEIU's withdrawal of a grievance within the cancellation period is not moot.

Under Illinois case law, a matter is moot when it involves no actual controversy, interests or rights of the parties, or where the issues have ceased to exist. First Nat'l Bank of Waukegan v. Kusper, 98 Ill. 2d 226, 456 N.E.2d 7 (1983). Exceptions to the mootness doctrine include matters that are capable of repetition yet evade review, and matters of great public interest. See e.g. People v. Bailey, 116 Ill. App. 3d 259, 452 N.E.2d 28 (1st Dist. 1983); Vill. of Palatine v. LaSalle National Bank, 112 Ill. App. 3d 885, 445 N.E.2d 1277 (1st Dist. 1983).

Here, the issue is not moot with respect to either unit, even though the parties executed a new Unit II contract that addresses the treatment of cancellation fees, because subsequent events do not moot a refusal to bargain charge. Specifically, the Board has stated that a complaint alleging a violation of the duty to bargain is not rendered moot simply because a respondent complies with its bargaining obligations at a later time. City of Ottawa, 27 PERI ¶ 6 (IL LRB-SP 2011) ("Negotiating in good faith at a later point in time does not obviate or render moot bargaining in bad faith at an earlier point in time"; case was a default judgment but Respondent argued mootness on appeal).¹⁶ Admittedly, the Boards of some other public sector jurisdictions

¹⁶ In City of Ottawa, the Board adopted the ALJ's decision which held that the Charging Party did not tacitly withdraw its ULP charge or expressly and unmistakably waive its right to pursue its already-filed claim merely by engaging in a subsequent round of negotiations with Respondent. City of Ottawa, 27 PERI ¶ 6 (IL LRB-SP 2011); See also Bd. of Trustees of the Univ. of Ill., 22 PERI ¶ 147 (IELRB 2006) (when a party corrects itself and bargains, the employer's action does not fully "cure" the violation, although it does affect the remedy); City of Highwood, 17 PERI ¶ 2021 Fn 11 (IL LRB-SP 2001) (finding case was not moot, even though Respondent agreed to start negotiations with Charging Party, where Respondent had previously preconditioned bargaining on the Charging Party's agreement that the Respondent was not waiving its right to challenge the Board's jurisdiction by bargaining with the Charging Party and where the Respondent remained free to assert, at any time, that it was not under the Act's jurisdiction).

have held that charges alleging a refusal to bargain in good faith are generally rendered moot by the execution of a new collective bargaining agreement.¹⁷ By contrast, the Illinois Labor Relations Board has found live issues even where the complaint alleged that the Respondent refused to bargain in good faith by failing to sign a tentative agreement, but where the parties had already executed a collective bargaining agreement at the time of hearing. Chief Judge of the Circuit Court of Cook Cnty., 11 PERI ¶ 2038 (IL SLRB 1995) (complaint alleged that the Respondent refused to bargain in good faith by failing to sign a tentative agreement but where the parties had already executed a collective bargaining agreement at the time of hearing; Board reversed ALJ's decision to dismiss based on mootness, remanded for hearing, but supplied no reasoning). Accordingly, this issue is not moot.

Even if the Board chooses to overrule its past decisions and adopt the approach taken by other jurisdictions, the case is not moot with respect to the Historical Unit because the parties did not execute a new Historical Unit contract and because SEIU seeks a monetary award in connection with the City's conduct concerning the Historical Unit. First, the issue concerning arbitration fees is not mooted by the parties' Unit II contract, executed after the alleged unlawful activity, because that contract does not apply to fees paid on behalf of Historical Unit members, also at issue in this case.

Second, this case is not moot with respect to that unit, even if the parties had executed a new Historical Unit contract addressing cancellation fees, because SEIU seeks reimbursement of

