

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

Oak Lawn Professional Firefighters Association, Local 3405, IAFF,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-08-271
)	
Village of Oak Lawn,)	
)	
Respondent)	

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

On August 15, 2011, Administrative Law Judge (ALJ) Philip M. Kazanjian issued a Recommended Decision and Order (RDO) in the above-captioned case, recommending that the Illinois Labor Relations Board, State Panel (Board), find that the Village of Oak Lawn (Respondent or Employer) violated Section 10(a)(2) and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), by laying off three firefighters and eliminating three additional vacant firefighter positions in retaliation for the Oak Lawn Professional Firefighters Association, Local 3405, IAFF (Charging Party or Union), having filed grievances and collectively bargained on behalf of Respondent's firefighters.

Respondent filed timely 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 Parts 1200 through 1240 (Board Rules), and Charging Party filed a timely response and cross-exceptions, to which the Respondent filed a cross-response.¹ After reviewing the record, exceptions, response,

¹ The ALJ also found Respondent had not violated Section 10(a)(2) and (1) by disciplining two firefighters for misconduct during a paramedic licensing examination, but no party filed exceptions to this portion of the RDO and we decline to review it on our own motion. Therefore, pursuant to Section 1200.135(b)(5) of the Board Rules, it is final and binding on the parties, but non-precedential.

cross-exceptions, and cross-response, we adopt the ALJ's conclusion that Respondent violated Section 10(a)(2) and (1) of the Act for the reasons articulated in the RDO and those that follow.²

ALJ's analysis

Sections 10(a)(2) and (1) make it an unfair labor practice for an employer or its agents

- (1) to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay; [or]
- (2) to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization.

The ALJ found Charging Party evidenced a prima facie case of a violation of Section 10(a)(2) and (1) in that: 1) Charging Party had engaged in activity protected under the Act (both by engaging in collective bargaining and by filing grievances); 2) Respondent was aware of that activity; 3) Respondent had taken an adverse employment action (implicit in the RDO where three employees were indisputably laid off and three additional positions eliminated from the bargaining unit); and, most critically according to the ALJ, 4) the decision to lay off employees and eliminate positions was substantially motivated by the parties' protracted negotiations, the Village manager's desire to induce Charging Party to make concessions, and the costs of the grievances and protracted negotiations.

Upon the ALJ's finding a prima facie case, the burden shifted to the Respondent to demonstrate a legitimate business reason for the layoffs and that the layoffs would have occurred regardless of the Charging Party's union activity, but the ALJ found the rationale proffered by the Respondent—a budget shortfall and overstaffing in the fire department—was pretextual. The

² Finding we are able to adequately address the issues without oral argument, we deny Respondent's request for that opportunity.

budget shortfall did not preclude the Employer from hiring additional employees in other departments and would not, by itself, have necessitated the reduction in the number of firefighters, so it is the perceived overstaffing that is the critical justification. On that point, the ALJ found the statistical analysis offered by the Respondent to justify the perception of overstaffing contained significant and obvious flaws. Because the purported basis for finding overstaffing was so clearly flawed, the ALJ concluded the Employer had failed to demonstrate the layoffs and elimination of positions were motivated primarily by overstaffing, and consequently found the Employer had taken those actions in retaliation for protected activity in violation of Section 10(a)(2) and (1). As relief, the ALJ ordered the Respondent to cease and desist and to take certain affirmative action, including rescission of the decision to eliminate the six firefighter positions and to make whole any employees represented by Charging Party who were adversely affected by its discriminatory actions.³

Respondent filed exceptions to the first part of the ALJ's analysis, both with respect to the prima facie case, and the proffered legitimate reason, and also filed exceptions to the relief ordered. As more fully explained below, we reject the Respondent's exceptions, and adopt the

³ Charging Party had alleged the determination to eliminate the six positions had also been motivated by its additional protected activity of distributing leaflets advocating against the layoffs, but the ALJ rejected this basis for finding a violation. He reasoned that

While there is ample evidence to show that Village officials were displeased with the campaign, this is not enough to demonstrate that the decision to lay off firefighters was motivated by the leaflets. Clearly the decision to lay off the firefighters predated the leaflets, which were aimed at thwarting that decision before it became official by a vote at the April 22 meeting. Chief Folliard's suggestion to Local 3405 member Scott Tsilis that the possibility of avoiding layoffs was precluded by the leafleting is insufficient to establish that the decision was substantially motivated in whole or in part by this union activity.

