

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

International Brotherhood of Teamsters,)	
Local 700,)	
)	
Charging Party)	
)	Case No. S-CA-12-057
and)	S-RC-10-133
)	
County of McHenry and McHenry County)	
Health Department,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On June 10, 2010, the International Brotherhood of Teamsters, Local 700 (Petitioner or Charging Party) filed a majority interest petition seeking to represent four Registered Nurses (RNs) and two Certified Nurses’ Aides at the County of McHenry within its Health Department (Employer or County). On December 9, 2010, Administrative Law Judge (ALJ) Joseph Tansino issued a Recommended Decision and Order (RDO) recommending that the Illinois Labor Relations Board, State Panel (Board), find appropriate a collective bargaining unit consisting solely of Home Health Care Nurses and Certified Nursing Aides employed by the County, and that the Board certify the Petitioner as the representative of that unit pursuant to the majority interest provisions of Section 9(a-5) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2012), as amended.

On June 13, 2011, the Board reversed the ALJ’s RDO and remanded the matter back to the ALJ for further proceedings.¹ The Board found that the issue of the appropriateness of a collective bargaining unit consisting of four Registered Nurses and two Certified Nurses’ Aides

¹ Subsequently, ALJ Tansino left the employment of the Board and the case was transferred to the undersigned.

in the Employer's Health Department, which employs a total of 29 RNs, none of whom are otherwise represented, was an issue of fact or law. Specifically, the Board held that contrary to the ALJ's decision, there were issues as to whether the petitioned-for employees share a community of interest among themselves sufficiently separate from that which they may share with the remaining RNs in the Employer's Health Department that required a hearing to resolve. A hearing in this matter was scheduled January 31 and February 1, 2012.

On October 7, 2011, the Charging Party filed a charge with the Board alleging that the County engaged in unfair labor practices within the meaning of Section 10(a) of the Act and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules) when the County shut down the Home Health Care Program laying off the six nurses petitioned for the Case No. S-RC-10-133. These charges were investigated pursuant to Section 11 of the Act and on January 18, 2012, the Executive Director of the Board issued a Complaint for Hearing. On February 3, 2012, the Board received the Respondent's Answer to the Complaint for Hearing.

Subsequently, the County moved to dismiss Case No. S-RC-10-133 on the basis that the petitioned-for employees were no longer employed with the County. The undersigned held Case No. S-RC- 10-133 in abeyance pending a decision in Case No. S-CA-12-057. I now consolidate the cases for resolution.

On May 15 and 16, 2012, a hearing was held in the Chicago office of the Board in Case No. S-CA-12-057. 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 County has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a) of the Act.
3. At all times material, the County has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act.
4. At all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.

II. ISSUES AND CONTENTIONS

The issue for hearing is whether the County shut down its Home Health Care Program and laid off or terminated its Home Health Care Nurses because they were seeking representation by the Charging Party, in violation of Section 10(a)(1) of the Act.

The County contends that it did not violate the Act when it laid off or terminated employees in the Home Health Care Program because it did so due to its loss of funding for the program. The County also argues that the allegations in the Complaint are time-barred as the County began the decision-making process to transfer the Home Healthcare Program from the County's Health Department to another agency as early as October 2009.

The Charging Party maintains that the County shut down the Home Health Care Program and laid off its employees on November 30, 2011 in retaliation for their efforts to join a union.

III. FINDINGS OF FACT

McHenry County Health Department has a Home Health Care Program. This program provides services to County residents as contracted for by the McHenry County Mental Health Board, for a fee, as negotiated on an annual basis.

The funding for the McHenry County Health Department comes from the Mental Health Board, which funds 80 different programs. In 2009, after an annual audit by the Health Department, the Mental Health Board determined that the Program was not in compliance with Medicaid Rule 132, under which the funding for the Home Health Care Program was supplied. Thus, on October 21, 2009 the Program was warned that failure to regain compliance could result in loss of funding.

