

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

Barbara A. Martenson,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-11-255
	)	
County of Boone and Boone County Sheriff,	)	
	)	
Respondent	)	

consolidated with

Barbara A. Martenson,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CB-11-063
	)	
International Union, United Automobile	)	
Aerospace and Agricultural Implement	)	
Workers of America, Local 1761,	)	
	)	
Respondent	)	

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

On April 29, 2014, Administrative Law Judge (ALJ) Elaine L. Tarver issued a Recommended Decision and Order (RDO) in the above-referenced consolidated cases, finding that Union Respondent International Union, United Automobile Aerospace and Agricultural Implement Workers of America, Local 1761 had not violated Section 10(b)(1)<sup>1</sup> of the Illinois

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<sup>1</sup> Section 10(b)(1) provides:

It shall be an unfair labor practice for a labor organization or its agents:  
(1) to restrain or coerce public employees in the exercise of the rights guaranteed in this Act, provided, (i) that this paragraph shall not impair the right of a labor organization to

Public Labor Relations Act, 5 ILCS 315 (2012), by its actions relating to discipline imposed on Charging Party Barbara A. Martenson, but that Employer Respondent County of Boone and Boone County Sheriff had violated Section 10(a)(1)<sup>2</sup> of the Act by its imposition of a gag order interfering with Martenson's ability to defend herself in disciplinary proceedings. The ALJ treated the complaint as alleging separate violations of Sections 10(a)(1) and 10(b)(1) of the Act, and rejected Charging Party's invitation to treat the case similar to that of a "hybrid" claim under Section 301 of the federal Labor Management Relations Act, 29 U.S.C. § 185.

Both Charging Party and the Employer Respondent have filed timely exceptions to the RDO pursuant to Section 1200.135(b) of the Board's Rules, 80 Ill. Admin. Code § 1200.135(b). Charging Party filed a response to the Employer Respondent's exceptions and also filed a motion for sanctions, the latter of which generated a response from the Employer Respondent. Based on a review of the RDO, the exceptions, the responses, and the record, we affirm the RDO, albeit with some modification to the articulation of the rationale as well as a substantive modification to the remedy. We deny Charging Party's motion for sanctions.

### **Pertinent Facts**

Barbara Martenson worked as a dispatcher for the Boone County Sheriff for about 27 years. She worked with five other dispatchers, two of whom, Denise Hagan and Teresa Numan, were representatives of Union Respondent. Lt. Gay became her supervisor in 2007. Interested

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prescribe its own rules with respect to the acquisition or retention of membership therein or the determination of fair share payments and (ii) that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act[.]

<sup>2</sup> Section 10(a)(1) provides:

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

in changing collective bargaining representatives, in that same year Martenson held meetings with three unions and scheduled the Fraternal Order of Police Labor Council to speak to union members. There was another such meeting in 2010.

On May 3, 2010, Martenson received two documented letters of counseling, the first in her career. They assert that on one occasion she did not respond quickly enough to an officer, and on another she gave an officer inaccurate information. She was also suspended one day in September 2010 because she inaccurately told an officer that a driver's license had been suspended. The driver was wrongly arrested before Martenson corrected herself. In November 2010, Martenson received a five-day suspension when, after an officer's emergency button went off, she attempted to check on his status, but did not follow up when he failed to respond. Union Respondent grieved, but withdrew the grievance at the third step. On December 22, 2010, Martenson was placed on administrative leave because she had mishandled two orders of protection. On January 28, 2011, she received notice that she was being terminated. Union Respondent again grieved, but withdrew the grievance after the third step.

Since 2007, only one other dispatcher, union representative Hagen, had been disciplined on multiple occasions. In July 2007, Hagen failed to enter a warrant for her son's arrest and was given a verbal reprimand. In March 2008, she failed to forward an order of protection involving her father and was given a written reprimand. In June 2010, Hagen failed to send police to her own home for a domestic violence dispute and received a one-day suspension. The suspension was served outside the 30-day period required by the contract, but Hagen had agreed to the extension of this period and did not grieve imposition of this discipline.

### **ALJ's Decision**

**a. Allegations against the Union**

Charging Party alleged Respondent Union breached its duty of fair representation by withdrawing her two grievances and by Hagen's agreeing to an extension of time within which to impose discipline (action taken against the advice of her international union representative and to the obvious benefit of Employer Respondent) and purportedly doing so because Martenson had actively sought to replace Union Respondent with another representative. Noting that the intentional misconduct standard applies under Section 10(b)(1), the ALJ found insufficient evidence<sup>3</sup> that the Union took any action designed to retaliate against Martenson or due to her status. The ALJ discounted testimony from Martenson and another dispatcher that from 2007 through 2010 Hagan had been horrible to Martenson because neither witness could provide specific examples of mistreatment, because Hagan testified she treated Martenson no differently than other employees, and because the testimony of Martenson and the other dispatcher seemed focused on attempts to demonstrate that Lt. Gay showed favoritism toward union representatives Hagan and Nyman rather than on Hagan's treatment of Martenson. The ALJ also discounted the potential that the discipline of Martenson occurred outside of the mutually agreed upon 30-day period because the union had twice before agreed to extend that period, once when Hagen herself was being disciplined. The ALJ said she would not second guess the Union's judgment that the grievance over the termination was not winnable, noting the Union's opinion that the earlier five-day suspension had been lenient in that failure to properly respond to a police officer's emergency call was a terminable offense. That Martenson felt the Union should have fought harder for her did not meet the statutory intentional misconduct standard for a Section 10(b)(1) violation.

**b. Allegations against Employer**

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<sup>3</sup> The ALJ actually stated there was "no evidence," but that is not literally true.

Martenson's charge against the employer was centered on the written investigative notice the County sent to Martenson and others, a notice which included a "gag order":

An Investigation into conduct or performance of an employee(s) is in process. The purpose of the investigation is to determine if there are facts to support the specific complaint filed against an employee. Because the investigation is ongoing and may involve several other employees you are hereby ordered not to speak to any other person as to the nature of the questions asked or the reason for your appearance at this interview on this date. You are not to speak to any employee about this interview or advise any other employee as to what was said during the interview. Everything within this interview that is asked or discussed is confidential and can only be divulged by the investigating authority as it relates to charges filed and testimony in future hearings.

A violation of this direct order will result in disciplinary action up to and including termination of your employment.

Charging Party alleges her collective bargaining rights were restricted by not being able to communicate with other employees during the pending investigation into her discipline, and by the Employer's failure to impose discipline within the 30-day period provided in the collective bargaining agreement.<sup>4</sup> The ALJ noted that proof of illegal motivation is unnecessary to establish a Section 10(a)(1) violation, and therefore a violation may be established if Employer Respondent's actions had the clear effect of restraining an employee's exercise of protected rights and those actions were not independently justified.

While Respondent Employer argued that the Charging Party had failed to evidence that Martenson had either engaged in concerted activity or was prevented from engaging in protected activity, the ALJ found that Section 6(a) of the Act supported a conclusion that Martenson's action constituted protected concerted activity.<sup>5</sup> She found Martenson sought to speak with other

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<sup>4</sup> Article IX, Section 1 of the contract reads: "The Employer agrees herein that disciplinary action shall be in a timely manner and shall not exceed thirty (30) calendar days from the date the incident giving rise to such disciplinary action or from first becoming aware of such incident ..."