Charging Party's cross-exceptions concern this portion of the RDO. We do not address them because the relief we order would not change even if we were to find that the adverse employment actions were also motivated by retaliation for the distribution of leaflets.

ALJ's recommendation to find the Respondent had violated Section 10(a)(2) and (1), and find the relief he ordered to be appropriate.

Respondent's exceptions

In part by drawing an artificial distinction between the Charging Party and those it represents, and then between the Respondent and its Board of Trustees, Respondent argues there is no evidence in support of three of the four elements of a prima facie case. First, it states there was no evidence that the three employees who were laid off had engaged in any protected concerted activity. Second, it states there was no evidence the Respondent's Board of Trustees was aware of the status of pending grievances or CBA negotiations when it voted to amend the budget. Third, it claims both that there was no evidence of animus toward Charging Party, and no evidence whatsoever that the Board of Trustees was retaliating against the three employees who were laid off. Even if Charging Party had made its prima facie demonstration, Respondent argues it had clearly demonstrated a legitimate business reason for its actions: a budget deficit and overstaffing in the fire department. Finally, it argues that the remedy proposed by the ALJ—reinstatement of the three laid-off employees and restoration of the three vacant positions—was beyond his authority and in direct conflict with Section 4 of the Act.⁴

Discussion and analysis

With respect to its distinction between the actions of the Charging Party and those of the three firefighters who were laid off, Respondent claims that in prior Board decisions it was the

⁴ The first paragraph of Section 4 provides:

Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives.

actions of the employees directly affected by the adverse employment action that were in issue, and that the ALJ misused Board precedent to allow a union to create absolute immunity from layoffs or budget cuts merely by engaging in protected concerted activity. The latter point is obviously an inaccurate exaggeration, and needs little discussion. A union alleging that layoffs constitute an unfair labor practice has the obligation to evidence a prima facie case in order to prevail, and even then the employer can successfully defend against such a charge merely by demonstrating that a legitimate business reason for the layoffs was the true motivation. Our decision today in no way diminishes an employer's authority to lay off employees, as long as its primary motivations for doing so are not unlawful.

Moreover, while Respondent is apparently correct that prior Board decisions had involved protected activity by employees directly affected by the adverse employment action, we reject its contention that the only protected concerted activity that counts is that of the individuals who were directly impacted by the adverse employment action. That certainly is not the way Sections 10(a)(2) and (1) are worded. Section 10(a)(2) makes it an unfair labor practice for an employer "to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization," and Section 10(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act." Discrimination against any employee in a manner that would discourage support for a labor organization would meet the literal wording of these sections and, in the context of a layoff of a larger number of employees than those shown to have been engaged in protected activity, courts reviewing National Labor Relations Board decisions have rejected the contention that each laid off employee must be shown to have engaged in protected concerted activity. NLRB v.

McClain of Georgia, Inc., 138 F.3d 1418, 1424 (11th Cir. 1998); Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162 (D.C. Cir. 1993); Dillingham Marine & Mfg. Co. v. NLRB, 610 F.2d 319, 321 (5th Cir. 1980). In reasoning that strikes even closer to the present situation, one of those courts explained:

Common sense dictates that when employees are discharged for individual reasons, then the employer's knowledge of each employee's union activity and the employer's motivation for each discharge are the relevant inquiries; but when an employer makes a single decision to fire 15 people to "discourage membership in any labor organization," then the relevant inquiry is the employer's motivation for that single decision.