From about October 2009 to June 2011, the Mental Health Board conducted 13 audits to monitor compliance and hired two consultants to assist the County. Additionally, the County met with the Mental Health Board Executive Director in an attempt to save funding and implemented training programs for the staff. Because the Program was not in compliance with Rule 132, the Mental Health Board had to stop submitting bills to Medicaid and instead had to use its own funds to reimburse the Program. In the end, the Mental Health Board decided to remove the Home Health Care Program and transfer all services to Family Services, which was independently certified for Medicaid. On or about September 2011, the employees of the Home Health Care Program were notified that the contract would not be renewed for the next fiscal year and they would be laid off.

In or around June 2010, four of the six nurses within the Home Health Care Program, Frances Russo, Marilous Belski, Donna Lynn DeRose and Rose Talluto, all signed a majority

interest petition seeking to organize a bargaining unit with Teamsters Local 700. The County challenged the petition on the basis that it sought to represent an inappropriate unit. In a meeting some time in 2010, where the County's staff and the nurses were present, the nurses were told by management that it was "okay" to join a union. At a meeting shortly thereafter and after the nurses signed showing of interest cards, one of the nurses, Frances Russo, was told by her immediate supervisor, Debbie Curry, to "be careful what you sign." Additionally, in a meeting in or around November 2011, the Director of the Health Department, Fran Stanwood, indicated to Russo that no raises would be given until there was some closure with the union process.

On November 30, 2011, the Home Health Care Program within the County was shut down. After notice of the shut-down, a majority of the employees within the Home Health Care Program were laid off or quit; however, a few were able to find jobs within the County. In proceeding with all of the layoffs the County states that it considered several factors, pursuant to the "Workforce Reduction" process laid out in the Personnel Policy Handbook. The handbook states that

"Conditions may require the department to make reductions in the work force. Employees who are losing their jobs due to a work force reduction will receive an official written notice at least fourteen (14) days prior to the effective date of their employment termination except for emergencies or other situations where it is not possible to give such notice. Employees will be laid off based on a number of factors, including, but not limited to, qualifications, past performance, and length of service with the department. Some employees may be reassigned to other positions for which they are qualified. Employees will not be laid off on the basis of any protected classification recognized by law."

The Home Health Care Program was not the only program that suffered layoffs. The Family Care Management Program, a program without union activity, lost two employees to layoffs in 2011 and an additional two employees in 2012 due to a lack of funding. Stanwood also informed the employees of other job openings and interviewed employees for three different

job positions. Russo was the only employee to secure employment with the County prior to being laid off.

VI. DISCUSSION AND ANALYSIS

a. Timeliness

The Respondent has the burden of proving that the charge is untimely. Sheriff of Jackson County, 14 PERI ¶ 2009 (IL SLRB 1998); County of Cook, 4 PERI ¶ 3012 (IL LLRB 1988). Therefore, the County must establish, by a preponderance of the evidence, that the charge was not filed and served within six months of when Charging Party knew or reasonably should have known of, the alleged unlawful conduct. City of St. Charles, 23 PERI ¶ 50, (IL LRB-SP 2007); Moore v. Illinois State Labor Relations Board, 206 Ill. App. 3d 327 (4th Dist. 1990); Service Employees International Union, Local 46 (Evans), 16 PERI ¶ 3020 (IL LLRB 2000).

The County argues that the charge is time-barred because the County began the decision to shut down the Home Health Care Program as early as October 2009. The evidence is clear that neither the nurses nor the Charging Party were aware that the program was in danger of losing funding at that time. I find that the limitations period began to run in September 2011, when the County sent a letter to Charging Party stating that it was laying off the petitioned-for nurses and shutting down the Home Health Care Program. On that date, Charging Party had notice of the County's intent. The six month limitations period began on September 2011 and the unfair labor practice charge was filed on October 7, 2011 and, thus, was timely filed.

b. Violation of Section 10(a)(1)

The Charging Party argues that County's shut down of the Home Health Care Program which led to the layoff of six nurses violated Section 10(a)(1) 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 the County'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; Chicago Housing Authority, 1 PERI ¶ 3010; City of Chicago, 3 PERI ¶ 3011 (IL LLRB 1987).

