STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Illinois Council of Police,	)	
	)	
Charging Party	)	
	)	
and	)	Case No S-CA-12-145
	)	
Village of Lyons,	)	
	)	
Respondent	)	

ORDER

On October 28, 2013 Administrative Law Judge Martin Kehoe, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its January 16, 2014 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 17th day of January 2014.

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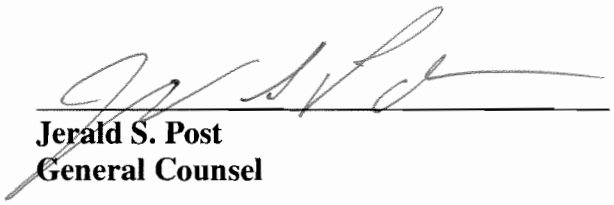

Jerald S. Post
General Counsel

STATE OF ILLINOIS
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ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On April 5, 2012, the Illinois Council of Police (Union) filed an unfair labor practice charge in Case No. S-CA-12-145 with the State Panel of the Illinois Labor Relations Board (Board) alleging that the Village of Lyons (Village) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act). Subsequently, the charge was investigated in accordance with Section 11 of the Act and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On December 18, 2012, the Board's Executive Director issued a Complaint for Hearing.

The case was heard on May 29, 2013 in Chicago, Illinois by the undersigned Administrative Law Judge. Both parties appeared at the hearing and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Written briefs were timely filed on behalf of both parties. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following.

I. PRELIMINARY FINDINGS

1. The parties stipulate and I find that the Village is a non-home rule municipality and a unit of local government within the meaning of the Act.

2. The parties stipulate and I find that the Village is a public employer within the meaning of the Act.

3. The parties stipulate and I find that the Union is a labor organization within the meaning of the Act.

4. The parties stipulate and I find that the Union is and was during all times relevant to this proceeding the exclusive bargaining unit representative of the Commanders of the Village.

5. The parties stipulate and I find that the Village is governed by the Village President and a six-member Board of Trustees.

6. The parties stipulate and I find that the Village has adopted the managerial form of government pursuant to the Illinois Municipal Code, 65 ILCS 5/5-1-1 et seq. (2004).

7. The parties stipulate and I find that, in accordance with the managerial form of government and the Village Code, the Board of Trustees appoints the Village Manager. The Village Manager is responsible for the day-to-day operations of the Village. All department heads, including the Chief of Police, are appointed by and report to the Village Manager.

8. The parties stipulate and I find that the Village currently employs 27 sworn personnel consisting of 1 Chief, 3 Commanders, 4 Sergeants, 3 Detectives, and 16 Police Officers.

II. ISSUES AND CONTENTIONS

The Union contends that the Village discriminated against its employees in a retaliatory manner in order to discourage membership in or support for the Union in violation of Sections 10(a)(1) and (2) of the Act. The Union also contends that the Village failed and refused to bargain with it in good faith in violation of Sections 10(a)(1) and (4) of the Act. The Village disputes both of those contentions and, in addition, contends that one of the Union's exhibits is protected by attorney-client privilege. The Union separately contends that the Village should be sanctioned.

III. FINDINGS OF FACT

The Village's police department presently employs three Commanders: Daniel Babich, Brian Kuratko, and Neil Sexton. As stipulated, the Commanders are exclusively represented by the Union. The Union and the Village are currently subject to a collective bargaining agreement (CBA) that runs from January 1, 2011 through December 31, 2013. A prior CBA ran from January 1, 2003 through December 31, 2007. Since March or April of 2010, the police department has been overseen by Harley Schinker, the current Chief of Police.

Six months after Schinker became the Chief of Police, he started to consider "reorganizing" or "restructuring" the police department. He noted that, while many police departments have a Deputy Chief rank, his own department did not. He also felt that his department did not need three "command staff executives" and that the elimination of one of those positions would save the Village money. Ultimately, Chief Schinker determined that, instead of employing the Union's three Commanders, the Village should employ just two non-union Deputy Chiefs who would serve at his pleasure.

Chief Schinker first presented his reorganization plan to Roy Woodrow, who, at the time, served as the Village Manager. He later discussed his plan with Michelle Henn, Woodrow's successor.[1] Chief Schinker and Village Manager Henn then worked on Chief Schinker's plan for a number of months. At some point, Chief Schinker also verbally shared his plan and its presumed savings with Christopher Getty, who serves as the Village's Mayor, and the Village's Board of Trustees.[2]

Chief Schinker separately discussed aspects of his reorganization plan with the Commanders. He did not mention to them that the Commander rank would be abolished. However, Chief Schinker did tell the Commanders that he thought that a reorganization would better serve the police department and would save the Village money. Later, he also shared some very basic personal notes with the Commanders. In part, those notes indicate that, if Chief Schinker's plan is implemented, one of the Commanders will be reverted to a Sergeant and lose his take-home vehicle. The notes also briefly compare the Village's police department with those of "all neighboring departments" and casually estimate the financial savings the reorganization would provide. At some point, the Union, in response, asked Chief Schinker for a related business plan and other relevant information.

