STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Stephanie Birkner and Douglas Birkner,	)	
	)	
Charging Parties	)	
	)	
and	)	Case Nos. S-CA-11-120
	)	S-CA-11-122
Village of New Athens,	)	
	)	
Respondent	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On January 31, 2012, Administrative Law Judge Michelle N. Owen issued a Recommended Decision and Order in the above-captioned case, recommending that the Illinois Labor Relations Board, State Panel (Board) find that the Village of New Athens (Respondent) violated Section 10(a)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act), when it terminated the employment of Stephanie Birkner and Douglas Birkner (Charging Parties) for their exercise of protected concerted activity within the meaning of the Act.

Respondent filed timely exceptions to the Recommended Decision and Order pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. Charging Parties filed a timely response. Respondent then filed a reply which was followed by Charging Parties' sur-reply. After reviewing the record, exceptions, responses and replies, we adopt the Administrative Law Judge's Recommended Decision and Order.

Respondent has a long-established ambulance service which operates under the oversight of the Public Safety Committee of Respondent's Board of Trustees. Trustee Daryl Ostendorf is

chairman of that committee. For several years prior to April 2010 Charging Parties had been paramedics with Respondent's ambulance service. All ambulance service personnel, though paid by Respondent, were referred to as volunteers until December 2010 when Respondent made them part-time Respondent employees.

In April 2010 Charging Parties signed a petition seeking to remove Daryl Ostendorf and Ed Cockrell from their Trustee positions. The petition cited their poor judgment in hiring, firing and demoting Respondent employees and was signed by other Respondent residents and at least one Respondent Trustee. Charging Parties were not among the individuals who presented the petition to the Board of Trustees at their May 2010 meeting. At the June 2010 Trustees' meeting, Ostendorf and Charging Party Douglas Birkner discussed upgrading the ambulance service from basic to advanced life support. At some point, Ostendorf told Birkner, "I can't believe you signed that petition against me. I'm very angry at you for that."[1]

Ostendorf asked Charging Parties to attend the January 18, 2011, meeting of the Public Safety Committee, and at that meeting confronted them about a Facebook page Ostendorf believed Charging Parties had created. Ostendorf demanded Charging Parties remove the page, while Charging Parties denied any involvement with Facebook. At some point Ostendorf asked them if they wanted to be suspended or discharged, which incited further argument. Ultimately, Respondent Mayor Gary Kearns, who was present at the meeting, announced that he had decided to terminate Charging Parties' employment, but gave no reason for his decision. At their next meeting Respondent's Trustees unanimously upheld Kearns' decision, at which time Kearns referred to Charging Parties' supposed violation of the section of Respondent's Municipal Code

[1] Charging Parties claim that after they signed the petition Ostendorf became increasingly hostile towards them and began a pattern of harassment against them such as sending a police officer to their home. The parties stipulated that Ostendorf was hostile towards Charging Parties.

concerning employee conduct. Kearns never specified or explained what Charging Parties had done that violated the Municipal Code.

The complaint before the ALJ alleged that Respondent violated Section 10(a)(1) of the Act when it discharged Charging Parties for having engaged in protected concerted activity within the meaning of the Act. There is no dispute that Charging Parties signed a petition in June 2010 seeking removal of Ostendorf and Cockrell from the Board of Trustees. Nor is there any dispute that the petition expressly addressed concerns of Respondent's employees related to to hiring, firing and demotion. Rather, Respondent contends that Charging Parties' June 2010 signing of the petition was not protected concerted activity because at the time ambulance service personnel were volunteers rather than employees of Respondent and the petition did not address terms or conditions of employment *of the ambulance personnel.* Respondent's contention is not persuasive. The petition was not limited to Respondent's non-ambulance personnel, but sought to improve certain employment practices for all Respondent employees. The fact that it sought the ouster of Ostendorf, the trustee most responsible for decisions regarding the ambulance service, underscores the interest of ambulance personnel in the concerns raised by the petition.

With respect to their employment status, Charging Parties *were* Respondent employees at the time of the alleged unfair labor practice, i.e., at the time of their discharge. That they may not have been public employees at the time they signed the petition is irrelevant. To find otherwise would allow a public employer to discriminate in the hiring or retention of an individual on the basis of his or her prior union or protected concerted activity. That the Act prohibits such discrimination in hiring is beyond argument. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186-87 (1941); Rockford Metro. Exposition Auditorium & Office Bldg. Auth. v. Ill. State Labor

Relations Bd., 224 Ill. App. 3d 1007, 1016 (2d Dist. 1992) (citing Phelps Dodge). That this prohibition continues after an individual is hired is a logical extension of the Act's protection.