However, where the allegations involve retaliation based on the exercise of protected rights under Section 6 of the Act, the analysis is the same as an alleged violation of Section 10(a)(2) of the Act and the Charging Party must show (1) that it engaged in protected, concerted activity, (2) the Respondent knew of said activity, and (3) that the Respondent took the adverse action against the Charging Party as a result of its involvement in protected, concerted activity. City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335 (1989). Once a charging party establishes a prima facie case that a violation has occurred, the burden then shifts to the

respondent to prove by a preponderance of the evidence that it had a legitimate business reason for the adverse action and that that action would have taken place absent the employee's union activity. County of Cook, 2012 Ill App (1st) 111514, ¶ 25; City of Burbank, 128 Ill. 2d at 335. Merely offering a legitimate business reason for the adverse action does not end the inquiry, because the reason advanced by the employer must be bona fide and not pretextual. Pace Suburban Bus Division, 406 Ill. App. 3d 484, 500 (1st Dist. 2010); Cnty. of Rock Island and Sheriff of Rock Island, 14 PERI ¶ 2029 (IL SLRB 1998), aff'd, Grchan v. Illinois State Labor Relations Board, 315 Ill. App. 3d 459, 16 PERI ¶ 4008 (3rd Dist. 2000), appeal denied, 192 Ill. 2d 687 (2000). If these requirements are not met, the respondent's explanation for its actions will be determined to be pretext and the respondent will be found to have violated the Act. City of Burbank, 128 Ill. 2d at 335.

First, the nurses engaged in protected activity when they signed authorization cards seeking to organize a bargaining unit with the Teamsters, Local 700 in or about June 2010. Cnty. of Cook, 7 PERI ¶ 3017 (IL LLRB 1991) (solicitation of authorization cards and voicing interest in joining union to supervisors constitutes protected activity); Chicago Bd. of Educ., 6 PERI ¶ 1107 (IELRB 1990) (seeking application for union membership constitutes protected activity).

Second, I find that the County knew of the nurses protected activity. It is uncontested that in 2010 the nurses were in a meeting with their immediate supervisor Debbie Currey and Fran Stanwood present while discussing unionizing and Currey stated directly to Russo to “be careful of what you sign.” Moreover, the County received the Board’s notice of the majority interest petition and it was posted outside Currey’s office window.

Third, the record clearly demonstrates that the Charging Party was adversely affected when the County shut down the Home Health Care Program and laid off six nurses. State of Illinois. Dep't of Central Mgmt Serv. (Dep't of Employment Security), 11 PERI ¶ 2022 (IL SLRB 1995) (examples of adverse employment action include discharge, discipline, assignment to more onerous duties, or working conditions, layoff, reduction in pay, hours or benefits, imposition of new working conditions or denial of advancement). Thus, the question that remains is whether the County's decision to shut down the program and lay off the nurses was done with unlawful motive.

Unlawful motive can be inferred from either direct or circumstantial evidence including: timing of the adverse action in relation to the occurrence of the union activity; a pattern of the respondent's conduct directed at those engaging in union activity; disparate treatment of employees; shifting explanations for a respondent's actions; and inconsistency in the reasons given for the respondent's actions against the charging party as compared to other actions of the respondent. City of Burbank, 128 Ill. 2d at 339; Circuit Court of Winnebago County, 17 PERI ¶ 2038 (IL LRB-SP 2001); North Main Fire Protection District, 16 PERI ¶ 2037 (IL SLRB 2000).