An April 25, 2011 meeting was attended by Village Clerk Dawn Campos, Mayor Getty, and Village Manager Henn.[3] During that meeting, Mayor Getty indicated that he wanted to take the Village in a new direction. There was also some discussion of what Chief Schinker wanted to do with the police department. Mayor Getty indicated that he supported Chief Schinker's

[1] Henn became Acting Village Manager in October of 2010 and was later appointed Village Manager on January 4, 2011.
[2] Getty was elected Mayor in April of 2009. He also appears to function as the Village President.
[3] At some point shortly before the April 25, 2011 meeting, the parties had tentatively agreed to a draft CBA.

reorganization plan. In response, Village Manager Henn stated that she had not yet received adequate information or an analysis related to the plan.

Henn testified that, during the April 25, 2011 meeting, Mayor Getty asked her to terminate certain department heads including the Fire Chief and the Public Works Director. According to Henn, at that time, Mayor Getty also instructed her to not communicate with any members of the Board of Trustees and, instead, only communicate with him. In addition, Mayor Getty allegedly told Village Manager Henn to "come down hard" on grievances filed by the Village's dispatch and public works unions.[4]

Shortly after the April 25, 2011 meeting ended, Village Manager Henn sent Mayor Getty an e-mail message. In her message, Village Manager Henn indicated that she believed that Mayor Getty's new direction could violate "labor law." She also took exception with Mayor Getty's alleged directive that she only take direction from him. A few minutes later, Mayor Getty responded with his own e-mail message. In his message, Mayor Getty clarified some of his positions and asserted that he has always insisted that the Village follow the law.

On April 27, 2011, a new Board of Trustees was sworn in. Soon after that, the Board of Trustees terminated Henn. She was not given a reason for her termination at that time. However, during a later unemployment hearing related to her termination, Mayor Getty indicated that Henn would not have been terminated if she had followed his direction to speak only with him. She eventually entered into a written settlement agreement with the Village.

After Henn's exit, Chief Schinker served as an interim Village Manager until that position was filled by Thomas Sheahan in October of 2011. Within 30 days of that start date, Village Manager Sheahan spoke with Chief Schinker about the police department. At that time, Chief Schinker and Village Manager Sheahan discussed Chief Schinker's reorganization plan.

[4] During the hearing, Mayor Getty did not recall giving Village Manager Henn those instructions.

Village Manager Sheahan agreed with Chief Schinker's ideas. The two subsequently discussed those ideas with Mayor Getty and the Board of Trustees.

The parties signed the current CBA on March 7, 2012. Later, on April 3, 2012, Richard Blass, the Union's attorney, sent a letter to Mark Sterk, one of the Village's attorneys. The letter indicated that Blass had just learned on April 2, 2013 that, during a meeting that was scheduled to occur on April 4, 2012, the Board of Trustees would be presented with an ordinance (Ordinance No. 04-04-2012-O3) that, when passed, would restructure the police department and amend portions of the Village Code to abolish the rank of Commander. Blass' letter then advised Sterk that those changes would violate the Act, demanded impact and effects bargaining, and demanded the Village cease and desist from passing the ordinance.

Despite Blass' letter, the April 4, 2012 meeting went ahead as scheduled and the Board of Trustees passed the ordinance. Mayor Getty did not participate in the vote, but did approve the ordinance. The ordinance states, in part, that the President and the Board of Trustees had determined that "compelling economic conditions" necessitated the restructuring of the police department. It also asserts that restructuring the police department "will promote more efficient departmental operations." On April 5, 2012, the Union filed the instant unfair labor practice charge.

Blass, the three Commanders, and Chief Schinker attended a bargaining session on April 16, 2012. That same day, Blass sent Sterk a letter that asked for copies of job descriptions for the Commander and Deputy Chief positions. The letter asserts that Blass needed the job descriptions in order to prepare for a bargaining session that was set for April 20, 2012. In another of Blass' letters dated April 20, 2012, Blass repeated his request. He also requested "any

and all documents including, but not limited to the studies done by the Chief or his designee as well as any presentations to the Board to institute the Ordinance abolishing the certified Unit."