¹⁷ In Michigan and Pennsylvania, charges alleging a refusal to bargain in good faith are generally rendered moot by the execution of a new collective bargaining agreement. However, California and Florida use the same approach applied by the Board, set forth above, and do not find such charges are moot. See Southeastern Pennsylvania Transportation Auth., 37 PPER ¶ 119 (Final Order, 2006); 36th Dist. Court, 17 MPER ¶ 36 (MERC 2004); City of Philadelphia, 36 PPER ¶ 158 (Final Order, 2005); City of Philadelphia, 29 PPER ¶ 29149 (Final Order, 1998); but see case law from Florida and California which uses the same approach as Illinois. See City of Orlando, 4 FPER ¶ 4214 at 388 (1978), aff'd, 384 So. 2d 941 (Fla. 5th DCA 1980)(ratification of a contract does not necessarily constitute a waiver of an unfair labor practice which occurred during the course of negotiating the contract, particularly, when the ratification is coerced by the very unfair labor practice from which relief is sought). Comm'n in Duval Teachers United, FEA-AFT, AFL-CIO v. Duval County School Bd., 3 FPER 96, 101-02 (1977), aff'd, 353 So. 2d. 1244 (Fla. 1st DCA 1978)(an employer will not be permitted to engage in a course of conduct tantamount to a refusal to bargain and subsequently be allowed to cleanse its illegal activity through the statutory impasse procedures); Temple City Unified School Dist., 29 PERC ¶ 27 (CA PERB ALJ 2004) (Citing Amador Valley Joint Union High School Dist., (1978) PERB Decision No. 74)(subsequent signing of an agreement does not moot a refusal to bargain charge and does not constitute a waiver by the Charging Party that the Respondent acted unlawfully).

the fees it paid upon the cancellation of a Historical Unit member's arbitration hearing. The United State Supreme Court has held that a case is not moot where a party seeks a monetary award as recompense for the alleged harm. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8-9 (1978) (finding that Respondents' claim for actual and punitive damages saved the cause of action from the bar of mootness). Thus, even if the Board finds that this allegation is moot with respect to Unit II, it is not moot with respect to the Historical Unit because the Union seeks a monetary award in connection with a Historical Unit member's arbitration cancellation fees.

In sum, the allegation that the City violated Sections 10(a)(4) and(1) of the Act when it refused to pay the arbitration cancellation fees upon SEIU's withdrawal of a grievance within the cancellation period is not moot with respect to either unit under Board case law. Further, even if the Board rejects its prior holdings and adopts the approach taken by other public sector jurisdictions, the allegation is not moot with respect to the Historical Unit.

ii. Meaning of the Act

Statutory construction and public policy support a reading of the Act under which "costs" of arbitration include arbitration cancellation fees incurred upon a union's withdrawal of a grievance within the cancellation period. Thus, where the parties' contract is silent as to the allocation of cancellation fees incurred upon a union's withdrawal of a grievance within the cancellation period, the parties are required to split the cancellation fee under the terms of the Act.

Section 8 of the Act provides in relevant part that "[t]he grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois 'Uniform Arbitration Act'" unless the parties agree otherwise, and that "[t]he costs of such arbitration shall be borne equally by the employer and the employee organization." 5 ILCS 315/8 (2010). The Uniform Arbitration Act (UAA) provides that, "unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." 710 ILCS 5/10 (2010). Courts have held that this language in the UAA means that "arbitrators' expenses ... must be paid either as provided in the agreement to arbitrate or as provided in the arbitrators' award," and that "provision for payment of the arbitrators' fees must be made in the arbitrators'

award [or the agreement], in order for the arbitrators to recover their fees.” Mirabella v. Safeway Ins. Co., 114 Ill. App. 3d 680, 683 (2nd Dist. 1983).

First, principles of statutory construction mandate a conclusion that “costs” of arbitration include cancellation fees incurred when a Union withdraws a grievance during the cancellation period, and not just those costs incurred upon issuance of the award. The primary objective in interpreting a statute is to give effect to legislative intent. Harshman v. DePhillips, 218 Ill. 2d 482 (2006). The best indicator of the legislators' intent is the plain language of the statute. Harshman, 218 Ill. 2d at 493. When a statute's language is clear and unambiguous, the interpreting body must give it effect without resorting to other aids of construction. Harshman, 218 Ill. 2d at 493. Courts also hold that “when the plain language of two statutes conflicts, a reviewing court will attempt to construe them together in *pari materia* if such an interpretation is reasonable.” Abruzzo v. City of Park Ridge, 231 Ill. 2d 324, 332 (2008). However, this principle of interpretation is not applicable to the Act when the conflicting statute relates to labor relations because the Act expressly provides that “in case of any conflict between the provisions of this Act and any other law ... executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control.” 5 ILCS 315/15(a) (2010).¹⁸

Here, the plain language of the statute is unambiguous because it states, without modification, that “[t]he costs of such arbitration shall be borne equally by the employer and the employee organization.” 5 ILCS 315/8 (2010). A cancellation fee incurred upon a union’s withdrawal of a grievance within the cancellation period is owed to an arbitrator and is therefore a cost of arbitration. Thus, the City is obligated to pay half of that cancellation fee within the plain meaning of the Act.

