STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Peter J. Wagner,	)	
	)	
Charging Party	)	
	)	
and	)	Case Nos. S-CA-12-072
	)	
State of Illinois, Department of Central Management Services,	)	
	)	
Respondent	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On April 18, 2012, Executive Director John F. Brosnan issued an order dismissing the unfair labor practice charge filed by Peter J. Wagner (Charging Party) in the above-captioned case. The Charging Party alleged that the State of Illinois, Department of Central Management Services (Respondent) engaged in unfair labor practices within the meaning of Section 10(a)(1), (2) and (3) of the Illinois Public Labor Relations Act, 5 ILCS 315/10 (2010), as amended (Act),[1]

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[1] Sections 10(a)(1), (2) and (3) provide, in relevant part:

> 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;
>
> (2) to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization[; or]
>
> (3) to discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition or charge or provided any information or testimony under this Act[.]

by terminating his probationary employment[2] after he participated in organizing, and in order to restrain him from participating in a representation case currently pending before the Illinois Labor Relations Board.[3] On April 26, 2012, Charging Party filed a timely appeal of the Executive Director's dismissal pursuant to Section 1200.135 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code §1200.135, and the Respondent filed a timely response. After reviewing the record, the appeal and the response, we affirm the Executive Director's order dismissing the charge for the reasons he articulated. We briefly respond to arguments raised in the appeal.

The Executive Director analyzed the charge under Section 10(a)(1) of the Act, and cited Board precedent holding that under this section a charging party would have to prove that: (1) he had engaged in protected activity; (2) the respondent knew of that activity; and (3) the respondent took adverse action against charging party because of that activity. Kirk and Chicago Housing Auth., 6 PERI ¶3013 (IL LLRB 1990); Green and Warns and City of Chicago, 3 PERI ¶3011 (IL LLRB 1987); Gale and Chicago Housing Auth., 1 PER ¶3010 (IL LLRB 1985). He noted that, generally, proof of illegal motivation is not necessary to establish a Section 10(a)(1) violation. However, a Board agent had contacted union officials and the Executive Director found that all sources who might lend credence to Wagner's charge had denied that he had been

[2] Although Wagner had been a State employee since 1994, effective June 1, 2010, he transferred from a Public Service Administrator position with the Illinois Commerce Commission to a Senior Public Service Administrator position with the Department of Commerce and Economic Opportunity, thus beginning a six-month probationary period. At three months, his interim probationary evaluation was "unacceptable." One month later, he began a three-month period of combined benefit and FMLA leave, followed by another month using benefit time, followed by non-service connected medical leave, so that he was still within his probationary period at the time of discharge.

[3] In the case referenced by Wagner, Case No. S-RC-11-098, AFSCME Counsel 31 seeks to represent a large number employees in 12 different Senior Public Service Administrator option classifications in a number of State departments located throughout the State. It remains pending before ALJ Martin Kehoe, who has thus far presided over 11 days of hearing.

involved in organizing activity, and consequently that Wagner failed to raise an issue of law or fact sufficient to warrant a hearing.

In his appeal, Wagner states that the union gave the Board agent erroneous information and that he had in fact engaged in the following protected activity: (1) on or after September 30, 2010 (one month after he had received an "unacceptable" evaluation and just before beginning his extensive series of leaves) he had made a number of phone calls to the union; (2) he petitioned to "participate in the organizing campaign" by means of a January 1, 2011 email from a personal email account stating he would like to "join AFSCME"; (3) his "petition" was "processed through the union" by means of email recipient, union official Tracey Abman, emailing that she would forward Wagner's email to another AFSCME employee; (4) he subsequently participated in several teleconferences with the second AFSCME employee and completed an eligibility questionnaire; (5) he told the second AFSCME employee that he would be available as a witness or to participate in any other way in Case No. S-RC-11-098; (6) he said he would be willing to complete or file additional paperwork to organize; and (7) the second AFSCME employee said he would notify Wagner if anything further was required.