We concur with the ALJ's determination that Respondent's decision to terminate Charging Parties' employment was motivated by animus towards the exercise of their protected concerted activity. There is no dispute that Ostendorf, chairman of the Public Safety Committee, was angry with Charging Parties for having signed the petition seeking to remove him as Trustee. As did the ALJ, we find sufficient evidence of inconsistent or inadequate explanations for Respondents' discharge decision to warrant an inference of unlawful animus. In particular, while Kearns testified that he believed Charging Parties had "totally" violated a section of Respondents' municipal code, Kearns never explained what the Charging Parties did in violation of the code. Kearns also testified that he was aware Charging Parties were engaged in the ongoing bickering among ambulance personnel and that he had had enough of it.[2] Yet, Kearns did not discipline other ambulance personnel for this same reason. Lastly, Kearns testified that "in order to keep [Respondent's] ambulance service from going under, I decided that this is [sic] in the best interest of the Village and terminated Doug and Stephanie Birkner." However, Kearns never explained why he believed terminating Charging Parties' employment would keep the ambulance service from going under or why they were solely responsible for the problems with that service.[3]

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[2] Kearns' testimony suggests that Charging Parties were primarily responsible for the dissension among ambulance personnel but there is no evidence to support that inference.

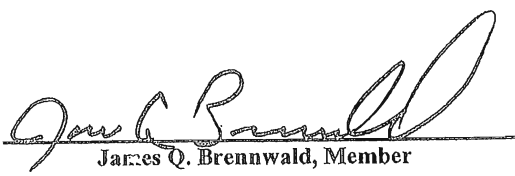
[3] In citing only these particular reasons, we by no means intend to discredit the ALJ's analysis supporting her determination that Respondent's decision to discharge Charging Parties was unlawfully motivated. Instead, we adopt that analysis with the exception of the ALJ's conclusion that Respondent's alleged failure to follow its disciplinary procedure was evidence of its unlawful motive. The ALJ found that Respondent's past practice was to vote on discipline before implementing it. This finding was based solely on Charging Parties' conclusory testimony. There was no evidence offered demonstrating the actual existence of that past practice or that Respondent did not apply the same disciplinary procedure to other employees that it applied to Charging Parties. In any event, Respondent's Trustees unanimously upheld Charging Parties' discharge.

Lastly, we address Respondent's contention that the ALJ erred in admitting irrelevant evidence into the record and failed to maintain impartiality during the hearing in giving assistance to the pro se Charging Parties. Our examination of the record reveals no clearly erroneous evidentiary rulings by the ALJ. Additionally, the record reflects no bias on the part of the ALJ. Her instructions to Charging Parties concerning the law and procedure were well within the proper role of an administrative law judge given her responsibility to conduct hearings in an orderly manner.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

Jacalyn 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 June 12, 2012, written decision issued at Chicago, Illinois, July 26, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

1/31/12

Stephanie Birkner and Douglas Birkner,	)		
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Charging Parties	)		
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and	)	Case Nos.	S-CA-11-120
	)		S-CA-11-122
Village of New Athens,	)		
	)		
Respondent	)		

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On February 22, 2011, Stephanie Birkner and Douglas Birkner (Charging Parties), filed charges in Case Nos. S-CA-11-120 and S-CA-11-122 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to 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. Adm. Code, Parts 1200 through 1240 (Rules), alleging that the Village of New Athens (Respondent or Village) violated Section 10(a)(1) of the Act. The charge was investigated in accordance with Section 11 of the Act and, on May 4, 2011, the Executive Director of the Board issued a Complaint for Hearing and Order Consolidating Cases.

A hearing was held on June 23, 2011, in Springfield, Illinois, at which time all parties appeared and were given a full opportunity to participate, present evidence, examine witnesses, argue orally and file written briefs. After full consideration of the parties' stipulations, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following.

I. PRELIMINARY FINDINGS

1. The parties stipulate, and I find that, at all times material, the Respondent has been a public employer within the meaning of Section 3(o) and 20(b) of the Act.

2. The parties stipulate, and I find that, at all times material, the Charging Parties have been public employees within the meaning of Section 3(n) of the Act.

II. ISSUES AND CONTENTIONS

The first issue in this case is whether the Village violated Section 10(a)(1) by terminating the Charging Parties. Charging Parties assert that the Village terminated them in retaliation for signing a petition to remove two Village trustees. The Village contends that the Charging Parties' terminations were not based on an unlawful motive.

The second issue in this case is whether the unfair labor practice charge was timely filed within the statute of limitations. The Village argues that the charge was not timely filed and therefore the complaint should be dismissed.