Contrary to the City’s contention, the Board should not use the UAA to limit the reading of the word “cost,” even if the Board determines that the UAA’s incorporation into Section 8 of the Act creates a latent ambiguity as to the word’s meaning, because the UAA’s narrower

¹⁸ The UAA is a law that “relates” to “employment relations” because the Act provides that “the collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance resolution procedure,” unless the parties agree otherwise, and that such a procedure is “subject to the Illinois ‘Uniform Arbitration Act.’” 5 ILCS 315/8 (2010).

language should not curtail the Act's reach when the Act conflicts with the UAA and takes precedence over it to the extent of that conflict.

First, the Act takes precedence over the UAA because the two conflict as to the source of an arbitrator's fee determinations. On the one hand, the UAA states that arbitrator's fees may be dictated only by the parties' agreement or by the arbitration award. On the other hand, the Act offers an additional, statutory basis which specifies the manner in which arbitrator's fees must be allocated, and thus provides that the award and the contract are not the only sources which may dictate an arbitrator's fees. Accordingly, the Act conflicts with the UAA because it provides a statutory basis for the determination of an arbitrator's fee allocation whereas the UAA limits the sources of an arbitrator's fee determination to the award and the parties' agreement. Thus, the Act takes precedence and allows for the creation of a statutory basis for the allocation of arbitrator's fees.

Consequently, the Act is broader than the UAA and the language of the UAA, which limits the source of an arbitrator's fee determination to the award and the parties' agreement, should therefore not be used to narrow the scope of the Act. Accordingly, contrary to the City's assertion, the costs of arbitration should not include only those costs specified in an award, even though the UAA states that an arbitrator's fees may be dictated only by an award (or alternatively, by the parties' agreement) because the language of the Act provides that those are not the only sources which may circumscribe the payment and allocation of an arbitrator's fees.

Further, public policy supports this interpretation because a more limited reading leaves the arbitrator no clear basis for recovery of his cancellation fee if the parties refuse to pay under circumstances where the agreement does not address cancellation fees and where no award issues. To illustrate, under the UAA, "arbitrators' expenses ... must be paid either as provided in the agreement to arbitrate or as provided in the arbitrators' award." Mirabella v. Safeway Ins. Co., 114 Ill. App. 3d 680, 683 (2nd Dist. 1983). However, in the absence of an award and language in the parties' agreement addressing cancellation fee allocation, the arbitrator has no basis for recovery because the award does not exist and the agreement provides no guidance. Thus, a broad reading of the word "cost" forestalls this outcome by providing a statutory basis upon which an arbitrator can recover his cancellation fees in the absence of an award where contract language is silent on the matter.

Thus, the language of the Act provides that the parties must split the cancellation fees incurred when a union withdraws its grievance within the cancellation period.

iii. Cancellation Fee Payment - The City's Liability¹⁹

The City did not violate Sections 10(a)(4) and (1) of the Act when it refused to pay half of the arbitrator's cancellation fees upon SEIU's withdrawal of a grievance within the cancellation period.

Section 10(a)(4) of the Act provides that "[i]t shall be an unfair labor practice for an employer or its agents to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including but not limited to, the discussing of grievances with the exclusive representative." 5 ILCS 315/10(a)(4) (2010). Section 8 of the Act provides in relevant part that, "the grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois 'Uniform Arbitration Act'" and that "the costs of such arbitration shall be borne equally by the employer and the employee organization." 5 ILCS 315/8 (2010).

The Board has never addressed whether an employer violates the Act when it refuses to split the costs of arbitration with a union, as required by Section 8 of the Act. The only relevant case law that directly relates to this issue is from Pennsylvania. The Pennsylvania Labor Relations Board (PLRB) has held that a respondent's failure to pay arbitration fees, as required by the Pennsylvania Labor Relations Act (PLRA) does not, in and of itself, constitute an unfair labor practice. McAdoo Borough, 37 PPER ¶ 107 (PLRB 2006), *aff'd* 38 PPER ¶ 110 (Pa. Cmwlth. 2007).

In McAdoo Borough, the Police Association and the Borough proceeded to binding interest arbitration after they bargained to impasse. *Id.* Pursuant to Pennsylvania law, the parties each appointed one arbitrator for the panel and the American Arbitration Association chose a neutral third arbitrator.²⁰ *Id.* The parties continued the interest arbitration four times and eventually settled their dispute without a hearing. *Id.* The neutral arbitrator

¹⁹ It is unnecessary to address the City's various contractual defenses here for the reasons set forth below.

