

**BEFORE
ARBITRATOR JEANNE CHARLES**

In the Matter of the Arbitration Between)	Case No. 20-08-038(se)
)	
CHICAGO TEACHERS UNION)	
LOCAL 1, AFT)	
Union)	REQUIRED IN-PERSON WORK
)	DURING REMOTE LEARNING
And)	
)	
CHICAGO BOARD OF EDUCATION)	
Employer)	

APPEARANCES

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INTRODUCTION

Pursuant to the collective bargaining agreement (“CBA”) between the Chicago Teachers Union (“CTU” or “Union”) and the Board of Education of the City of Chicago (“Board” or “CPS” or “Employer”) the parties have designated Jeanne Charles to hear and to decide certain disputes arising between them. On August 26, 2020, the parties contacted the undersigned with an “emergency arbitration request.” The hearing was scheduled on September 15 and 16, 2020, via videoconference. The parties presented evidence and were provided with a full opportunity to

examine and cross-examine witnesses. The witnesses were sworn and testified under oath. The record was closed by the submission of post-hearing briefs, the last of which was received by the Arbitrator on September 28, 2020. Due to the urgent nature of the matter, on October 2, 2020, this Arbitrator issued a Summary Findings and Order in which it was noted that the Opinion would be provided separately. On October 5, 2020, the Employer submitted a Motion to Reconsider Summary Findings and Order. The Union was provided with an opportunity to respond and submitted its Response in Opposition to the Board's Motion on October 15, 2020. The Board filed a Reply to the Union's Response on October 20, 2020.¹ In accordance with the October 2nd Summary Findings and Order, the opinion and full award follow.

ISSUE

Whether the Board violated Article 14-1 of the CBA, and if so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

2019-2024 Collective Bargaining Agreement

ARTICLE 14

SAFE AND HEALTHY WORK ENVIRONMENT

Article 14-1. Safe and Healthful Working Conditions.

Bargaining unit employees shall work under safe and healthful conditions.

¹ The undersigned denied the Motion for Reconsideration on November 3, 2020.

BACKGROUND

The grievance arose because CPS ordered its school clerks, school clerk assistants, and technology coordinators (“affected employees”) to report for work in-person, full time, five days per week while remote learning is still in place. The Illinois Governor and the Illinois State Board of Education (“ISBE”) in June 2020 authorized in-person instruction at the Chicago Public Schools (“CPS”).² Yet, on August 5, 2020,³ CPS reversed its initial decision to reopen schools with in-person instruction and chose instead to commence the school year with fully remote instruction. In a communication dated August 24, 2020, the Board identified categories of employees who would need to report to work in person despite the decision to conduct learning remotely. School clerks were required to report to work at schools on August 26, 2020, and clerk assistants and technology coordinators were directed to report to work on August 31, 2020.

The affected employees worked remotely 100% of the time during the shutdown beginning March 17, 2020, until they were ordered back to in-person work in late August. The CPS allowed requests for accommodations to continue working remotely for those with health or childcare concerns. However, the Union filed a grievance on behalf of the affected employees contesting the Employer’s decision to order 100% in-person work in CPS buildings as a violation of the safety and health provision contained in Article 14 of the CBA.

² Board Exhibit 10; (Sontag, 563-64, 569-70). *See*, ISBE June 23, 2020 Guidance on starting the 2020-21 school year; Governor Pritzker’s June 4 Executive Order authorizing limited in-person instruction is published at www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-40.aspx.

³ *See* Board Exhibit 5, July 31, 2020 *Preliminary Opening Framework*, announcing hybrid in-person instruction; Union Exhibit 20, CPS August 5, 2020 press release announcing the district has since decided to implement fully remote instruction, and stating: “The district will implement remote learning through the first quarter and work with CDPH to determine if it is safe to open with a hybrid learning model in the second quarter, which begins on November 9.”

Summary of Testimony

A summary of the relevant testimony presented during the hearing sufficient to understand the background follows. However, additional record testimony may be referenced in the Findings and Opinion section below.

The Union's Case

The Union called as its first witness Sarah Rothschild (“Rothschild”), an education policy analyst in the research department. Rothschild testified that she studied survey design during her graduate studies. She stated that the CTU emailed a survey to all members, the results of which Rothschild helped analyze. The survey was conducted between August 31 and September 11, 2020 and asked about safety measures conducted by CPS during the COVID-19 pandemic.

Rothschild asserted that she personally verified that every respondent is a CPS employee. She eliminated duplicate responses, as well as responses that indicated the employee had not personally entered the schools. Of the 310 nonduplicative responses, Rothschild testified that 92 were from school clerks and assistants, 25 were from technology coordinators, and 193 were from “others.”

After going through some of the results of the survey, Rothschild testified that she has studied CPS facilities for 20 years. She stated that about 60% of schools do not have a centralized heating and air conditioning system. She further testified that 496 schools were inspected in May or June of 2020 for airflow and ventilation. Of those 496 schools, 290 had an issue with their HVAC or window units. One-hundred twenty-five schools were identified

as needing work, and only three of the schools have received the required repairs. The rest are awaiting investigation, quotes, or funding.

The Union called as its second witness Jennifer Medina (“Medina”), a clerk assistant for a CPS high school. Medina testified that she went to the school building the last week of the 2019-2020 school year, which was voluntary. She officially came back to work on August 31 when the new school year began. She stated that CPS provided her with three cloth masks and that most people in the school wear their masks. She did state that security guards and lunch staff often wore their masks under their noses or chins. She has never been provided gloves, but they are at the security office if she needs them. She testified that there are seven offices around the main office where she works, and people are in the offices every day. Desks face each other and are 3-6 feet apart.

Medina went on to testify that when parents and students came to the school for student registration, there were no health checks. She asserted that her duties can be performed at home, except for obtaining transcripts before 2010. She works on Fridays in the building and the other days of the week she works from home. She offered to come to the school for any urgent matters, but otherwise, she handles any in-person duties on Fridays.

The Union called as its third witness Kala Christmas (“Christmas”), technology coordinator at a CPS high school. Christmas testified that while schools were shut down, she entered the building twice – on April 13 and June 15. Since the schools have reopened, she has been working from home due to a pending ADA accommodation. She has attended three virtual meetings with administrative staff who were in the school and not wearing masks. She testified that she is able to do her job tasks remotely, except for device audits. She stated that she would not feel safe working on site, since she feels people are not wearing masks or

practicing social distancing. She also testified that she heard via word of mouth that someone in the school contracted COVID-19.

The Union called as its fourth witness Lori Malo (“Malo”), school clerk for a CPS elementary school. Before returning to work, Malo testified that on August 25, she asked the principal if she could work in another office in the building. She was concerned with the safety measures in the main office, so the principal allowed her to work in the nurse’s office. Malo stated that she asked the principal about the cleaning schedule, but she had yet to receive an answer. From March 17 when schools closed to August 26 when she returned to work, Malo testified that she did not enter the school. She asserted that there is no job task she has not been able to perform from home. Malo further testified that she was given three cloth masks but no gloves or disinfecting wipes. She has seen no changes to the building to improve ventilation, nor has she seen anyone clean the nurse’s office.

