

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

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|----------------------------|---|----------------------|
| Wayne Harej, |) | |
| |) | |
| Charging Party |) | |
| |) | |
| and |) | Case No. L-CB-12-032 |
| |) | |
| Fraternal Order of Police, |) | |
| |) | |
| Respondent |) | |

ORDER

On July 11, 2012, Administrative Law Judge Anna Hamburg-Gal, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its September 11, 2012 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 11th day of September, 2012.

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



Jerald S. Post
General Counsel

STATE OF ILLINOIS
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| |) | |
| Charging Party |) | Case No. L-CB-12-032 |
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| and |) | |
| |) | |
| Fraternal Order of Police, Lodge 7, |) | |
| |) | |
| Respondent |) | |

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On January 19, 2012, Wayne Harej (Charging Party) filed a charge pursuant to Section 11 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board 80 Ill. Admin. Code, parts 1200 through 1240 (Rules) alleging that Fraternal Order of Police, Lodge 7 (Respondent) violated Section 10(b)(1) of the Act by failing and refusing to provide Charging Party with information concerning the manner in which it has calculated the fair share fee assessment as paid by Charging Party and by failing and refusing to provide Charging Party with information concerning the manner by which he may object to the fair share fee calculation. The charges were investigated in accordance with Section 11 of the Act and, on April 25, 2012, the Executive Director of the Illinois Labor Relations Board (Board) issued a Complaint for Hearing. The Complaint contained the following statement:

RESPONDENT IS HEREBY NOTIFIED that pursuant to Section 1220.40(c)¹ of the Rules and Regulations of the Illinois Labor Relations Board (Rules), it must file an answer to the complaint and serve a copy thereof upon the Charging Party within 15 days of the service of the complaint upon it. Said Answer shall include an express admission, denial, or explanation of each and every allegation of this complaint. **Failure to specifically respond to an allegation shall be deemed an affirmative admission of the facts or conclusions alleged in the allegation. Failure to timely file an answer shall be deemed an admission of all material facts or legal conclusions alleged, and a waiver**

¹ The section of the Rules quoted is 1220.40(b) and not 1220.40(c). This is a typographical error which does not affect any conclusion or determination in this case.

of hearing. The filing of any motions or other pleadings will not stay the time for filing an answer.

Section 1200.3(c) of the Rules provides that a document is presumed served on a party three days after it is mailed. According to the affidavit of service attached to the Complaint, a copy of the Complaint was mailed to Clark Devereux, Respondent's representative, by post-paid certified mail on Wednesday, April 25, 2012. Service on Respondent was therefore presumed effective on Monday, April 30, 2012. Under City of St. Charles, the addressee alone may rebut the presumption of service with sufficient evidence that actual delivery occurred at a later date. City of St. Charles v. Ill. Labor Rel. Bd., 395 Ill. App. 3d 507, 510 (2nd Dist. 2009). Respondent has not offered any evidence to rebut the presumption of service on April 30, 2012. Thus, a timely answer should have been postmarked by May 15, 2012. However, Respondent did not file an answer until Thursday, May 24, 2012. It was received by the Board on May 29, 2012. Respondent did not seek a variance from the Board's rules before filing its untimely answer.

On May 24, 2012, Charging Party filed a Notice of Objection requesting that the Board hold Respondent in default. On June 4, 2012, the undersigned issued an order directing Respondent to show cause (Order) not later than June 18, 2012, why a default judgment consistent with Section 1220.40 of the Board's Rules should not issue. On June 13, 2012, Respondent filed its response to the Order (Response).

Respondent's Response asserts that counsel failed to file a timely answer (1) because Respondent agreed to submit the matter to mediation and mistakenly believed that mediation stayed the time period to answer the complaint and (2) because during April and May of 2012 counsel for Respondent was busy attending to his duties with the FOP in preparation for the NATO Summit held in Chicago from May 20-21, 2012. Respondent also notes that Charging Party was not prejudiced by a delay in the filing of Respondent's answer and that Respondent is now willing to tender the information sought by the Charging Party to the Charging Party, upon his request. Respondent did not request leave to file a late answer.