On April 22, 2012, Blass sent the Village a Freedom of Information Act (FOIA) request. Then, on April 23, 2012, Blass sent the Village (via Sterk) a separate information request "pursuant to the Illinois Public Labor Relations Act" (that appears to parallel the April 22, 2012 FOIA request). The April 23, 2012 information request specifically sought:

1. A copy of the job description for the Police Department position of Deputy Chief approved by Village Ordinance No. 04-04-12-03 on or about April 4, 2012 (Line Item No. 12b of the Board of Trustees Meeting Agenda);
2. A copy of the job description of the Police Department position of Commander abolished by Village Ordinance No. 04-04-12-03 approved by the Village Board on or about April 4, 2012 (Line Item No. 12b of the Board of Trustees Meeting Agenda);
3. A copy of any and all information including, but not limited to proposals, savings studies, financial statements, departmental restructuring plans and any other documents related to the abolishment of the Police Commander rank regardless of by whom they were prepared and whether or not they were utilized as well as any supporting documents/exhibits;
4. The names and contact information of any and all persons/entities involved in the abolishment of the Police Commander position;
5. The specific input given by those persons/entities disclosed in Request No. 4 as it relates to the abolishment of the Police Commander position; and
6. An accounting of monies spent including vendor information to abolish the Police Department Commander position.

Sterk replied to Blass' April 23, 2012 information request with a letter dated April 26, 2012. In the letter, Sterk stated that the Village had reviewed the Act and was unable to identify the statute that obligates the Village to produce the documents identified in the Union's April 23, 2012 request. Michael Hayes, another of the Village's attorneys, responded to the FOIA request on May 2, 2012.[5] As part of that response, Hayes gave Blass a copy of the Commander job description and another copy of Chief Schinker's notes.

[5] Hayes' May 2, 2012 letter also responds to Blass' April 20, 2012 letter and another Blass apparently sent the Village on April 30, 2012.

In a May 11, 2012 letter, Sterk told Blass that Village officials had informed him that the Village intended to move forward with the reorganization of the police department as directed by the ordinance. He also alleged that the reorganization was within the Village's rights under the CBA, indicated that Chief Schinker would be interviewing all of the Commanders for Deputy Chief positions, and indicated that the remaining Commander would be returned to the rank of Sergeant. In addition, Sterk stated that, during the interview and selection process, the Village would be willing to meet with representatives of the bargaining unit to discuss whether the Union had a proposal that would result in the same economic savings that the Village expected to realize from its reorganization.

Blass, Commanders Kuratko and Sexton, and Chief Schinker later attended a bargaining session on June 14, 2012. During that session, the Union again asked for a job description for the Deputy Chief position. However, at that time, a Deputy Chief job description did not yet exist. Ultimately, the June 14, 2012 session ended early because the Village's attorney was absent. In a June 18, 2012 letter to Sterk, Blass summarized the June 14, 2012 session and asserted that, "without the Village bargaining in good faith and providing the Union with documentation supporting [the Village's] position, the Union is not in a position to be able to negotiate."

At some point after the June 14, 2012 session, Chief Schinker interviewed each of the three Commanders to determine which two Commanders could be Deputy Chiefs. Chief Schinker testified that he will consider hiring Commanders Babich, Kuratko, and Sexton for the Deputy Chief positions. He also testified that he finds that all three of them are qualified to be Deputy Chiefs. No Deputy Chiefs have been hired yet.

Chief Schinker presently has a job description for the Deputy Chief position. It has never been given to the Union. During the hearing, Commander Kuratko (who serves as the Union's local president) testified that the Deputy Chief job description is important to the Union because it would allow the Union to understand a Deputy Chief's duties and responsibilities and see if they differ from those of a Commander. He also testified that the Deputy Chief job description would allow others to see where the police department is going and understand the chain of command.

Separate testimony suggests that, when the reorganization is fully implemented, the Deputy Chiefs will absorb the vast majority, if not all, of the Commanders' duties. However, Deputy Chiefs, unlike Commanders, will allegedly be responsible for the development and enforcement of policy. In contrast, Commanders are only responsible for enforcing policy. Though one employee will likely be moved, it appears that the police department's overall chain of command and divisional structure will largely be unchanged.

IV. DISCUSSION AND ANALYSIS

The Alleged Retaliation

The Union contends that the Village passed the April 4, 2012 ordinance in order to retaliate against the Commanders for their active and visible support for the Union. It also contends that, by doing so, the Village discriminated against its employees in order to discourage membership in or support for the Union in violation of Sections 10(a)(1) and (2) of the Act. The Village disputes those contentions. This analysis must resolve that dispute.

Section 10(a)(1) provides, in relevant part, that an employer may not interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in the Act or dominate or

interfere with the formation, existence, or administration of any labor organization. Ordinarily, whether an employer has violated Section 10(a)(1) does not depend on the employer's motive. Rather, the test is whether the employer's conduct, viewed objectively from the standpoint of a reasonable employee, had the tendency to interfere with, restrain, or coerce an employee or to dominate or interfere with the formation, existence, or administration of any labor organization. See Chicago Transit Authority, 18 PERI ¶3021 (IL LRB-LP 2002); Chicago Park District, 7 PERI ¶3021 (IL LLRB 1991). However, that objective test cannot be utilized where, as here, it must be determined whether the employer's actions were in fact improperly motivated. Consequently, in this instance, the analysis of an alleged Section 10(a)(1) violation must follow the criteria arising under Section 10(a)(2) of the Act. See Chicago Park District, 9 PERI ¶3016 (IL LLRB 1993); Chicago Park District, 8 PERI ¶3017 (IL LLRB 1993); Chicago Park District, 7 PERI ¶3021; Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990).