The Union called as its fifth witness Deanna Myron (“Myron”), clerk at a CPS high school. Myron testified that since the schools shut down on March 17, she went on campus twice. She requested an ADA accommodation and has been working from home, due to her fiancé undergoing chemotherapy. She is able to perform all of her job tasks remotely.

The Union called as its sixth witness Cecilia Negron-Martinez (“Martinez”), clerk for a CPS elementary school. Martinez testified that she has been working at the school every day since August 26, and that she was issued three cloth masks. Other than the engineer, she testified that everyone she has seen has worn a mask. She explained that during student registration, she greeted parents and took documents from them, made copies, and then gave the documents back to them. She asserted that this could have been done via a drop box system where the parents dropped off the documents. She further testified that she interacts face to

face with anywhere from 10 to 30 people per day in the course of her job. She stated that the janitor disinfects the counters, but she has to disinfect the phones, her desk, and sometimes the bathroom. She testified that she would be able to do the majority of her work from home. If she needed a document, her principal would scan it and send it to her.

The Union called expert witness Dr. William James Mills, III (“Mills”), professor of environmental health and safety at Northern Illinois University. His PhD studies were in industrial hygiene and air quality, toxicology, environmental chemistry, and biostatistics. He is also a certified industrial hygienist. Mills testified that the scientific evidence supports the conclusion that the six-foot social distancing rule is inadequate to prevent the transmission of the virus in inadequately ventilated indoor spaces. Mills explained that the best way to escape the danger of COVID-19 infection is to eliminate it altogether by allowing the clerks and technology coordinators to work remotely.

Alternatively, if the hazard cannot be eliminated altogether (or a safe substitute found), Mills testified that the best means of control over the hazard are engineering controls to isolate people from the hazard. Engineered controls are more effective than administrative controls (changing the way people work) or personal protective equipment. The latter controls assume human perfection to implement them, whereas engineered controls do not. Appropriate engineering controls to reduce disease transmission indoors include those that increase ventilation and filter or purify the air. Mills also testified that employers have an obligation under the Occupational Safety and Health Act to perform a hazard assessment when they are determining what personal protective equipment might be necessary to protect workers.

Mills testified that anything less than 100% mask usage inside the schools was unacceptable. He also testified that it was the employer’s responsibility to ensure that

employees wore masks and that instruction regarding the use of face coverings was essential. He further testified that wellness checks are useless for asymptomatic carriers, since up to 50% of infected individuals are asymptomatic. Mills, upon reviewing CPS safety measures and their implementation, concluded that CPS schools are not currently safe. He testified that the “Everyday Guidelines” for principals did not provide safe and healthful working conditions. He asserted that the ventilation issues reported in the schools caused him great concern.

On cross examination, Mills testified that he has not been on a CPS campus in about seven years. He further testified that he does not know if his recommendations have been adopted by any regulatory agencies but that they have been used by several universities. He confirmed that he is not aware of any city code violations in CPS schools. He also confirmed that he is not a medical doctor but has taken courses in infectious disease.

The Board’s Case

The Board called as its first witness Michael Pacourek (“Pacourek”), CPS principal. Pacourek testified that the Board has provided hand sanitizer stations, masks, thermometers for check-in stations, and signage. He stated that mask usage is required unless an employee is in their office alone. He testified that neither of his school clerks have made any complaints in regard to safety protocols not being followed.

The Board called as its second witness Sandra Shimon (“Shimon”), principal at a CPS school and witness Medina’s supervisor. Shimon testified that her school has distributed masks to all employees and that in limited situations where individuals were not wearing masks properly or complying with social distancing, those individuals were redirected to do

so. Shimon further testified that her staff and individuals in her buildings are wearing masks routinely. Shimon also stated that the workspace for Medina and the clerk she works with were actually measured to ensure that there was more than 6 feet between their desks. Shimon testified that if Medina had raised any concerns with her, she would have immediately addressed them.

The Board called as its third witness Jennifer Rath (“Rath”), principal at a CPS school and witness Malo’s supervisor. Rath testified that Malo made her aware of concerns about her work location prior to her return to work, and that in response to those concerns, she met with Malo and her Union representative remotely for over an hour. During that meeting, Rath agreed to allow Malo to work in a private office, the nurse’s office, because of Malo’s concerns. Rath also provided Malo with her own phone and computer. Rath testified that she has not had any problems with individuals failing to adhere to proper safety protocols, including masking, in her building other than a few occasions where an individual's mask had slipped when they were talking. Malo never raised any concerns to Rath about compliance with safety protocols after returning to work. She testified that, in order for Malo to perform her duties from home, it required additional steps such as administration scanning and sending Malo physical documents which was extremely time consuming.

The Board called as its fourth witness Allison Tingwall (“Tingwall”), CPS principal and witness Myron’s supervisor. Tingwall testified that in order for clerk duties to be completed remotely, individuals must be physically present in the school building to take on portions of the school clerks’ job duties. She confirmed that Myron has not been in the building since March, with the exception of stopping in once over the summer to pick up materials. Tingwall explained that receipting of purchases is not a duty Myron can perform remotely.

The Board called as its fifth witness Clarence Carson (“Carson”), Chief Facility Officer. Carson testified that at the outset of the pandemic, the Board increased its custodial staffing and devised a custodial plan which included enhanced routine cleaning and disinfectant programs. He stated that the Board ordered 1.2 million face masks, three for every student and staff member. The Board also provided 40,000 dispensers of hand sanitizer throughout the entire district, as well as 40,000 tubs of disinfectant wipes.

On cross examination, Carson testified that there is no hazard assessment document with respect to the COVID pandemic and how it affects CPS. He further testified that no facilities assessment reports have been conducted since 2014. Although none of the documents provided to the Union contain hazard assessments specifically related to COVID, Carson testified that there have been assessments on air ventilation systems. Since COVID is an airborne illness, Carson stated that assessing ventilation has become a more urgent matter since the pandemic began. He also testified that CPS was following the Chicago Building Code with respect to ventilation.

The Board called as its sixth witness Dr. Alexandra Sontag (“Sontag”), and advanced practice registered nurse in the Office of Student Health and Wellness and holds a PhD in family practice as a nurse practitioner. Sontag testified that she serves as an emergency deputy for clinical affairs under CPS Chief Health Officer, Dr. Kenneth Fox to help with the school’s response to COVID-19. She explained that masks are required in the schools, as well as hygiene upon entry and exit and before meals. Daily health screenings are also required. She stated that hand sanitizer as well as signage has been placed throughout the school. She testified that she also works in contact tracing through reporting of positive cases. She asserted

that there are no general recommendations from the Center for Disease Control (“CDC”) for gloves because they do not eliminate disease transmission.

On cross examination, Sontag testified that she has not taken any courses in industrial hygiene. She stated that a cloth face covering is not considered personal protective equipment (“PPE”) under OSHA standards. She confirmed that 250 people associated with CPS have tested positive for COVID. Of those 250 positive cases, 123 were deemed actionable by CPS.⁴ Sontag further testified that about six or seven employees are involved in contact tracing. During the shutdown of schools in March, Sontag stated that clerks were not deemed essential employees. She further testified that the Department of Public Health encourages remote work when possible. She also acknowledged that the risk of contracting the virus decreases with decreased interactions. Sontag went on to testify that CPS does not have a testing program in place for teachers or students.