Here, the County's actions did not have the clear effect of restraining employee's exercise of their protected rights. The Charging Party argues that union animus is supported by evidence of the County's shifting and dubious explanations for the shutdown, intimidating and coercive statements made by supervisors, the timing of the shutdown, the County targeting the single group of employees engaged in union activity and the County's failure to follow its reduction-in-force policy.

i. Timing

The nurses signed cards to organize as early as June 2010 and the County announced that the Home Health Care Program would be shut down in September 2011. The Charging Party argues that the ongoing litigation between the parties should be attributed as evidence of timing and because the parties were going to hearing on the majority interest petition during the time in which the County laid off the nurses, the timing of the protected activity to the adverse action is far less than 17 months. However, I find that it is the time in which the protected activity began that is precedent. Thus, because the protected activity began in June 2010 there was approximately 17 months between the protected activity and the adverse action. Therefore, timing, in this case, is not an indication of unlawful motive. Forest Preserve Dist. of Cook Cnty., 7 PERI ¶ 3016 (IL LLRB 1991) (four-month time span between protected activity and adverse action did not demonstrate proximity to support a finding of anti union animus); cf. City of Burbank, 128 Ill. 2d at 349 (discharge which occurred two days before union's certification was “telling” and contributed to a finding of animus); Sarah P. Culbertson Memorial Hosp., 25 PERI ¶ 11 (IL LRB-SP 2009) (a “few weeks” between employees' testimony before Board and adverse action sufficient to demonstrate proximity indicative of animus); Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007) (three weeks demonstrates proximity).

ii. Shifting Explanations

Next, I find that the County did not provide shifting or inconsistent explanations for the shut down of the Home Health Care Program, which led to the layoff of the six nurses. The Charging Party argues that the County stating that the program was eliminated due to “loss of funding” and it being “cheaper for the Mental Health Board to transfer services to an outside corporation,” was inconsistent because the County hired at least ten individuals in the Health

Department near the time of the shut down and never informed the nurses of the Medicaid certification rationale prior to the shutdown. Therefore, the Charging Party contends that the reasons set forth by the County were mere litigious figment.

The evidence presented supports a finding that the County gave only one reason for the layoff of the nurses in the Home Health Care Program, and that was due to a loss of funding. The County provided evidence that as early as 2009 the Home Health Care Program was in jeopardy of having its funding withdrawn due to performance issues. It was not the County's desire, intent or decision to pull funding from the program as a whole. Moreover, the County's ability to continue to hire is not evidence of inconsistent explanations because the County did not hire nurses or hire within the Home Health Care Program. There is also no evidence that the department as a whole was under financial constraints, just that the program lost its funding. The fact that the County did not specifically address all the reasons why it lost its funding for the program to the nurses does not support the conclusion that the County's explanations were dubious. Because the County has not implied that the layoffs were attributed to anything other than budget cuts, I find no evidence that the County provided inconsistent reasons or shifting explanations. Village of Frankfort, 15 PERI ¶ 2012 (IL SLRB 1999), aff'd by unpub. order, 16 PERI ¶ 4005 (2000); see also City of Evanston, 5 PERI ¶ 2046 (IL SLRB H.O. 1989); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

iii. Disparate Treatment

The Charging Party has not demonstrated that the County treated the nurses disparately from other employees because it has introduced no evidence of employees who were similarly situated, yet treated more favorably. Am. Fed. of State, Cnty. and Mun. Empl., Council 31, 175 Ill. App. 3d 191, 198 (1st Dist. 1988); City of Decatur, 14 PERI ¶ 2004 (IL SLRB

1997) (charging party bears the burden of demonstrating employees who engaged in protected activity received disparate treatment).

In fact, the County provided evidence that during the same time it laid off employees from the Family Case Management Program in 2011 and 2012 due to lack of funding, and these employees were not represented by the union or intending to organize. Therefore, I find there is no evidence of disparate treatment to support an inference of union animus.

