

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

Tyron McCullough,)	
)	
Charging Party)	Consolidated Case Nos.
)	S-CA-12-197-C
and)	S-CA-12-201-C &
)	S-CA-12-211-C
Harvey Park District,)	
)	
Respondent)	

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

On July 16, 2014, Administrative Law Judge (ALJ) Deena Sanceda issued a Recommended Decision and Order (RDO), recommending that the Illinois Labor Relations Board, State Panel, order Respondent Harvey Park District to comply with orders previously issued by the Board in consolidated Case Nos. S-CA-12-197, S-CA-12-201 and S-CA-12-211, modified only to provide for the accrual of additional back pay and interest accumulating since issuance of those orders. Respondent filed timely exceptions to the ALJ's RDO pursuant to Section 1200.135 of the Board's rules and regulations, 80 Ill. Admin. Code § 1200.135, and Charging Party, Tyron McCullough, filed a response. After reviewing the exceptions, the response, and the record, we accept the ALJ's recommendation for the reasons articulated in the RDO, and order Respondent to comply with the Compliance Officer's order as modified to allow for additional back pay and interest accruing since the date that order was issued.

Background

These consolidated compliance cases were initiated after (1) the Respondent, Harvey Park District, failed to file a petition for review with the Appellate Court of the Board's final

determination of unfair labor practices in consolidated Case Nos. S-CA-12-197, S-CA-12-201 and S-CA-12-211 and (2) Charging Party filed a petition for enforcement alleging Respondent also failed to comply with the Board's order issued in those consolidated cases. In those earlier cases, the Board's Executive Director issued a complaint consolidating three charges alleging that Respondent violated Sections 10(a)(2), (3) and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315/10(a)(1), (2) & (3) (2012), by: 1) failing to pay Charging Party, Tyron McCullough, a scheduled salary increase; 2) failing to pay McCullough for the correct number of hours worked; 3) suspending McCullough without pay on June 20, 2012; 4) suspending McCullough for five days without pay beginning August 28, 2012; and 5) suspending McCullough without pay pending termination on September 10, 2012.

The Complaint in those earlier cases issued May 29, 2013. Pursuant to Board Rule 1200.30(c), 80 Ill. Admin. Code §1200.30(c), it was presumed to have been received by Respondent three days later; however, June 1, 2013 was a Saturday and Board Rule 1200.30(a) extends periods falling on weekends to the next business day, in this case, to Monday, June 3, 2013. Board Rule 1220.40(b) requires respondents to answer complaints within 15 days, 80 Ill. Admin. Code 1220.40(b), so Respondent was required to file an answer to the complaint by Tuesday, June 18, 2013. The Complaint explicitly warned of this deadline, and in bold, underlined text further warned that

Failure to specifically respond to an allegation shall be deemed an affirmative admission of the facts or conclusions alleged in the allegation. Failure to timely file an answer shall be deemed an admission of all material facts or legal conclusions alleged and a waiver of hearing. The filing of any motion or other pleading will not stay the time for filing an answer.

This warning is taken from Board Rule 1220.40(b)(3), and the Board's application of that rule has been affirmed by the Appellate Court in Wood Dale Fire Prot. Dist. v. Ill. Labor Relations Bd., 395 Ill. App. 3d 523 (2d Dist. 2009), *aff'g* Wood Dale Fire Prot. Dist., 25 PERI ¶136 (IL LRB-SP 2008), and in Metz v. Ill. State Labor Relations Bd., 231 Ill. App. 3d 1079 (5th Dist. 1992), *aff'g* Cir. Clerk of St. Clair Cnty., 6 PERI ¶2036 (IL SLRB 1990).

On Monday, June 17, 2013, Respondent's counsel contacted Board Agent Michael Provines to request an extension of time, and Provines appropriately referred counsel to the Administrative Law Judge assigned to the case, Michelle Owen. Her assignment to the case was explicitly noted in the Complaint immediately prior to the warning set out above. The next day, June 18, Respondent's counsel contacted ALJ Owen to request an extension of time, and ALJ Owen informed her that the request needed to be in writing and also that counsel could seek leave to file a late answer pursuant to Board Rules, or seek a variance from the Board Rules. On June 19, Respondent requested leave to file a late answer and for a variance from the 15-day filing requirement, stating that she had been out of the country and had not received the Complaint until June 17, 2013, and consequently could not answer within 15 days. Charging Party objected to the request, noting that he had been suspended for over nine months and that the suspension had caused him hardship, pain and suffering.