POSITIONS OF THE PARTIES

The Union argues that:

- CPS must provide a “safe and healthful” workplace for its employees.
- Reporting to work inside CPS school buildings increases the danger of infection by COVID-19, an airborne, highly communicable, deadly, and still not fully understood disease.
- The only way to eliminate the risk of COVID-19 infection and death is for school clerks, school clerk assistants, and technology coordinators to work remotely.

⁴ According to the CPS School Reopening webpage as of today, the COVID-19 tracker reveals that the number of positive cases increased to 339 since the September hearing dates even with remote learning still in place. *See*, <https://www.cps.edu/school-reopening-2020>.

- Subjecting these employees to increased risk of COVID-19 infection for work that can be performed remotely does not fulfill CPS’s contractual promise that its employees work in “safe and healthful conditions.”
- The Union acknowledges that some clerks and technology coordinator duties can only be performed inside the school building, but it is also clear that these in-person duties are limited and vary by school and particular clerk duties.
- COVID-19 is a deadly disease with significant community spread, afflicting people of color worse than the general population. The largest group of employees involved in this grievance – school clerks and school clerk assistants – are predominantly people of color. Age is also a risk category for COVID-19; 255 of 743 employees (34.3%) are age 50 or older, and 42 (17.3%) are age 65 or older.
- COVID-19 is transmitted principally by airborne aerosols, which requires either the elimination of the hazard by allowing remote work or engineered solutions to prevent employee exposure.
- Dr. William Mills, an expert in the airborne transmission of health hazards and in industrial hygiene, testified that the scientific evidence supports the conclusion that the six-foot social distancing rule is inadequate to prevent the transmission of the virus in inadequately ventilated indoor spaces.
- The government recommends, and CPS acknowledges and agrees, that work be conducted remotely where remote work is an option.
- Where work must be conducted indoors, proper ventilation is a critical engineered control.
- CPS measures to make schools safer are insufficient to mitigate the risk of COVID-19 infection. CPS has not conducted the necessary hazard assessment to determine if schools are “safe and healthful” workplaces. The record here shows that CPS’s response to the coronavirus to date has mostly been limited to the least effective measures as identified in the Hierarchy of Controls – administrative controls and PPE.
- Despite its efforts, CPS cannot establish that school buildings are safe and healthful.

The Employer argues that:

- The Union has the burden of proof in establishing facts that indicate a contract violation occurred. They must show that the Board’s actions were arbitrary or capricious.

- The Union failed to establish the existence of any unsafe and unhealthy working conditions. The Union’s survey is unreliable hearsay evidence that does not provide a representative sample of school clerks, school clerk assistants, and technology coordinators working throughout the district sufficient to justify deeming the entirety of CPS’ 550+ schools “unsafe” or to determine that the safety and cleaning protocols that have been put in place are not being followed.
- While the Union acknowledged at the hearing that several responses were submitted more than once, there are even more significant issues with the integrity of the remaining responses.
- The Union’s own witness, Sarah Rothschild, admits that the entirety of the survey responses was self-reported. Rothschild acknowledged that she did not take any action to verify that the information included in the responses was true or accurate, but rather, simply relied on the respondents to be honest in their responses.
- By refusing to provide the Board with identifying information, the Union clearly was attempting to prejudice the Board’s ability to adequately respond to or rebut the allegations in this case, let alone remedy any purported unsafe condition.
- The few anecdotal accounts of supposed intermittent failure to follow safety protocols were provided by witnesses who had either spent little to no time in the school building, or whose assertions were credibly rebutted by their school’s principal.
- None of the Union’s witnesses provided evidence of unsafe and unhealthy working conditions. The Union must establish that the school clerks are working in unsafe and unhealthful working conditions, not that they have concerns about the possibility of working in unsafe conditions.
- Working conditions are safe and healthful because the Board has complied with or exceeded all requirements from the Illinois Department of Public Health, the Chicago Department of Public Health, and the Illinois State Board of Education.
- The Board also put in place numerous health and safety measures, including requirements that masks must be worn in all buildings, that social distancing of at least six feet be maintained inside school buildings, cleaning protocols, addressed employee hygiene safety concerns by providing employees with various types of PPE, including face shields, gowns, and over 1.2 million cloth masks. The Board embarked on an aggressive marketing campaign by acquiring and installing approximately 1.5 million signs which remind staff of the requirement to wear masks, maintain social distance, and practice hand hygiene.
- When Dr. Mills was not testifying about his own personal beliefs as it related to the COVID-19 virus, he was providing opinions and recommendations that were

inapposite of those issued by the public health agencies that govern CPS, the City of Chicago, and even the State of Illinois at large. He also provided opinions about the state of CPS schools despite the fact that he has not stepped foot into any CPS school in over seven years.

- A finding that conditions in CPS Schools are not safe and healthful would subject CPS to a different and stricter standard than all other schools and employers in the state of Illinois. The standards that govern re-opening of schools are those promulgated by ISBE, IDPH and CDPH, with which the Board has unquestionably complied.
- School clerks, school clerk assistants, and tech coordinators cannot adequately perform their duties remotely. CPS has managerial authority to direct its employees to perform work at a specified location.
- Injunctive relief is inappropriate, and any declaratory relief should only be imposed on an individual school basis.

FINDINGS AND OPINION

The agreed upon issue to be resolved is whether the Board violated Article 14-1 of the CBA which requires the CPS to provide a safe and healthful workplace. Screening protocols, as referenced in the underlying grievance, is interpreted broadly to include health screenings, ventilation, air purification, PPE and the like since, as will be discussed in detail below, all are essential to providing a safe and healthful workplace in the context of a global pandemic.

I. BURDEN OF PROOF

As this is a claim for an alleged contract violation, the Union has the burden of proving that the Employer failed to provide safe and healthful working conditions, as required by Article 14-1 of the CBA. The *safe* and *healthful* terminology is set forth in the preamble of the U.S. Occupational Safety and Health Act (“OSH Act”). It stands to reason that the phrase as used in the CBA should be interpreted consistent with the OSH Act. This is particularly true since the initial appearance of the wording in the CBA between the parties coincides with the passage of the OSH

Act in 1970.⁵ In pertinent part, the Illinois version of the OSH Act mirrors the duties and standards required of Illinois employers. Thus, if the Union can establish that the CPS has not acted consistent with statutory requirements, it has proven unsafe and unhealthful working conditions. After considering the record evidence and arguments of the parties whether specifically addressed or not, for the reasons set forth below, the Union has met this burden.