²⁰ An interest arbitration panel "shall be composed of three persons, one appointed by the public employer, one appointed by the body of policemen or firemen involved, and third member to be agreed upon by the public employer and such policemen or firemen." Policemen and Firemen Collective Bargaining Act. 43 P.S. §§ 217.4(b).

assessed a cancellation fee plus expenses and submitted it to the Borough. *Id.* Under the Pennsylvania Police and Fireman Collective Bargaining Act, the public employer must pay for the compensation of the neutral arbitrator including other “expenses incurred by the arbitration panel in connection with the arbitration proceedings.”²¹ *Policemen and Firemen Collective Bargaining Act*, 43 P.S. §§ 217.4(8). The Borough refused to pay the neutral arbitrator’s cancellation fee. *Id.* The Union paid the fee instead and then sought reimbursement by filing an unfair labor practice charge against the Borough for failure to pay, alleging a refusal to bargain in good faith. *Id.*

The PLRB dismissed the Union’s charge, reasoning that “the payment of arbitration fees...is not part and parcel of the collective bargaining obligation owed by the public employer to the employe[e]s’ representative and thus does not, in and of itself, give rise to” a finding that the employer refused to bargain in good faith in violation of the PLRA. *McAdoo Borough*, 37 PPER ¶ 107 (PLRB 2006), *aff’d* 38 PPER ¶ 110 (Pa. Cmwlth. 2007). Specifically, the PLRB noted that the duty to bargain in good faith under the PLRA is “owed to employe[e]s and their representative, not the arbitrators” and that “any obligation of the employer...to compensate the neutral arbitrator...is not an obligation or duty owed to the union.” *Id.*

The Board further held that, “we do not believe that the failure of the political subdivision to pay the expenses of the neutral arbitrator authorizes a union to pay the neutral arbitrator’s bill and utilize the Board’s unfair labor practice jurisdiction to recoup that payment from the political subdivision.” *Id.* The PLRB explained that the statutory scheme did not permit that practice and that the Board would frustrate the policy of the *Policemen and Firemen Collective Bargaining Act* if it endorsed it. *Id.* Specifically, the PLRB reasoned that if it found a violation of the Act under such circumstances and thereby “authorize[d]...the union to effectively act as the collection agent for the neutral arbitrator as against the political subdivision,” then that would “invite compromise of the arbitrator’s neutrality in subsequent proceedings in a manner contrary to the express provisions and policy of Act.” *Id.* Finally, the PLRB noted that it did not condone a party’s failure to comply with the Act’s provisions, but that

²¹ “The compensation, if any, of the arbitrator appointed by the policemen and firemen shall be paid by them” but “the compensation of the other two arbitrators, as well as all stenographic and other expenses incurred by the arbitration panel in connection with the arbitration proceedings, shall be paid by the political subdivision or by the Commonwealth, as the case may be.” *Policemen and Firemen Collective Bargaining Act*, 43 P.S. §§ 217.4(8).

the appropriate remedy under such circumstances would be “for the neutral arbitrator to proceed directly against the party not in compliance with the law.” Id.

The facts in this case are analogous to those in McAdoo Borough. Like the Firemen Collective Bargaining Act, the IPLRA specifies the parties’ arbitration fee payment obligations. Like the McAdoo Borough, the City here refused to pay its share of the fees as required under the Act. Like the McAdoo Police Association, SEIU asks the Board to find that City failed to bargain in good faith when it refused to pay its share of arbitration cancellation fees and seeks reimbursement for fees it paid to arbitrators on the City’s behalf.

Accordingly, the PLRB’s rationale applies equally here. The City’s refusal to pay half of the arbitration cancellation fees upon SEIU’s withdrawal of a grievance does not violate Sections 10(a)(4) and (1) of the Act because an employer’s duty to bargain is owed to the union, not the arbitrator, and the employer’s duty to compensate the arbitrator is not an obligation owed to the union. Further, the Act does not authorize a charging party to act as a collection agent for the arbitrator. Indeed, the Board would undermine the policy of the Act if it encouraged such a practice because it would risk compromising the arbitrator’s neutrality in subsequent proceedings. In the future, if one party refuses to pay its share of the arbitrator’s fees as required under Section 8 of the Act, the arbitrator should proceed directly against the party not in compliance with that provision.

Thus, the City did not violate Sections 10(a)(4) and (1) of the Act by refusing to pay half the arbitrator’s cancellation fees when SEIU withdrew its grievances within the cancellation period.