III. FINDINGS OF FACT[1]

The Charging Parties were employed as paramedics with the Village's ambulance service. The ambulance service was staffed by volunteers until December 2010, when the Village made all of the ambulance service staff employees of the Village. Douglas Birkner had been a paramedic for the Village for 17 years; Stephanie Birkner for eight years. The Charging Parties are married.

[1] The facts are based on the testimony of Stephanie Birkner, Douglas Birkner, Donald Birkner, and Gary Kearns.

The Village has a board of trustees. Daryl Ostendorf is a Village trustee and the chairman of the Village's Public Safety Committee, which oversees the ambulance service and its employees. Ed Cockrell Jr. is also a Village trustee. Gary Kearns is the mayor of the Village and has held that position for two and a half years.

On or about April 2010, the Charging Parties signed a petition, which sought to remove Ostendorf and Cockrell Jr. from their trustee positions.[2] Ostendorf had allegedly orchestrated the demotion of the chief of police. As reasons for the trustees' removal, the petition cited their poor judgment in following proper procedures when demoting, hiring, and firing of Village personnel and their banning of police officers from eating establishments. The Village admits that Ostendorf was an unpopular trustee. Mayor Kearns acknowledged that the manner in which the chief of police was demoted was a violation of policy and Illinois statute. At the May 3, 2010 Village board meeting, the board was presented with the petition.[3]

At a June 2010 Village board meeting, Ostendorf and Douglas Birkner were discussing the Village's possible transition from a Basic Life Support service to an Advanced Life Support service. At the meeting, Ostendorf reportedly said "I can't believe you signed that petition against me. I'm very angry at you for that." The Charging Parties allege that after signing the petition, there was hostility between Douglas Birkner and Ostendorf. They report that Ostendorf began harassing Douglas Birkner. The Charging Parties attest that Ostendorf called a police officer to the Charging Parties' house and also told Douglas Birkner to no longer call or text Ostendorf.

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[2] It is not clear from the record if other employees also signed the petition. The record did show that citizens and one Village trustee had signed the petition.

[3] The Charging Parties were not among the group of individuals who handed in the petition.

On January 18, 2011, the Charging Parties were called and asked to come to the Village's Public Safety Meeting.[4] At the meeting, the Charging Parties had a "heated verbal exchange" with Ostendorf. The Village stipulated that there was hostility between Ostendorf and the Charging Parties. Ostendorf asked the Charging Parties about a Facebook page.[5] Ostendorf allegedly told the Charging Parties to take down the page. The Charging Parties explained to Ostendorf that they did not create the page, and therefore could not take it down. Ostendorf then asked them if they wanted to be suspended or terminated. The Charging Parties report that Mayor Kearns decided he was "just going to go ahead and terminate us." Mayor Kearns then terminated the Charging Parties. The Charging Parties were not given a reason for their termination at the meeting. At the next board meeting in February, the board unanimously held up the decision to terminate the Charging Parties.

A. Reasons for Termination

1. Pre-Hearing Memorandum

The Village argues that it did not terminate the Charging Parties because they signed the petition. In the Village's pre-hearing memorandum, the Village stated that Mayor Kearns believed the Charging Parties' were "at will" employees, who could be terminated for any reason or no reason at all. In its memorandum, the Village listed three reasons for the Charging Parties' termination. First, the Charging Parties' allegedly caused dissention among the other ambulance service employees relating to whether the treasury funds of the ambulance service volunteers remained their funds once they became employees of the Village. Second, the Charging Parties allegedly wanted the ambulance service changed from a Basic Life Support ambulance service to

[4] The Charging Parties received the call from Tom Weber. The testimony did not reveal any further information regarding Tom Weber.

[5] The evidence did not reveal the subject matter of the Facebook page. Therefore, I am unable to examine whether the Charging Parties' involvement with the Facebook page constituted protected, concerted activity.

an Advanced Life Support ambulance service. Lastly, Douglas Birkner allegedly mishandled a suicide ambulance run in November 2010. The Village's standard operating guidelines require a crime scene be secured by police before ambulance employees enter the scene. Douglas Birkner was found inside a suicide scene before it had been secured by police. A police report was given to Mayor Kearns regarding the incident. Kearns never mentioned the November 2010 incident to Douglas Birkner and he was never disciplined for the incident. Further, the Charging Parties report that the Village's representatives, board members, and president of the ambulance service never mentioned the incident to the Charging Parties. They report that the first time anyone from the Village mentioned the incident was when the Village's attorney sent an email containing a copy of the police report a week prior to the Board hearing. Finally, the Village argued that the Charging Parties were terminated in accordance with the Village Code of Ordinance employment policy which states:

> All employees are to hold their position in high regard. Any personal action or activities on or of [sic] duty, which may be regarded as reflecting on the dignity and credibility of their fellow employees, the Mayor, Village Board of Trustees, Village Police Department or the Village of New Athens, shall subject such employee to disciplinary action, including dismissal.