II. THE EMPLOYER’S CONTRACTUAL DUTY

Illinois OSH Act Imposes a Duty Upon the CPS to Provide Safe and Healthful Conditions

While there is *guidance* on the re-opening of schools from various public agencies, it is the OSH Act and its Illinois counterpart that governs the *regulation* of safe and healthful conditions in Illinois workplaces, including public employers such as CPS⁶. As referenced above, the terminology was adopted in the CBA between the parties when the OSH Act was enacted. The duties and standards provisions of the OSH Act are mirrored in the Illinois OSH Act. Therefore, it is reasonable to conclude that the contractual duty in the CBA to provide a safe and healthful workplace is appropriately analyzed based upon requirements in the Illinois OSH Act. The Illinois OSH Act (“Act”) in Section 20 (a) states, in relevant part, that:

Every public employer must provide **reasonable protection** to the lives, health, and safety of its employees and must furnish to each of its employees employment and a workplace which are **free from recognized hazards** that cause or are **likely to cause death or serious physical harm** to its employees. (Emphasis added).

⁵ See Union Exhibits 6 and 7.

⁶ See 820 ILCS 219/20.

It continues in subpart (b) that “[e]very public employer must comply with the occupational safety and health standards promulgated under this Act. Those standards in connection with “harmful physical agents” must be those

which **most adequately ensures, to the extent feasible**, on the basis of the **best available evidence**, that no employee will suffer **material impairment of health or functional capacity** even if the employee has regular exposure to the hazard dealt with by the standard for the period of the employee's working life. (Emphasis added).

Thus, CPS is required to provide reasonable protection against hazards; furnish a workplace free from recognized hazards; impose standards; and follow protocols that ensure, to the extent feasible, the affected employees will not suffer a material impairment to their health or functional capacity. Such standards and protocols must be based on the best available evidence. The following analysis examines the requirements of the Act and whether CPS has fulfilled its duty to meet those requirements.

A Recognized Hazard Exists

In order to provide a safe and healthful workplace, protection from recognized hazards must exist. There can be no dispute that a recognized hazard exists since the spread of COVID-19 began in the United States. COVID-19 is a deadly and dangerous disease with significant community spread which as of this writing, has not been controlled. As of the hearing, CPS reported that 258 persons present at CPS buildings have contracted COVID-19 since March 2020, and eight have died from it. Of these cases, 123 were considered “actionable.” Board witness Sontag explained that “actionable” is a case “requiring notification because the person was present in the building while contagious, thus resulting in either close contacts or required cleaning and disinfection.”⁷ Since the hearing, the parties have informed the undersigned that cases have

⁷ Tr. at 546.

increased but in response, the CPS has taken steps to quarantine and disinfect areas from known cases. It is common knowledge that the virus has not been eradicated, no vaccine is available to the public and that community spread is on the rise in Chicago and other areas across the country. Thus, a recognized hazard currently exists.

The Hazard May Cause Death

The Union placed in the record recent evidence showing the pandemic's impact in that nearly 6,500,000 cases nationwide and nearly 200,000 deaths as of the hearing date had occurred.⁸ In Chicago, 8.1% of the tested population are positive for COVID-19, and 20,609 people have contracted COVID-19 just since July 1, 2020.⁹

Other evidence submitted by the Union shows that 19% of COVID-19 cases require hospitalization, 6% of COVID-19 patients are admitted to intensive care, and the overall COVID-19 fatality rate is 2.3%.¹⁰ Further, COVID-19 can result in prolonged illness even among persons with milder outpatient illness, including young adults.¹¹

People of color face even greater risk from the pandemic. Current data suggest a disproportionate burden of illness and death from COVID-19 among people of color.¹² Dr. Allison Arwady, commissioner of the Chicago Department of Public Health stated on August 31, as the affected employees were being directed to report in person that

We are seeing almost half of our new cases in Latinx Chicagoans, that's been our biggest number in terms of cases, and we are seeing 43% across this whole time period of deaths being in Black Chicagoans. . . . So we're seeing more deaths in Black Chicagoans and more cases in Latinx Chicagoans.¹³

⁸ Union Exhibit 1.c., bates 0005-07.

⁹ Union Exhibit 1.a., bates 0001-02.

¹⁰ Union Exhibit 1.d., bates 0008-17.

¹¹ Union Exhibit 1.e., bates 0018-24.

¹² Union Exhibit 1.f., bates 0025-29.

¹³ Union Exhibit 1.h., bates 0033.

The record establishes that the largest group of employees involved in this grievance – school clerks and school clerk assistants – are predominantly people of color. Of 729 school clerks and school clerk assistants whose race is known, 494 (67.7%) are either Black (239) or Latinx (255).¹⁴

Age is also a risk category for COVID-19. The CDC statistics show that persons aged 50 - 64 are four times more likely to be hospitalized for COVID-19 and thirty times more likely to die from COVID-19 than 18-29 year old individuals. And the odds of hospitalization and death increase dramatically thereafter, reaching five times higher hospitalization rates and 90 times higher death rate for persons aged 65-74.¹⁵ Again, the school clerks and school clerk assistants are overrepresented in these categories, as 255 of 743 employees (34.3%) are age 50 or older, and 42 (17.3%) are age 65 or older. This evidence supports the conclusion that to the extent they meet the above-referenced demographics, the affected employees are particularly vulnerable to a deadly hazard.

Evidence Shows that the Virus is Transmitted Through the Air in Inadequately Ventilated Spaces

Dr. William Mills, an expert in the airborne transmission of health hazards and in industrial hygiene, testified that the scientific evidence supports the conclusion that the six-foot social distancing rule is inadequate to prevent the transmission of the virus in inadequately ventilated indoor spaces. This conclusion is shared by many other scientists. For example, in an article published this year by the Oxford University Press for the Infectious Diseases Society of America,

¹⁴ Union Exhibit. 8.

¹⁵ Union Exhibit 9.

scientists Lidia Morawska and Donald K. Milton, along with a plethora of other scientific signatories, in addressing SARS-CoV-2 (COVID-19) explained “that airborne transmission was the most likely mechanism explaining the spatial pattern of infections.”¹⁶ The authors explain further that “[t]his problem is especially acute in indoor or enclosed environments, particularly those that are crowded and have inadequate ventilation relative to the number of occupants and extended exposure periods.”¹⁷ They provide the example that “airborne transmission appears to be the only plausible explanation for several superspreading events investigated which occurred under such conditions e.g., and others where recommended precautions related to direct droplet transmissions were followed.”¹⁸

In addition, the U.S. Environmental Protection Agency (“EPA”) agrees with this science.

In a FAQ document dated July 16, 2020, the EPA explained:

There is growing evidence that this virus can remain airborne for longer times and further distances than originally thought. In addition to close contact with infected people and contaminated surfaces, there is a possibility that spread of COVID-19 may also occur via airborne particles in indoor environments, in some circumstances beyond the 2 m (about 6 ft.) range encouraged by social distancing recommendations.¹⁹

Prestigious professional associations agree with the science, as well. For example, the American Society of Heating Refrigerating and Air Conditioning Engineers, (“ASHRAE”) states: “Transmission of SARS-CoV-2 through the air is sufficiently likely that airborne exposure to the virus should be controlled. Changes to building operations, including the operation of heating,

¹⁶ Union Exhibit 2 b., bates 0041.

¹⁷ *Id.*, bates 0042.