On June 27, 2012, Charging Party filed a reply to Respondent's Response. Charging Party offered not to oppose Respondent's late filing provided that Respondent waived its affirmative defenses of statute of limitation and laches and additionally agreed not to contest Charging Party's right to reach back in time to recover damages incurred since September 2005,

the month in which Charging Party was first made a fair share member.² The Respondent did not reply to Charging Party's offer.

I. Discussion and Analysis

The issue presented in this case is whether to grant Respondent a variance from the Board's rule requiring Respondent to file an answer within 15 days after service of the complaint.³

Section 1220.40(b) of the Rules which governs the filing of an answer to a complaint for hearing states:

Whenever the Executive Director issues a complaint for hearing, the respondent shall file an answer within 15 days after service of the complaint and deliver a copy to the charging party by ordinary mail to the address set forth in the complaint. Answers shall be filed with the Board with attention to the designated Administrative Law Judge.

In applying Section 1220.40, the Board has held that a respondent's failure to timely file an answer to a complaint results in a default judgment. Metz v. Ill. State Labor Rel. Bd., 231 Ill. App. 3d 1079, 596 N.E. 2d 855, 8 PERI ¶ 4019 (5th Dist. 1992), aff'g St. Clair Cnty. (Cir. Clerk), 6 PERI ¶ 2036 (IL SLRB 1990); Peoria Housing Auth., 11 PERI ¶ 2033 (IL SLRB 1995); Cnty. of Jackson (Jackson Cnty. Nursing Home), 9 PERI ¶ 2025 (IL SLRB 1993); City of Springfield (Office of Public Utilities), 9 PERI ¶ 2024 (IL SLRB 1993); City of Mattoon, 9 PERI ¶ 2016 (IL SLRB 1993); Cnty. of Jefferson and Cir. Clerk of Jefferson Cnty., 7 PERI ¶ 2042 (IL SLRB 1991); City of Markham, 7 PERI ¶ 2003 (IL SLRB 1990).

A variance or suspension of any provision of the Rules is permitted by Section 1200.160 of the Rules which states:

The provisions of this Part or 80 Ill. Adm. Code 1210, 1220 or 1230 may be waived by the Board when it finds that:

² Section 11(a)'s six-month limitation period is a restriction upon the Board's jurisdiction and not a waivable affirmative defense. Vill. of Dolton, 17 PERI ¶ 2017 (IL SLRB 2001) (citing, Charleston Cmty. Unit School Dist. No. 1 v. Ill. Educ. Labor Rel. Bd., 203 Ill. App. 3d 619, 561 N.E.2d 331 (4th Dist. 1990)).

³ Respondent has at no time requested leave to file a late answer, therefore I will not address the circumstances which permit an Administrative Law Judge to grant such a request.

- a) The provision from which the variance is granted is not statutorily mandated;
- b) No party will be injured by the granting of the variance; and
- c) The rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome.

The first requirement is satisfied because the Section 1220.40(b) rule that a respondent file an answer within 15 days after service of the complaint is not a statutory mandate.

The second requirement is satisfied because neither party would be injured by granting of the variance. The Charging Party in a non-educational labor dispute is not injured merely because Respondent's untimely answer frustrates the public policy favoring the dispute's expeditious resolution. Cook Cnty. State's Attorney v. Ill. State Labor Rel. Bd., 292 Ill. App. 3d 1, 6 (1st Dist. 1997). Furthermore, prejudice is even less likely where issuance of the complaint is significantly delayed and other evidence shows that "time was not of the essence for either the Union or the Board prior to the late filing." Id. (delay of answer did not cause more injury than that already suffered where complaint issued 5 months after charge which itself was filed two months after adverse action). As in Cook Cnty. State's Attorney, the complaint here followed almost four months after the charge. Consequently, there is no injury to the Charging Party from granting a variance here.

However, the third requirement is not satisfied because there is no indication that application of the rule in this case is unreasonable or unnecessarily burdensome because Respondent has not demonstrated mitigating circumstances which would justify its late answer.