The Charging Parties allege that were never given a copy of this policy and have never seen it before.

2. Hearing

At hearing, Mayor Kearns also mentioned his belief that the Charging Parties were "at-will" employees and could be terminated for any reason or no reason at all. Kearns also cited the alleged dissention among ambulance service employees as reasons for their termination. In addition, he noted that there was "bickering" among the employees. At hearing, Kearns said that he did not terminate the Charging Parties because they wanted to go from a Basic Life Support

service to an Advanced Life Support. Kearns reported that other employees also wanted to switch services. When asked at hearing whether Douglas Birkner's alleged mishandling of a suicide scene had any influence on his terminating the Birkners, Kearns answered "maybe yes, maybe no."

Kearns also stated that he did not terminate the Charging Parties because they signed the petition. He stated, "[W]hy would I terminate someone for signing a petition that I didn't let go any farther than one night at a meeting? It was dead, dead in the water. I killed it at that meeting." When asked whether he gave a reason for the Charging Parties' termination at the January 18th meeting, Kearns answered, "I believe I don't have to give a reason right then and there." At hearing, Kearns said that he terminated the Charging Parties because "I got fed up and enough was enough, and in order to keep our ambulance service from going under, I decided that this is in the best interest of the Village and terminated Doug and Stephanie Birkner." Kearns also stated they were terminated for violating the revised Village Code of Ordinance employment policy.

3. Post-Hearing Brief

In its post-hearing brief, the Village again argues that Kearns dismissed the Charging Parties because he considered them "at will" employees, who could be dismissed for any reason or no reason at all. The Village also cites the alleged dissention among employees and "bickering" as reasons for the Charging Parties' terminations, as well as the alleged mishandling of the suicide run. The Village also notes that Stephanie Birkner was involved in an argument with the president of the ambulance service. The Village argues that this "goes to the disharmony" in the ambulance service. The Village argues that the argument between Ostendorf and the Charging Parties at the board meeting was the final straw. The Village argues that it did

not violate Village policy when it terminated the Birkners because it followed the Village Code of Ordinance employment policy, which does not call for a report to the Personnel Committee, an investigation by the Personnel Committee, or a recommendation to the Board from the Personnel Committee.

B. Circumstantial Evidence

The Charging Parties note that they had no prior discipline before their termination. The Charging Parties argue that the Village changed the reasons for their termination several times. They argue that at the time of their termination they were not given a reason for the termination. The Charging Parties also disagree with the argument that there was dissention or bickering among the ambulance service employees. In addition, they note that no other employees were terminated over alleged dissention. As previously noted, the Charging Parties also argue that no one from the Village ever mentioned the alleged mishandling of the suicide run until the unfair labor practice charge had been filed.

The Charging Parties also allege that the Village did not follow the Village's employment policy in discharging them.[6] They argue that for terminations, the past practice of the Village is

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[6] The Village's Municipal Code of Ordinances that the Birkners received upon hiring states:

> The Ambulance Service President shall have no right to discharge any part-time employee. However, in the event any disciplinary action is deemed necessary by the Ambulance Service President, the Ambulance Service President shall submit a written report to the Personnel Committee, setting forth the factual grounds, with a request for specific disciplinary action. It will then become the responsibility of the Personnel Committee to investigate any and all allegations, including but not limited to the part-time employee in question. Unless the investigation is deemed to be criminal in nature, the part-time employee that is the subject of the investigation, shall co-operate fully and answer all questions truthfully. Other Employees shall cooperate fully in such investigation and shall answer all questions truthfully. The Personnel Committee will then make any and all recommendations to the Village Board for any action to be taken.

The current Village Code of Ordinance employment policy states:

> The Village Board of Trustees shall have the ultimate authority to dismiss or otherwise discipline any employee, whether or not said employee has completed his/her probationary period. The parties acknowledge that this Code is not a guarantee of future

to have at minimum a public safety, disciplinary, or personnel committee meeting before issuing discipline. They also argue that the Village's past practice is to vote on discipline before implementing it. They note that they were terminated on January 18, 2011, but the decision was not voted on until the February Village board meeting. They also argue that the Village's argument that they were terminated for violating the current Village Code of Ordinance employment policy is faulty because the current code was not completed until after their termination.

The Charging Parties alleged at hearing that Stephanie Birkner had been sexually assaulted by the president of the ambulance service. They allege the incident was reported to the mayor, Ostendorf, and the board. They stated that no disciplinary action was taken against the director except for a written warning placed in his personnel file. They note that the president is a close friend of Ostendorf. They argue that the president committed a crime and was not terminated, while they signed a petition and were terminated.