¹⁸ *Id.*

¹⁹ Union Exhibit 2.a., bates 0036.

ventilating, and air-conditioning [HVAC] systems, can reduce airborne exposures.”²⁰ Mills also described the specific studies that supported these conclusions.

I find substantial evidence to accept the conclusion that the virus is airborne and transmitted by small droplets and can cause infections in inadequately ventilated indoor spaces beyond the social distancing protocols of six feet in an indoor setting and must be controlled by the Employer to the extent feasible.

The Affected Employees Work Indoors and Interact with the Public

Except for during the shutdown, the affected employees have performed their duties in the offices of their assigned school. Particularly relevant at the time the grievance was filed, is the duty of student registration which takes place, in large part, at the beginning of the school year but can occur at other times throughout the school year. School clerks assist with enrollment and registration of students, which involves accepting and logging the requisite student enrollment paperwork from CPS families. Unlike years past, the beginning of this school year has been marked by an additional event – distribution of remote learning technology devices for students who will be attending school remotely until at least November of 2020. School clerks, in conjunction with technology coordinators and other school staff, assist in facilitating this distribution by helping with necessary tracking of device distribution.

In addition to these responsibilities, clerks also handle a litany of other duties, including, but not limited to, answering telephone calls, receiving, sorting and responding to general school mail and email, assisting with distributing instructional material to students, processing procurement requests, ordering, bill paying, processing student transfer requests and receiving and

²⁰ Union Exhibit 5.d, bates 0673.

receiving deliveries to the school before distributing those delivered materials to various areas around the school.

Similar to school clerks, school clerk assistants help facilitate school clerk duties by assisting with the above responsibilities and processing clerical duties such as data entry and student transfer requests. Technology coordinators assist with managing technology devices at CPS schools, including technical support, password management and device audits. Union witness Negron-Martinez testified that she interacts with 10-30 people per day in the performance of her duties. The evidence supports the conclusion that because of the physical interaction with the public and others, the nature of their duties and the indoor working environment, in general, provide an inherent risk of exposure to the hazard.

The CPS is Required to Use the Best Evidence to Ensure a Workplace Free from Recognized Hazards

CPS standards and protocols must be implemented using the best evidence available. Given the on-going nature of the hazard that is presented by the virus, there is no way that the CPS can guarantee a workplace completely free of the hazard. That being the case, it is incumbent upon the CPS to use the best evidence available to minimize worker exposure to the risk presented by COVID-19, as required by the Act.

To this end, Mills testified about the Hierarchy of Controls, which is used by safety experts to determine the best ways to control the danger of workplace hazards. The Hierarchy of Controls is used by the National Institute of Occupational Safety and Health, which is part of the CDC. The Hierarchy of Controls provides five (5) methods for protecting workers from hazards which are elimination (physically remove the hazard), substitution (replace the hazard), engineering controls

(isolate people from the hazard), administrative controls (change the way people work) and PPE.²¹ Given these methods, a review of the best available evidence for determining the appropriate level of control in the instant case is required.

The Best Evidence of Standards Includes Public Health Guidance and Expert Testimony

The best available evidence in the record to adequately ensure no employee will suffer material impairment of health or functional capacity is reflected in the public health guidance and expert testimony. As it relates to the instant grievance, this evidence confirms that working remotely, where possible, along with appropriate administrative and engineering controls are reasonable protective measures. And where remote work is not possible, the evidence provides standards and protocols that are required for a safe and healthful workplace.

Public Health Guidance

The Board relies heavily on the joint guidance issued by the Illinois State Board of Education (“ISBE”) and the Illinois Department of Public Health (“IDPH”).²² Throughout that guidance, school administrators are directed to refer to protocols and recommendations issued by the CDC. In the CDC’s *Interim Guidance for Business and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, dated May 6, 2020, the agency recommends in establishing policies and practices for social distancing, that employers implement, among other things, flexible worksites (e.g., telework).²³ It repeats that recommendation for employees with an elevated risk for severe illness. It states that employers should “[s]upport and encourage options

²¹ Union Exhibit 4.c.ii., bates 0568-0569.

²² Board Exhibit 10, bates 112.

²³ Union Exhibit 4.a.i., bates 0079.

to telework, if available” and continues that employers should “[o]ffer flexible options such as telework to employees. This will eliminate the need for employees living in higher transmission areas to travel to workplaces in lower transmission areas and vice versa.”²⁴

Additionally, in his June 26, 2020 Executive Order, Illinois Governor Pritzker set public health requirements for businesses, nonprofits, and other organizations. He recommended that all businesses must “continue to evaluate which employees are able to work from home, and are *encouraged to facilitate remote work* from home when possible”²⁵(Emphasis added). This guidance is reasonably interpreted to include school office buildings.

Furthermore, the Chicago Department of Public Health (“CDPH”) also concurs in this assessment. In its recommendation for opening Chicago schools, *Be Safe. PK-12 Education, Chicago* (2020), CDPH encouraged “Operational resilience and monitoring,” which includes “Flexibility with sick leave and remote work (when possible).”²⁶ This guidance is also consistent with CPS’s commitment in its *School Reopening 2020: Final Framework* that the “health and wellness of students and staff is our highest priority”²⁷ and policy to manage the prevention and spread of communicable diseases *so as to provide all students and staff with the healthiest possible learning and work environments.*”²⁸ (Emphasis added). Even in its communication with the Union regarding health protocols issued on August 25, 2020, (the day before most of the affected employees were to report to in-person work), CPS acknowledged its adherence to Cook County Department of Public Health Mitigation Guidance stating:

NOTE: Mitigation guidance is specific to suburban Cook County, not the city. Still, the Board meets (sic) this criteria that organizations should ‘institute remote work

²⁴ *Id.*, bates 0078-79.

²⁵ Union Exhibit 4.a.iii. bates 93.

²⁶ Union Exhibit 4.a.iv., bates 0100.

²⁷ Union Exhibit 4.a.v., bates 0120.

²⁸ Union Exhibit 4.c.i., bates 558.

for high-risk individuals and continue to support telework for as many workers as possible.’²⁹

Currently, CPS allows its teachers and most other employees to work remotely. CPS witness Sontag acknowledged the above-referenced CDPH guidance encouraging remote work when possible, testifying that “the risk is real ... the less interactions we can have does influence risk.”³⁰

In sum, the resounding view of public policy is that to minimize the risk of exposure to the COVID-19 hazard and to reduce community spread, working remotely where possible should be supported by employers. This is compelling evidence. Thus, unless it is not possible for the affected employees to perform their duties remotely, based on public health guidance, they should be allowed to work remotely to the greatest extent feasible.

Expert Testimony of Dr. Mills

Expert testimony in the record provides additional evidence of the standards and protocols to be adopted by CPS and which align with the Act. The record reflects that there are approximately 9,000 staff currently working in-person in CPS buildings. Substantial evidence of the risk to working indoors was provided by the testimony of Industrial Hygienist Dr. William Mills. Mills testified that CPS should apply the “precautionary principle” to the implementation of workplace protections. He explained that many unknowns still exist about the disease, such as the viral load necessary to cause an infection; the vulnerability of certain populations to infection and severe illness; the effects of the disease on cardiac function; and the effects of the disease on children. Mills explained that, where a hazard exists that has not yet been quantified, extra steps should be

²⁹ Board Exhibit 1, bates 5.