Section 10(a)(2) provides, in part, that an employer may not "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." In order to establish a prima facie violation of Section 10(a)(2), a charging party must prove by a preponderance of the evidence: (1) that employees engaged in union or protected, concerted activity; (2) that the employer had knowledge of such activity; and (3) that the employees' protected conduct was a motivating factor in the adverse employment action. City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 345, 538 N.E.2d 1146, 1149 (1989); City of Chicago, 11 PERI ¶3008 (IL LLRB 1995). The failure to prove such a causal connection precludes a finding of a violation. See Chicago Park District, 9 PERI ¶3016; Chicago Park District, 7 PERI ¶3021.

Here, at least two of the police department's three Commanders (Babich and Kuratko) were visible members of the Union's bargaining team. That team had finalized a temporary agreement and a CBA. That type of activity is certainly union and protected, concerted activity that was obvious to the Village. The Commanders also visibly engaged in protected union activity through their election of the Union as their exclusive bargaining representative. See City of Mattoon, 11 PERI ¶2016 (IL SLRB 1995); Southern California Stationers, 162 NLRB 1517, 1535 (1967). Accordingly, the first two elements of the Section 10(a)(2) test have readily been satisfied. Further, the abolition of a position undoubtedly is an adverse employment action. The same is true of the inevitable demotion. See Chicago Transit Authority, 30 PERI ¶9 (IL LRB-LP 2013). Thus, the key issue is whether, as the Union alleges, the Village's action was improperly motivated.

A charging party may establish the third element of the Section 10(a)(2) test from direct evidence such as statements or threats. Alternatively, it may rely on circumstantial evidence such as the timing of the employer's action in relation to the protected activity; expressed hostility toward protected activities; disparate treatment of the alleged discriminatees in comparison to other employees; or shifting, pretextual, or inconsistent explanations for the adverse action. City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149; County of Williamson and Sheriff of Williamson County, 14 PERI ¶2016 (IL SLRB 1998), Sheriff of Jackson County, 14 PERI ¶2009 (IL SLRB 1998), Village of Glenwood, 3 PERI ¶2056 (IL SLRB 1987). In this case, the Union attempts to establish a causal connection by alleging a variety of circumstantial indicators. Those attempts are ultimately unpersuasive.

The Union suggests that Getty boasted that he could unilaterally decertify the Union and disband the bargaining unit. However, that particular fact has not sufficiently been established in

the record. The Union further alleges that Getty "despises" the Union, but that, too, is not readily apparent. (Henn's characterizations of Mayor Getty's feelings are of limited value.) I also note that, technically, Mayor Getty did not participate in the vote that passed the ordinance. The same is true of Chief Schinker. See East St. Louis Housing Authority, 29 PERI ¶154 (IL LRB-SP G.C. 2013). Separately, the Union portrays Henn's termination, which happened about a year before the ordinance was passed, as evidence of anti-union animus. I do not make the same logical leap.

Conceivably, one could argue that Chief Schinker's known preference for non-union direct reports implies an improper motive. I suggest that it should not, as the free speech provision contained in Section 10(c) of the Act generally protects the expression of opinions, views, and arguments regarding unionization, provided that "such expression contains no threat of reprisal or force or promise of benefit." Though the implications of Chief Schinker's ideas may be notable, his statements 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.

I do note that the Board of Trustees passed the ordinance about a month after the parties signed the current CBA. However, traditionally, such a "coincidence" in timing is not enough to salvage a charging party's case when there is no other evidence of a causal connection. See County of Cook (Department of Central Services), 15 PERI ¶3008 (IL LLRB 1999); County of Williamson, 13 PERI ¶2015 (IL SLRB 1997); Village of Barrington Hills (Police Department), 29 PERI ¶98 (IL LRB-SP G.C. 2012); Broadway Motors Ford, Inc. v. National Labor Relations Board, 395 F.2d 337, 340 (8th Cir. 1968). Moreover, the Village's reorganization plan (which

was implemented on April 4, 2012) has, to some degree, has been considered since shortly after Schinker's arrival in April of 2010. See Village of Hazel Crest, 30 PERI ¶72 (IL LRB-SP 2013).

In sum, the Union has not established the required prima facie case. To that extent, it has not demonstrated that the Village violated Sections 10(a)(1) and (2) of the Act. Because the Union has not established a prima facie case, the instant analysis need not examine whether the Village would have taken the action it did for legitimate reasons even in the absence of union or protected, concerted activity. City of Burbank, 128 Ill. 2d at 346, 538 N.E.2d at 1150.