IV. DISCUSSION AND ANALYSIS

The issue in this case is whether the Village violated Section 10(a)(1) of the Act by terminating the Charging Parties.

Section 10(a)(1) prohibits an employer or its agents from interfering with, restraining, or coercing employees for exercising their rights guaranteed under the Act.[7] Section 10(a)(1) does

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employment and that the employees remain employees at will. The purpose of this Code is to outline the conditions of their employment and not to guarantee future employment.

[7] Section 10 of the Act states in relevant part:

(a) It shall be 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;

not generally require proof of illegal motive, however if an employee alleges an adverse employment action in retaliation for engaging in protected activity, the motivation of the employer must be examined. County of Jersey, 7 PERI ¶2023 (IL SLRB 1991), aff'd by unpublished order County of Jersey v. Illinois State Labor Relations Board, 8 PERI ¶4015 (4th Dist. 1992); Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990). To establish a prima facie case, a charging party must prove by a preponderance of the evidence that (1) the employee engaged in protected, concerted activity; (2) the respondent had knowledge of such activity; (3) the respondent took an adverse employment action against the employee; and (4) the employee's protected conduct was a substantial or motivating factor in the adverse action. City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 345 (1989).

The last factor, the employer's unlawful motive, may be inferred by direct or circumstantial evidence, including the timing of the adverse action in relation to the protected, concerted activity; expressed hostility toward engaging in protected, concerted activity; disparate treatment of employees; shifting explanations for the respondent's action; and inconsistency in the reasons given for its actions against a charging party as compared to other actions of the respondent. Id. at 345-46.

If a charging party establishes the prima facie elements of a 10(a)(1) violation, the burden shifts to the respondent to demonstrate by a preponderance of the evidence that it had a legitimate business reason for the adverse employment action and that it would have taken the same action notwithstanding the employer's unlawful motive. Id. at 346. However, a

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provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

respondent will not meet his or her burden by merely proffering a legitimate business reason for the adverse action. Id. It must be determined whether the employer's reasons are bona-fide or pretextual. Id. If the reasons offered are a mere litigation figment or were not relied upon, then the reasons offered will be found to be pretext and the inquiry is over. Id.[8]

Here, there is no dispute that (1) the Respondent had knowledge that the Charging Parties signed the petition and (2) the Charging Parties' terminations were adverse employment actions. The only remaining issues are whether (1) the Charging Parties engaged in protected, concerted activity and whether (2) the Village terminated them because of their protected, concerted activity.

A. Protected, Concerted Activity

"Concerted activity" is activity undertaken jointly by two or more employees, or by one employee on behalf of others. County of Cook (Management Information Services), 11 PERI ¶3012 (IL LLRB 1995). To be protected, concerted activity must be for the purpose of collective bargaining, "other mutual aid or protection", or aimed at improving the wages and terms and conditions of employment. Id. Public sector labor agencies generally take a broad view as to what constitutes protected activity. County of Cook, 27 PERI ¶57 (IL LRB-SP 2011); Village of Bensenville, 10 PERI ¶2009 (IL SLRB 1993). "Where it can be shown that the complained-of employer actions directly affect their working conditions, employees are permitted a wide range of protest." Village of Bensenville, 10 PERI ¶2009. "As long as the activities engaged in are

[8] If the employer gives legitimate reasons for the discharge and is found to have relied upon them in part, the case is one of "dual motive" and the employer must demonstrate by a preponderance of the evidence that the employees would have been terminated notwithstanding their protected, concerted activity. City of Burbank, 128 Ill. 2d at 346. Here, the Village did not argue that the Charging Parties would have been terminated notwithstanding the signing of the petition. Thus, this case is not one of "dual motive", so I will not perform the "dual motive" analysis.

lawful and the character of the conduct is not indefensible in its context, employees are protected by . . . the Act." Id., citing Reef Industries v. NLRB, 952 F.2d 830, 836 (5th Cir. 1991)

However, the Board has distinguished between concerted activity that is protected and concerted activity that is unprotected insubordination. County of Cook, 27 PERI ¶57. Activity is unprotected insubordination when an employee ignores a work rule or when the employee's conduct is so destructive that it threatens the employer's right to maintain discipline in the workplace. Id. (nurses' refusal to submit to mandatory background checks was unprotected insubordination); Village of Bensenville, 10 PERI ¶2009 (full-time employee's conversation with paid-on-call employee regarding loss of overtime opportunities for full-time employees because of use of paid-on-call personnel was protected, concerted activity).