The Board must consider Respondent's excuses, explanations and mitigating circumstances in determining whether strict adherence to its filing rules is unreasonable or unnecessarily burdensome. Wood Dale Fire Protection Dist. v Ill. Labor Rel. Bd., 395 Ill. App. 3d 523, 532-533 (2nd Dist. 2009). Attorney negligence is not a sufficient ground to overturn a Board decision denying a variance. Wood Dale Fire Protection Dist., 395 Ill. App. at 530. However, "the negligence of counsel may be excused where mitigating circumstances are present." Cook Cnty. State's Attorney, 292 Ill. App. 3d at 12. Yet, the Board grants such variances only under exceptional circumstances. Vill. of Calumet Park, 17 PERI ¶ 2024 (IL LRB-SP 2001) (variance only granted in exceptional circumstances); aff'd by unpub. order, Docket No. 1-01-1520 (1st Dist. 2000); City of Kankakee, 17 PERI ¶ 2013 (IL LRB-SP 2001) (variance only granted in exceptional circumstances); City of Chicago Heights, 17 PERI ¶

2026 (IL LRB-SP 2001); (due diligence standard utilized); Vill. of Maywood, 21 PERI ¶ 147 (IL LRB-SP ALJ 2005) (variance granted in exceptional circumstances).

Here, Respondent's counsel argues that it was unaware of the Board's rules and that, in any event, it was too busy to submit a timely answer. Such justifications do not rise to the level of exceptional circumstances which warrant granting a variance. Indeed, the Board has upheld default judgments in the face of similar excuses. See, Vill. of Dolton, 17 PERI ¶ 2017 (III LRB-SP 2001) (answer untimely due to docketing error arising from office personnel changes); City of Markham, 17 PERI ¶ 2036 (IL LRB-SP 2001) (attorney misread due date for answer and response to order to show cause); Ill. Secretary of State, 11 PERI ¶ 2027 (IL SLRB 1995) (failure to mail answer in a timely manner); Vill. of Maywood, 21 PERI ¶ 147 (IL LRB-SP ALJ 2005) (failure to file timely answer due to office turmoil).

Thus, given the Board's strict application of the time limit for filing an answer and the lack of mitigating circumstances, Respondent has waived its right to a hearing in this matter and has admitted the material factual and legal allegations as stated in the Complaint.

II. Respondent's Admissions

By failing to file an answer, the Respondent has admitted the following material facts and legal allegations as stated in the Complaint.

1. At all times material herein, Respondent has been a labor organization within the meaning of Section 3(i) of the Act.
2. At all times material herein, City of Chicago (City) has employed the Charging Party as a police officer.
3. At all times material herein, the Charging Party has been a public employee within the meaning of Section 3(n) of the Act.
4. At all times material herein, the Charging Party has been a member of a bargaining unit composed of City employees (Unit).
5. At all times material herein, the Respondent has been the exclusive representative of the Unit.
6. At all times material herein, the City and Respondent have been parties to collective bargaining agreements (Agreements) setting out terms and conditions of employment for employees within the Unit, including the Charging Party.

7. The Agreements described in paragraph [6] include, *inter alia*, payroll deduction of fair share fees from Unit employees who are not members of the Respondent.
8. In or about 2006, the Respondent expelled the Charging Party as a member of the organization.
9. By its acts and conduct as described in paragraph 6, the Charging Party became a fair share fee payer.
10. Since in or about 2006, the Respondent has received fair share fees from the Charging Party by means of payroll deduction as provided in the Agreements.
11. Since in or about 2006, and continuing thereafter, the Respondent has failed and refused to provide the Charging Party with information concerning the manner in which it has calculated the fair share fee assessment as paid by the Charging Party.
12. Since in or about 2006, the Respondent has failed and refused to provide the Charging Party with information concerning the manner by which he may object to the fee calculation resulting in the assessment as paid by the Charging Party.
13. By its acts and conduct as described in paragraphs 11 and 12, the Respondent has interfered with the exercise of rights guaranteed public employees by the Act, in violation of Section 10(b)(1) of the Act.