The Alleged Failure and Refusal to Bargain

The Alleged Unilateral Change

The Union separately charges that the Village violated Sections 10(a)(1) and (4) of the Act by failing to bargain with the Union prior to implementing its decision to abolish the rank of Commander and replace it with the rank of Deputy Chief. The Village denies that charge. This analysis must resolve that dispute.[6]

Section 10(a)(1) is addressed above. Pursuant to Section 10(a)(4), it is an unfair labor practice for an employer "to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit." If the employer fails to bargain in that way, it violates not only its Section 10(a)(4) duty but, derivatively under Section 10(a)(1), those employees' right to have a representative as the Act envisions. An employer violates its obligation to bargain in good faith, and therefore Sections 10(a)(1) and (4) of the Act, when it makes a unilateral change in a mandatory subject of bargaining without granting notice to and an opportunity to bargain with its employees'

[6] As evidenced by the parties' joint pre-hearing memorandum, conduct during the hearing, and post-hearing briefs, both parties have drifted from some of the specific allegations provided by the Complaint for Hearing. This Recommended Decision and Order reflects that movement. See Chicago Transit Authority, 16 PERI ¶3021 (IL LLRB 2000).

exclusive bargaining representative. County of Lake, 28 PERI ¶67 (IL LRB-SP 2011); City of Chicago (Department of Police), 21 PERI ¶83 (IL LRB-LP 2005); County of Perry and Sheriff of Perry County, 19 PERI ¶124 (IL LRB-SP 2003).

The Union contends that the abolition of the rank of Commander and the affiliated demotion are mandatory bargaining subjects. I agree. Generally speaking, a matter is a mandatory bargaining subject if it involves wages, hours, or terms or conditions of employment. City of Belvidere v. Illinois State Labor Relations Board, 181 Ill.2d 191, 205, 692 N.E.2d 295, 302 (1998); Central City Education Association v. Illinois Educational Labor Relations Board, 149 Ill.2d 496, 508, 599 N.E.2d 892, 897 (1992). The total abolition of the Commander rank concerns all of those issues. The demotion also meets the standard. See City of Evanston, 29 PERI ¶162 (IL LRB-SP 2013); County of Cook and Cook County Sheriff, 12 PERI ¶3021 (IL LLRB 1996); Chicago Transit Authority, 21 PERI ¶95 (IL LRB-LP G.C. 2005); Health Care and Retirement Corporation of America, 317 NLRB 1005, 1008 (1995); Southern California Stationers, 162 NLRB at 1537. The Village does not strictly dispute those conclusions. Instead, it asserts, in part, that the abolition and the demotion are matters of inherent managerial authority (and thus not true mandatory bargaining subjects) because they are parts of a "legitimate reorganization."

Indeed, the duty to bargain does not extend everywhere and attach to every subject. City of Aurora, 24 PERI ¶25 (IL LRB-SP 2008). Section 7 of the Act, which defines the duty to bargain, requires an employer to bargain in good faith with the exclusive representative over wages, hours, and other conditions of employment not excluded from the bargaining obligation by Section 4 of the Act. Notably, Section 4 provides, in relevant part, that an employer shall not be required to bargain over its organizational structure. It also excludes an employer's overall

budget from the bargaining process. American Federation of State, County and Municipal Employees v. State Labor Relations Board, 274 Ill. App. 3d 327, 331, 653 N.E.2d 1357, 1360 (1st Dist. 1995); State of Illinois, Departments of Central Management Services and Corrections, 5 PERI ¶2001 (IL SLRB 1988).

To establish a legitimate (or "bona fide") reorganization, an employer must demonstrate one or more of the following: (1) that its organizational structure has been fundamentally altered; (2) that the nature or essence of the services provided has been substantially changed; or (3) that the nature and essence of a position has been substantively altered such that the occupants of that position no longer have the same qualifications, perform the same functions, or have the same purpose or focus as had the previous employees. State of Illinois, Department of Central Management Services (Department of Corrections), 17 PERI ¶2046 (IL SLRB 2001). The Village has not done so.

The record does not indicate that the Village's reorganization will change the nature or essence of the services provided by the police department. Moreover, because the reorganization is not merely "altering" a position, it cannot truly be said that the nature and essence of any position will be changed. (The Commander rank is not simply being altered; it is being abolished.) It therefore follows that the Village must prove that the police department's overall organizational structure has been "fundamentally altered." It has not.

