STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Patrick C. Nickerson,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-12-011
	)	
Village of University Park,	)	
	)	
Respondent	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On January 10, 2012, the Illinois Labor Relations Board's Executive Director, John F. Brosnan, dismissed the unfair labor practice charge filed by Patrick C. Nickerson (Charging Party) in the above-captioned case. Nickerson alleged that the Village of University Park (Respondent or Village) engaged in unfair labor practices within the meaning of Section 10(a)(1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), as amended, when it terminated Nickerson's employment as a Maintenance Technician in its Public Works Department, allegedly because he had complained about a loss of sick and vacation time in 2008 or 2009 and because, in 2009, he assisted a co-worker who had filed charges with the Board, the Equal Employment Opportunity Commission (EEOC), and the Illinois Department of Human Rights (IDHR).[1]

The Executive Director dismissed Nickerson's charge, asserting that Nickerson could not demonstrate a causal connection between his alleged protected activity and Respondent's decision to discharge him. Nickerson filed a timely appeal of the Executive Director's dismissal. On May 29, 2012, the Board reversed the dismissal and remanded for further investigation. On

[1] Nickerson served as a witness on his coworker's behalf concerning at least one of these charges.

September 17, 2012, Executive Director Melissa Mlynski again dismissed Nickerson's charge, finding that Nickerson still could not prove a causal connection between his protected activity and his discharge.

On September 28, 2012, Nickerson filed a timely appeal of the Executive Director's second dismissal. Nickerson's appeal included substantive objections to the Executive Director's determination and a hand-written cover sheet which stated the case caption, the case number, the Respondent's address, the date, and the title "Request for Review of Charge of Dismissal." Nickerson did not include formal proof of service with his exceptions. The hand-written cover sheet did not assert that Nickerson served Respondent with his exceptions.

On October 10, 2012, Respondent filed a response to Nickerson's appeal of the dismissal. Respondent asserted that Nickerson's appeal should be rejected because it failed to comply with the Board's requirements for appeals from Executive Director's Orders. First Respondent notes that Nickerson did not include proof of service with his exceptions. Second, Respondent contends that Nickerson did not provide any reasons in support of his appeal. To illustrate, Respondent attached the document that Nickerson purportedly mailed to Respondent. The document was a copy of Nickerson's hand-written cover sheet which stated the case caption, the case number, Respondent's address, the date, and the title "Request for Review of Charge of Dismissal." That document contained no reasons which supported Nickerson's appeal and did not represent the complete document that Nickerson mailed to the Board.

The threshold issue in this appeal is whether the Board should strike Nickerson's exceptions or instead address them on their merits. Here, the language of the dismissal, the Board's rules, persuasive precedent, and principles of equity mandate that we strike Nickerson's exceptions because Nickerson did not include proof of service with his exceptions and because

there is no other indication that Nickerson served Respondent with the same documents that Nickerson sent to the Board.

First, the Executive Director's dismissal provides the following:

> the party filing the appeal must provide a copy of its appeal to all other persons or organizations involved in this case at the same time the appeal is served on the Board. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that a copy of the appeal has been provided to each of them. An appeal without such a statement and verification will not be considered.

In addition, the Board's rules provide that the "appeal [of an Executive Director's dismissal] shall be served on all other parties in accordance with Section 1200.20." 80 Ill. Admin. Code § 1200.135(a)(1). Under Section 1200.20, "all unfair labor practice charges and all documents...shall be served by the party filing the documents on all other parties to the proceedings." 80 Ill. Admin. Code § 1200.20(e). That section further states that "the document shall not be considered properly served unless accompanied by proof of service. Proof of service shall consist of a written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service." Id.