3. Arbitration Scheduling Issue

The City’s scheduling practices do not constitute a repudiation of its collective bargaining obligations in violation of Sections 10(a)(4) and (1) of the Act.

i. Unit II Contract

The City did not repudiate the Unit II contract when it allegedly failed to timely schedule grievance arbitration hearings because the parties have a good faith disagreement as to the meaning of the contract language which purportedly addresses the City’s scheduling obligations.

The Board does not have jurisdiction to enforce provisions of collective bargaining agreements where there is a good faith dispute as to the agreement's meaning. Vill. of Creve Coeur, 3 PERI ¶ 2063 (IL SLRB 1988). The Board does not allow parties to "use the Board's processes to remedy alleged contractual breaches or to obtain specific enforcement of contract terms." Id. Instead, the Board has jurisdiction to adjudicate only those breaches of contract involving conduct so sufficiently lacking in good faith that they amount to a repudiation of the collective bargaining process. City of Loves Park v. Ill. Labor Rel. Bd. State Panel, 343 Ill. App. 3d 389, 395 (2nd Dist. 2003), citing City of Collinsville, 16 PERI ¶ 155 (IL SLRB 2000), aff'd City of Collinsville v. Ill. State Labor Rel. Bd., 329 Ill. App. 3d 409, 767 N.E.2d 886 (5th Dist. 2002); City of Kewanee, 23 PERI ¶ 110 (IL SLRB 2007); Cnty. of Cook (Office of the Public Defender), 13 PERI ¶ 3005 (IL LLRB 1997).

Repudiation therefore requires (1) a substantial breach by the Respondent (2) made without rational justification or reasonable interpretation such that it demonstrates bad faith. City of Loves Park v. Ill. Labor Rel. Bd. State Panel, 343 Ill. App. 3d 389, 395 (2nd Dist. 2003)(repudiation requires outright refusal to abide by a contractual term or disregard for the collective bargaining process), citing City of Collinsville, 16 PERI ¶ 155 (IL SLRB 2000), aff'd City of Collinsville v. Ill. State Labor Rel. Bd., 329 Ill. App. 3d 409, 767 N.E.2d 886 (5th Dist. 2002); City of Kewanee, 23 PERI ¶ 110 (IL SLRB 2007) (repudiation requires a substantial breach and a contractual argument by the employer that is without rational justification or reasonable interpretation of that contract); Cnty. of Cook (Office of the Public Defender), 13 PERI ¶ 3005 (IL LLRB 1997). There can be no repudiation where the contract's language is open to more than one reasonable interpretation. City of Kewanee, 23 PERI ¶ 110 (IL SLRB 2007).

The City did not repudiate the Unit II contract because the parties have each offered reasonable interpretations of the contract's language which demonstrates that the parties have a good faith disagreement as to the contract's meaning. In short, both parties assert that the contract must be read as a harmonious whole, but they each point to different sections of the contract to support their interpretation.

On the one hand, SEIU asserts that the contract specifies a time limit within which the parties must participate in arbitration. In support, SEIU notes that the contract provides that "arbitrators shall select a date for arbitration within ninety (90) days of notice that a grievance is

ready for arbitration,” shall “submit their decision within thirty (30) days following such hearing,” and that the parties will contact the arbitrator “to obtain an arbitrator’s commitment to arbitrate the respective grievance within the stated time limit.”²² Taken together, SEIU asserts that this language shows that the parties agreed to arbitrate a grievance within 90 days of the arbitrator’s selection.

On the other hand, the City asserts that the contract sets forth no such time limit and instead only mandates that an arbitrator choose a hearing date within 90 days of his appointment. Specifically, the City notes that the clause at issue simply provides that an arbitrator must “select a date for arbitration within ninety (90) days of notice.” (emphasis added). The City rejects SEIU’s assertion that such language means that the parties agreed to conduct a hearing within 90 days because the parties’ contract distinguishes between an arbitrator’s duty to “conduct” a hearing and to “select” a date. In support, the City notes that similar language within the same contract related to the arbitration of other grievances specifies that “arbitrators shall conduct a hearing within (60) days of being notified by the parties of his/her selection.”²³ (emphasis added). The City concludes that if the parties had intended that an arbitrator hold a hearing on the grievances at issue within 90 days, they would have used the word “conduct” instead of “select,” as they did in a different, related section of the contract.