<sup>5</sup> The ALJ quoted the first sentence of Section 6(a) of the Act:

Employees of the State and any political subdivision of the State ... have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own

employees regarding the investigation of her discipline, and that in doing so she was invoking rights contained in the parties' collective bargaining agreement: the right to be disciplined only for just cause, the right to an accurate investigation, and the right to respond to charges.

The ALJ also found the County's directive violated employees' rights to engage in protected concerted activity. While noting that some NLRB decisions found employers' justifications for gag orders adequate in the context of illegal drug activity, she relied on several NLRB precedents that found inadequate the employers' justification for broad directives lacking time period limitations and applicable to the accused. Oakland Cambridge LLC, 2011 WL 5971219 (NLRB 2011), aff'g 2011 WL 4499438 (NLRB Div. Judges 2011).<sup>6</sup>

Respondent Employer justified its broad restriction on "in-house discussion" with the need to protect the integrity of the investigation by means of assuring that employees interviewed could not warn or prepare others before Lt. Gay had the opportunity to speak with them. It cited County of Cook v. Ill. Labor Relations Bd., 266 Ill. App. 3d 53 (1st Dist. 1994), in support of its position, but the ALJ found this case distinguishable because, contrary to Lt. Gay's description, the directive at issue here, was not limited to preclusion of "at work" discussions. She found Employer Respondent had failed to provide a legitimate reason for its broad directive, opining that Martenson's need to obtain information from other employees in order to defend her termination outweighed Respondent Employer's desire to limit potential collusion among

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choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 of this Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion.

<sup>6</sup> The order in Oakland Cambridge read:

Depending upon the circumstances of a particular investigation[,] employees may be requested and expected not to disclose any confidential information that could compromise an ongoing investigation, including not only the scope and content of the investigation, but also the fact that an investigation is being conducted.

coworkers. With respect to the allegation that Respondent Employer failed to abide by the contractual 30-day time limit on imposing discipline, the ALJ found the parties had contrasting interpretations of the meaning of their agreement, that the Respondent Employer's conduct did not constitute repudiation of the collective bargaining agreement, and that any mere potential breach of the contract was a matter for grievance proceedings, not grounds for finding a 10(a)(1) violation.

**c. ALJ's recommended order**

The ALJ sought to remedy the gag order violation of Section 10(a)(1) by ordering the employer to cease and desist from such conduct, to rescind any discipline imposed pursuant to its overbroad policy, to remove all reference of such discipline from employees' personnel files, and to make whole "any employees in the bargaining unit for all losses incurred as a result of the Respondent's overly broad policy, including back pay with interest ..." She also ordered the posting of a notice and notification to the Board of such posting.

**Analysis**

**a. Employer Respondent's violation of Section 10(a)(1) of the Act**

We initially note that the Employer Respondent has filed no exception to the ALJ's recommended finding that it violated Section 10(a)(1) of the Act by its implementation of a gag order. Consequently, we do not address the appropriateness of that conclusion, and the ALJ's recommended finding on that point is final and binding on the parties. 80 Ill. Admin. Code § 1200.135(b)(2).

**b. The Board does not enforce collective bargaining agreements**

In her exceptions, Charging Party claims that the ALJ improperly gave effect to the verbal agreement between union representative Hagen and Lt. Gay to extend the time for filing discipline against Martenson, and that she should have found the untimely discipline violated the contract. We find these arguments without merit. Simply put, the Board does not enforce the terms of parties' contracts. Village of Creve Coeur, 3 PERI ¶ 2063 (IL SLRB 1988). For purposes of our enforcement of the Illinois Public Labor Relations Act, the relevant issues arising from this situation are: 1) whether Union Respondent's withdrawal of the grievance over the purportedly untimely discipline was done to retaliate against Martenson or because of Martenson's status such as to violate Section 10(b)(1), and 2) whether Respondent Employer's violation of the contractual timing provision constituted repudiation of the contract in violation of Section 10(a)(4) and derivatively in violation of Section 10(a)(1). Regarding the first issue, we do not second guess a union's assessment of whether a grievance has merit, Int'l Bhd. of Teamsters Local 700 (Dontay Brassel), 31 PERI ¶5 (IL LRB-LP 2014); 5 ILCS 315/10(b)(1)(ii) (2012) (intentional misconduct standard required), nor with regard to the second issue do we readily find that violation of a single provision in a contract constitutes repudiation of the bargaining process, Service Employees Int'l Union Local 73 and City of Chicago, 30 PERI ¶194 (IL LRB-LP 2014) (repudiation requires a substantial breach of the contract made without rational justification or reasonable interpretation such as to demonstrate bad faith). Whether this situation is so extraordinary that these general results should not apply is addressed below, but the Charging Party's first exception is without merit.

Charging Party next argues that the ALJ erred in finding that Respondent Union withdrew the suspension grievance at the third step because the grievance lacked merit. It again points to the contract entered between Respondent Union and Respondent Employer and states

the activity here violated three provisions: 1) the contractual time period for imposing discipline; 2) the contractual requirement that precludes verbal agreements (here, to extend the time period); and ultimately 3) the provision that Martenson be disciplined only for just cause. Whether articulated as one or three potential contractual violations, we still apply some deference to a union's assessment of the likelihood that it would prevail in a grievance. The ALJ's RDO addresses potential grounds upon which Respondent Union might legitimately have concluded that it could not prevail on the substantive issue of whether Martenson's conduct warranted discipline (first by suspension, then by termination). With respect to the timing of the discipline, the ALJ notes this same sort of extension had been agreed to twice before, and once regarding discipline against Hagen herself. That history undermines any suggestion that the extension was agreed to merely because Martenson had done something to offend the union.

The same holds true with respect to the apparent difference in interpretations of the contractual language, the subject of Charging Party's third exception. She argues that, in finding that the parties had a good faith disagreement about the meaning of the time limitation in the contract, the ALJ improperly relied upon Lt. Gay's interpretation of the contractual time limitation rather than the interpretation given by the Sheriff. It argues that the Sheriff is "the party" and Gay is merely his subordinate and to the extent the Sheriff's interpretation tracks that of the Union business representative, there was no good faith disagreement.

The parties' various arguments confirm that there is ambiguity in the contractual language, particularly when factoring in the parties' past practice of allowing "extensions" in the discipline of other employees. We find the exceptions on this point tend to confirm the ALJ's recommended finding that the Union had not violated Section 10(b)(1) by withdrawing the

grievance, and that the Employer had not repudiated the contract in violation of Section 10(a)(4) and, derivatively, of Section 10(a)(1).

**c. Repudiation requires disregard for the bargaining process**

In its fourth exception, Charging Party cites City of Loves Park v. Ill. Labor Relations Bd., 343 Ill. App. 3d 389, 395 (2d Dist. 2003), for the assertion that repudiation requires disregard for the collective bargaining process or “refusal to abide by a contractual term.” It argues the fact that Hagen and Lt. Gay made a verbal agreement while the contract calls for written modifications to the contract shows repudiation. Charging Party provides a fair statement of a particular phrase within City of Loves Park (“a contractual term”), but in that case the court found there had been repudiation where the city had attempted to vacate a grievance arbitration award, nullify the contract’s entire grievance resolution provision, and thus deprive an employee of due process. Ignoring the grievance resolution provisions of a contract (designed to resolve all contractual disputes) is a much higher magnitude of rejection than is ignoring a particular substantive contractual provision (which could be remedied through the contractual grievance process).<sup>7</sup> We have previously found that repudiation requires a substantial breach and a contractual argument by the employer that is without rational justification or reasonable interpretation of that contract. City of Kewanee, 23 PERI ¶110 (IL SLRB 2007). That standard is not met here.