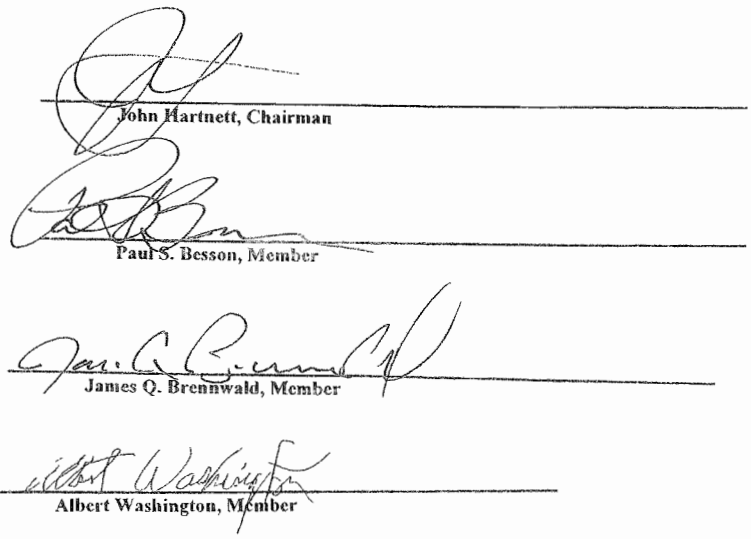
Further, the IELRB has applied similar rules[2] to consistently strike exceptions where a party has failed to provide a certificate of service or other proof of service and has otherwise failed to demonstrate that the exceptions have been served on the other parties. See Chicago Teachers Union and Chicago Bd. of Educ. (Russell), 22 PERI ¶ 123 (IELRB 2006) (striking charging party's exceptions where charging party did not sign the certificate of service and did

[2] The Illinois Educational Labor Relations Board's (IELRB) rules provide that "whenever a document is filed with the [IELRB], it shall be accompanied by a certificate of service" which is a "written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service." 80 Ill. Adm. Code § 1100.20(e). The IELRB's rules further provide that "failure of a party to serve a document or failure to attach a certificate of service may be grounds to strike the document, if the failure results in prejudice to another party (such as lack of notice or detrimental reliance) or demonstrates disregard of the Board's processes (such as continued noncompliance)." 80 Ill. Adm. Code § 1100.20(f).

not provide additional evidence demonstrating that the exceptions were properly served on the other parties, and where the Respondents, accordingly, were denied an adequate opportunity to respond to the Charging Party's exceptions); Int'l Bhd. of Teamsters, Local 743, AFL-CIO, 21 PERI ¶ 89 (IELRB 2005); Int'l Union of Operating Engineers, Local 143-143-B, 21 PERI ¶ 23 (IELRB 2005). The Appellate Court approved this practice in Jones v. Illinois Educational Labor Relations Board, 272 Ill. App. 3d 612 (1st Dist. 1995) (affirming IELRB's ruling to strike exceptions filed without a certificate of service where Respondent never appeared before the Board to respond; also finding that lack of notice of a filing by itself is sufficient to establish prejudice).

Applying these principles, we strike Nickerson's exceptions because he has produced neither formal proof of service with his exceptions nor any other indication that he served the Respondent with the same documents he mailed to the Board. Indeed, Nickerson's cover sheet, which included the caption, Respondent's address, the date, and the title of the document, did not in any manner assert that he provided Respondent with his substantive exceptions. While the Board, in the interests of fairness and equity, has historically granted pro se parties some leniency in the manner in which they present their documents, the Board will not skew the equities so far in favor of the pro se charging party that they unfairly prejudice the respondent. Here, we must conclude that Nickerson did not mail Respondent his substantive exceptions, because there is no evidence that he did. Accordingly, we strike Nickerson's exceptions and let the Executive Director's dismissal stand as binding but non-precedential because Nickerson did not supply Respondent with sufficient information to permit a substantive response and, as such, Respondent would be unfairly prejudiced if we considered Nickerson's exceptions.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD[3]



Decision made at the State Panel's public meeting in Chicago, Illinois on January 8, 2013, written decision issued in Chicago, Illinois on January 28, 2013.

[3] Member Coli did not participate in the determination of this case.