³⁰ Tr. at 565.

taken for safety until the hazard risk is fully known. Mills' expert opinion is in keeping with the statutory requirement to eliminate risk to the extent feasible.

Where it is not possible to work remotely, Mills advised that hazard assessment and air filtration controls should be implemented before requiring in-person work. Mill testified that proper indoor ventilation greatly reduces the risk of disease transmission. His testimony is supported by scientific studies referenced in the Oxford University Press publication, as referenced above. The authors note that using the "precautionary principle," every potential pathway to slow the spread of COVID-19 must be addressed and they identify providing "sufficient and effective ventilation (supply clean outdoor air, minimize recirculating air) particularly in public buildings, workplace environments, schools, hospitals and aged care homes" as a means of slowing viral spread.³¹

Mills' expert opinion is also consistent with CDC guidance that employers should "[c]onduct a thorough hazard assessment of the workplace to identify potential workplace hazards that could increase risks of COVID-19 transmission."³² Among the many recommendations made by the CDC and which have been largely implemented by CPS, the CDC also recommends improving central air filtration as an appropriate engineering control.³³ Hazard assessments and air filtration will be discussed in more detail below. However, neither of these controls have been appropriately implemented by CPS in the context of the instant grievance.

The expert testimony, scientific data, along with guidance provided by public health agencies and CPS policy taken together proves to be the best evidence in determining the appropriate health protocols and controls that should be in place in public school buildings in order

³¹ Union Exhibit 2b, bates 0042.

³² Union Exhibit 4.d., bates 570.

³³ *Id.* at 571.

to minimize the risk of exposure to the hazard for the affected employees. That evidence supports the conclusion that maximizing remote work arrangements is required unless hazard assessment, air quality controls along with administrative controls have been appropriately implemented. Next, the inquiry turns to whether the Employer has fulfilled its duty to implement to the extent feasible, appropriate engineering, administrative, and other controls in order to provide safe and healthful working conditions.

III. THE EMPLOYER HAS NOT FULFILLED ITS DUTY UNDER THE CBA

The Board Has Not Established that it Provided Reasonable Protection to the Extent Feasible for the Affected Employees

The agreement to provide a safe and healthful workplace as required by Article 14-1 of the CBA stems from the Illinois OSHA's duty clause which requires, "[e]very public employer [to] provide reasonable protection to the lives, health, and safety of its employees and [to] furnish to each of its employees employment and a workplace which are free from recognized hazards that cause or are likely to cause death or serious physical harm to its employees."³⁴ As confirmed in this Act and CDC guidance discussed above, the CPS has the burden of establishing that it has provided reasonable protection to the affected employees which most adequately ensures, to the extent feasible, no material impairment to their health or functional capacity. It has not met that burden.

While the CPS took significant steps toward implementing some protections (hand sanitization stations, signage, spacing of desks, self-health screenings, expanded cleaning routines, increased air exchanges, etc.), the measures simply do not go far enough to be deemed reasonable

³⁴ See 820 ILCS 219/20, Sec. 20. Duties of employers and employees.

given the gravity of the potential risk of exposure to the hazard when working in public school buildings. Reasonable protections include considering the methods of transmission for this highly infectious and deadly disease which include its airborne nature and mitigating the risk of exposure to the extent feasible to fulfill the contractual promise of providing a safe and healthful workplace. The public health guidance upon which the Board relies, includes other reasonable protective measures that were not implemented in CPS buildings. It is for this reason that the Board has fallen short of its commitment to provide a safe and healthful workplace. The discussion that follows addresses these shortcomings.

The Administrative Controls Implemented by CPS Do Not Go Far Enough to Provide Reasonable Protection

Working Remotely

Working remotely is a reasonable and feasible protective measure, where possible in the sense that it eliminates exposure to the hazard while in a public school building. Mills explained that the best way to escape the danger of COVID-19 infection is to eliminate it altogether by allowing the clerks and technology coordinators to work remotely. However, the Board has taken a position adverse to this opinion with respect to the affected employees.

As an initial point, the Board has already determined that it is not safe to conduct learning in-person using the same public health guidance it advances here. Logic necessarily dictates that the determination has been made by the Board that in-person activities in CPS school buildings for non-essential personnel poses enough of a risk that activity inside of CPS school buildings should be minimized. However, it is not clear why the affected employees who have not been designated as essential (nor has any evidence been introduced to establish they are essential) are

being held to a different standard. There has been no showing why it would be unsafe for students and teachers, yet safe and healthful for the affected employees to conduct 100% of their duties in person where they previously performed mostly all of their duties remotely.

That aside, it is undisputed that the duties performed by the affected employees take place indoors. It is well established that indoor activities during the COVID-19 pandemic places individuals at greater risk for contracting the disease. Allowing the affected employees to work remotely to the greatest extent possible would be one way of providing reasonable protection against the hazard. This option was confirmed by expert witness Mills as a viable means of fulfilling the obligation and promise of a safe and healthful workplace. Yet, in minimizing the ability to work remotely instead of maximizing that arrangement, CPS fails to provide reasonable protective measures to the affected employees.

Engineering Controls: Air Filtration and Purification

If the hazard cannot be eliminated altogether (or a safe substitute found), the best means of control over the hazard are engineering controls (discussed below) to isolate people from the hazard. Engineering controls are more effective than administrative controls (changing the way people work) or PPE because the latter controls assume human perfection to implement them, whereas engineered controls do not.³⁵

For those who work in buildings, appropriate engineering controls include those that increase ventilation and that filter or purify the air. Mills testified that a hazard assessment is the standard for determining the air quality in a building. Additionally, the CDC guidance referenced in the joint ISBE and IDPH document instructs employers to conduct hazard assessments. It

³⁵ Mills, 248.

explains that updated recommendations for employers responding to COVID-19, including those seeking to resume normal or phased business operations include “conducting a hazard assessment of the workplace.”³⁶ A hazard assessment requires a written certification per OSHA regulations.³⁷

The EPA sets forth the following actions which should be taken to assess and improve building ventilation systems:

The layout and design of a building, as well as occupancy and type of heating, ventilation, and air conditioning (HVAC) system, can all impact potential airborne spread of the virus. Although improvements to ventilation and air cleaning cannot on their own eliminate the risk of airborne transmission of the SARSCoV-2 virus, EPA recommends precautions to reduce the potential for airborne transmission of the virus. These precautions include increasing ventilation with outdoor air and air filtration as part of a larger strategy that includes social distancing, wearing cloth face coverings or masks, surface cleaning and disinfecting, handwashing, and other precautions.³⁸

In addition, the EPA described the means that can be used to purify indoor air to reduce the transmission of the virus:

Air cleaners and HVAC filters are designed to filter pollutants or contaminants out of the air that passes thru them. Air cleaning and filtration can help reduce airborne contaminants, including particles containing viruses. Portable air cleaners (also known as air purifiers) may be particularly helpful when additional ventilation with outdoor air is not possible without compromising indoor comfort (temperature or humidity), or when outdoor air pollution is high.³⁹

Furthermore, ASHRAE, the professional society of experts in ventilation systems and recognized by the CDC⁴⁰ has published guidance regarding COVID-19 and ventilation systems. In its publication *Reopening Schools and Universities*, ASHRAE takes the position that “[t]ransmission of SARS-CoV-2 through the air is sufficiently likely that airborne exposure to the virus should be controlled. Changes to building operations, including the operation of heating, ventilating, and air-

³⁶ <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

³⁷ Tr. at 267. See, 29 C.F.R. 1910.132(d)(2).