Wagner also stated in his appeal that evidence clearly showed Respondent was aware that he had participated in protected activity in that, on June 23, 2011, he informed Respondent by facsimile and email that he had petitioned to join the union. The form of this correspondence was a letter from his attorneys to Respondent which merely indicated that Wagner had "petitioned through AFSCME to have his position covered under the applicable collective bargaining agreement." More significant than its content was its indication that it was submitted in response to Respondent's "letter of June 10, 2011 and its accompanying Statement of Charges stating that he is being considered for a probationary discharge." Thus, this document confirms

that the Respondent had taken significant steps toward discharge *before* Wagner informed Respondent that he, like numerous others, had signed up to join the union.

The process to terminate Wagner, while not completed, had clearly begun and was nearly completed before Wagner informed Respondent of his protected activity. Indeed, the timing suggests the beginning of the termination proceedings precipitated his informing Respondent, not the other way around. Wagner referenced no evidence that the Respondent would likely have been aware of his activity prior to the time he informed it. His means of communicating with the union had been through private channels, and the sheer number of employees at issue in S-RC-11-089 suggests that the role he played in the effort was too small to have likely been noticed. We find no evidence Respondent knew of Charging Party's protected activity prior to its determination to begin the termination process, and consequently no issue of fact or law warranting a hearing on whether Section 10(a)(1) had been violated.

Wagner also alleged a violation of Section 10(a)(2), but that allegation has even greater deficiencies. The most recent court decision to address the distinction and the overlap between Sections 10(a)(1) and (2) describes it as follows:

> Although section 10(a)(1) generally does not require proof of the employer's illegal motive ... when an employee asserts that she was discharged for engaging in protected activity, she necessarily contends that the employer's motives for her discharge were improper. In those cases, the Board has followed the framework applied in Section 10(a)(2) claims to determine whether a public employer terminated the employee for an illegal motive.... Because section 10(a)(1) broadly protects public employees in exercising their rights under the Act, in contrast to section 10(a)(2), which more narrowly protects union membership and activities, an employer violates section 10(a)(1) if it discharges an employee in retaliation for exercising her rights under the Act, regardless of whether the employee establishes antiunion animus.

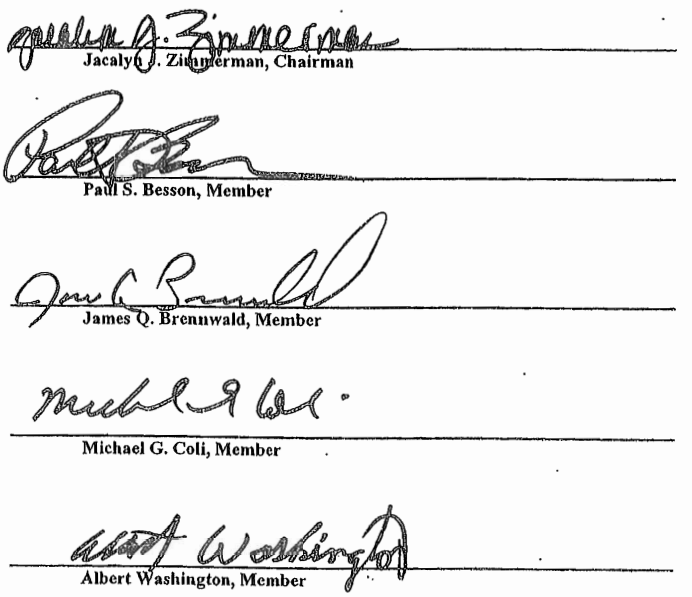
Pace Suburban Bus Div. of Reg'l Transp. Auth. v. Ill. Labor Relations Bd., 406 Ill. App. 3d 484, 494-95 (1st Dist. 2010). Thus, Charging Party's burden under Section 10(a)(2) includes the

additional requirement to show anti-union animus. He fails to raise an issue of fact or law on that point as well.

