

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

James Pino,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-08-131
)	
Village of Oak Park,)	
)	
Respondent)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

On October 11, 2011, Administrative Law Judge (ALJ) Martin Kehoe issued a Recommended Decision and Order (RDO) in the above-captioned matter, recommending that the Illinois Labor Relations Board, State Panel (Board), dismiss an unfair labor practice complaint filed against the Village of Oak Park (Respondent). The complaint had alleged Respondent violated Sections 10(a)(2) and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), by terminating the employment of James Pino (Charging Party).

Charging Party timely filed exceptions to the ALJ's RDO pursuant to Section 1200.135 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code §1200.135, and Respondent filed a timely response. After reviewing the record, exceptions, and response as well as the RDO and a memorandum prepared by the administrative law judge originally assigned to this matter, we adopt the RDO. We address one issue raised in the exceptions that is not addressed in the RDO, but arose because of the issuance of the RDO.

Charging Party excepts both to the substance of the recommended decision and order, and to a procedural aspect of this case. Resolution of the issues raised in the complaint was originally assigned to Administrative Law Judge Sylvia Rios, who presided at a hearing and heard all the relevant testimony. Unfortunately, ALJ Rios was not able to complete a recommended decision and order before she left the employment of the Board. The case was reassigned to ALJ Kehoe who issued the RDO.

Charging Party claims ALJ Kehoe's RDO required him to make implicit credibility determinations, something it argues it was improper for him to do since he had not observed any of the witnesses. In support of its position, Charging Party relies on Quincy Country Club v. Human Rights Comm'n, 147 Ill. App. 3d 497, 500 (4th Dist. 1986). There a court reversed an agency decision and remanded for a new hearing where an administrative law judge who issued a decision had not presided at the evidentiary hearing. The court reasoned:

The constitution does not require that the ultimate decision-maker always hear the testimony relied upon for the decision. (Homefinders, Inc. v. City of Evanston (1965), 65 Ill.2d 115, 2 Ill. Dec. 565, 357 N.E.2d 785.) However, where credibility is a determining factor in a case, we believe the presiding administrative law judge must participate in the decision. In the present case, the [Human Rights] Commission could rely only upon the impressions of an administrative law judge who had not participated in the hearing itself.

We find Quincy Country Club distinguishable, its holding inapplicable, and that we need not remand this matter for a second hearing.¹ We note that ALJ Kehoe did not make any explicit credibility determinations, and that another court decision involving the Human Rights Commission distinguished Quincy Country Club where credibility was not a determining factor,

¹ Charging Party does not argue that it is entitled to a new hearing, but that the change in administrative law judges requires that it prevail. However, we find any procedural errors that may have existed could not warrant finding against the Respondent, but could only serve as a basis for another hearing. As we explain in this decision, we further find there is no need for a second hearing.

Arlington Park Race Track Corp. v. Human Rights Comm'n, 199 Ill. App., 3d 698, 709-10 (1st Dist. 1990). We also find additional, perhaps more relevant distinctions in the nature of our authority as compared to that of the Human Rights Commission and by our ability to review the previously mentioned memorandum prepared by the originally assigned administrative law judge containing her credibility impressions.

An issue similar, but not factually identical, to that raised in the current case was presented in North Shore Sanitary Dist. v. Ill. State Labor Relations Bd., 262 Ill. App. 3d 279 (2d Dist. 1994), involving review of another decision of this Board. The court there quoted the last sentence set out in the above quotation from Quincy Country Club, but found no violation of due process where one ALJ presided during the presentation of most of one party's case, there was then a year-long delay caused by a dispute over a subpoena request during which time the original ALJ resigned her position, which delay was followed by the appointment of a second ALJ who heard the remainder of the case and issued an RDO. In addition, the parties there stipulated to substitute transcripts of a hearing held before an arbitrator in place of most of the testimony heard by the original ALJ, leaving very little of the testimony she heard a part of the case. Despite quoting from Quincy Country Club, the court in North Shore Sanitary District ruled there was no need for a new hearing. In part this was because the party seeking a new hearing had caused the delay that necessitated the substitution of judges. Id. at 294. Additionally, the court found there remained very little, if any, material testimony raising substantial issues of credibility that had not been heard by the final ALJ. Id. at 295. However, the court's primary rationale was that it saw little distinction between situations where ultimate decision-making resides in a board which itself does not hear testimony (found to meet the requirements of due process by the Illinois Supreme Court in cases like Starkey v. Civil Serv.

Comm'n, 97 Ill. 2d 91 (1983)) and the situation presented to the court where “a substituting hearing officer bases his decision not only on evidence presented before him but also on the evidence contained in the report of proceedings before a prior hearing officer.” Id. at 294.