³⁸ Union Exhibit 2.a., bates 0036.

³⁹ *Id.*, bates 0038.

⁴⁰ Union Exhibit 4d, bates 570.

conditioning [HVAC] systems, can reduce airborne exposures.”⁴¹ ASHRAE recommends using the highest Minimum Efficiency Reporting Value (MERV) applicable for HVAC units. A MERV 13 filter is the recommended minimum if equipment can accommodate the pressure drop and MERV 14 is preferred. And where a system cannot support these filters, HEPA/UV machines should be provided.⁴²

Guidance provided by the EPA, ASHRAE and CDC regarding hazard assessments and the use of air purification and filtration in school ventilation systems, provide overwhelming evidence about engineering controls that establish reasonable protective measures to provide a safe and healthful workplace. The record evidence does not support the conclusion that CPS has sufficiently implemented these protective measures.

Administrative Controls

Administrative controls are among the recommended protective measures advanced by public health agencies like the CDC. Administrative controls refer to changing the way people work e.g. distancing, health screenings, hand hygiene. Alone, these controls do not provide sufficient protection for working inside of public buildings because human error is a factor.

The record evidence reflects that CPS has broadly implemented a great deal of the administrative protocols recommended by public health agencies across all schools. This includes requiring the use of face coverings (each employee and student has or will be provided with three); prohibiting more than 50 individuals from gathering in one space; requiring social distancing of at least 6 ft., as much as possible; requiring that schools conduct symptom screenings and

⁴¹ Union Exhibit 5.d., bates 0673.

⁴² Union Exhibit 5.d., bates 0684-0685.

temperature checks or require that individuals self-certify that they are free of symptoms before entering school buildings; installing sneeze guards⁴³; providing hand sanitizing stations throughout buildings; signage and an increase in schoolwide cleaning and disinfection. While administrative controls provide some protection, given the airborne nature of the hazard, implementation of administrative controls without the proper hazard assessments and air filtration/purification in place, do not go far enough to fulfill the Employer’s contractual promise of a safe and healthful workplace.

Personal Protective Equipment (PPE)

Although the ISBE/IDPH Joint Guidance the Board relies upon provides requiring the “appropriate” PPE (e.g. N95), there is no evidence that this measure has been widely imposed, if at all.⁴⁴ Drs. Mills and Sontag confirmed that a cloth mask is not PPE because it does not protect the wearer from contracting the virus.⁴⁵ While cloth masks may prevent the spread, the N95 mask protects the wearer who may be exposed due to human error associated with non-compliance with administrative protocols or other airborne exposure. Based on the record evidence, this level of PPE is feasible protection for those that must work with the public.

There is Insufficient Evidence to Determine that All School Buildings are Safe and Healthful for the Affected Employees

As discussed above, COVID-19 is transmitted by droplets and airborne aerosols, which under the Act requires either the elimination of the hazard (which in this case would be remote

⁴³ At the time of the hearing, Board witness Carson testified that plexiglass (sneeze) guards had been delivered to all schools to be installed in administrative areas. However, his testimony was not clear as to whether he had personal knowledge of them all being installed. Tr. at 484-485.

⁴⁴ Board Exhibit 10 ISBE/IDPH Joint Guidance, Appendix F.

⁴⁵ Tr. at 241, 242 and 544.

working arrangements for the affected employees) or engineering controls, administrative controls and PPE to minimize employee risk of exposure to the hazard. For the reasons set forth below, it is concluded that the Board has provided insufficient evidence that the appropriate controls have been implemented to the extent feasible in each school building where the affected employees are required to work. Therefore, given the infectious and contagious aspects of COVID-19, the Board has not provided safe and healthful working conditions as required by the CBA where it minimizes the ability of the affected employees to work remotely.

Hazard Assessments Should be Conducted

No hazard assessments have been conducted in CPS schools since the onset of the pandemic. While Chief Facilities Officer Clarence Carson testified that the Board increased its custodial staffing and devised a custodial plan which included enhanced and more frequent routine cleaning and disinfectant programs, and increased the frequency with which ventilation filters are replaced and air exchanges in buildings occur, he also confirmed that CPS performed no hazard assessments; no other risk assessments; no ventilation study; and has implemented no air purification measures as recommended by the CDC since the onset of the pandemic.

Ventilation Systems Must be Working Properly

The record evidence reveals a state of disrepair with a significant number of CPS ventilation systems. Part of the hazard evaluation recommended by the CDC is to “[e]nsure that ventilation systems in your facility operate properly” and “[i]mprove central air filtration: increase air filtration to as high as possible without significantly diminishing design airflow.”⁴⁶ The relevant

⁴⁶ Union Exhibit 4.d.i., bates 0570-71.

authorities stress the importance of proper air circulation and purification. While some intermittent repair work is to be expected across such a large school district, at the time of the hearing, the record evidence showed a significant number of the CPS HVAC and ventilation systems in disrepair.

CTU Analyst Sarah Rothschild provided relevant testimony on this point. Rothschild testified without contradiction that the oldest CPS school building was built in 1893, that approximately 60% of CPS school buildings were built before 1950, and the majority of these pre-1950 school buildings lack a centralized HVAC system to circulate, replenish and/or purify the air. Overall, approximately 60% of CPS schools utilize window air conditioning and thus have no centralized ventilation system.

Rothschild reviewed data provided in spreadsheets generated by CPS detailing the ventilation inspection, maintenance and repairs at CPS schools which were entered into the record as Union Exhibits 17 and 18. The data in the spreadsheets cover 496 CPS schools that were inspected in May and June, 2020. Rothschild's review of the data showed that 58% of the schools (290 of the 496 schools) have an air circulation component that is non-functioning. From this data, Rothschild also concluded that of HVAC system work needing to be completed, only three of one-hundred twenty-five repairs been completed. Rothschild's analysis was uncontroverted. Having ventilation systems in disrepair to the extent reflected does not provide a protective work environment where an infectious and deadly virus can be transmitted through the air.