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<sup>7</sup> In the case cited by the City of Loves Park court, City of Collinsville, 16 PERI 2026 (Ill. State Labor Relations Bd. 2000), *aff’d*, City of Collinsville v. Ill. Labor Relations Bd., 329 Ill. App. 3d 409 (5th Dist. 2002), a city abided by all terms of an unsigned agreement except one concerning transfers which it argued was inconsistent with the municipal code. We there spoke of its breaching and repudiating this particular section of the contract, and found a violation of the Act where the city took unilateral actions inconsistent with the provision. As was the case in City of Loves Park, the refusal to implement a provision in City of Collinsville under the assumption that it was illegal, and the refusal to sign the agreement because of that interpretation, is a significantly broader affront to the bargaining process than a simple failure to abide by the contract on a single occasion, or than a general misinterpretation of a provision’s requirements.

**d. There is insufficient evidence of retaliation**

In its fifth exception, Charging Party justifiably takes issue with the ALJ's statement that there was "no evidence" that the Union had retaliated against Martenson. It sets out a list of evidence tending to support the proposition that the Union had retaliated:

- Martenson's relationship with Hagen and the other union representative deteriorated after Martenson criticized them and tried to bring in another union
- When Martenson's discipline issues arose, Hagen did not ask to review Martenson's disciplinary record, failed to raise the timeliness issue, verbally agreed to an indefinite extension of time for discipline, and withdrew her suspension grievance despite the timeliness issue
- Hagen verbally agreed to an indefinite extension of time for the discipline that resulted in termination, action that served no union purpose
- Despite the fact that Martenson's grievances were the first Hagen had handled and that Hagen had no training in the handling of grievances (which weighs against Charging Party) Hagen acted in a way inconsistent with the express contractual language and the interpretation of an International Union Representative
- Hagen excluded Martenson from caucuses and the step three grievance meeting where she again withdrew Martenson's grievance

We agree with Charging Party that the ALJ erred in stating there was "no evidence", but under the totality of the evidence we find there was insufficient evidence of Union retaliation.

**e. Martenson is not entitled to make whole relief**

Charging Party's sixth exception notes that the third item in the ALJ's recommended order fails to specifically identify Martenson as an employee who has incurred a loss as a result of Employer Respondent's overly broad gag order. Indeed, the ALJ is ambiguous on this point, ordering the Employer in paragraph 3 to "[m]ake whole any employees in the bargaining unit for all losses incurred as a result of the Respondent's overly broad policy, including back pay with interest as allowed by the Illinois Public Labor Relations Act, at seven percent per annum." The immediately preceding paragraph 2 orders the Employer to "[r]escind any discipline imposed

pursuant to the overbroad policy and remove all reference to that discipline from employees' personnel files." Although another employee apparently was disciplined for violating the gag order, Martenson was not, so paragraph 2 does not apply to her and presumably neither does paragraph 3. But paragraph 3 *arguably* does, and the ambiguity within it may subsequently lead to disputes regarding compliance with the order.

Indeed, Employer Respondent has filed a somewhat qualified, related exception. It interprets the ALJ's order as *not* requiring it to make Martenson whole, and that only the employee who had been disciplined for violating the gag order need be made whole. In light of Martenson's demand to be made whole, it either wants clarification of the ambiguity in the award, or if its interpretation is incorrect, modification. Charging Party has filed a response to Employer Respondent's exceptions, noting that the Employer has not excepted to the finding that its gag order was overly broad, and confirming that it interprets the award as applying make whole relief to Martenson. It notes the recommended order refers to Lt. Gay's directive on December 22, 2010, and, while Gay gave the same directive to other employees, Martenson was the only employee who received it on December 22. It argues that the overly broad gag order proximately caused Martenson's loss of employment.

To eliminate this dispute, we clarify that Martenson is not entitled to make whole relief. The record does not contain evidence which would establish that absence of Employer Respondent's gag order would have impacted Martenson's disciplinary hearing in such a way that she would not have been terminated. The make whole relief arising from the ALJ's finding that the Employer Respondent's gag order violated Section 10(a)(1) applies only to the employee who was disciplined for having violated the gag order.

**f. Sanctions are not warranted**

Charging Party's seventh exception takes issue with the fact that the ALJ did not issue sanctions against Employer Respondent. It never asked the ALJ to impose sanctions, but correctly states that this does not necessarily preclude it from now asking the Board for such sanctions. 80 Ill. Admin. Code § 1220.90(d)(3) (allowing post-RDO motions for sanctions to be filed no more than seven days after the last brief required to be filed). Charging Party has filed a separate motion for sanctions with the Board exactly seven days after filing its response to Employer Respondent's exceptions.

Section 11(c) of the Act provides that Board orders in unfair labor practice proceedings may include sanctions:

The Board's order may in its discretion also include an appropriate sanction, based on the Board's rules and regulations, and the sanction may include an order to pay the other party or parties' reasonable expenses including costs and reasonable attorney's fee, if the other party has made allegations or denials without reasonable cause and found to be untrue or has engaged in frivolous litigation for the purpose of delay or needless increase in the cost of litigation; the State of Illinois or any agency thereof shall be subject to the provisions of this sentence in the same manner as any other party.

Section 1220.90 of the Board's rules allows for such sanctions. As with the Act, it allows the Board to issue sanctions, but does not require it to. Subsection (a) repeats the statutory language. Subsections (b) and (c) provide:

b) The Board may award sanctions for such written or recorded *allegations or denials*, including statements recorded during the course of Board proceedings.

c) *The sanction may include an admonition or reprimand; striking an offending allegation or denial; an order to pay the other party or parties' reasonable expenses, including costs and reasonable attorney's fees or an appropriate portion thereof; and/or any other appropriate sanction.* (Section 11 of the Act) Sanctions are to be awarded only against a party or parties to the proceeding.

Subsection (d) allows for the filing of motions for sanctions at various stages of the Board's proceedings, including, in subsection (d)(3), before the Board and after issuance of an RDO, provided they be filed "no later than 7 days after receipt of the last brief scheduled to be filed with the Board, or no later than 7 days after oral argument before the Board," a restriction complied with here.

Charging Party here seeks sanctions for the answers to the complaint filed by Employer Respondent, specifically its answers to paragraphs 11, 15 and 17 of Count I and to paragraph 12 of Count II.<sup>8</sup> In City of Bloomington, 26 PERI ¶ 99 (IL LRB-SP 2010), *aff'd by unpub. order*, City of Bloomington v. Ill. Labor Relations Bd., 28 PERI ¶ 29 (Ill. App. Ct., 4th Dist., 2011), the Board granted a post-RDO motion for sanctions even where no party had filed exceptions to the RDO. More precisely, in that case the Board declined to issue sanctions for false assertions made in answers to a complaint, but (with one member dissenting) did issue sanctions for false statements made during the hearing at which stage the Board deemed the party had had sufficient time to ascertain that the statements were false. It reasoned as follows:

Several of the Respondent's answers to the complaint were clearly false and, at the time the hearing was held after the employer had a chance for full factual development of its case, not even debatable. But they were proffered at the beginning of the proceedings and, while we do not in any way wish to diminish respondents' obligation to answer the allegations of complaints truthfully, we recognize there may be limits on the information available at that early stage of the adjudicative process. For that reason, we decline to impose sanctions for the Respondent's answers to the complaint.