Finally, Charging Party also alleged a violation of Section 10(a)(3), but because there is no evidence that he testified or filed an affidavit, petition or charge, or provided information that might have precipitated his discharge, that allegation, too, fails to raise an issue of fact or law regarding an unfair labor practice and was properly dismissed.

For these reasons, we affirm the Executive Director's order dismissing the charge.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



Jacalyn J. Zimmerman, Chairman

Paul S. Besson, Member

James Q. Brennwald, Member

Michael G. Coli, Member

Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on June 12, 2012, written decision issued at Chicago, Illinois, August 10, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Peter J. Wagner, Charging Party	)	
	)	Case No. S-CA-12-072
State of Illinois, Department of Central Management Services, Respondent	)	

DISMISSAL

On September 30, 2011, Charging Party, Peter J. Wagner filed the above referenced charge with the State Panel of the Illinois Labor Relations Board, alleging that Respondent, State of Illinois (Employer) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), *as amended.* Following an investigation conducted pursuant to Section 11 of the Act, I determined that the charge fails to raise an issue of fact or law sufficient to warrant a hearing, and issue this dismissal for the reasons set forth below.

I. INVESTIGATORY FACTS

Respondent is a public employer within the meaning of Section 3(o) of the Act. Charging Party is a public employee within the meaning of Section 3(n) of the Act. The American Federation of State, County, and Municipal Employees, Council 31, is a labor organization within the meaning of Section 3(i) of the Act, and currently has petitioned the Board in Case No. S-RC-11-098, to be the exclusive representative of a bargaining unit of comprised of Public Service Administrator I's (unit). The Board's administrative law judge,

Martin Kehoe, is currently conducting a representation investigation and hearing into the appropriateness of the make-up of the unit.

In the instant charge, Wagner asserts that his employment with the State was terminated because of his union activity. Wagner was hired by the State on June 1, 1994, and in his current duties as Senior Public Service Administrator I (SPSA), was on probation since June 1, 2010, employed in Respondent's Department of Commerce and Economic Opportunity (DCEO), Bureau of Business Development, Division of OSHA.

On or about June 10, 2011, DCEO Director, Warren Ribley, notified Wagner by letter that he was being considered for "Discharge of Probationary Employees". The letter explained that Wagner was to be discharged for failure to satisfactorily perform the duties of SPSA, during the first probationary period. The letter went on to state that all of Wagner's appraisals for the performance evaluation period, 6-1-10 to 9-1-10, were unacceptable, and, "*overall the employee has not met the established objectives and standards of the job in a significant number of situations.*" Wagner's discharge was effective June 30, 2011.

Wagner claims the reasons for his discharge are false, and asserts that while he was on medical leave, he was terminated because he was active in the organizing effort in Board Case No. S-RC-11-098, filed December 20, 2010. He claims that between September 2010 and June 30, 2011, he contacted AFSCME to become a part of the unit. The Board's records reveal no evidence in the hearing record to date, that Wagner provided testimony before the Board, or was otherwise engaged in any significant activity relative to the filing of the petition. The Board agent questioned AFSCME's supervising counsel in this matter, Thomas Edstrom, who indicated that Wagner's name was not on eligibility lists provided to the Union by DCEO; Wagner did not sign an authorization card; and he did not actively participate in any organizing campaign either

prior to or after the December 2010 filing. Moreover, the Board agent questioned the organizer of the unit, who related that neither she nor anyone else involved in organizing the unit had knowledge of any involvement by Wagner.

II. 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). 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, Wagner 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). Here, all the sources that would lend credence to Wagner's charge, deny that he did anything to initiate, support or advance the petition, therefore, the claim fails to raise an issue of law or fact sufficient to warrant a hearing.

III. 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 Chicago, Illinois, this 18th day of April, 2012.

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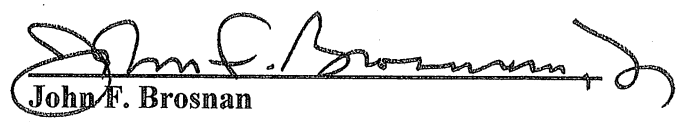

John F. Brosnan
Executive Director