Notably, SEIU’s own arguments undermine its assertion that the contract is unambiguous because SEIU relies on principles of contract interpretation to support its conclusion,

²² Section 7.2(a) Grievance Procedure

Arbitrators shall select a date for arbitration within ninety (90) days of notice that a grievance is ready for arbitration and submit their decision within thirty (30) days following such hearing.

...

Upon a Step IV request for arbitration, arbitrators will be designated by the parties in alphabetical rotating order and subsequently contacted to obtain an arbitrator’s commitment to arbitrate the respective grievance within the stated time limit within seven (7) days from the date the grievances are submitted to the arbitration process. If an arbitrator is not available to hear the case, the next arbitrator in rotating alphabetical order will be chosen.

²³ Section 7.2(b) Procedures for Arbitrations of Suspensions of Over Thirty (30) Days and Discharges

The Terms of Step IVB and Step IVC of Section 7.2(a) above shall also apply to arbitration of suspensions of over thirty (30) days and discharges, except only that the arbitrator shall conduct a hearing within (60) days of being notified by the parties of his/her selection, and the arbitrator shall submit his/her decision within thirty (30) days following the close of hearing, unless the parties mutually agree otherwise. If an arbitrator informs the parties that he/she is unable to comply with said time frames, the parties will select another arbitrator, unless the parties mutually agree otherwise.

specifically, extrinsic evidence concerning the industry practice. Here, SEIU notes that the parties did not intend the word “select” to take on its plain meaning because arbitrators never take 90 days to provide the parties with possible dates. However, the customs of the industry are for the arbitrator to weigh and not the Board. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-81 (1960) (arbitrators consider the custom or practice of a particular industry to interpret a contract); but see City of Markham, 7 PERI ¶ 2021 (IL SLRB 1991)(finding bad faith and repudiation, even where interest arbitration award was “somewhat ambiguous,” where the City’s final proposal to the interest arbitration panel preserved that option which the City claimed it still possessed, even though the arbitration panel had unmistakably rejected it).

In sum, the City did not repudiate the Unit II contract by scheduling arbitrations more than 90 days from the date of the arbitrator’s selection because the contract language does not unambiguously require the parties to hold arbitration hearings within those 90 days. Although the Union’s reading of the contract is “a very reasonable one[.]...it is not so clearly right that no other interpretation [is] possible.” City of Kewanee, 23 PERI ¶ 110 (IL LRB-SP 2007) (no repudiation where City’s interpretation of the contract was a possible one).

4. Historical Unit Contract²⁴

The City did not repudiate the parties’ Historical Unit contract when it failed to timely schedule arbitration hearings, even though it breached the parties’ collective bargaining agreement, because its breach did not prevent the grievance process from working its course and because the City did not otherwise demonstrate bad faith.

As noted above, repudiation requires (1) a substantial breach of contract by the Respondent (2) made without rational justification or reasonable interpretation of that contract such that it demonstrates bad faith. City of Loves Park, 343 Ill. App. 3d at 395.

As a preliminary matter, the City had a contractual obligation to arbitrate grievances within 60 days of the arbitrator’s selection and the City breached that obligation by instead scheduling arbitrations approximately eight to ten months out. First, the Board must find that the parties agreed to arbitrate grievances within 60 days of the arbitrator’s selection because SEIU’s

²⁴ If the Board determines that the Unit II contract is not ambiguous, the following reasoning also applies to the City’s conduct with respect to that contract.

reading of the contract is supported by the contract's plain language and because the City has offered no basis for an alternate reading. Here, SEIU asserts that parties must hold an arbitration hearing within 60 days of the arbitrator's selection because the contract provides that "arbitrators...must agree as a whole to commencement of a hearing within sixty (60) days of selection." While the City asserts that the contract contains no time limits within which the parties must arbitrate grievances, the City has offered no alternate interpretation of the quoted language. Second, the City breached that contractual obligation because it scheduled arbitration hearings between eight to ten months after the arbitrator's selection in approximately 8 Historical Unit cases, far past the 60-day contractual requirement.