We are far more troubled by the Respondent's assertions raised for the first time during the hearing which were not only found by the ALJ to be untrue (a finding not challenged by the Respondent) but so blatantly false that the ALJ found they constituted further evidence of union animus (again, a finding not challenged by the Respondent). The Respondent had full opportunity to understand its case at this point in time, and may properly be criticized for presenting never-before-offered false alternative reasons for its conduct toward Williams. For this reason,

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<sup>8</sup> Respondent Employer responded to the motion for sanctions by repeating its responses to Charging Party's exceptions.

and because the Respondent raises no objection, we grant the motion for attorney fees and costs.

Here, the Employer Respondent denied the allegations of Paragraph 11 of Count I of the Amended Complaint: “The suspension described in paragraph 10 was issued contrary to the terms of the Agreement.” It similarly denied the allegations of Paragraph 15: “The termination described in paragraph 14 was contrary to the terms of the Agreement.” Paragraph 17 of Count I, and its answer, read as follows:

17. On or about April 6, 2011, the Union withdrew the Termination Grievance.

ANSWER: The Sheriff denies that the union withdrew the grievance and affirmatively avers that the Union pursued the grievance through the third step and declined to take the matter to binding arbitration after it was determined that the grievance was without merit.

Finally, the Employer Respondent denied the allegations of Paragraph 12 of Count II:

On or about December 22, 2011, Gay issued a directive to the Charging Party prohibiting her from discussing the substance of the investigation as described in paragraph 11 with any other employee of the Respondents, and directing her to receive prior approval from him before receiving any documents from other employees of Respondents.

~~We decline to impose sanctions. The record shows some ambiguity in the time for~~  
issuing discipline arising from the fact that the parties had previously allowed discipline outside the 30-day period and from the witnesses’ differing interpretations as to whether the contractual language required actual imposition of the discipline within the time frame, or mere notice of discipline. In light of that, the Employer Respondent’s responses to paragraphs 11 and 15 are not sanctionable. While Employer Respondent’s assertion that the union had not “withdrawn” the grievance may have been inaccurate, the remainder of its answer to paragraph 17 adds clarity to its position and is fully accurate. There is nothing misleading in this answer, and again, it is not

sanctionable. Employer Respondent's answer to Paragraph 12 of Count II appears to be incorrect, but its inaccuracy may well have come to light only during the hearing itself when the two parties to the conversation testified. The caution we exercised in City of Bloomington is applicable here. A sanction is not warranted for this answer to the complaint.

**g. Charging Party's request for application of a "hybrid" analysis**

Charging Party's eighth and final exception concerns the ALJ's decision to not apply a "hybrid" Section 301-style analysis to these two cases. Section 301 of the Labor Management Relations Act permits suits in federal district court for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the National Labor Relations Board. 29 U.S.C. § 185; Vaca v. Sipes, 386 U.S. 171, 180 (1967). Typically in such actions an employer can raise as a defense to a court proceeding the fact that the employee has failed to exhaust contractual remedies where an employee has not used contractual grievance procedures, but in Vaca v. Sipes the Supreme Court found that "the employee may seek judicial enforcement of his contractual rights [where] ... the union has sole power under the contract to invoke the higher stages of the grievance procedures, and [where] ... the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance." 386 U.S. at 185. It ruled: "the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 186.

The ALJ found that the Board does not have jurisdiction to decide issues under Section 301 of the Labor Relations Act and therefore analyzed the issues strictly as allegations of

violations of Sections 10(a)(1) and 10(b)(1) of the Act. She was, of course, correct that Section 301 does not give the Board jurisdiction—it is a federal statute providing jurisdiction in federal court—but Charging Party really wanted her to apply the “hybrid” *analysis* in this case over which the Board clearly has jurisdiction under the IPLRA. We find it inappropriate to do so.

Charging Party acknowledges that to prevail under the federal hybrid analysis a bargaining unit member must prove both 1) that the employer breached the collective bargaining agreement and 2) that the union breached its duty of fair representation. White v. Anchor Motor Freight, Inc., 899 F.2d 555, 559 (6th Cir. 1990). However, in Stahulak v. City of Chicago, 184 Ill. 2d 176 (1998), the Illinois Supreme Court held that individual employees represented by unions lack standing to seek judicial review of grievance procedures unless they prove that their union breached its duty of fair representation. That decision relied on Section 16 of our Act which provides that suits for violations of collective bargaining agreements may, after exhaustion of arbitration mandated by the Act, be brought in circuit court, and specifically relied on that portion of Section 16 which states that such suits “may be brought *by the parties* to such agreement.” Because only the exclusive representative and the public employer are parties to the agreement, individuals lack standing. That is unless they can first prove the union breached its duty of fair representation. In Foley v. Am. Fed’n of State, County and Mun. Employees, Local No. 2258, 199 Ill. App. 3d 6 (1st 1990), the Illinois Appellate Court, First District, held that this Board has exclusive jurisdiction over duty of fair representation claims. Because this Board’s decisions are reviewed in the appellate court, a circuit court will never have jurisdiction over such an issue. Consequently, before a public employee in Illinois may bring a court action for violation of a collective bargaining agreement, she must first obtain from this Board a determination that her union has breached its duty of fair representation. There will never then

be a hybrid claim, or need for a hybrid analysis for that matter, in any forum. The ALJ was therefore right to simply analyze these consolidated cases under the standards applicable to a Section 10(a)(1) allegation and the standards applicable to a Section 10(b)(1) allegation.

### **Summary**

Pursuant to the reasoning set out above, we affirm the RDO, clarifying that Charging Party is not entitled to make whole relief. We also deny the motion for sanctions for the reasons explained above.

### **ORDER**

IT IS HEREBY ORDERED that Count II of the Complaint against the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1761, be dismissed in its entirety.

IT IS ALSO HEREBY ORDERED that the County of Boone and Boone County Sheriff, its officers and agents, shall:

1. Cease and desist from implementing overly broad policies limiting a bargaining unit member's rights to engage in activities protected under the Illinois Public Labor Relations Act; and

2. Take the following affirmative actions designed to effectuate the purpose and policies of the Illinois Public Labor Relations Act:

a. Rescind any discipline imposed pursuant to the overly broad policy contained in the investigative notice sent to employees and remove all reference to that discipline from the employees' files;

b. Make whole any employees in the bargaining unit who were disciplined for violating the overly broad policy referenced in paragraph 2.a. for all losses incurred as a

result of that discipline, including back pay with interest as allowed by the Illinois Public Labor Relations Act, at seven percent per annum;

c. 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. Employer Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material; and

d. Notify the Board in writing, within 20 days from the date of this Decision, of the steps Employer Respondent has taken to comply with this order.

**BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL**

/s/ John J. Hartnett  
John J. Hartnett, Chairman

/s/ Paul S. Besson  
Paul S. Besson, Member

/s/ James Q. Brennwald  
James Q. Brennwald, Member

/s/ Michael G. Coli  
Michael G. Coli, Member

/s/ Albert Washington  
Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois, on August 12, 2014; written decision issued at Chicago, Illinois, January 2, 2015.