Five weeks later, Respondent had still not tendered a proposed answer, and on July 22, 2013, ALJ Owen issued a recommended decision and order finding that, by defaulting on its obligation to file a timely answer, Respondent had admitted the material facts and legal conclusions alleged in the complaint and waived its right to a hearing. She found Respondent had not met the requirements for filing a late answer as set out in Board Rule 1220.40(b)(4) which provides that "[l]eave to file a late answer shall only be granted by the Administrative

Law Judge if the late filing is due to extraordinary circumstances, which will include among other things: fraud, act or concealment of the opposing party, or other grounds traditionally relied upon for equitable relief from judgments.” She found an attorney being out of the country did not meet this requirement, and cited recent Board decisions for the proposition that simple inattention¹ or negligence by a party’s attorney² did not constitute extraordinary circumstances. ALJ Owen also found that, while Respondent had met the first requirement for a variance under Board Rule 1200.160 in that the 15-day deadline for an answer was not a statutory requirement, it failed to meet the other two requirements because McCullough would be harmed by further delay and it could not be said that the 15-day deadline was in this particular case unreasonable or unnecessarily burdensome.

Significantly, Respondent did not file exceptions to ALJ Owen’s RDO recommending a default judgment. On September 10, 2013, the Board’s State Panel declined to review the RDO on its own initiative, and on September 11, 2013, the Board’s General Counsel issued an order noting these facts and advising that: “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.”

Among other things, that now-binding order required Respondent to take the following affirmative action:

(a) Make Tyron McCullough whole for all losses incurred as a result of (1) the failure to pay McCullough the scheduled salary increase effective with his June 1, 2012 promotion,

¹ First Transit/River Valley Metro, 26 PERI ¶38 (IL LRB-SP 2010), *aff’d by unpub. order*, 27 PERI ¶61 (3d Dist. 2011).

² Amalgamated Transit Union, Local 241, 29 PERI ¶78 (LRB-SP 2012) (*citing Wood Dale*, 25 PERI ¶136, and Bd. of Educ. Thornton Twp. High Sch. Dist. No. 205 v. Ill. Educ. Labor Relations Bd., 235 Ill. App. 3d 724, 730-31 (4th Dist. 1992)).

(2) the failure to pay McCullough the correct number of hours he worked for the period from May 31, 2012 through June 13, 2012, (3) the suspension without pay that McCullough received on June 20, 2012, (4) the suspension for five days without pay that McCullough received on August 28, 2012, and (5) the suspension without pay and pending termination that McCullough received on September 10, 2012.

(b) Effective immediately, rescind the disciplinary action taken against Tyron McCullough on June 20, 2012, August 28, 2012 and September 10, 2012, without prejudice to his seniority or other rights and privileges.

(c) Remove from all files and records, including Tyron McCullough's personnel file, any and all documents and references to the disciplinary actions taken against him on June 20, 2012, August 28, 2012, and September 10, 2012, and notify him in writing both that this has been done and that evidence of his unlawful discipline will not be used as a basis for future personnel actions against him.

(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 analyze the relief due under the terms of this decision.

(e) Post at all places where notices to employees are normally posted, copies of the notice attached hereto and marked "Addendum." Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period for 60 consecutive days. Respondent 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 Decision and Order, of the steps Respondent has taken to comply herewith.

Matter Presently Before the Board

On September 23, 2013, less than two weeks after the Board's final action in the earlier cases, Charging Party filed a "petition for enforcement" with the Board in current consolidated Case Nos. S-CA-12-197-C, S-CA-12-201-C and S-CA-12-211-C. Sections 11(f) and (g) of the Act provide that the Board can bring an action in the Illinois Appellate Court to obtain

enforcement of its orders,³ but the Illinois Appellate Court is not a court of original jurisdiction and lacks mechanisms for taking evidence so it is best that the Board first follow its compliance procedures set out in Board Rule 1220.80 before seeking enforcement. In his petition, McCullough alleged that the Respondent had not complied with the ALJ's recommended order, which, at this point in time, constitutes a final administrative order.⁴ The matter was assigned to the Board's Compliance Officer, Michael Provines, who, on February 6, 2014, contacted Respondent seeking information on what steps it had taken to comply with the Board's order. He set a deadline of February 20, 2014, for a response.