Clearly the factual distinctions found in North Shore Sanitary District do not exist here—the Union was not responsible for the delay in writing the RDO, all of the testimony heard by ALJ Rios remains relevant, and ALJ Kehoe heard none of the testimony—but the primary analysis in North Shore Sanitary District shows Quincy Country Club is distinguishable from the present situation. Quincy Country Club premised its analysis on the fact that the Human Rights Act provided that the Human Rights “Commission *shall* adopt the hearing officer’s findings of fact if they are not contrary to the manifest weight of the evidence.” 147 Ill. App. 3d at 499 (citing Ill. Rev. Stat. (1983) ch. 68 par. 8-107(E)(2), see now 775 ILCS 5/8A-103(E)(2) (2010)) (emphasis by court). In other words, as the court noted, the Commission provided the same deference to the ALJ’s factual determinations as the court was required to provide in its own review of the Commission.²

There is no such required deference to an ALJ’s factual findings in the Illinois Public Labor Relations Act. Rather, the Act provides: “[i]f, upon a preponderance of the evidence taken, *the Board* is of the opinion that any person named in the charge has engaged in or is engaging in an unfair labor practice, then it shall state *its findings of fact* and shall issue and cause to be served upon the person an order requiring him to cease and desist from the unfair

² The Appellate Court, Fourth District, has recently reversed, rather than remanded, one of our representation determinations because of the peculiar role of administrative law judges at the Human Rights Commission. Compare Dep’t of Cent. Mgmt. Serv./Human Rights Comm’n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 310 (4th Dist. 2010) (reversing Board) with Dep’t of Cent. Mgmt. Serv./Ill. Commerce Comm’n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766 (4th Dist. 2010) (remanding to Board).

labor practice.” 5 ILCS 315/11(c) (2010) (emphasis added).³ The fact that it is the Board that can make the findings of fact is particularly evident in that the first sentence of Section 11(c) explicitly provides that testimony may be received by the Board, a member designated by the Board, or a hearing officer of the Board, yet the Act references only the Board itself with respect to making findings of fact.

This same sort of distinction that exists between the Human Rights Commission and the Board was drawn between the Human Rights Commission and the Illinois Health Facilities Planning Board in Highland Park Convalescent Ctr. v. Ill. Health Facilities Planning Bd., 217 Ill. App. 3d 1088, 1092 (1st Dist. 1991). There a party seeking a permit to build a nursing home facility challenged the Planning Board’s denial in part on the basis that its appointed hearing officer had recommended the application be granted. The court noted this argument is common, but uniformly rejected. Citing a regulation applicable at that time to the Planning Board, the court there stated:

The Board, not the hearing officer, is the ultimate factfinder and decision-maker.... Where an administrative agency is responsible for the decision, the agency is required to consider the findings of the hearing officer, but it is not bound to accept them. Rather, the agency must make its own decision based upon the evidence in the record.... The rule applies even when findings of fact depend on the credibility of witnesses, and it is the hearing officer who observes the witnesses.

In similar fashion, because the Illinois Labor Relations Board is the fact finder and owes no deferential review to the ALJ’s recommended findings of fact, the precise holding of Quincy Country Club does not apply to it, and the fact that ALJ Kehoe did not preside at the hearing does not require remand for a new hearing.

³ The Board’s rules provide: “The Board may adopt all, part or none of the [ALJ’s] recommended decision and order depending on the extent to which it is consistent with the record and applicable law.” 80 Ill. Admin. Code 1200.135(b)(4).

The appropriateness of considering this case on the merits rather than remanding for a new hearing is particularly strong here because, before she left the Board's employment, ALJ Rios wrote a brief memorandum summarizing her assessment of key witnesses' testimony. We have reviewed that document in aid of our role as finder of fact. Consistent with the primary rationale in North Shore Sanitary District, with the rationale in Highland Park Convalescent Center, and with the proposition that ultimate decision-makers need not always hear the testimony relied upon for the decision asserted in, among other cases, Homefinders, Inc. v. City of Evanston, 65 Ill. 2d 115, 128-29 (1965), and acknowledged as the general rule in Quincy Country Club, 147 Ill. App. 3d at 500, we find no need to remand this matter for another hearing and that we may resolve the pending issues on their merits.

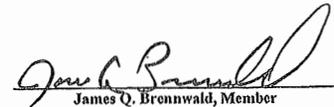
As to the exceptions on the merits of ALJ Kehoe's RDO, we find they fail to demonstrate error in his analysis and adopt that analysis as our own. In fact, we find his recommendations fully buttressed by ALJ Rios' credibility impressions as articulated in her memorandum.

The complaint is dismissed.

BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL


Jacalyne J. Zibulderman, Chairman


Paul S. Besson, Member


James Q. Brennwald, Member


Michael G. Coll, Member


Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on January 10, 2012; written decision issued at Chicago, Illinois, January 27, 2012.