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

Barbara A. Martenson,	)	
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and	)	
	)	Case Nos. S-CA-11-255
County of Boone & Boone County Sheriff	)	S-CB-11-063
and International Union, United Automobile	)	
Aerospace and Agricultural Implement	)	
Workers of American, Local 1761,	)	
	)	
Respondents	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On June 23, 2011, Barbara Martenson (Charging Party) filed a charge with the State Panel of the Illinois Labor Relations Board (Board) in Case No. S-CA-11-255, alleging that the County of Boone and Boone County Sheriff (County), engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) as amended (Act). On June 23, 2011, the Charging Party also filed a charge with the Board in Case No. S-CB-11-063 alleging that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1761 (Union), engaged in unfair labor practices within the meaning of Section 10(b) of the Act. The Executive Director conducted an investigation pursuant to Section 11 of the Act and on November 28, 2011, issued a Complaint for Hearing and Order Consolidating Cases and a Partial Dismissal dismissing the unfair labor practice charges filed by the Charging Party in Case No. S-CA-11-255. On December 14, 2011, the Board received the Union’s Answer and Affirmative Defenses to the Complaint for Hearing in Case No. S-CB-11-063.

The Charging Party filed a timely appeal of the Executive Director's Partial Dismissal pursuant to Section 1200.135(a) of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. Respondent did not file a response. On May 14, 2012, after reviewing the record and the appeal, the Board issued a decision reversing the Executive Director's Partial Dismissal and remanding the case for issuance of a Complaint for Hearing. On May 16, 2012, the Executive Director issued an Amended Complaint for Hearing. On May 29, 2012, the Board received the County's Answer to the Amended Complaint for Hearing.

A hearing in the consolidated cases was held in the Chicago office of the Board on January 22, 23, February 26 and March 1, 2013. The Charging Party presented evidence in support of the allegations, and all parties were given an opportunity to participate, adduce relevant evidence, examine witnesses, argue orally and file written briefs. After full consideration of the parties' stipulations, evidence, and arguments, and upon the entire record of the case, I recommend the following.

**I. PRELIMINARY FINDINGS**

The Parties stipulate and I find as follows:

1. At all times material, the County has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
3. At all times material, the County and Union have been subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a) of the Act.
4. At all times material, the County and Union have been subject to the Act pursuant to Section 20(b) of the Act.

5. At all times material, the Charging Party was a public employee within the meaning of Section 3(n) of the Act.
6. At all times material, the Union and County have been parties to a collective bargaining agreement (Agreement), containing a grievance procedure for the resolution of disputes concerning its application and interpretation.
7. At all times material prior to January 28, 2011, the County employed the Charging Party in the job classification of Dispatcher.

## **II. ISSUES AND CONTENTIONS**

At issue for hearing was whether the Union acted with intentional misconduct when it withdrew the Charging Party's suspension and termination grievances, in violation of Section 10(b)(1) of the Act.

Also at issue was whether the County interfered with, restrained or coerced public employees in the exercise of rights guaranteed by the Act, in violation of Section 10(a)(1) of the Act when it prohibited the Charging Party from discussing the substance of the investigation of workplace performance with other employees, directing her to receive prior approval from her supervisor prior to receiving any documents from other employees, and directing other employees not to speak to the Charging Party concerning the substance of the investigation.

## **III. FINDINGS OF FACT**

Barbara Martenson worked as a Dispatcher for the County for approximately 27 years. In 2007, Lieutenant Perry Gay became Martenson's immediate supervisor. Martenson worked as a dispatcher along with Denise Hagan, Dawn Lutwiz, Teresa Nyman, Bonnie Pearson and LaWanna Turnipseed. At all times material Hagan and Nyman were representatives for the Union.

Beginning in 2007, Martenson planned and held meetings with the Fraternal Order of Police (FOP), Metropolitan Association of Police (MAP) and American Federal, State, and County Municipal Employees (AFSCME) for all union members because she was interested in voting on new bargaining unit representation. On October 17, 2007, Martenson scheduled a meeting so that the FOP could speak with all union members. There was another meeting in 2010. Although Martenson was interested in changing unions, both Hagan and Nyman made it clear that they were not interested and did not feel it was in the best interest of the unit.

On May 3, 2010, Lt. Gay issued Martenson her first documented letters of counseling. Martenson received one letter in her file because she did not respond fast enough to an officer and the other because she gave an officer inaccurate information. The letters stated that they would remain in her personnel file, but were not considered disciplinary action.

In or around September 2010, Martenson inaccurately told an officer that a suspect's license was suspended. Martenson corrected herself immediately, but not until after the suspect was arrested for driving with a suspended license. For her error, she received a one-day suspension as discipline. Martenson recognized that she was responsible for her error and did not file a grievance.

In or around November 2010, Martenson received her second disciplinary action for improperly responding when an officer's emergency button accidentally went off. Out of three available dispatchers, Martenson was the only one to check on the officer's status, but she did not follow up after receiving no response. For her error, she received a five-day suspension as discipline. Martenson filed a grievance over the disciplinary action because she was not the only person working at the time, felt the punishment was excessive and maintained that she was never trained on the proper procedures. The County denied the grievance claiming that because she

had received two previous written reprimands and a one-day suspension the punishment was not excessive and her claims lacked merit. The Union withdrew the grievance at the third step because it lacked merit.

On or about December 22, 2010, Martenson was placed on a paid administrative leave while the County investigated her alleged mishandling of two orders of protection, one from in-county and one from out-of-county. That day the County issued a written investigative notice to Martenson and others that provides as follows:

An Investigation into conduct or performance of an employee(s) is in process. The purpose of the investigation is to determine if there are facts to support the specific complaint filed against an employee. Because the investigation is ongoing and may involve several other employees you are hereby ordered not to speak to any other person as to the nature of the questions asked or the reason for your appearance at this interview on this date. You are not to speak to any employee about this interview or advise any other employee as to what was said during the interview. Everything within this interview that is asked or discussed is confidential and can only be divulged by the investigating authority as it relates to charges filed and testimony in future hearings.

A violation of this direct order will result in disciplinary action up to and including termination of your employment.

On or about January 28, 2011, Martenson received notice that she was being terminated for the mishandling of the orders of protection. She filed a grievance for unjust termination. The Union initiated the grievance for the termination but withdrew its grievance after the third step, deciding not to take it to arbitration.

Since 2007, only one other dispatcher, Denise Hagan, had been disciplined several times. On or about July 16, 2007, Hagen failed to enter a warrant for her son's arrest and for her misconduct she was given a verbal reprimand. On or about March 9, 2008, Hagen failed to forward an order of Protection involving her father and for this misconduct she was given a written reprimand. On or about June 1, 2010, Hagan failed to send police to her own house for a

domestic violence dispute and instead stepped away from her work area and used her cell phone to communicate. For this incident she received a one-day suspension and her suspension was served outside of the 30-day period in which the County has to impose discipline according to the parties' agreement. Hagan and the County were both aware of this and agreed to an "extension" because the 30-day period included a holiday. Hagan did not file a grievance regarding this issue.