Respondent, now represented by a different counsel, sent no such response, but instead on February 19, 2014, filed in consolidated Case Nos. S-CA-12-197, S-CA-12-201 and S-CA-12-211 a motion for reconsideration of the Board's decision in those cases. As a basis for the Board's authority to reconsider the decision, Respondent relied on Section 11(d) of the Act, which provides: "Until the record in a case has been filed in court, the Board at any time, upon

³ These sections provide:

(f) Whenever it appears that any person has violated a final order of the Board issued pursuant to this Section, the Board must commence an action in the name of the People of the State of Illinois by petition, alleging the violation, attaching a copy of the order of the Board, and praying for the issuance of an order directing the person, his officers, agents, servants, successors, and assigns to comply with the order of the Board. The Board shall be represented in this action by the Attorney General in accordance with the Attorney General Act. The court may grant or refuse, in whole or in part, the relief sought, provided that the court may stay an order of the Board in accordance with the Administrative Review Law, pending disposition of the proceedings. The court may punish a violation of its order as in civil contempt.

(g) The proceedings provided in paragraph (f) of this Section shall be commenced in the Appellate Court for the district where the unfair labor practice which is the subject of the Board's order was committed, or where a person required to cease and desist by such order resides or transacts business.

⁴ The time to seek judicial review of the Board's order lapsed 35 days after issuance, on October 29, 2013 (applying the presumption of receipt of the General Counsel's Order three days after issuance). 5 ILCS 315/11(e) (2012); 735 ILCS 5/3-113 (2012); Ill. Sup. Ct. R. 335.

reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any finding or order made or issued by it.” On March 3, 2014, the Board’s General Counsel issued an order denying the request for reconsideration. He reasoned that Section 11(d) was not operative because the lapse of the time for seeking judicial review of the Board’s decision necessarily terminated the time within which the administrative record on review might be filed. Following a then-recent decision of the State Panel regarding a motion to reconsider a gubernatorial designation for bargaining unit exclusion under Section 6.1, he also stated:

Even if there were no statutory prohibition on such action, the Appellate Court has ruled that, in absence of an administrative rule providing for rehearing, administrative agencies are without authority to engage in rehearing. Board of Educ. of Mundelein Elementary School v. Ill. Educational Labor Relations Bd., 179 Ill. App. 3d 696 (4th Dist. 1989). It has also noted that the Board’s rules do not provide for rehearing. Laborers Int’l Union of N. Am. Local 1280 v. Ill. State Labor Relations Bd., 154 Ill. App. 3d 1045, 1053 (5th Dist. 1987); see also State of Ill., Dep’t of Cent. Mgmt. Servs. (Ill. Commerce Comm’n) and Am. Fed’n of State, Cnty. & Mun. Employees, Council 31, Cons. Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086, at 17,⁵ 30 PERI ¶¶83 (IL LRB-SP 2013), appeal pending, Cons. Nos. 4-13-1022, 4-13-023 & 4-13-024 (Ill. App. Ct., 4th Dist.).

Following this activity in the earlier cases, on April 7, 2014,⁶ Compliance Officer Provines issued a Compliance Order in Consolidated Case Nos. S-CA-12-197-C, S-CA-12-201-C and S-CA-12-211-C. Noting that Respondent had submitted no evidence concerning potential compliance, the Compliance Officer considered the evidence presented by Charging Party. He found that evidence deficient with respect to whether McCullough had been paid the correct number of hours and consequently found no need for back pay with respect to this aspect of the Board’s order. He also found the evidence showed McCullough had actually been paid for the June 20, 2012 suspension and thus found no need for back pay on that point. However, the

⁵ Available at <http://www.state.il.us/ilrb/subsections/pdfs/FY14ILRBDecisions.PDF>.

⁶ Even in the unlikely event that it were possible to seek judicial review of the General Counsel’s action, Respondent made no attempt to obtain review.

Compliance Officer found back pay plus interest was required regarding the August 28, 2012 suspension as well as the September 10, 2012 termination of McCullough's employment. He calculated the amount owed to the date of his order, and also directed certain actions with respect to expunging McCullough's personnel files and posting a notice. The Compliance Officer noted that his order was "intermediate," but would become final unless the parties filed an appeal within seven days.

On April 11, 2014, Respondent filed objections to the Compliance Order and the case was then assigned to ALJ Sanceda for an evidentiary hearing. In that proceeding, the Respondent made no argument that it had complied with the Board's order; rather it argued that it had no obligation to comply. It argued that the Board lacked jurisdiction in the earlier cases because McCullough was a supervisor and therefore lacked standing to file his charges. Respondent offered evidence in support of its contention that McCullough was a supervisor and therefore not a public employee. McCullough, in turn, argued that Respondent's failure to file an answer constituted an admission that he was a public employee (this was a specific allegation of the unanswered complaint), and further argued that Respondent's evidence failed to support its contention that he was a supervisor within the meaning of Section 3(r) of the Act.