Here, the signing of the petition by the Charging Parties was protected, concerted activity. It was concerted because it was undertaken by at least two employees: Douglas Birkner and Stephanie Birkner. In addition, it was undertaken on behalf of all Village employees; the petition specifically referenced all "Village personnel" and Village police officers.

The signing of the petition was protected because it sought to improve demoting, hiring, and firing practices for all Village employees. Thus, the act of signing the petition was for mutual aid or protection of Village employees and also aimed at improving the terms and conditions of Village employees. See County of Cook (Management Information Services), 11 PERI ¶3012 (computer operator who met with supervisor to seek a change to the employer's holiday pay policy and a wage increase for key punch operators was engaged in protected, concerted activity); City of Chicago (Department of Public Health), 17 PERI ¶3006 (IL LRB-SP 2001) (employee who signed and distributed a grievance among her fellow employees alleging that the employer had engaged in unprofessional conduct and contract violations was engaged in

protected, concerted activity). The signing of the petition was also lawful. Furthermore, the activity was not unprotected insubordination. The Charging Parties did not violate any work rule by signing the petition or threaten the Village's right to maintain discipline in the workplace. In sum, I find that the Charging Parties engaged in protected, concerted activity.

B. Unlawful Motive

The next issue is whether the Village terminated the Charging Parties because of their protected, concerted activity. The Charging Parties provided no direct evidence of unlawful motive, but instead rely on circumstantial evidence. I find that proximity in time does not support an inference of unlawful motive. However, I find that the Village's expressed hostility, disparate treatment of the Charging Parties, the shifting explanations for the terminations, and the inconsistent reasons given for the termination support an inference of unlawful motive.

1. Proximity in Time

Here, the timing of the Charging Parties' terminations in relation to the signing of the petition does not support an inference of unlawful motive. The Charging Parties signed the petition on or about April 2010. The Village would have been aware of this activity at the latest on May 3, 2010, when the petition was presented to the Board. The Charging Parties were not terminated until January 2011. The termination therefore occurred about eight months after the Village had knowledge of the employee's protected, concerted activity and therefore does not support an inference of unlawful motive. County of Cook (Management Information Services), 11 PERI ¶3012 (proximity in time not found where termination occurred four months after employee's last concerted activity). However, even if eight months were sufficient to establish proximity in time, the Board has held that mere proximity in time is insufficient to base an inference of unlawful motive. City of Kewanee, 23 PERI ¶110 (IL LRB-SP 2007). Therefore,

proximity in time between the Charging Parties' termination and the signing of the petition does not support an inference of unlawful motive.

2. Expressed Hostility

The Village's expressed hostility toward the Charging Parties because they signed the petition supports an inference of unlawful motive. At the June 2010 Village board meeting, Ostendorf told Douglas Birkner that he was angry at him for signing the petition. In addition, Douglas Birkner reported that there was hostility between him and Ostendorf from that point on. Ostendorf called a police officer to the Charging Parties' house and also told Douglas Birkner to no longer call or text Ostendorf. The Respondent also expressed hostility toward the Charging Parties at the board meeting where they were terminated. However, it is not clear from the record whether the hostility was due to the Facebook page, the signing of the petition, or something else. Nonetheless, I find that the evidence supports a finding of unlawful motive because of the other expressions of hostility.

3. Disparate Treatment

The Village's disparate treatment of the Charging Parties supports an inference of unlawful motive. The Village argued that one of the reasons for the Charging Parties' terminations was the alleged bickering and dissention among ambulance employees. However, as the Charging Parties point out, no other employees were terminated for the alleged bickering and dissention.

The Village also argued that the Charging Parties were terminated because they wanted to go from a Basic Life Support service to an Advanced Life Support service. Mayor Kearns admitted, however, at hearing that other employees also wanted to switch services. The record did not establish that any of those other employees were terminated.

The Charging Parties also note that the Village did not follow its own disciplinary rules and past practice when terminating them. The past practice of the Village was to vote on discipline before implementing it. Here, the Village board did not vote on the discipline until after it had already been implemented.

As final evidence of disparate treatment, an employee who allegedly sexually assaulted Stephanie Birkner was given a written warning; while the Charging Parties were allegedly terminated for causing dissention among employees, wanting the ambulance service to go from Basic Life Support service to an Advanced Life Support service, mishandling a suicide run, arguing with the president of the ambulance service, and arguing with Ostendorf at the January Village board meeting.

Based on the five preceding examples, I find that the Village treated the Charging Parties differently than other Village employees. Thus, the disparate treatment of the Charging Parties by the Village supports a finding of unlawful motive.