Essentially, it appears that the Village's "reorganization" changes one person's rank and gives the Chief of Police's other highest-ranking direct reports or "command staff executives" (whether they are labeled Commanders or Deputy Chiefs) one additional responsibility. That slight change in duties paired with a single demotion cannot reasonably be considered a "fundamental" organizational change. See County of Lake, 28 PERI ¶67; State of Illinois,

Department of Central Management Services (Department of Corrections), 17 PERI ¶2046; County of Cook and Cook County Sheriff, 12 PERI ¶3021; City of Peoria, 3 PERI ¶2025 (IL SLRB 1987); Chicago Transit Authority, 21 PERI ¶95. Accordingly, the change at issue is not a matter of inherent managerial authority and should have been bargained.[7] By unilaterally implementing that change, the Village violated the duty to bargain in good faith as required by Sections 10(a)(1) and (4) of the Act.

If the Board disagrees with the foregoing and determines that the reorganization is a subject that has an impact on wages, hours, or terms or conditions of employment but also involves managerial policy, it must weigh the benefits that bargaining would have on the decision-making process against the burdens that bargaining would impose on the Village's authority. City of Belvidere, 181 Ill. 2d at 203, 692 N.E.2d at 302; Central City Education Association, 149 Ill. 2d at 523, 599 N.E.2d at 905, 599 N.E.2d at 905; American Federation of State, County and Municipal Employees, AFL-CIO v. State Labor Relations Board, 190 Ill. App. 3d 259, 267, 546 N.E.2d 687, 693 (1st Dist. 1989). In this instance, the benefits of bargaining outweigh its burdens.

The abolition of the Commander rank completely dissolves the entire bargaining unit and removes all of its work. In that kind of situation, a labor organization would certainly benefit from bargaining. See County of Lake, 28 PERI ¶67; Illinois Department of Central Management Services (Department of Corrections), 17 PERI ¶2046; Southern California Stationers, 162 NLRB at 1537. Moreover, it is not hard to imagine a range of proposals that the Union could provide that would address the Village's primary concerns – purportedly, saving money and improving efficiency. Evidently, all of the Commanders are already qualified to be Deputy

[7] To be clear, I find that the Village passed the ordinance without meaningful notice after only informally discussing some aspects of the matter with the Commanders.

Chiefs. See American Federation of State, County and Municipal Employees, 274 Ill. App. 3d at 333, 653 N.E.2d at 1362; Village of Ford Heights, 26 PERI ¶145 (IL LRB-SP 2010); Village of Franklin Park, 8 PERI ¶2039 (1992).

Experience has shown that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. See Southern California Stationers, 162 NLRB at 1535. Attempts to reduce labor costs are particularly amenable to collective bargaining. See City of Evanston, 29 PERI ¶162; County of St. Clair and Sheriff of St. Clair County, 28 PERI ¶18 (IL LRB-SP 2011). Chief Schinker's personal preference for non-union direct reports who can be appointed and fired at his discretion should not be given any weight. Logically, to do otherwise would frustrate the declared policy of the Act. See Village of Franklin Park, 8 PERI ¶2039.

Significantly, the merits of a unilateral change do not negate or excuse an employer's duty to bargain over it. City of Peoria, 3 PERI ¶2025. Further, the Village has not identified exigent or unusual circumstances that justified implementing the change prior to bargaining with the Union. The Village's economic issues had existed since at least 2009. See Central City Education Association, 149 Ill. 2d at 523, 599 N.E.2d at 905; County of Lake, 28 PERI ¶67; County of Cook (Juvenile Temporary Detention Center), 14 PERI ¶3008 (IL LLRB 1998); County of Cook and Cook County Sheriff, 12 PERI ¶3021; Chicago Transit Authority, 21 PERI ¶95.

The Village separately contends that its reorganization was also authorized by the parties' CBA. Generally speaking, it is possible for a party to a CBA to contractually waive its right to bargain. However, the Board will not lightly infer a waiver of a statutory right. American Federation of State, County and Municipal Employees, 274 Ill. App. 3d at 334, 653 N.E.2d at

1362; Village of Bensenville, 19 PERI ¶119 (IL LRB-SP 2003); Village of Westchester, 5 PERI ¶2016 (IL SLRB 1989); see Owens-Corning Fiberglas Corporation, 282 NLRB 609 (1987). The relevant contract language must evince an unequivocal intent to relinquish that right. American Federation of State, County and Municipal Employees, 274 Ill. App. 3d at 334, 653 N.E.2d at 1362; Village of Bensenville, 19 PERI ¶119; Village of Westchester, 5 PERI ¶2016; see Bancroft-Whitney Co., Inc., 214 NLRB 57, 60 (1974); Radioear Corporation, 199 NLRB 1161 (1972). Notably, it is the respondent's burden to show the waiver. City of Chicago (Department of Police), 21 PERI ¶83; Village of Bensenville, 19 PERI ¶119. The Village has not satisfied that burden.