The ALJ found that the "jurisdiction"⁷ of administrative agencies consists of three parts: (1) personal jurisdiction over the parties; (2) subject-matter jurisdiction over the general class of cases in which the at-issue case belongs; and (3) scope of authority under the agency's enabling statute. She also found that, in failing to file an answer, Respondent had waived any argument that McCullough was not a public employee within the meaning of Section 3(n).⁸ She found the

⁷ While it is more appropriate to speak of administrative agencies "authority" rather than their "jurisdiction," we loosely use the term in this context.

⁸ Paragraph 10 of the Complaint alleges: "At all times material, Charging Party, Tyron McCullough, was a public employee within the meaning of Section 3(n) of the Act."

issue of McCullough's "standing" was therefore not properly before her. Citing Henriksen v. Ill. Racing Bd., 293 Ill. App. 3d 569, 571 (1st Dist. 1997), she found that Respondent had *not* waived the issue of the Board's subject matter jurisdiction in that issues of jurisdiction cannot be waived. Citing a non-precedential decision of the Executive Director of our sister agency, the Illinois Educational Labor Relations Board, Bd. of Trustees of S. Ill. Univ. at Edwardsville, 19 PERI ¶16 (IL ELRB E.D. 2003), she stated that McCullough's standing was a question of fact, but also an issue upon which the Board possessed subject matter jurisdiction. Nevertheless, she found the Board's final order in the earlier cases was not subject to collateral attack in the current proceeding pending before the Board. Finding the issue of McCullough's standing was not presently before her, she made no ruling on whether McCullough was a public employee. As Respondent had not challenged the Compliance Officer's findings, she ordered that it comply with the Compliance Order as written, modified only to reflect the additional accrual of back pay and additional accrual of interest.

Respondent's exceptions to the ALJ's RDO, raise only a couple of points. First, it asserts that (pursuant to the ALJ's directive) it had submitted evidence that McCullough was a supervisor, evidence which it claims was uncontroverted by McCullough, and that consequently McCullough could not allege an unfair labor practice charge and the Board could not exercise jurisdiction over Respondent. With respect to the ALJ's observation that Respondent had, by means of default, admitted McCullough was a "public employee" within the meaning of the Act, Respondent points out the complaint had also alleged McCullough was "the superintendent of maintenance,"⁹ and asserts this "is by definition a supervisory position." Thus, it claims "the

⁹ Paragraph 11 of the Complaint alleges: "At all times material, Respondent has employed Charging Party in the working title of maintenance field technician or superintendent of maintenance" and Paragraph 16 of the Complaint alleges: "On or about June 1, 2012, Respondent promoted Charging Party to superintendent of maintenance."

Complaint on its face alleged that Mr. McCullough was a supervisor thereby divesting subject matter jurisdiction under the Act.” While its first argument may appear to challenge standing, Respondent also claims it had never argued McCullough lacked standing, but that the Act excludes statutorily defined supervisors from the subject matter jurisdiction of the Illinois Labor Relations Board. Consequently, it views this as a matter of the Board’s statutory authorization. Rather than being improper, it argues it is imperative for this Board to make a factual finding as to whether McCullough was a supervisor, noting that no new or additional evidence is permitted to be presented to the Appellate Court.

Analysis

Initially we note that, contrary to Respondent’s assertion, the fact that the Complaint alleges that after June 1, 2012 McCullough had the working title of “superintendent of maintenance” is *not* an allegation (or concession) that he was a “supervisor” within the meaning of Section 3(r) of the Act,¹⁰ excluded from the definition of a public employee within the

¹⁰ Section 3(r) provides:

(r) “Supervisor” is an employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising that authority, State supervisors notwithstanding. In addition, in determining supervisory status in police employment, rank shall not be determinative. The Board shall consider, as evidence of bargaining unit inclusion or exclusion, the common law enforcement policies and relationships between police officer ranks and certification under applicable civil service law, ordinances, personnel codes, or Division 2.1 of Article 10 of the Illinois Municipal Code, but these factors shall not be the sole or predominant factors considered by the Board in determining police supervisory status.

Notwithstanding the provisions of the preceding paragraph, in determining supervisory status in fire fighter employment, no fire fighter shall be excluded as a supervisor who has established representation rights under Section 9 of this Act. Further, in new fire fighter units, employees shall consist of fire fighters of the rank of company officer and below. If a company officer otherwise qualifies as a supervisor under the preceding paragraph, however, he or she shall not be included in the fire fighter unit. If there is no rank between that of chief and the highest company

meaning of Section 3(n) of the Act. Even if the working title had been labeled “supervisor” that would be insufficient to support a finding that the position met the very technical requirements of the term as defined in Section 3(r).