STATE OF ILLINOIS
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REMANDED INVESTIGATION

DISMISSAL

On July 11, 2011, and as amended on August 23, 2011, Charging Party, Patrick C. Nickerson, filed a charge with the State Panel of the Illinois Labor Relations Board (Board) in the above-captioned case, alleging that Respondent, Village of University Park (Village or Employer), violated Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), *as amended.* On January 10, 2012, the Board's Executive Director dismissed the above referenced charge. Nickerson filed a timely appeal of the dismissal claiming discrimination based on protected activity, and that the Village applied workplace standards more stringently on Nickerson than other similarly situated employees. On May 29, 2012, the Board remanded the charge for further investigation. Specifically, the Board directed further investigation as to whether Nickerson's discharge may have closely followed his participation in a Department of Human Rights investigation and whether similarly situated employees were treated differently than Nickerson. After an investigation conducted in accordance with Section 11 of the Act, I determined that the charge fails to raise an issue of law or fact sufficient to warrant a hearing.

I. INVESTIGATORY FACTS

Respondent is a public employer within the meaning of Section 3(o) of the Act and subject to the jurisdiction of the State Panel of the Board pursuant to Sections 5(a-5) and 20(b) of the Act. At all times material, Nickerson was a public employee within the meaning of Section 3(n) of the Act, employed by Respondent in the title or classification of Maintenance Technician. The American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union), is a labor organization within the meaning of Section 3(i) of the Act, and the exclusive representative of a bargaining unit comprised of Village employees, including those in the title or classification of Maintenance Technician (Unit).[1] At all times relevant, Nickerson was a member of the AFSCME bargaining unit. The Village and Union are parties to a collective bargaining agreement (CBA) for the Unit which provides for a grievance procedure culminating in arbitration.

II. BACKGROUND

Charging Party, Patrick C. Nickerson, was hired by the Village of University Park on November 5, 2008. Respondent terminated Nickerson's employment on February 23, 2011. The Village asserts that Nickerson was terminated because he no longer possessed a valid Illinois Commercial Driver's License (CDL), one of the qualifications necessary to retain his position. In his appeal, Nickerson disputes the Village's assertion, and contends that he was terminated because he engaged in protected activity by assisting Thaddeus Lis, a co-worker, in filing a charge with the Board and two complaints with the Illinois Department of Human Rights/Equal Employment Opportunity Commission (IDHR/EEOC).[2] Furthermore, Nickerson claims he provided a witness statement to IDHR/EEOC on behalf of the co-worker.[3]

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[1] AFSCME is not a party to this charge.

[2] There is no evidence that Lis filed a charge with the Board.

[3] Nickerson claims that he assisted co-worker Thaddeus Lis in IDHR/EEOC Charge Nos. 2010CF1927 and 2010CF2074. IDHR/EEOC provided a written response to an inquiry by the Board agent concerning testimony

In or around April 2009, Thaddeus Lis claimed that Village Public Works Director, Jerry Townsend,[4] offered to promote Lis from part-time employment, to full-time employment with the Village. By November 2009, Lis had not been promoted and, accompanied by Nickerson, Lis spoke to Townsend again about the promotion. Noting that many of the Village employees were African-American, Lis sensed that the reason he was not promoted was because he is Caucasian. On January 4, 2010, and again on January 14, 2010, Lis filed a complaint with IDHR/EEOC, alleging discrimination by the Village.

On or about September 21, 2011, Nickerson was interviewed via telephone by an investigator from IDHR/EEOC. Nickerson told the IDHR/EEOC investigator a similar account of the meetings between Lis and Townsend, adding that Lis was a good worker, never late, and completed his assignments as directed. Moreover, Nickerson believed that Townsend was leading Lis on, and never intended to follow through with the full-time offer.

With regard to Nickerson's issues with his driver's license, the Village job description for Maintenance Technician requires, among other things, that an employee possess a CDL, along with the ability to operate all of the Village's heavy equipment including trucks, tractors, mowers, backhoes, street sweeper, and other related equipment. Without a valid CDL, a Village employee does not have the complete ability to engage in required tasks as posted in the job description for Maintenance Technician.

On May 6, 2010, Nickerson's CDL expired. On that same date, Nickerson tested for renewal of his CDL, but he failed the exam. He then failed the exam two more times. By October 12, 2010, after Nickerson had yet to pass the CDL exam after three attempts, or

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provided by Nickerson on behalf of Lis. In the response, IDHR/EEOC states that Nickerson was only interviewed in Charge No. 2010CF1927. This interview took place on September 21, 2011. Additionally, the investigative file for Charge No. 2010CF2074, filed by Lis on January 14, 2010, does not show that IDHR/EEOC interviewed Nickerson or that he provided any investigative information.