Dillingham Marine & Mfg., 610 F.2d at 321.

We also note the NLRB does not limit application of provisions of the National Labor Relations Act which are worded similarly to Sections 10(a)(2) and (1) to adverse actions taken against persons actually engaged in protected concerted activity. For example, courts have affirmed NLRB orders to reinstate supervisors—not even directly covered by the NLRA—where they had been discharged because of the activities of relatives. Kenrich Petrochemicals, Inc. v. NLRB, 907 F.2d 400, 406 (3d Cir. 1990) (en banc) ("While it is uncontestedly true that the Act does not protect a supervisor from being discharged for engaging in concerted activity, this does not deprive the Board of the authority to order the reinstatement of a supervisor whose firing resulted not from her own pro-union conduct, but from the employer's efforts to thwart the exercise of section 7 rights by protected rank-and-file employees. A legion of cases, with which we agree, so hold.") It is also clear that elimination of six bargaining unit positions—three occupied—damages the size of the bargaining unit, and thus its collective strength, and therefore the members of the unit including those who had engaged in protected concerted activity.

Respondent's argument that there was *no* evidence concerning the second element—that the Employer was aware of the protected concerted activity—also fails. Its argument depends in

part on isolating the Village Board of Trustees, which passed the budget that included a reduction in the fire department, from the two Village officials who proposed the budget and indisputably had knowledge of the hard bargaining and the filing of grievances. Village Manager Deetjen knew of the protected concerted activities and Village Finance Director Brian Hanigan was in a position to know the expenditures made to respond to grievances and to negotiate. Even if there were no evidence the members of the Board of Trustees had themselves discussed or been informed of these costs, the knowledge of their agents who initiated the adverse employment action by fashioning the budget could reasonably be imputed to the Employer, the Village of Oak Lawn. Cf. Grand Rapids Die Casting Corp. v. NLRB, 831 F.2d 112, 117 (6th Cir. 1987) (supervisor's anti-labor motivation in making a false report leading to discharge imputed to employer though person making adverse employment decision did not share animus).

In any event, contrary to Respondent's assertions, there was evidence the trustees had been informed of the grievances. There was evidence an email from Village Manager Deetjen so informed them. In addition, Deetjen indicated the trustees had such knowledge when he told firefighters their grievances made them look like a bunch of animals to the trustees. And one trustee testified that grievances, as well as legal costs, were referenced at the Board of Trustees' budget meeting.⁵

With respect to the final element of a prima facie case, the Respondent's argument that there is no evidence the Employer retaliated against the three laid-off employees (as opposed to

⁵ Respondent asserts that at the time of the vote on the budget, each trustee testified there were no discussions about grievances, many lacked knowledge that the grievances were pending or the exact number of grievances, and they also lacked "specifics" about the status of the CBA negotiations. However, specifics are certainly not critical. A general understanding that things are not going well, or are becoming expensive, would be sufficient. Moreover, the portions of the record cited by Respondent do not support its assertions.

the Charging Party or members of the bargaining unit) is, like its first argument, myopic. We also reject Respondent's contention that there was no evidence of animus toward the Union. The Village Manager's hope that the layoff of firefighters would soften the Charging Party's bargaining stance (in itself, insufficient to show animus) was accompanied with complaints about the costs of the contract negotiations and, more significantly, with a subsequent reference to the layoffs as a form of punishment when he told firefighters: "What do we have to do, hit you on the head with a hammer again?" And, even more directly, Respondent's fire chief told the firefighters the budget deficit was merely an excuse for the layoffs, implying it was instead retaliation for their conduct. We agree with the ALJ's finding that the Charging Party had, with evidence of these statements, presented a prima facie case of a Section 10(a)(2) and (1) violation.