Although this is not directly pertinent, we also note that it is a fallacy to assume, as Respondent does, that the Board lacks authority with respect to all supervisors. Although McCullough is not a member of an historical unit that would be permitted to have supervisors (see Section 9(n)) and there is no evidence Respondent has agreed to a unit of supervisors (see Section 3(s)(2)), the Board has authority with respect to some supervisors, whether that be considered in the context of standing to bring a charge or in terms of the Board’s subject matter jurisdiction.

More significantly, Respondent’s failure to file an answer in the earlier cases denying the Complaint’s allegation that McCullough was a public employee within the meaning of Section 3(n) of the Act *is* a concession that McCullough was, indeed, a public employee. Similarly, Respondent’s failure to file an answer is a concession that it is a public employer¹¹ and even that the Board has jurisdiction over the Respondent.¹²

Indeed, the Board explicitly has authority with respect to “collective bargaining matters ... between employee organizations and units of local government” (Section 5) and to enforce the Public Labor Relations Act, the purposes of which includes to “prescribe the legitimate rights of both public employees and public employers” (Section 2). As explained by Justice Kilbride in a recent concurring opinion, the Illinois Supreme Court “has consistently held that the [Illinois

officer, the employer may designate a position on each shift as a Shift Commander, and the persons occupying those positions shall be supervisors. All other ranks above that of company officer shall be supervisors.

¹¹ Paragraph 1 of the Complaint alleges: “At all times material, Respondent has been a public employer within the meaning of Section 3(o) of the Act.”

¹² Paragraph 2 of the Complaint alleges: “At all times material, Respondent has been subject to the jurisdiction of the State Panel of the Board, pursuant to Section 5(a-5) of the Act.”

Educational Labor Relations Board] and the [Illinois Labor Relations Board] have *exclusive* jurisdiction to hear disputes that fall within their respective statutory schemes.” Bd. of Educ. of Peoria School Dist. No. 150 v. Peoria Fed’n of Support Staff, 2013 IL 114853 ¶65 (Kilbride, J., concurring); see also Community Unit School Dist. No. 4 v. Ill. Educ. Labor Relations Bd., 204 IL App (4th) 130294 ¶46 (“the [Illinois Educational Labor Relations Board] has the authority to decide charges of unfair labor practices, giving it subject-matter jurisdiction over the case”); id. (finding the Illinois Educational Labor Relations Board had personal jurisdiction over a board of education where the complaint erroneously merely named the school district but the district’s board of education had notice); Eisenberg v. Industrial Comm’n of Ill., 337 Ill. App. 3d 373, 383 (1st Dist. 2003) (rejecting contention that the Industrial Commission had to first and separately determine whether an entity was an employer subject to its determination prior to addressing the merits of a claim, stating that under the Workers Compensation Act “the Commission has authority, after notice and a hearing, to determine whether the charged party is an ‘employer’ and to impose civil penalties upon an ‘employer.’”).

Respondent’s inactivity in the prior cases—its failure to answer the complaint, to file exceptions to ALJ Owen’s RDO, and to file a petition for judicial review—clearly constitutes a concession that the Board had jurisdiction or authority in the case which finally determined whether Respondent had committed an unfair labor practice. The question is whether, having failed to avail itself of adequate opportunities to present evidence demonstrating a lack of agency authority, it can simply refuse to comply with an unchallenged agency order and by that means gain entitlement to a second opportunity to make such a factual presentation. There are many decisions holding that “[b]ecause agency action for which there is no statutory authority is void, it is subject to attack at any time in any court, either directly or collaterally,” e.g. Daniels v.

Industrial Comm'n, 201 Ill. 2d 160, 166 (2002), but as Justice Kilbride noted, the Board has exclusive jurisdiction over issues like those raised in the Complaint, Bd. of Educ. of Peoria School Dist. No. 150, 2013 IL 114853 ¶¶65 (Kilbride, J., concurring). And there are an equal number of cases holding that “[w]hen the Administrative Review Law is applicable to an administrative agency, it provides the sole method of reviewing an agency decision.” E.g. People ex rel. Madigan v. Burge, 2014 IL 115635 ¶35. Respondent’s failure to seek administrative review of the Board’s earlier decision similarly precludes it from collaterally attacking that decision here. To hold that Board decisions unchallenged under the Administrative Review Law nevertheless remain continually vulnerable to subsequent collateral attacks would serve to destabilize collective bargaining situations in contravention of the purposes of both the Illinois Public Labor Relations Act and the Administrative Review Law.