Nevertheless, the City's breach does not constitute repudiation in this case because the hallmarks of such a claim, discussed below, are noticeably absent. A respondent repudiates the collective bargaining process when it prevents the grievance procedure from working its course, such that the Board may infer the respondent acted in bad faith. City of Loves Park, 343 Ill. App. 3d at 395 (inference of bad faith required); City of Chicago, 10 PERI ¶ 3002 (IL LLRB 1993) (no repudiation from Respondent's failure to timely process grievances where grievance proceeded to arbitration at the next agreed-upon date). For example, the Board has consistently held that a blatant refusal to process grievances to arbitration constitutes bad faith bargaining, as does a boldfaced refusal to adhere to an unambiguous grievance settlement agreement whose terms are undisputed. City of Chicago, 10 PERI ¶ 3002 (IL LLRB 1993); Cnty. of Cook and Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB) (Board found violation of Section 10(a)(4) when, on numerous occasions, respondents never responded to or answered employees' grievances after the grievances were processed beyond the first step); City of Markham, 7 PERI ¶ 2021 (ISLRB 1991) (consistent refusal to process an employee's grievances constituted a violation of the Act); and Ill. Dep't of Corrections and Cent. Mgmt Serv., 4 PERI ¶ 2043 (IL SLRB 1988) (boldfaced refusal to abide by a grievance settlement agreement, the terms of which are undisputed and unambiguous, constitutes a violation of Sections 10(a)(4) and (1)); Cnty. of Cook, Cook Cnty. Hospital, 4 PERI ¶ 3022 (IL LLRB 1988) (no violation of Section 10(a)(4) when Respondent's delays in processing grievances lasted only a few days and where there were legitimate extenuating circumstances for the delay, including a criminal investigation of the grievant).

Most recently, the Board addressed a respondent's delays in processing grievances, at issue here, in City of Chicago. City of Chicago, 10 PERI ¶ 3002 (IL LLRB 1993). In that case, the Executive Director dismissed the Union's charge alleging that the Respondent violated Sections 10(a)(4) and (1) of the Act when it requested continuances of arbitration hearings and failed to fully cooperate in arbitration scheduling. Id. The Executive Director noted that the Charging Party failed to present evidence demonstrating repudiation of the collective bargaining process and that it "even failed to disclose the length of the delays" allegedly caused by Respondent's requests for continuances and delays in scheduling. Id. Accordingly, the Executive Director dismissed the charge, finding that in the absence of such evidence, the Charging Party could not show that the Respondent violated its bargaining obligation. Id. The Board affirmed the Executive Director's dismissal holding that "even delays of extreme and unusual length do not prevent the grievance procedure from working its course" and that such "delays in scheduling arbitration hearings [are] not a repudiation of the collective bargaining process, even if the delays are of [such] extreme or unusual length." Id.

Here, the City's eight to ten month delays²⁵ between the selection of an arbitrator and the hearing date are extreme and unusual but they do not violate the Act for the following three reasons. First, the delays do not prevent the grievance procedure from working its course because they do not bar the grievances from reaching a hearing eventually, on the agreed-upon hearing date. Id. ("The Respondent correctly points out that requests for continuances will not prevent the grievances from reaching a hearing at the next agreed date, unless the dispute is settled or Charging Party withdraws"). Second, the City has not demonstrated the bad faith necessary to transform this breach into repudiation because it has presented genuine reasons for its delay including its high volume of arbitration demands, the availability of City attorneys who have cases in many different forums, and the availability of the parties and witnesses in scheduling dates.²⁶ See Chicago Transit Auth., 17 PERI ¶ 3014 (IL LRB-LP 2001) (repudiation charge dismissed, even though Respondent was dilatory in paying out monetary grievance

²⁵ In some Unit II grievances, the delays between selection of an arbitrator and the hearing date were between 10 and 12 months.

²⁶ This finding adopts the ALJ's rationale set forth in the non-precedential decision of County of Cook Cnty. of Cook, 6 PERI ¶ 3016 (IL LLRB ALJ 1990) (no repudiation found as a result of five to nine month delays between grievance filing and arbitration hearing, even though the Respondent was "unable to cite to any legitimate extenuating circumstances" and even though the delay "somewhat diminished" the value of the grievance procedure, because the respondent's excuses were nevertheless genuine; respondent referenced scheduling difficulties, business, and the high volume of grievances).

settlements, where the grievance procedure continued to function, where there was no additional evidence of employer's intent to repudiate the agreement, and where respondent explained that staffing shortages interfered with its efficiency); but see Cnty. of Cook (Cermak Health Serv.), 10 PERI ¶ 3009 (IL LLRB 1994) (Board rejected Respondent's excuse that its small staff and the numerous contracts it had to prepare justified its seven-month delay in executing a single collective bargaining agreement where the Respondent both failed to contemporaneously explain the delay to the Charging Party and twice ignored the Charging Party's request to execute it). Third, the City's delays do not constitute repudiation of the parties' grievance arbitration process because even extreme and unusual delays such as these do not alone constitute repudiation, as a matter of law. City of Chicago, 10 PERI ¶ 3002 (IL LLRB 1993).