[4] On June 23, 2008, Jerry Townsend was hired as Respondent's Director of Public Works, replacing the former director, Gerald Crockett.

alternatively obtain a basic drivers license so he could at least operate Village vehicles other than those classified as heavy equipment, Director Townsend ordered Nickerson to produce the basic license by October 13, 2010. On October 12, 2010, Nickerson did obtain a basic license.[5]

However, on October 8, 2010, Nickerson had been arrested and charged with four traffic violations, including "Driving under the Influence of Alcohol". As a result of his arrest, *all* of Nickerson's driving privileges, both CDL and basic, were suspended by the Secretary of State (SOS) for a period of twelve months, from November 23, 2010, through November 23, 2011. Nickerson notified Townsend of the suspension, and explained that he was attempting to get his license and driving privileges reinstated. By December 1, 2010, Nickerson had yet to obtain re-instatement of his driving privileges. On December 1, 2010, Townsend required Nickerson to provide proof of reinstatement of his license by December 21, 2010. Townsend warned Nickerson that if he could not provide the requested information, he would be suspended on December 22, 2010, pending further discipline. On December 2, 2010, Townsend obtained the SOS notice of suspension which indicated that Nickerson's suspension would not end until November 23, 2011. Based on the SOS notice, Townsend suspended Nickerson pending further discipline. Between December 2, 2010, and February 22, 2011, Respondent provided Nickerson with additional opportunities to demonstrate legal driving capabilities in order to retain his job, to no avail. On February 23, 2011, Respondent terminated Nickerson for failing to maintain either a valid Illinois CDL or basic license.

II. POSITIONS OF THE PARTIES

In his appeal of the Executive Director's January 10, 2012 dismissal, Nickerson contends that he was terminated because of the assistance he provided to Lis after Lis filed the IDHR/EEOC complaint against the Village. Additionally, Nickerson claimed on appeal that

[5] It appears that Nickerson either concealed the fact that he was arrested for DUI only 5 days before, or that the record of his arrest had not been received and processed by the Secretary of State as of October 12, 2010.

other employees, namely Zischan Jenkins and Steve Allen, retained their employment even though they too lacked valid Illinois driver's licenses.

The Village asserts that after providing Nickerson with several warnings and opportunities to come into compliance, Nickerson was terminated because he allowed his CDL to expire and failed to apply for and successfully pass CDL licensure and that he failed to maintain a valid basic license. Moreover, the Village denies that it treated Nickerson in a disparate manner as compared to Jenkins and Allen.

III. DISCUSSION AND ANALYSIS

Section 10(a)(1) of the Act makes it an unfair labor practice for an employer or its agents to interfere with, restrain or coerce public employees in the exercise of their Section 6 rights. In general, proof of illegal motivation is unnecessary in establishing a 10(a)(1) violation. Green and Warns and City of Chicago, 3 PERI ¶3011 (IL LLRB 1987); Gale and Chicago Housing Authority, 1 PERI ¶3010 (IL LLRB 1985). Here, however, since Charging Party alleges that certain acts were committed against him because of, and in retaliation for, the exercise of protected rights, to determine whether the action complained of in fact "restrains, interferes or coerces," the analysis must necessarily track that used in cases arising under Section 10(a)(2) concerning the exercise of the right to engage in union activity. Kirk and Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990). Therefore, in order to obtain a complaint on a Section 10(a)(1) allegation, Charging Party must make some showing that he engaged in protected activity, that Respondent knew of that activity, and that Respondent took adverse action against him as a result of his involvement in that activity. Gale and Chicago Housing Authority, 1 PERI ¶3010 (IL LLRB 1985).