Based in part on the undisputed fact that we issued our earlier order to Respondent, and in part on Respondent’s earlier concession in those cases that McCullough was at all material times a public employee, we find we have personal jurisdiction over the parties, that we have subject-matter jurisdiction, and that a determination concerning compliance with our prior order is within the scope of our authority under the Illinois Public Labor Relations Act. We refuse any invitation to revisit our earlier unfair labor practice determination for the reasons expressed in the General Counsel’s order refusing reconsideration in those earlier cases. We disavow any suggestion that may be present in the RDO that the court’s authority in administrative review of our present decision would extend to agency decisions never brought in administrative review. Finally, as Respondent has made no attempt to demonstrate that it has complied with our earlier order or that ALJ Sanceda’s modification of Compliance Officer Provine’s Compliance Order was substantively in error, we accept the ALJ’s recommendation, and order that Respondent,

Harvey Park District, comply with the order issued by Compliance Officer Provines, modified only to require the payment of additional back pay and interest accrued from the date of that order through the date of compliance.

BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL

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

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

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

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

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on October 7, 2014;
written decision issued at Chicago, Illinois, December 31, 2014.

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STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Tyron McCullough,)
)
Charging Party,)
)
and) Case Nos. S-CA-12-197-C¹
) S-CA-12-201-C
) S-CA-12-211-C
Harvey Park District,)
)
Respondent)

**ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED COMPLIANCE DECISION AND ORDER**

On September 23, 2013, Charging Party, Tyron McCullough, filed a Petition for Enforcement (Petition) with the Illinois Labor Relations Board (Board). In the Petition, McCullough requested enforcement of the Board's Final Order in Case Nos. S-CA-12-197, S-CA-12-201, and S-CA-12-211, where the Board ordered Respondent, Harvey Park District (Park District) to take specific actions to effectuate the policies of the Illinois Public Relations Act (Act), 5 ILCS 315 (2012), *as amended*. The Petition was investigated pursuant to the Act and Section 1220.80 of the Board's Rules and Regulations, 80 Ill. Admin. Code Sections 1200-1240 (Rules). On April 7, 2014, Compliance Officer, Michael Provines issued a Compliance Order in the above-captioned cases directing the Park District to take actions to facilitate full compliance with the Board's Final Order. On April 11, 2014, the Park District filed objections to the Compliance Order, and on April 14, 2014, McCullough filed a response to the objections. Pursuant to Section 1220.80(f) of the Rules, a hearing was held in the form of written briefs submitted on May 29, 2014 and June 2, 2014, through which both parties were given the opportunity to participate, adduce evidence, present witness affidavits, and present legal arguments. After full consideration of the relevant evidence, arguments, briefs, and upon the entire record of the above-captioned case, I recommend the following:

I. BACKGROUND

On June 18, 2012, McCullough filed an unfair labor practice charge in Case No. S-CA-12-197. On June 20, 2012, McCullough filed an unfair labor practice charge in Case No. S-CA-

¹ In all of its filings in the above-captioned case, the Park District identifies the case nos. incorrectly as the unfair labor practice case nos. The unfair labor practice cases concluded with the Board's Final Order, and the at-issue case is the Park District's compliance with the Board's Final Order. Although the only distinction between the case nos. is the "-C" at the end of the compliance case no., the compliance case is not a continuance of the unfair labor practices cases, they are are different cases.

12-201. On June 25, 2012, McCullough filed an unfair labor practice charge in Case No. S-CA-12-211. The charges alleged that the Park District had engaged in unfair labor practices within the meaning of Section 10(a) of the Act. The charges were investigated in accordance with Section 11 of the Act. On May 29, 2013, the Board's Executive Director consolidated the three unfair labor practice charges and issued a consolidated Complaint for Hearing (Complaint), setting the matter before Administrative Law Judge Michelle Owen (ALJ Owen). The Complaint alleged that the Park District violated Sections 10(a)(1), (2) and (3) of the Act. Section 1220.40(b) of the Rules required the Park District to answer the Complaint within 15 days of service. See 80 Ill. Admin. Code Section 1220.40. A timely answer was required to be postmarked by June 18, 2013. On June 29, 2013, the Park District's counsel requested leave to file a late answer, and requested that the Board grant a variance from the 15-day filing requirement in the Rules.