The contract language the Village emphasizes states, "Any reductions in the number of active commanders must be based on either compelling economic conditions or restructuring of the department based [upon] efficiency, economy, or other management prerogatives." That language, which ostensibly covers seniority and a mere reduction in force, does not clearly describe the reorganization at issue, as it does not explicitly address the unilateral abolition of a single rank and the simultaneous creation of a new one that essentially replaces it. Where, as here, a contract is silent on the subject matter in dispute, a finding of waiver by contract is absolutely precluded. American Federation of State, County and Municipal Employees, 274 Ill. App. 3d at 334, 653 N.E.2d at 1362; Chicago Transit Authority, 14 PERI ¶3002 (IL LLRB 1997); see Metropolitan Edison Company v. National Labor Relations Board, 460 U.S. 693, 708, 103 S. Ct. 1467, 1477 (1983); New York Mirror, 151 NLRB 834, 840 (1965).

The Village also contends that it could not have violated the Act because its reorganization plan has not been implemented yet. Specifically, the Village observes that, in

reality, the Commanders still have the same rank and benefits and perform the same work. Though accurate to a degree, those observations are unpersuasive.

The ordinance is cast in terms of a fait accompli. Its wording is essentially unequivocal and unconditional and clearly does not present a merely potential decision that the Village planned to consider. Further, it does not provide a future implementation date. Rather, the ordinance, according to its terms, was "in full force and effect" from the moment of its passage. See City of Peoria, 3 PERI ¶2025 (IL SLRB 1987); Owens-Corning Fiberglas Corporation, 282 NLRB at 615.

I also suggest that an unfair labor practice can occur before the consequences of an action become painful for the employees involved. See County of Cook, Forest Preserve District of Cook County, and Civil Service Commission of Cook County, 4 PERI ¶3012 (IL LLRB 1988); County of Cook, Cook County Sheriff, 2 PERI ¶3030 (IL LLRB 1986). The unfair labor practice presented is the unilateral change and not its application to particular individuals. See Village of Elk Grove Village, 22 PERI ¶119 (IL LRB-SP G.C. 2006). The most immediate harm in this case was a harm to the parties' collective bargaining relationship. See City of Peoria, 3 PERI ¶2025. The sudden creation of a Deputy Chief position, filled or unfilled at the moment, was also a substantial change to the status quo.

The Alleged Failure to Provide Information

The Union separately contends that the Village further violated its statutory duty to bargain in good faith when it failed to provide requested information related to the reorganization. The Village disputes that contention as well. That dispute must be resolved.

The general rule is that an employer must supply, on request, relevant information in the employer's possession needed by a union for the proper performance of its duties as the

employees' bargaining representative. In that context, relevance is determined by a liberal discovery-type standard. County of Champaign, 19 PERI ¶73 (IL LRB-SP 2003); City of Chicago (Chicago Fire Department), 12 PERI ¶3015 (IL LLRB 1996); see National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432, 435, 87 S. Ct. 565, 568 (1967); Soule Glass and Glazing Co. v. National Labor Relations Board, 652 F.2d 1055, 1092 (1st Cir. 1981); Health Care and Retirement Corporation of America, 317 NLRB 1005, 1008 (1995). Materials that relate to unit employees' wages, hours, or terms or conditions of employment (i.e., mandatory bargaining subjects) are presumptively relevant and necessary. City of Chicago (Chicago Fire Department), 12 PERI ¶3015; Village of Franklin Park, 8 PERI ¶2039.

The Union has asked the Village for a variety of relevant information. However, significantly, the Union has largely failed to demonstrate that the requested information is actually in the Village's possession. In general, it appears that, over time, the Village has only generated a few documents that are related to its reorganization: the job descriptions for the Commander and Deputy Chief positions, Chief Schinker's notes, the ordinance, and the minutes of the April 4, 2012 Board of Trustees meeting. Except for the Deputy Chief job description, all of those documents have been provided upon request.

While the contents of the Deputy Chief job description are unknown, it reasonably follows that they are highly relevant. I also suspect that the Union will need the job description in order to bargain intelligently with the Village. See County of Champaign, 19 PERI ¶73; City of Bloomington, 19 PERI ¶11 (IL LRB-SP 2003); State of Illinois, Department of Central Management Services, 9 PERI ¶2032 (IL SLRB 1993). Thus, going forward, in order to comply with its statutory duty to bargain in good faith, the Village must provide the Union a copy of the Deputy Chief job description. That being said, because the Deputy Chief job description was not

shown to have existed before the Union's charge was filed, it generally follows that an additional violation of Sections 10(a)(1) and (4) cannot be found at this time.

The Allegedly Privileged Exhibit

The Village asserts that Union Exhibit 7 is protected by attorney-client privilege. That particular exhibit is an April 4, 2012 e-mail message that was authored by Sterk and sent to Mayor Getty, Chief Schinker, and Village Manager Sheahan. Shortly after Sterk's message was sent, Commander Kuratko asked Chief Schinker for a copy of it. Chief Schinker gave it to him freely. Blass then included Union Exhibit 7 as an attachment to his initial April 5, 2012 charge. Blass also discussed and included a copy of the exhibit in a letter to the Board's Investigator on July 9, 2012. The Village later filed its motion to strike the allegedly privileged exhibit on May 22, 2013.