Assuming for the sake of this analysis that Nickerson engaged in protected activity when he accompanied Lis, in November of 2009, to inquire about Townsend's failure to promote Lis,

there is simply no causal connection between this event and Nickerson's discharge. It appears that Nickerson merely expressed an opinion about Lis' work ethic during this conversation. There is no evidence that Townsend was so taken aback, or his authority was so challenged by Nickerson, that Townsend would have a reason to retaliate in any manner against Nickerson. The available evidence indicates that for nearly six months after November 2009, Nickerson had little contact with Townsend until May 10, 2010, when Townsend received the SOS notification that Nickerson's CDL had expired. Following the May 2010 SOS notification, Townsend provided Nickerson several months of opportunities to obtain a valid CDL, allowing him to continue to work throughout that time period. In February 2011, Nickerson was finally terminated for failure to obtain either a CDL or a basic license. The temporal gap between the November 2009 conversation and the February 2011 discharge, as well as the numerous opportunities Townsend gave Nickerson to save his employment, belies a causal connection between Nickerson's alleged protected activity and his discharge.

Again, assuming for the sake of this analysis that Nickerson's interview in IDHR/EEOC Charge No. 2010CF1927 was protected activity, this interview took place on September 21, 2011, six months after Nickerson was terminated. Clearly Nickerson's statement to IDHR/EEOC had no impact on the termination of his employment.

In his appeal, Nickerson also complained that two other employees retained their jobs even though they did not have the appropriate driver's license. In response to the Board's remand of the charge, Respondent reports that former employee Steve Allen was one of the two employees that Nickerson believes received preferential treatment. Allen was hired by Respondent in July 2008, and assigned as a Pool Attendant in its parks department. On November 17, 2008, Respondent re-assigned Allen as a probationary Maintenance Technician in the public works department. During his six-month probation period in public works, Allen was

unable to obtain the required CDL in order to retain employment in the public works department. Allen did, however, possess a valid Class D or basic driver's license, and in July 2009, was subsequently transferred back to the park department and assigned to duties requiring less skill. In September 2009, Allen was terminated for misconduct.

The other individual referred to by Nickerson as receiving preferential treatment was former employee, Zischan Jenkins. Jenkins was hired by Respondent as a seasonal worker in April 2008. As a seasonal worker, Jenkins would not normally be required to operate any of Respondent's vehicles. On his application for employment, Jenkins was required to provide, among other things, a state issued driver's license or photo identification card. On his application Jenkins wrote "driver's license" next to a copy of his identification. Former Director of Public Works, Gerald Crockett, corrected the application when he noticed that the photocopy of the identification that Jenkins provided was actually an Illinois State ID Card, and not a driver's license. In November 2008, Jenkins was promoted to Maintenance Technician. In June 2008, upon assuming the duties of Director of Public Works, Townsend had occasion to inspect the employment records of public works employees. In December 2008, Townsend noted that Jenkins did not possess a valid Illinois license of any sort because it had been suspended by the Secretary of State. Townsend provided Jenkins an opportunity to restore his driving privileges. In February 2009, Jenkins resigned in lieu of termination.

Charging Party has provided insufficient evidence to raise a question of law or fact regarding disparate treatment. In both instances, Allen and Jenkins either resigned or were terminated before Nickerson's alleged protected activity. More importantly, there is no evidence that the Employer waived the requirement that Allen and Jenkins have a CDL, or at least a basic driver's license, while employed in the public works department.

IV. ORDER

Accordingly, the instant charge is hereby dismissed. Charging Party may appeal this dismissal to the Board at any time within 10 calendar days of service hereof. Any such appeal must be in writing, contain the case caption and number, and be addressed to the Board's General Counsel, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Appeals will not be accepted in the Board's Springfield office. In addition, any such appeal must contain detailed reasons in support thereof, and the party filing the appeal must provide a copy of its appeal to all other persons or organizations involved in this case at the same time the appeal is served on the Board. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that a copy of the appeal has been provided to each of them. An appeal filed without such a statement and verification will not be considered. If no appeal is received within the time specified herein, this dismissal will become final.

Issued in Springfield, Illinois, this 18th day of September, 2012.

STATE OF ILLINOIS
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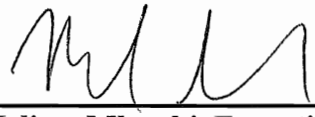
STATE PANEL



Melissa Mlynski, Executive Director