On July 22, 2013, ALJ Owen, on behalf of the Board issued a Recommend Decision and Order (RDO), in which she found that the Park District failed to show that extraordinary circumstances existed to allow for a late filing of an answer to the Complaint and denied the Park District's request for a variance. She found that because the Park District failed to file a timely answer, the Park District waived its right to a hearing, and that this failure resulted in the admission of the material facts alleged the Complaint. As such, ALJ Owen found that the Park District violated Sections 10(a)(1), (2) and (3) of the Act. As a remedy to its unlawful conduct, ALJ Owen ordered the Park District to take specific affirmative actions to effectuate the policies of the Act. Neither party filed timely exceptions to the RDO, and the Board declined to take the matter up on its own motion. Accordingly, on September 10, 2013, pursuant Section 1220.135(b)(5) of the Rules, the Board's General Counsel issued an Order stating that the parties have waived their exceptions to the RDO and memorialized ALJ Owen's RDO as final and binding upon the parties.²

On September 23, 2013, pursuant to Sections 11(f) and 11(g) of the Act and 1220.80 of the Rules, McCullough filed a Petition for Enforcement, in which McCullough contended that the Park District failed to take the actions required by the Board's Final Order. The Petition was assigned to Compliance Officer Provines for investigation. On February 6, 2014, a Board agent contacted the Park District requesting that it inform the Board what steps, if any, it had taken to

² ALJ Owen's RDO will hereinafter be referred to as the "Board's Final Order."

comply with the Board's Final Order, and that it provide the agent with this information by February 26, 2014. The Park District did not comply with the Board agent's request for information in the at-issue case. Instead, on February 19, 2014, the Park District filed a motion in the underlying unfair labor practice cases, requesting that the Board reconsider the Board's Final Order. On March 3, 2014, the Board's General Counsel denied the Park District's motion for reconsideration. On April 7, 2014, Compliance Officer Provines issued a Compliance Order in the above-captioned cases directing the Park District to take actions to facilitate full compliance with the Board's Final Order.

II. ISSUES AND CONTENTIONS

The central matter before the Board is whether the Park District has complied with the Board's Final Order that was issued in the unfair labor practice cases. The Park District argues that it is not required to comply because the Board did not have subject matter jurisdiction over the unfair labor practice cases, and that consequently the Board's subsequent Compliance Order in which it instructed the Park District to comply with the Board's Final Order is void and should be vacated. The Park District argues that the Board acted without jurisdiction because McCullough holds a supervisory position, and therefore lacked standing to bring the unfair labor practice charges before the Board. The Park District argues that only public employees can bring such charges, and provides documentation to support its position that McCullough is a supervisor rather than a public employee within the meaning of the Act. McCullough argues that his protection as a public employee is an allegation in the Complaint for Hearing, and the Park District's failure to file a timely answer resulted in the admission of the material facts alleged the Complaint. McCullough also argues that the evidence the Park District submitted in support of the contention that he is a supervisor does not in fact support this contention.

III. DISCUSSION AND ANALYSIS

The Park District has not complied with the Board's Final Order. Although the term "jurisdiction" is not strictly applicable to an administrative agency such as the Board, the Illinois Supreme Court has held that the term may be used to designate an administrative agency with its authority to act. Alvarado v. Indus. Comm'n., 216 Ill.2d 547, 554 (2007). In the administrative law context, the term "jurisdiction" has three aspects: (1) personal jurisdiction over the parties; (2) subject-matter jurisdiction over the general class of cases in which the at-issue case belongs;

and (3) an agency's scope of authority under its enabling statute. Bus. & Prof'l People for the Pub. Interest v. Ill. Commerce Comm'n, 136 Ill. 2d 192, 243 (1989); Cnty. Unit School Dist. No. 5 v. Ill. Educ. Labor Rel. Bd., No. 4-13-0294, 2014 WL 2535338, at *8 (4th Dist. Ill App. June 5, 2014); Armstead v. Sheahan, 298 Ill. App. 3d 892, 895 (1st Dist. 1998). The Board possesses subject matter jurisdiction over matters relating to collective bargaining, including unfair labor practice charges alleging that a public employer has discriminated against a public employee because of the employee's participation in activities protected by the Act. Cnty. of Rock Island, 14 PERI ¶2029 (IL SLRB 1998), *aff'd*, Grchan v. Ill. Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000).