#### **IV. DISCUSSION AND ANALYSIS**

##### **a. Legal Standard of Review**

The Amended Complaint in this case alleges violations of Section 10(b)(1) and 10(a)(1) of the Act. The Executive Director's Partial Dismissal alluded to the issues in these cases being issues of first impression for the Board because the Board would have the opportunity to analyze these cases under Section 301 of the Labor Management Relations Act. In their post-hearing briefs, the parties analyzed the allegations for the Board to consider the relation of Section 301 hybrid claims to Section 10 of the Act. Section 301 of the Labor Management Relations Act provides, in relevant part, as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a).

To recover against a union under Section 301, the union member must prove both (1) that the employer breached the collective bargaining agreement and (2) that the union breached its duty of fair representation. White v. Anchor Motor Freight, Inc., 899 F.2d 555, 559 (6th Cir. 1990). These are "the two constituent claims in every hybrid 301 action." Id. If the union member fails to prove that the union breached its duty, he will, obviously, recover nothing from

the union. If the union member fails to prove that the employer breached the collective bargaining agreement, he also will recover nothing, because the union member's grievance would have failed regardless of the union's representation.

A hybrid Section 301 suit implicates the interrelationship among a union member, his union, and his employer. White, 899 F.2d at, 561. However, the Section 301 hybrid claim specifically relates to lawsuits “that may be brought in any *district court* of the United States” and not charges brought before the Board. Moreover, Section 301 requires the Board to decide whether the employer “breached the collective bargaining agreement” and it is well-established that the Board does not have jurisdiction to enforce provisions of collective bargaining agreements where there is a good faith dispute as to the agreement's meaning. Vill. of Creve Coeur, 3 PERI ¶ 2063 (IL SLRB 1988). The Board does not allow parties to “use the Board's processes to remedy alleged contractual breaches or to obtain specific enforcement of contract terms.” Id.

Therefore, I find that the Board does not have jurisdiction to decide the issues in this matter under Section 301 of the Labor Management Relations Act and I have analyzed the issues in this case strictly as violations of Section 10(a)(1) and 10(b)(1) under the Act.

**b. Charge Against the Union**

The Charging Party argues that the Union breached its duty of fair representation under Section 10(b)(1) of the Act when it withdrew two of Martenson’s grievances in retaliation. The Charging Party claims that Union did not adequately represent Martenson in the grievance process when Denise Hagan improperly agreed to an extension of the agreement, against the advice of her international union representative and to the benefit of the County, and because Martenson was actively looking to replace the Union.

Section 10(b)(1) of the Act provides “ that a labor organization or its agents shall commit an unfair labor practice...in duty of fair representation cases only by intentional misconduct in representing employees under this Act.” Because of the intentional misconduct standard, demonstration of a breach of the duty to provide fair representation, a violation of Section 10(b)(1), requires a charging party to “prove by a preponderance of the evidence that: (1) the union's conduct was intentional, invidious and directed at charging party; and (2) the union's intentional action occurred because of and in retaliation for some past activity by the employee or because of the employee's status (such as race, gender, or national origin), or animosity between the employee and the union' s representatives (such as that based upon personal conflict or the employee' s dissident union practices).” Metro. Alliance of Police v. Ill. Labor Relations Bd., Local Panel, 345 Ill. App. 3d 579, 588 (1st Dist. 2003).

To prove unlawful discrimination, a charging party must demonstrate, by a preponderance of evidence, that: (1) the employee has engaged in activities tending to engender the animosity of union agents or that the employee's mere status, such as race, gender, religion or national origin, may have caused animosity; (2) the union was aware of the employee's activities and/or status; (3) there was an adverse representation action taken by the union; and (4) the union took an adverse action against the employee for discriminatory reasons, i.e. because of animus towards the employee' s activities or status. Id. at 588-89.

In this case, there is no evidence that the Union intentionally took any action either designed to retaliate against Martenson or due to her status, nor is there evidence that the Union's conduct in connection with the grievances filed by Martenson was based on something other than an assessment of the merits of those grievances. Martenson and Turnipseed testified that after Martenson began planning meetings with different unions, Hagan was “horrible” to Martenson.

The evidence suggests that from 2007-2010 Hagan yelled at and belittled Martenson. However, neither Martenson nor Turnipseed could provide specific instances when Hagan exhibited this kind of behavior. Hagan testified that she did not treat Martenson any differently. Other than these vague statements, Martenson and Turnipseed focused most of their testimony on how Lt. Gay showed favoritism toward Hagan and Nyman. Therefore, I find there is no evidence of animosity between Hagan and Martenson.

The evidence also suggests that even if the County and the Union had a mutual understanding of the 30-day period in which to discipline union members, the Union had knowledge of the County extending that period at least twice in the past and did not file a grievance. At least one of those times the employee being disciplined was Hagan, a Union representative. Therefore, there is no evidence the Union treated Martenson differently from other similarly situated employees.

Moreover, following the decision to allow the County to extend the time in which it had to discipline Martenson, the Union still filed a grievance against the County on Martenson's behalf and that grievance went through the second step. The Union states that it relied on Martenson's disciplinary record and the severity of the infraction when making its decision. At hearing, both the Union and County agreed that the Martenson's failure to answer the officer's emergency call button was a terminable offense. The Union maintains that the five-day suspension was a far less severe discipline than the action warranted and that was the reason it felt that the grievance was not winnable.

Martenson's position is that the Union should have fought harder on her behalf and Martenson was obviously dissatisfied with the manner in which the Union interpreted the CBA and believed that its enforcement was not aggressive enough. However, simply displeasing or

dissatisfying a bargaining unit member, or disagreeing as to the manner or degree in which to enforce the parties' Agreement, is not unlawful under the Act. The standard in cases such as this is quite high, as the exclusive representative has a wide range of discretion in representing the bargaining unit, and as the Board has previously held under Section 6(d) of the Act, a union's failure to take all the steps it might have taken to achieve the results desired by a particular employee does not violate the Act, unless as noted above, the union's conduct appears to have been motivated by vindictiveness, discrimination, or enmity. Outerbridge and Chicago Fire Fighters Union, Local 2, 4 PERI ¶ 3024 (IL LLRB 1988); Parmer and Service Employees International Union, Local 1, 3 PERI ¶ 3008 (IL LLRB 1987).

The Union maintains that the Charging Party has failed to prove that the Union withdrew Martenson's grievances for invidious reasons, and claims that the Union withdrew the grievances because the bargaining committee honestly believed they were not winnable. Accordingly, a union must be accorded substantial discretion in deciding whether, and to what extent, a particular grievance should be pursued... and the Board will not second guess a union's administrative decision regarding grievance handling. See Benny Eberhardt and International Brotherhood of Teamsters, Local 700, 29 PERI ¶77 (ILRB-SP 2012); Amalgamated Transit Union, 2 PERI ¶3021 (IL LLRB 1986). No such evidence was presented in this case.

**c. Charge Against the Employer**

The Charging Party argues that the County's acts independently violated Section 10(a)(1) of the Act. Specifically, the Charging Party argues that her collective bargaining rights were restricted by not being able to communicate with other employees during the pending investigation into her discipline. The Charging Party also alleges that the County's failure to

impose discipline on Martenson within the 30-day timeframe allotted in the parties' agreement was also a violation of the Act.