Notably, the cases SEIU cites on brief are distinguishable because the respondents in those cases, unlike the City here, both prevented the grievance process from working its course and acted in bad faith. For example, in U.S. Postal Service, the Respondent did not merely fail to adhere to the grievance processing time limits set forth in the contract but also failed to assign regional managers to hundreds of third step grievances, unilaterally remanded grievances²⁷ so that the Union could not proceed to arbitration, refused to initial²⁸ grievances (a practice which generated another grievance), and showed a "perceptible reluctance and failure to settle" even those grievances that constituted repetitive and clear-cut contract violations. Id. at 15, 19.

Similarly, in American Beef Packers, Inc., the Respondent did not just fail to adhere to contractual time limits for processing grievances, but failed to respond to the Union's grievances until after the Union filed its charge with the Board, ignored the union's letters of inquiry as to why it did not respond, and offered no plausible explanation for its unreasonable delay in processing, answering, or discussing those grievances. American Beef Packers, Inc., 193 NLRB 1117 (1971); See also Crestfield Convalescent Home, 287 NLRB 328 (1987) (Respondent's repeated initial refusal to discuss a discharge grievance and its one month delay in permitting such discussion constituted a violation of section 8(a)(5) of the NLRA); Peoria School. Dist. 150, 22 PERI ¶ 180 (IL ELRB ALJ 2006) (Respondent violated Section 14(a)(5) of the IELRB when

²⁷ This conduct also violated the parties' contract which provided that such remands required the Union's consent.

²⁸ Supervisors had to sign their initials on grievances before the grievances could move to the next step in the process.

it refused to arbitrate a grievance by declining to sign the request for arbitration and when it refused to process a grievance by failing to respond to it entirely for two and a half months).

By contrast, in this case, there is no allegation or evidence that the City has fallen short with respect to its obligation to answer grievances, to respond to scheduling requests, or to move the grievances along at the earlier steps; nor is there evidence that the City refused to arbitrate grievances. Rather, the City has promptly responded to arbitration demands, has consistently tried to settle grievances, has offered to expedite arbitrations if SEIU states they are time-sensitive, has offered to substitute new arbitrations into the dates of settled cases, has set aside one day each month for SEIU's arbitrations for the past year, and has never refused to arbitrate grievances. See, City of Chicago, 10 PERI ¶ 3002 (IL LLRB 1993) ("What does constitute bad faith bargaining under Section 10(a)(4) is a blatant refusal to process grievances to arbitration").

At most, in this case, there are certain problems with the way in which the City administers its grievance procedure. For example, the City assigns its attorneys to arbitrations only two months before their scheduled hearing date such that SEIU's initial information request, often made far in advance, sometimes languishes in the case file, requiring SEIU to renew that request later.²⁹ Nevertheless, while the City's conduct with respect to grievance handling is somewhat careless, it does not rise to the level of bad faith.³⁰

Finally, even if the Board determines that there is an independent duty to act diligently upon grievances, apart from the contractual time limits, such failure to act diligently does not alone violate the Act because a violation of Section 10(a)(4) requires bad faith, and SEIU has not shown that the City acted in bad faith here.

Thus, the City did not violate Sections 10(a)(4) and (1) of the Act when it failed to timely schedule grievance arbitration hearings.

V. CONCLUSIONS OF LAW

²⁹ SEIU has only asserted that the City delayed its production of requested information on three isolated occasions, those in which union ultimately determined that the grievance was not meritorious and withdrew the grievance within the 30-day arbitration cancellation period. Only one of those instances pertained to a Historical Unit member's grievance.

³⁰ Similarly, this finding adopts the rationale set forth in County of Cook in which the ALJ determined that the Respondent did not repudiate the collective bargaining agreement through its dilatory grievance processing, even though there were problems with the way in which the Respondent administered its grievance procedure (failure to use ID numbers when logging grievances), because such conduct was careless but did not evidence bad faith. Cnty. of Cook, 6 PERI 3016 (IL LLRB ALJ 1990).

1. The City did not violate Sections 10(a)(4) and (1) of the Act when it refused to pay half of the arbitrators' cancellation fees upon SEIU's withdrawal of a grievance within the cancellation period.
2. The City did not violate Sections 10(a)(4) and (1) of the Act when it failed to timely schedule arbitration hearings.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the instant complaint be dismissed.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 1st day of July, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

/S/ Anna Hamburg-Gal

Anna Hamburg-Gal
Administrative Law Judge