There is Limited Evidence of Sufficient Air Filtration and Purification Measures

The record reflects limited use of the appropriate air purification measures in place. CDC guidance recommends, among other things, increased air filtration to as high as possible without diminishing design airflow and the use of portable high-efficiency particulate air (HEPA)

fan/filtration systems to enhance air cleaning.⁴⁷ As referenced above, MERV 13 filters is the recommended minimum by ASHRAE. Carson acknowledged that MERV13 filters are recommended for removing Coronavirus particles from the air, in addition to increased airflow, but he did not know how many schools are equipped with them. However, Rothschild testified that, based on her review of CPS's records contained in Union Exhibit 17, she was able to determine that only 7% of filters used at CPS are rated MERV 13 or better.⁴⁸

Additionally, the EPA informs us that

When used properly, air cleaners and HVAC filters can help reduce airborne contaminants including viruses in a building or small space. By itself, air cleaning or filtration is not enough to protect people from exposure to the virus that causes COVID-19. When used along with other best practices recommended by CDC and others, filtration can be part of a plan to protect people indoors.⁴⁹

Using air filtration and purification measures as discussed above is a reasonable and feasible method for ensuring that the workplace for the affected employees is safe and healthful. However, there is limited evidence of sufficient measures being taken in this regard. its use in CPS school buildings.

In sum, given the airborne nature of this contagious and infection disease as explained in great detail above, engineering controls including air filtration and purification provide the highest level of protection for workers and must be in place for in-person work. As Mills opined, the CPS must carry out a hazard assessment and provide appropriate application of hierarchy of controls for those who absolutely have to work in person. To the extent this has not been done and no showing was made that it is not feasible, there is insufficient evidence to determine all schools are safe and healthful for the affected employees.

⁴⁷ Union Exhibit 4di. at bates 0571.

⁴⁸ Tr. at 594-95.

⁴⁹ Union Exhibit 2a. bates 0038.

CONCLUSION

Based on the foregoing, I find reporting to work inside CPS school buildings at this time, increases the danger of infection by COVID-19, an airborne, highly communicable, deadly, and still not fully understood disease. The only way to eliminate the risk of COVID-19 infection and death is for school clerks, school clerk assistants, and technology coordinators to work remotely. Although the Board has made efforts to mitigate the risk, subjecting these employees to increased risk of COVID-19 infection for work that can be performed remotely does not provide reasonable protection to these employees, to the extent feasible, and fails to fulfill CPS's contractual promise that its employees work in safe and healthful conditions. Therefore, Article 14-1 of the CBA has been violated.

Further, on this record, it cannot be determined that each school building is safe and healthful to work in without evidence that the additional reasonable protective measures referenced in the Opinion above have been implemented. As expert witness Mills explained, according to the precautionary principle, it is better to err on the side of allowing remote work, where feasible, since the extent of the inherently hazardous conditions presented by COVID-19 in each school building is unknown. Allowing these employees to work remotely, properly balances employer and employee needs that are necessary to fulfill CPS's contractual promise to provide a safe and healthful workplace for its employees and to meet CPS's operational objectives. This is especially true where the cases of COVID-19 are increasing.

In arriving at these conclusions, the undersigned is instructed by the totality of Illinois statutory requirements; public health guidance at the local, state, and federal levels; expert testimony in the record; and other authorities referenced throughout the Opinion. That being the case, it is the public health agencies that inform employers to encourage remote work

arrangements, if possible and the record reflects that it is possible for the aggrieved employees to perform a significant amount of their duties remotely. The Arbitrator, through finding a violation of Article 14-1 of the CBA for the aggrieved employees, makes no finding with respect to the Board's ability to reopen schools. That is not an issue before the undersigned.

REMEDY

This remedy assumes that no hazard assessment has been conducted or acted upon; appropriate engineering controls including air filtration and purification are not in place; and appropriate PPE has not been issued. If that is the case, remote work to the greatest extent possible is the best protective measure for the affected employees.

While working remotely one-hundred percent of the time eliminates exposure to the viral hazard in school buildings, there must be a reasonable balance between the remote working arrangement and the CPS operational needs. Thus, the inquiry becomes to what degree should the affected employees be required to work in-person in CPS buildings.

The evidence reflects that during the shutdown, the affected employees were not deemed essential workers and performed 100% percent of their duties from home. Admittedly, some tasks were delayed or had to be assisted or completed by others like school principals. As the Union acknowledges, it is necessary for the affected employees to work in-person to some degree. However, each school and staffing circumstance is different. Thus, a one-size-fits-all approach may be difficult to achieve. For example, some schools have more than one school clerk. The ability to work remotely may be different under those circumstances than where only one clerk is assigned to a school. For the technology coordinators, they may need to be on-site only where there is a need to physically address a technology problem. It is for these reasons the parties were

directed to reach agreement on what work could feasibly be performed remotely in the October 2, 2020 Summary Findings and Order. I retained jurisdiction in the event that no agreement was reached.

The Union has advised that the Board has offered only one day for remote work and four days in-person. Without more, that certainly appears to be a one-size-fits-all approach. However, given the evidence in the record, four in-person workday arrangements do not serve to minimize worker exposure to the COVID-19 hazard unless the protocols listed above (hazard assessment; air filtration and purification; and appropriate PPE) have been implemented. The presumption then is that the aggrieved employees will be allowed to work remotely at least four days per week unless it can be established that those duties that must be physically completed in-person exceed one regular workday. This presumption serves to encourage remote working arrangements as instructed by public health and other authority referenced in this Opinion. Accordingly, the parties are directed to:

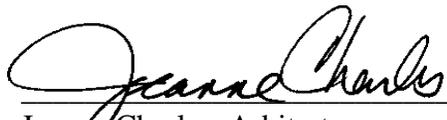
1. Determine which schools meet the certified hazard assessments, engineering controls (air filtration and purification protocols) administrative controls and PPE measures referenced above. CPS shall provide the Union with all necessary information to confirm a school's status in this regard. If a school is in compliance, 100% in-person work is appropriate.
2. CPS shall also provide the Union with information necessary to assess the current number of COVID-19 cases in CPS buildings. A subpoena requested by the Union has been signed by this Arbitrator and is attached hereto.
3. If paragraph #1 above is not applicable, CPS shall identify which duties are not feasible to be performed remotely and the number of days needed to perform those duties each week, keeping in mind the duty to maximize remote work as a protective measure during the pandemic. CPS shall then formulate a remote work schedule based on the required in-person duties for each of the affected employees.

4. This process shall be completed within three (3) business days of the date of this Award (or a mutually agreed upon date) and the results provided to Counsel for the Union.
5. The remote work schedules resulting from this Award shall become effective within seven (7) business days from the date established in paragraph #4 above (or a mutually agreed upon date).
6. If disputes arise over the number of remote days granted to an affected employee, the retention of jurisdiction shall continue solely for the purpose of implementing this Award and the parties shall return to this Arbitrator to schedule a remedy hearing.

AWARD

For the reasons set forth above and incorporated herein, the Arbitrator finds that:

1. The grievance is sustained.
2. The remedy as reflected above shall be implemented.
3. The Arbitrator retains jurisdiction over this matter for the sole purpose of resolving any issue pertaining to implantation of the remedy. Such retention of jurisdiction shall be for a period of 30 days from the date of this Award. A request to the Arbitrator to exercise jurisdiction shall be made in writing as to the exact issue and shall be served on the other party at the same time that it is filed with the Arbitrator. It is within the sole discretion of the Arbitrator to determine whether the issue presented by the party or parties is within the jurisdiction of this provision pertaining to the Arbitrator's retention of jurisdiction.



Jeanne Charles, Arbitrator

Dated: November 12, 2020