Section 10(a)(1) of the Act states, in relevant part, that it is an unfair labor practice for an employer or its agents to interfere with, restrain, or coerce public employees in the exercise of the rights guaranteed in the Act. In order to establish a violation of Section 10(a)(1) of the Act, Charging Party must prove, by a preponderance of the evidence, that Respondent attempted to or effectively did interfere with, restrain, or coerce the employees in such protected activity. Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990).

The Board has held that, in general, proof of illegal motivation is unnecessary in establishing a Section 10(a)(1) violation. Village of Schiller Park, 13 PERI ¶ 2047 (IL SLRB 1997); see also Chicago Housing Authority, 1 PERI ¶ 3010 (IL LLRB 1985). Thus, if a respondent's actions have the clear effect of restraining employees' exercise of protected rights, and those actions are not independently justified, a Section 10(a)(1) violation may be established even though illicit motivation is not proved. Chicago Housing Authority, 6 PERI ¶ 3013; City of Chicago, 3 PERI ¶ 3011; Chicago Housing Authority, 1 PERI ¶ 3010.

The County argues that during the hearing on this matter, the Charging Party offered no evidence that Martenson either engaged in concerted activity or was prevented from engaging in protected concerted activity. Board precedent, however, supports the conclusion that Martenson's action constituted protected concerted activity within the meaning of Section 6 of the Act.<sup>1</sup>

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<sup>1</sup> Section 6 of the Act provides, in pertinent part:

Employees of the State and any political subdivision of the State...are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 [Management Rights] of this Act, and to

Martenson sought to speak with other employees regarding the investigation of her discipline, and in doing so, Martenson was invoking rights contained in Article IX of the parties' agreement, Section 1, 2 and 3 respectively – the right to be disciplined only for just cause, the right to an accurate investigation and the right to respond to charges.<sup>2</sup> Pace West Division, 13 PERI ¶ 2027 (1197), citing City Disposal Systems, 465 U.S. 822 (1984) (concerted activity may be engaged in by a sole employee as long as that employee is invoking a right grounded in a collective bargaining agreement). Therefore, I find that Martenson's actions constituted engaging in protected concerted activity.

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engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid protection, free from interference, restraint or coercion.

<sup>2</sup>Article IX states as follows:

#### Section 1. Discipline

The Employer agrees herein that disciplinary action shall be in a timely manner and shall not exceed thirty (30) calendar days from the date the incident giving rise to such disciplinary action or from first becoming aware of such incident and shall recognize only that disciplinary action appropriately documents and filed in the employee's central personnel files and not other working files maintained by other management staff. Furthermore, the Employer shall, prior to actual imposition of discipline, afford the subject employee an opportunity to discuss his/her views concerning the conduct causing such disciplinary action. Such discussion should take place as soon as practicable and not be unduly or unreasonably delayed, and the employee should be informed clearly and concisely of the basis of such action. Furthermore, upon request of the employee, a Union Representative shall be allowed to be present and, if the employee approves, participate in such discussions. Any employee who alleges that disciplinary action is not based on just cause may grieve such action pursuant to the grievance procedures

#### Section 2. Investigations

The parties agree that disciplinary action must be supported by timely and accurate investigation. An employee shall be entitled upon request to the presence of a Union Representative at any meeting which discipline may or will take place, or at an investigatory interview of the employee by the Employer regarding charges which, if substantiated, could result in suspension or discharge. The employee will be advised of the nature of any disciplinary or investigatory meeting before it commences.

#### Section 3. Disciplinary Conferences

Whenever an employee is to be formally charged in a violation of any rule, regulation or policy, a disciplinary conference shall be scheduled and the employee shall be notified of the charge and shall have Union representation at this conference if so desired. The employee shall be informed of the nature of the charges against him/her and the reasons that disciplinary action is intended. The employee shall have the right to respond to the results of the disciplinary conference.

i. Lt. Gay's December 22, 2010 Order

I also find that the County's directive to employees to refrain from discussing discipline and disciplinary investigations with co-workers constituted a violation of employees' rights to engage in protected concerted activity. The NLRB case law has provided guidance to the Board in its determination regarding this issue. The NLRB has consistently held that when an employer's directives interfered with employee's rights to discuss discipline or disciplinary investigation involving other employees, the employer could escape a finding of a violation of Section 8(a)(1) of the NLRA by demonstrating a legitimate and substantial business justification that outweighs the employee's Section 7 interests. SSC Oakland Cambridge LLC d/b/a Cambridge East Healthcare Center and Patrick Gordon, 2011 WL 5971219 (NLRB Nov. 29, 2011) aff'g, 2011 WL 4499438 (NLRB Div. Judges Sept. 28, 2011); Desert Palace Inc. d/b/a Caesar's Palace and Richard Zollo, 336 NLRB 271, 272 (2001); Westside Community Mental Health Center, Inc. and SEIU, Local 790, AFL-CIO, 327 NLRB 661, 666 (1997).

The NLRB has found that an employer's rule violated Section 8(a)(1) of the NLRA because it imposed the following overly broad confidentiality directive:

Depending upon the circumstances of a particular investigation employees may be requested and expected not to disclose any confidential information that could compromise an ongoing investigation, including not only the scope and content of the investigation, but also the fact that an investigation is being conducted.

The NLRB held that this directive was overly broad because it did not limit the time-period of the investigation and it restricted the accused employee from discussing the investigation and the allegations against him. Oakland Cambridge LLC, 2011 WL 5971219 (NLRB Nov. 29, 2011) aff'g, 2011 WL 4499438 (NLRB Div. Judges Sept. 28, 2011).

In Phoenix Transit System, the Board reasonably found that the employer's directive to the employees--never to talk about the matter, at any time, to anyone, even about their *own* observations and complaints—was unduly broad, and that employer's asserted confidentiality interest was weak where the employer asserted that the success of its sexual harassment policy depended on confidentiality. Phoenix Transit System v. NLRB, 524, 2003 WL 21186045 (NLRB Div. Judges May 14, 2003). The NLRB found that this assertion lacked evidentiary support, and is particularly unconvincing in light of the fact that the confidentiality directive's effect was to silence sexual harassment witnesses and victims. Id.

The NLRB also rejected an employer's business justification when the employer's rule prevented an employee from possibly obtaining information from co-workers that might be used in her defense. Westside Community Health Center, 327 NLRB 661. The employer's justification included concerns of other employees and avoidance of work place disruption. Id.

In specific circumstances involving an investigation of illegal drug activity in the work place, the NLRB held that the employer's rule not to discuss anything related to their investigations with anyone at anytime or in any way, shape or form—in or out of the work place—constituted a substantial and legitimate business justification that outweighed the restriction on the employees' Section 7 rights. Desert Palace 336 NLRB 271 (2001).

Here, the County maintains that it restricted the “in-house discussion” of the pending discipline to protect the integrity of the investigation by assuring that employees who were interviewed could not warn or prepare each other before Lt. Gay had the opportunity to speak with them. To support its contention, the County cites County of Cook v. ILRB, where the court held that witness statements or reports may be withheld during grievance proceedings to maintain confidentiality. County of Cook, 266 Ill. App. 3d 53 (1st Dist. 1994).

I find that the case the County relies on does not support the County's argument. In County of Cook, the court specifically discusses situations where the employer is refusing to disclose seemingly confidential information on other employees, to an employee being disciplined, strictly for the use of said information during their disciplinary matter. County of Cook, 266 Ill. App. 3d 53. This is not the issue in this case.