4. Shifting Explanations & Inconsistent Reasons

The Village's shifting explanations and inconsistent reasons for the Charging Parties' terminations supports an inference of unlawful motive. Initially, the Village provided no explanation for the Charging Parties' terminations at the board meeting where they were terminated. Then, in the Village's pre-hearing memorandum, it stated three reasons for the Charging Parties' terminations: causing dissention among ambulance employees, wanting to change ambulance services, and mishandling a suicide run. However, at hearing Mayor Kearns said that he did not terminate the Charging Parties for wanting to change ambulance services even though this was a stated reason for the terminations in the pre-hearing memorandum.

In addition, at hearing Mayor Kearns answered "maybe yes, maybe no" when asked whether the mishandling of the suicide run was reason for the terminations. Yet, in its post-hearing brief, the Village cites the suicide run as reason for their termination despite Kearns' testimony to the contrary.

In addition, in its post-hearing brief, the Village did not cite the Charging Parties' desire to change ambulance services as reason for their terminations, even though it had done so in its pre-hearing memorandum.

The Village also cites, in its post-hearing brief, an argument between the president of the ambulance service and Stephanie Birkner as evidence of the "disharmony" at the ambulance service. This argument was not brought up in the Village's pre-hearing memorandum or at hearing.

Finally, in its post-hearing brief, the Village argues that the argument between Ostendorf and the Charging Parties at the January board meeting was the "final straw." This argument was not brought up in the pre-hearing memorandum or at hearing.

The Village also provided inconsistent reasons for the Charging Parties' terminations. One of the reasons stated for the termination was Douglas Birkner's alleged mishandling of a suicide run. However, the Village did not cite this reason when it terminated the Charging Parties at the board meeting. In addition, as previously noted, the Mayor answered "maybe yes, maybe no" when asked if this incident was a reason for the terminations. Moreover, Douglas Birkner was never disciplined for the incident. In addition, Mayor Kearns, board members, and the president of the ambulance service never mentioned the incident to Douglas Birkner. Douglas Birkner first heard that the incident was reason for his dismissal in an email from the Village's attorney a week before the Board hearing. Douglas Birkner's alleged mishandling of

the suicide run also does not explain why Stephanie Birkner was terminated. Further, the Charging Parties had been paramedics with the Village for eight and 17 years and had received no discipline prior to their termination.

The Village also argues that the Charging Parties were terminated for violating the current Village Code of Ordinances employment policy. However, in citing the Code of Ordinances as reason for termination, the Village did not explain what specific "action or activity" the Charging Parties engaged in to warrant discipline. The Mayor merely cited the Code without providing further explanation. As such, I find that the Charging Parties have established that the Village has provided shifting explanations and inconsistent reasons for their terminations. Thus, the Village's shifting explanations and inconsistent reasons for the terminations support a finding of unlawful motive.

For the above stated reason, I find that there is sufficient circumstantial evidence to infer that the Village had an unlawful motive for terminating the Charging Parties. Although proximity in time does not support the Charging Parties' contention, the Charging Parties have established four other factors that can be relied upon to establish unlawful motive: expressed hostility toward their protected, concerted activity; disparate treatment by the Village; shifting explanations; and inconsistent reasons for their termination. Thus, I find that the Charging Parties have established the prima facie elements of a 10(a)(1) violation.

5. Legitimate Business Reason

I find that the Village's offered reasons for the Charging Parties' terminations were not relied upon by the Village, and instead pretextual. To the extent that the Village relies upon the same incidents as previously stated to justify the Charging Parties' terminations, the Village's business justification is subject to the same finding of shifting explanations and inconsistent

reasons I have set out previously. Thus, the Employer has failed to provide a legitimate business reason for the Charging Parties' terminations. In sum, I find that the Village violated Section 10(a)(1) of the Act when it terminated the Charging Parties.

C. Statute of Limitations

The Village argues that the charge should be dismissed because it was not timely filed. The Village argues that the conduct relied upon by the Charging Parties occurred outside of the statute of limitations. It argues that because the Charging Parties signed the petition in April 2010 and the charge was not filed until February 22, 2011 the charge was not timely filed.

Section 11(a) of the Act states, in part,

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby did not reasonably have knowledge of the alleged unfair labor practice or was prevented from filing such a charge by reason of service in the armed forces, in which event the six month period shall be computed from the date of his discharge.