I would deny the Village's motion to strike. In the motion, the Village characterizes Union Exhibit 7 as "advice and opinion" from an attorney, Sterk, to his client, the Village. One of the exhibit's intended recipients, Chief Schinker, voluntarily and knowingly disclosed Sterk's advice and opinion to another party. When Chief Schinker did that, he waived the attorney-client privilege. See Profit Management Development, Inc. v. Jacobson, Brandvik and Anderson, Ltd., 309 Ill. App. 3d 289, 299, 721 N.E.2d 826, 835 (2nd Dist. 1999).

The possibility that Sterk may not have intended for his client to share his advice and opinion with another party does not preclude a waiver. The client, not the attorney, holds the privilege. Center Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107, ¶28, 981 N.E.2d 345, 355. If Chief Schinker (an appointed "department head" and "Village official") is not a representative of Sterk's client, then, logically, there was no attorney-client privilege in the first place. See Chicago Transit Authority, 21 PERI ¶38 (IL LRB-LP G.C. 2005).

The Union's Motion for Sanctions

The Union filed a motion for sanctions against the Village on July 9, 2012. In the motion, the Union asks the undersigned to consider certain facts. Specifically, the Union notes that, in a June 11, 2012 letter to the Board's Investigator, Hayes asked the Board to dismiss the Union's charge and defer to the parties' contractual grievance and arbitration process. It also notes that, subsequently, in a July 2, 2012 letter to Blass, Hayes informed Blass that, because the Union had filed an unfair labor practice charge with the Board, the Village would not be arbitrating the Union's charges. In its brief, the Union asks the undersigned to consider Chief Schinker's testimony as well.

Section 11(c) of the Act provides that the Board has discretion to include an appropriate sanction in its order if a party (1) has made allegations or denials without reasonable cause and found to be untrue or (2) has engaged in frivolous litigation for the purposes of delay or needless increase in the cost of litigation. The test for determining whether a party has made factual assertions which were untrue and made without reasonable cause is an objective one of reasonableness under the circumstances. The test for determining whether a party has engaged in frivolous litigation is whether a party's defenses to a charge were not made in good faith or did not represent a "debatable" position. County of Bureau and Bureau County Sheriff, 29 PERI ¶163 (IL LRB-SP 2013); Chicago Transit Authority, 16 PERI ¶3021; County of Cook, 15 PERI ¶3001 (IL LLRB 1998).

Simply put, I find that the circumstances highlighted above do not satisfy either test. While the Village's two positions could appear to contradict one another, arguably, it is possible that the Village simply changed its position from one month to the next. Moreover, I find that the Village's initial deferral request was not obviously beneath debate. In addition, I do not find

that Chief Schinker's testimony was objectively unreasonable. Accordingly, I would deny the Union's motion.

V. CONCLUSIONS OF LAW

1. I find that the Village did not violate Sections 10(a)(1) and (2) of the Act.
2. I find that the Village violated Sections 10(a)(1) and (4) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Village and its respective officers and agents shall:

1. Cease and desist from:
   (a) Implementing or giving effect to the Village's April 4, 2012 ordinance regarding the reorganization of the police department;
   (b) Failing and refusing to bargain in good faith with the Union as to changes set forth in the April 4, 2012 ordinance that affect wages, hours, or terms or conditions of employment of the Village's Commanders;
   (c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act:
   (a) Rescind any changes made pursuant to the April 4, 2012 ordinance that affect wages, hours, or terms or conditions of employment of the Village's Commanders made on or after April 4, 2012 and any other such changes made thereafter;
   (b) Make whole any employees in the bargaining unit represented by the Union for all losses incurred as a result of any changes made pursuant to the April 4, 2012

ordinance that affect wages, hours, or terms or conditions of employment of those employees, including back pay plus interest at seven percent per annum, as allowed by the Act;

(c) Prior to implementation, give reasonable notice to the Union of any proposed changes that affect wages, hours, or terms or conditions of employment of employees represented by the Union and, upon request of the Union, bargain in good faith over those changes;

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to calculate the amount of back pay due under the terms of this decision;

(e) Post, at all places where notices to employees are regularly 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. The Village will take reasonable efforts to ensure that the notices are not altered, defaced, or covered by any other material;

(f) Notify the Board in writing within 20 days from the date of this order of the steps the Village has taken to comply herewith.

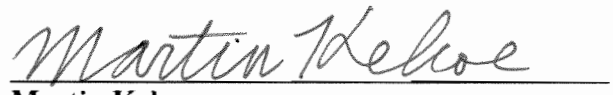
VII. EXCEPTIONS

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 10 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 5 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 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 in Chicago, Illinois this 28th day of October 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL



Martin Kehoe
Administrative Law Judge