We also agree with the ALJ's determination that Respondent failed to demonstrate the layoffs and position eliminations were primarily motivated for the legitimate business reason that the Respondent had a budget shortfall and the fire department was overstaffed. The budget deficit did not prevent Respondent from spending more money on police protection and other areas of perceived need, so the legitimacy of its proffered reason for the layoff and position elimination lies primarily with its assertion that the fire department was overstaffed. However, the Employer's submissions do not adequately support that assertion. The Employer primarily relies on a statistical analysis of sick time used compared to overtime awarded, an analysis generated by one of the trustees at some point in time not clearly established as predating Village Manager Deetjen's generation of the proposed budget and its suggestion for elimination of firefighter positions.

Not only the timing, but the very purpose for the analysis is unclear. There was some indication it was generated to examine whether there was an abuse of overtime, but per

Respondent, the analysis showed overstaffing in that it revealed more than a one-to-one ratio of sick time to overtime. However, the analysis included some long-term sick time for which the Village would have been able to make scheduling adjustments eliminating the need for overtime, yet the analysis excluded leave caused by on-duty injuries which probably should have been included if the analysis were intended to explore the issue of overstaffing.⁶

That the analysis had flaws is not significant in itself—employers have the right to make mistakes—but the flaws here seem obvious and, combining the existence of obvious flaws with the lack of clarity concerning the timing, originator, and even the very purpose of the analysis, makes the Employer’s reliance on the analysis seem more a post-decision justification than an originating basis for the decision to eliminate fire fighter positions.

There were somewhat similar flaws in a second analysis offered by Respondent in support of its assertion of fire department overstaffing. It referenced data concerning the ratio of service providers to community population within the Village of Oak Lawn compared to that in other communities, but its witnesses could not explain what criteria had been used to select the comparable communities, or who had chosen those criteria. And while some of the communities in the study provided services through their fire departments, others provided some of these these services by means of contracts with outside contractors, making a valid comparison of the number of municipal employees to population levels impossible.

The two analyses do not make a convincing case for overstaffing, and, more importantly, when we consider the obvious nature of their flaws in combination with the more direct evidence of anti-union animus in statements made by the Village Manager and former fire chief, we must conclude that Respondent failed to demonstrate its decision to reduce fire fighter positions was

⁶ Respondent claims the statistical analysis excluded “firefighters who were off duty due to an injury on-duty,” but does not assert the analysis excluded other types of long-term sick leave.

motivated by a legitimate business reason, that Respondent failed to rebut the prima facie case of discrimination, and that Respondent took action because of Charging Party's engagement in protected concerted activity. We therefore adopt the ALJ's recommendation to find Respondent violated Section 10(a)(2) and (1).

Finally, we reject Respondent's argument that the ALJ's remedy exceeds his authority and conflicts with the management rights protections of Section 4. The argument incorrectly assumes the ALJ's recommended order not only requires it to reinstate the three vacant positions, but to fill them. It does not. It restores the status quo ante by reinstating the firefighters who were laid off, reversing the decision to eliminate the positions, and making adversely affected *employees* whole, but it does not require Respondent to fill positions that were unfilled before the unfair labor practice took place. To eliminate any question on that issue, we make explicit that the Employer is required to restore the three eliminated vacant positions, but we do not order it to fill those positions where they were vacant at the time Respondent violated the Act.

Order

IT IS HEREBY ORDERED that the Respondent, Village of Oak Lawn, its officers and agents shall:

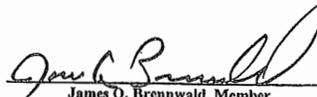
1. Cease and desist from:
 - a. Enforcing or giving effect to its April 22, 2008, decision to eliminate six firefighter positions, three by layoff and three by eliminating vacant firefighter positions.
 - b. Taking disciplinary or any other adverse employment action against its employees because they have engaged in union and or protected, concerted activities including negotiations and the filing and processing of grievances.