iv. Expressed Hostility

The Charging Party argues that Currey's comment to nurses to "be careful what you sign" regarding the signing of cards in support of the union and Stanwood's comment to Russo that no one would receive raises until there was some closure with the union process, imply improper motive. Whether such comments had the effect of coercing, restraining, or interfering with activity protected by the Act depends upon whether a reasonable employee would have viewed the comments as conveying a promise of benefit or a threat of reprisal or force. City of Mattoon, 1 PERI ¶ 2016 (IL SLRB 1995); City of Chicago (Dep't of Health), 10 PERI ¶ 3031 (IL LLRB 1994); City of Chicago, 3 PERI ¶ 3011 (IL LLRB 1987); Chicago Housing Auth., 1 PERI ¶ 3010 (IL LLRB 1985). Hostile or anti-union animus can be used to infer improper motivation. See City of Mattoon, 10 PERI ¶ 2036 (IL SLRB 1994) (statement "you have your union buddies to thank for this" and comments blaming union for layoff characterized as evidence that anti-union animus caused layoff); Clerk of the Circuit Court, Court of Champaign Cnty. 8 PERI ¶ 2025 (1992).

I find that the comments made by Currey and Russo did not amount to expressed hostility in support of a finding of union animus. Though the statements made by Currey and Stanwood may be noteworthy, they did not contain any threats or promises and cannot reasonably be

viewed as coercive. See Village of Calumet Park, 22 PERI ¶ 23 (IL LRB-SP 2006); City of Mattoon, 11 PERI ¶ 2016. Additionally, Stanwood's comment was made in November 2011, a month after the nurses were informed of the shut down and during a conversation to Russo about another position to which she had applied. Russo ultimately received that position.

vii. Other Evidence of Unlawful Motive

The Charging Party also argues that the County failed to follow its own reduction-in-force policy when it laid off the nurses. According to the County's Personnel Policy Handbook, the County did not lay off its employees based on seniority as the policy states. The Charging Party argues that at least one employee, Donna Lynn DeRose, was more senior than at least 10 other nurses within the Health Department and the County did no comparative assessment to see if she qualified for any other position. The policy provides, relevant part that "employees will be laid off based on a number of factors including but not limited to qualifications, past service, and length of service with the Department."

I find that the County did not act with union animus because it did not expressly follow its reduction-in-force policy. The County maintains that it laid off the nurses strictly due to budget cuts and the nurses received at least 30 days notice prior to the effective date of their termination. The evidence is such that the employees in the Home Health Care Program were not performing satisfactorily which is the main reason why the program lost its funding. Moreover, policy allows for reassignments for other positions if the employee is qualified. At least 3 of the 6 employees applied for other vacant positions and they were informed of them by Stanwood. Russo received another job within the Health Department and Carrie Gordon and DeRose had interviews for the Coordinator position but neither were qualified for the position

sought. Lastly, DeRose testified that she was aware that she could be recalled within six months but stated that she did not apply after she was laid off.

In light of the foregoing, I find that the Charging Party has not met its burden and has failed to establish, by a preponderance of the evidence, that the County violated the Act. Even if the Board finds that the County engaged in union animus, the County's "sole" motive – economics – is not pretextual because the Home Health Care Program survived on funding from the Mental Health Board and the Board's decision to pull its funding was the act that the County relied on when making its decision to shut down the entire program. Village of Barrington, 29 PERI ¶ 15 (IL LRB-SP 2012) (where pretext was found when the employer did not rely on its economics and there were no changes in its economics before making the decision to revoke wage increases).

Because the Charging Party has not sufficiently established a prima facie case of retaliation, I must hold that it has not proven, by a preponderance of the evidence, that the County unlawfully shut down the Home Health Care Program.

V. CONCLUSIONS OF LAW

I find that the Charging Party failed to prove, by a preponderance of the evidence, that the County violated Section 10(a)(1) of the Act. Because the Home Health Care Program nurses are no longer employed with the County, I find that the representation petition in Case No. S-RC-10-133 is no longer valid.

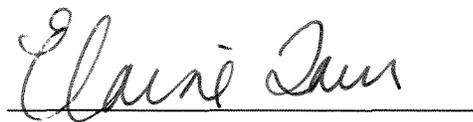
VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the complaint in Case No. S-CA-12-057 and the representation petition in Case No. S-RC-10-133 be dismissed in their entirety.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. 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 9th day of April, 2014.

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

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