In this case, the Village's argument is incorrect. The statute of limitations period begins when the unfair labor practice occurred or when the person aggrieved reasonably had knowledge of the unfair labor practice. The unfair labor practice in this case was the termination of the Charging Parties in retaliation for engaging in protected, concerted activity. Thus, the unfair labor practice or adverse employment action occurred, not when the Charging Parties signed the petition, but when the Village terminated the parties for signing the petition. The Charging Parties were terminated on January 18, 2011. The charge was therefore timely filed within the six months statute of limitations period on February 22, 2011. "Although the Board is limited to remedying unfair labor practices to those occurring within six months of the charge, it is not

thereby prevented from reaching the patient respondent, the one who allows six months to pass before retaliating." Pace Northwest Division, 25 PERI ¶188 (IL LRB-SP 2009), aff'd sub nom. Pace Suburban Bus Division v. Illinois Labor Relations Board, State Panel, 406 Ill. App. 3d 484 (1st Dist. 2010). Here, although the Village waited approximately eight months before terminating the Charging Parties, the Village can still be found to have violated Section 10(a)(1) of the Act. In sum, I find that the charge was timely filed within the statute of limitations.

D. "At-Will" Employees

Finally, the Village makes repeated references to the fact that the Charging Parties were "at-will" employees. The Village should be aware that the Act protects "at-will" employees.[9] It is true that as "at-will" employees, the Charging Parties could be terminated for a good reason, bad reason, or no reason at all. But, the Charging Parties could not be terminated for an unlawful reason. In this case, the Village terminated two employees for a reason which violated the Act. The Act clearly states that it is unlawful to "interfere with, restrain or coerce *public employees* in the exercise of the rights guaranteed in this Act." (emphasis added). The fact that the Charging Parties were "at-will" employees is thus irrelevant.

V. CONCLUSIONS OF LAW

Respondent, Village of New Athens, violated Section 10(a)(1) of the Act, when it terminated Stephanie Birkner and Douglas Birkner.

[9] Section 3 of the Act states in relevant part: "Public employee" or "employee", for the purposes of this Act, means any individual employed by a public employer . . ."

VI. RECOMMENDED ORDER

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

1. Cease and desist from:

a. interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them under the Act, by discharging them in retaliation for their exercise of such rights;

b. in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them under the Act.

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

a. reinstate Douglas Birkner to the position he held prior to termination, immediately and without prejudice to his seniority or other rights and privileges;

b. reinstate Stephanie Birkner to the position she held prior to termination, immediately and without prejudice to her seniority or other rights and privileges;

c. make Douglas Birkner whole for all losses he incurred as a result of his termination, including back pay plus interest at a rate of seven percent per annum;

d. make Stephanie Birkner whole for all losses she incurred as a result of her termination, including back pay plus interest at a rate of seven percent per annum;

e. expunge from Respondent's files and records any reference to the termination of Douglas Birkner and Stephanie Birkner's employment and notify them in writing both that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel actions against them;

f. preserve, and upon request, make available to the Board or its agents for examination and copying, all records, reports and other documents necessary to analyze the amount of back pay due under the terms of this decision;

g. post, for 90 consecutive days, at all times where notices to employees of the Village of New Athens are regularly posted, signed copies of the attached notice. Respondent shall take reasonable steps to insure that the notices are not altered, defaced, or covered by any other material.

3. Notify the Board, in writing, within 20 days of the date of this order, of the steps that Respondent City has taken to comply herewith.

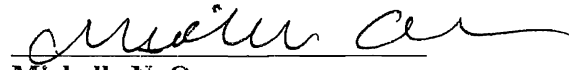
VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. 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 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 Springfield, Illinois on this day of January 31, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL



Michelle N. Owen
Administrative Law Judge

NOTICE TO EMPLOYEES

FROM THE
ILLINOIS LABOR RELATIONS BOARD

The Illinois Labor Relations Board has found that the Village of New Athens 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 gives you, as an employee, these rights:

To engage in protected, concerted activity.
To engage in self-organization.
To form, join, or help 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.
And, if you wish, not to do any of these things.

Accordingly, we assure you that:

WE WILL NOT retaliate against Stephanie Birkner and Douglas Birkner, or any of our other employees, for engaging in union or protected, concerted activity.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them under the Act, by discharging them in retaliation for their exercise of such rights.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights under the Act.

WE WILL reinstate Stephanie Birkner and Douglas Birkner to the positions they held prior to their terminations, immediately and without prejudice to their seniority or other rights and privileges.

WE WILL make Stephanie Birkner and Douglas Birkner whole for all losses they incurred as a result of their terminations, including back pay plus interest at a rate of seven percent per annum.

WE WILL expunge from all files and records, including Douglas Birkner and Stephanie Birkner's personnel files, any and all references to the termination of Douglas Birkner and Stephanie Birkner's employment and notify them in writing both that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them.

WE WILL preserve, and upon request, make available to the Board or its agents for examination and copying, all records, reports and other documents necessary to analyze the amount of back pay due under the terms of this decision.

This notice shall remain posted for 90 consecutive days at all places where notices to employees are regularly posted.

_____	_____
Date of Posting	Village of New Athens (Employer)