After review of the NLRB case law, I find that the County's order issued December 22, 2010, was overly broad and the County failed to provide a legitimate reason for the restriction. Contrary to the County's contentions, the order issued by Lt. Gay did not limit the discussion of the investigations to "at work" discussions. Instead, the order states "[employees] are hereby ordered not to speak to any other person as to the nature of the questions asked or the reason for your appearance at this interview on this date." This directive is overly broad.

Consistent with the finding in Westside Community Health Center, I also find that County has provided no legitimate reason. It is not enough to restrict the exercise of an employees' rights merely so that the County can protect the integrity of an investigation. Martenson's ability to discuss the investigation with other employees and obtain information to defend her termination, in my opinion, weighs more heavily than the County's desire to limit possible collusion among coworkers.

ii. Repudiation

The Charging Party also argues that the County breached the collective bargaining agreement when it issued Martenson discipline outside of the 30-day timeframe allotted in the parties' collective bargaining agreement. As stated above, the Board does not allow parties to obtain specific enforcement of contract terms, but instead the Board has jurisdiction to adjudicate those breaches of contract involving conduct so sufficiently lacking in good faith that they

amount to a repudiation of the collective bargaining process. City of Loves Park v. Ill. Labor Rel. Bd. State Panel, 343 Ill. App. 3d 389, 395 (2nd Dist. 2003), citing City of Collinsville, 16 PERI ¶ 155 (IL SLRB 2000), aff'd City of Collinsville v. Ill. State Labor Rel. Bd., 329 Ill. App. 3d 409, 767 N.E.2d 886 (5th Dist. 2002); City of Kewanee, 23 PERI ¶ 110 (IL SLRB 2007); Cnty. of Cook (Office of the Public Defender), 13 PERI ¶ 3005 (IL LLRB 1997).

Repudiation therefore requires (1) a substantial breach by the Respondent (2) made without rational justification or reasonable interpretation such that it demonstrates bad faith. City of Loves Park v. Ill. Labor Rel. Bd. State Panel, 343 Ill. App. 3d 389, 395 (repudiation requires outright refusal to abide by a contractual term or disregard for the collective bargaining process), citing City of Collinsville, 16 PERI ¶ 155 (IL SLRB 2000), aff'd., 329 Ill. App. 3d 409; City of Kewanee, 23 PERI ¶ 110 (IL SLRB 2007) (repudiation requires a substantial breach and a contractual argument by the employer that is without rational justification or reasonable interpretation of that contract but there can be no repudiation where the contract's language is open to more than one reasonable interpretation).

The agreement between the parties covered December 1, 2008 through November 30, 2009, and its terms were extended until November 30, 2011, by agreement of the parties.

The Charging Party argues that the undersigned must decide the meaning of Article IX, of the parties' agreement<sup>3</sup> and that the words in this section should be given their plain and ordinary meaning consistent with the long-standing rule in Illinois. Young v. Allstate Insurance Co., 351 Ill. App. 3d. 151, 158 (1st Dist. 2004). While the Charging Party maintains that this section of the agreement requires the County to issue disciplinary action within the 30-day time limit, the County argues that the section merely requires the notification of intended disciplinary action and an opportunity to respond with 30 days of the infraction charged.

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<sup>33</sup> Supra note 2.

The Charging Party provides several examples as evidence that the County understood and operated under the interpretation that management has 30 days from the time in which they learn of an incident, to impose disciplinary action. Such evidence includes Sheriff Wirth's testimony that per the agreement the County has 30 days from the date it becomes aware to conduct an investigation and to issue disciplinary action. The International Union Representative Ted Dever also testified that he informed Hagan and Gay of the 30-day requirement for the County to issue discipline. Hagan also testified that she received discipline on conduct that occurred on June 1, 2010, and she was aware that she could have filed a grievance for being issued discipline July 7, 2010, more than 30 days after the infraction. Hagan testified that she did not file a grievance because she was guilty and felt the discipline issued was warranted. Hagan also testified that she was aware of the 30-day requirement in Martenson's case but that she allotted the County additional time to complete its disciplinary action in Martenson's case.

Lt. Gay testified that he found the 30-day requirement in the parties' agreement to mean that an investigation for disciplinary action has been started, the County has within 30 days given the employee notice, held a conference, and let them know that there is an investigation. Lastly, the evidence is such that at least two other employees were disciplined beyond the 30-time frame allotted for in the parties' agreement and neither filed a grievance.

It is clear that the County did not repudiate the agreement because the parties have each offered reasonable interpretations of the contract's language which demonstrates that the parties have a good faith disagreement as to the contract's meaning. The County's actions did not amount to an outright refusal to abide by contractual terms and the County provided a reasonable

interpretation of the contract terms. As such, I find that the County has not repudiated the parties' agreement.

### **CONCLUSIONS OF LAW**

I find that the Charging Party failed to prove, by a preponderance of the evidence, that the Union violated Section 10(b)(1) of the Act. However, I find that the County violated Section 10(a)(1) of the Act when it issued an overly broad directive to its employees.

### **VI. RECOMMENDED ORDER**

IT IS HEREBY ORDERED that Count II of the Complaint against the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1761 be dismissed its entirety.

IT IS ALSO HEREBY ORDERED that the County of Boone and Boone County Sheriff, its officers and agents, shall:

1. Cease and desist from implementing overly broad policies limiting a bargaining unit member's rights to engage in protected activities.
2. Rescind any discipline imposed pursuant to the overbroad policy and remove all reference to that discipline from employees' personnel files.
3. Make whole any employees in the bargaining unit for all losses incurred as a result of the Respondent's overly broad policy, including back pay with interest as allowed by the Illinois Public Labor Relations Act, at seven percent per annum.<sup>4</sup>

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<sup>4</sup> “[W]here discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule.” N.L.R.B. v. Northeastern Land Services, Ltd., 645 F.3d 475 (1st Cir. 2011)(citing Double Eagle Hotel & Casino, 341 N.L.R.B. 112, 112 n. 3 (2004), enforced, 414 F.3d 1249 (10th Cir. 2005) and Opryland Hotel, 323 N.L.R.B. 723, 728 (1997)); see also Saia Motor Freight Line, Inc., 333 N.L.R.B. 784, 785 (2001) (“Because [the employee]

4. Take the following affirmative action designed to effectuate the purpose and policies of the Act:

- a. 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.
- b. Notify the Board in writing, within 20 days from the date of this Decision, of the steps Respondent 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

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was disciplined for violating the [employer]'s unlawful overly broad ... rule, that discipline itself constitutes a violation of Section 8(a)(3) and (1), without consideration of Wright Line's dual-motivation analysis." A make-whole remedy is required in such cases. Northeastern Land Services, Ltd., 352 NLRB No. 89, 5 (2008), aff'd 645 F.3d 475 (1st Cir. 2011); Double Eagle Hotel & Casino, 341 N.L.R.B. at 112, enforced, 414 F.3d 1249 (10th Cir. 2005); Opryland Hotel, 323 N.L.R.B. at 728; Saia Motor Freight Line, Inc., 333 N.L.R.B. at 785.

General Counsel of the Illinois Labor Relations Board 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 29<sup>th</sup> day of April, 2014.**

A handwritten signature in cursive script that reads "Elaine L. Tarver" is written over a horizontal line.

**Elaine L. Tarver  
Administrative Law Judge  
Illinois Labor Relations Board**