III. Conclusions of Law

Respondent violated Section 10(b)(1) of the Act by failing and refusing to provide the Charging Party with information concerning the manner in which it has calculated the fair share fee assessment as paid by the Charging Party and information concerning the manner by which he may object to the fee calculation resulting in the assessment as paid by the Charging Party.

IV. Recommended Order

IT IS HEREBY ORDERED that the Respondent, Fraternal Order of Police, Lodge 7, its officers and agents shall:

1. Cease and desist from:
 - a. Restraining and coercing public employees in the exercise of the rights guaranteed by the Act.

b. Collecting or receiving fair share fees deducted by the City of Chicago from the Charging Party per the collective bargaining agreement with the City of Chicago until such time as Respondent has provided the Charging Party with information concerning the manner in which it has calculated the fair share fee assessment, as paid by the Charging Party, and until Respondent has provided the Charging Party with information concerning the manner by which he may object to the fair share fee calculation.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- a. Provide the Charging Party with information concerning the manner in which it has calculated the fair share fee assessment, as paid by the Charging Party, and provide the Charging Party with information concerning the manner by which he may object to the fair share fee calculation.
- b. Notify the City of Chicago to cease the deduction of fair share fees from Charging Party until such time as the directive in paragraph (a) above has been followed.
- c. Refund to the Charging Party a sum in the amount of all his fair share monies collected after July 19, 2011, a date six months prior to the date on which the charge was filed, plus any interest on those fees if they were held in escrow by Respondent.⁴
- d. Post, at all places where notices to employees are normally posted, copies of the notice attached hereto and marked "Addendum." Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

⁴ See, Am. Fed. of State, Cnty. and Mun. Empl., Council 31 (McMann), 8 PERI ¶ 2050 (IL SLRB 1992) ("While Section 11(c) of the Act authorizes the Board to order backpay with seven percent interest, there is no similar express authorization with respect to an ordered refund of fair share fees and we cannot find that the legislature intended to do so"; 7% interest on improperly assessed fair share fees was denied, but interest earned on those fees while held in escrow by Respondent was granted); Combined Counties Police Assoc. (Slechter), 6 PERI ¶ 2019 (IL SLRB 1990) (rejecting Respondent's argument to limit remedy to time period after six-month limitation period only because Board found limitation period waived; limitation period is now considered jurisdictional, thus remedy must be limited to time period after six-months prior to the date on which the charge was filed).

- e. Notify the Board in writing, within 20 days from the date of this Decision, of the steps Respondent has taken to comply herewith.

V. 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 Board's General Counsel at 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 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 11th day of July, 2012

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**

NOTICE TO EMPLOYEES

FROM THE ILLINOIS LABOR RELATIONS BOARD

The Illinois Labor Relations Board, Local Panel, has found that the Fraternal Order of Police, Lodge 7, has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in the Act.

WE WILL cease and desist from collecting or receiving fair share fees deducted by the City of Chicago from the Wayne Harej per the collective bargaining agreement with the City of Chicago until such time as we have provided Wayne Harej with information concerning the manner in which we have calculated the fair share fee assessment, as paid by Wayne Harej, and until we have provided Wayne Harej with information concerning the manner by which he may object to the fair share fee calculation.

WE WILL provide Wayne Harej with information concerning the manner in which we have calculated the fair share fee assessment, as paid by Wayne Harej, and provide Wayne Harej with information concerning the manner by which he may object to the fair share fee calculation.

WE WILL notify the City of Chicago to cease the deduction of fair share fees from Wayne Harej until such time as the directive in the paragraph above has been followed.

WE WILL refund to Wayne Harej a sum in the amount of all his fair share monies collected after July 19, 2011, a date six months prior to the date on which the charge was filed, plus any interest on those fees if they were held in escrow by Respondent.

DATE _____

Fraternal Order of Police, Lodge 7
(Union)

ILLINOIS LABOR RELATIONS BOARD

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Chicago, Illinois 60601-3103

(312) 793-6400

**THIS IS AN OFFICIAL GOVERNMENT NOTICE
AND MUST NOT BE DEFACED.**