- c. Discriminating in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or support for the Oak Lawn Professional Firefighters Association, Local 3405, IAFF, or any other labor organization.
 - d. In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act:
- a. Rescind its April 22, 2008, decision to eliminate six firefighter positions, three by layoff and three by eliminating vacant firefighter positions.
 - b. Make whole any employees represented by the Oak Lawn Professional Firefighters Association, Local 3405, IAFF, who have been adversely affected by the Village of Oak Lawn having implemented its April 22, 2008 decision to eliminate six firefighter positions, including reinstatement of the three firefighters subject to the layoff, along with back pay plus interest at the rate of seven per cent per annum from the effective date of their layoff to the date of their reinstatement, and restoration of any loss of seniority or other benefit they would otherwise have received.
 - c. Post at all places where notices to employees are ordinarily posted, copies of the notice attached hereto and marked "addendum". Copies of this Notice shall be posted, after being duly signed by the Respondent, in conspicuous places and shall be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that these notices are not altered, defaced or covered by any other material.
 - d. Notify the Board in writing, within 20 days from the date of this decision, of what steps the Respondent has taken to comply herewith.

BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL


Jacaly J. Zimmerman, Chairman


Paul S. Besson, Member


James Q. Brennwald, Member


Michael G. Coli, Member


Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on February 7, 2012;
written decision issued at Chicago, Illinois, March 5, 2012.

ADDENDUM

NOTICE

After a hearing in which all parties had the opportunity to present their evidence, the Illinois Labor Relations Board found that the Village of Oak Lawn 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 or protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from enforcing or giving effect to the April 22, 2008, decision to eliminate six firefighter positions, three by layoff and three by eliminating vacant firefighter positions.

WE WILL cease and desist from taking disciplinary or any other adverse employment action against its employees because they have engaged in union and or protected, concerted activities including negotiations and the filing and processing of grievances.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or support for the Oak Lawn Professional Firefighters Association, Local 3405, IAFF, or any other labor organization.

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

WE WILL rescind the April 22, 2008 decision to eliminate six positions in the fire department, three by layoff and three by eliminating vacant positions.

WE WILL make whole any employees represented by the Oak Lawn Professional Firefighters Association, Local 3405, IAFF, who have been adversely affected by the Village of Oak Lawn having implemented its April 22, 2008 decision to eliminate six firefighter positions including reinstatement of the three firefighters subject to the layoff, along with back pay plus interest at the rate of seven per cent per annum from the effective date of their layoff to the date of their reinstatement, and restoration of any loss of seniority or other benefit they would otherwise have received.

DATE _____

Village of Oak Lawn (Employer)

(Representative) (Title)

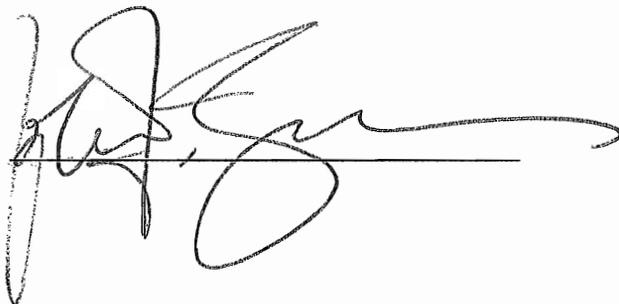
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)	
Charging Party)	
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and)	Case No. S-CA-08-271
)	
Village of Oak Lawn,)	
)	
Respondent)	

AFFIDAVIT OF SERVICE

I, John F. Brosnan, on oath state that I have this 5th day of March, 2012 served the attached **DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL** issued in the above-captioned case on each of the parties listed herein below by depositing, before 5:00 p.m., copies thereof in the United States mail at 100 W Randolph Street, Chicago, Illinois, addressed as indicated and with postage prepaid for first class mail.

Lisa Moss
Carmell Charone Widmer Moss & Barr, Ltd
230 West Monroe Street, Suite 1900
Chicago, IL 60606



Karl Ottosen
Ottosen Britz Kelly Cooper & Gilbert
1804 N Naper Blvd, Suite 350
Naperville, IL 60563

SUBSCRIBED and SWORN to
before me this **5th day**
of **March 2012**.



NOTARY PUBLIC