The Board determined that McCullough had standing to bring unfair labor charges. The Park District argues that McCullough lacked standing because the McCullough was a supervisor as defined by Section 3(r)³ of the Act, and only a public employee as defined by Section 3(n)⁴ has standing to bring an unfair labor practice charge before the Board. The doctrine of standing exists to ensure that courts and administrative agencies decide only actual, specific controversies. Bridgestone/Firestone, Inc. v. Aldridge, 179 Ill. 2d 141, 147 (1997). To have standing a party must possess a real interest in the action and its outcome. Underground Contractors Ass'n v. City of Chicago, 66 Ill. 2d 371, 376 (1977). In order to have standing to bring an unfair labor practice charge before the Board, Section 10 of the Act must be applicable to the charging party. See 5 ILC 315/10. Generally, Section 10 of the Act does not protect a supervisor against retaliation by an employer because of the supervisor's union or protected activity. But see Forest Pres. Dist. of Cook Cnty., 5 PERI ¶3002 (IL LLRB 1988)(adopting the National Labor Relations Board's rationale in finding that under specific circumstances an employer's conduct toward a supervisor can constitute an unfair labor practice); State of Ill. Dep't Cent. Mgmt. Serv., 4 PERI ¶2004 (IL SLRB 1987); Vill. of Barrington Hills (Police Dep't.), 29 PERI ¶98 IL LRB-SP ALJ 2012); City of Chicago, Mayor's Office of Emp't. and Training, 4 PERI ¶3005 (IL LLRB ALJ

³ A supervisor is an "employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires consistent use of independent judgment. Except with respect to police employment, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising that authority, State supervisors notwithstanding." 5 ILCS 315/3(r).

⁴ A public employee is "any individual employed by a public employer, . . . excluding . . . supervisors except as provided in this Act." 5 ILCS 315/3(n).

1988). The Complaint specifically alleged “[A]t all times material, Charging Party, Tyron McCullough, was a public employee within the meaning of Section 3(n) of the Act.” Since the Park District failed to file a timely Answer to the Complaint, it waived its right to a hearing, and this failure resulted in the admission of the material facts alleged the Complaint. See Wood Dale Fire Prot. Dist. v. Ill. Labor Rel. Bd., 395 Ill. App. 3d 523 (2nd Dist. 2009), *aff’g* Wood Dale Fire Prot. Dist., 25 PERI ¶136 (IL LRB-SP 2008); Metz v. Ill. State Labor Rel. Bd., 231 Ill. App. 3d 1079 (5th Dist. 1992); First Transit/River Vall. Metro, 26 PERI ¶38 (IL LRB-SP 2010). Accordingly, the Board’s Final Order identified that McCullough was a public employee within the meaning of Section 3(n) of the Act, and this public employee status provided McCullough with standing to bring unfair labor practice charges before the Board.

However, the Park District has not waived the issue of whether the Board possessed subject matter jurisdiction in the underlying unfair labor practice cases. McCullough’s standing as a public employee is a question of fact, but it is also a basis in which the Board possessed subject matter jurisdiction, and jurisdictional matters are not subject to waiver. See Bd. of Trustees of S. Ill. Univ. at Edwardsville, 19 PERI ¶16 (IL ELRB E.D. 2003)(dismissing an unfair labor charge because the Illinois Educational Labor Relations Board’s (IELRB) Executive Director determined that the IELRB lacked subject matter jurisdiction because the charging party was a “peace officer” who was excluded from the definition of “educational employee” articulated in the Illinois Educational Labor Relations Act (IELRA) and thus lacked standing to bring the charge); Henriksen v. Ill. Racing Bd., 293 Ill. App. 3d 569, 571 (1st Dist. 1997)(noting that parties may object to jurisdiction at any time though the parties first raised the issue of the Illinois Racing Board’s jurisdiction for the first time on appeal to the Appellate Court). Thus, the Park District’s failure to deny the allegation in the Complaint that McCullough was a public employee does not constitute waiver.

The Board’s Final Order in the unfair labor practice cases is not subject to collateral attack in this proceeding. The Board’s final orders are subject to direct judicial review by the Appellate Court. 5 ILCS 315/11(e); Laborer’s Int’l Union of N. Am. v. Ill. State Labor Rel. Bd., 154 Ill. App. 3d 1045, 1050 (1987); see Bd. of Trustees of the Univ. of Ill. v. Ill. Labor Rel. Bd., 224 Ill. 2d 88, 97-98, (2007). A decision rendered by an administrative agency that lacks jurisdiction over the parties or the subject matter, or a decision that is beyond the statutory authority of the administrative agency, is void and can be collaterally attacked in any court, at

any time. Wabash Cnty. v. Ill. Mun. Ret. Fund, 408 Ill. App. 3d 924, 929 (2nd Dist. 2011); Bd. of Educ. of City of Chicago v. Bd. of Tr. of Pub. Sch. Teachers' Pen. and Ret. Fund of Chicago, 395 Ill. App. 3d 735, 739 (1st Dist. 2009). The Board is an administrative agency, not a court. See Lynch v. Dep't of Transp., 2012 IL App (4th) 111040 (finding that the State Law Immunity Act immunized the state from being sued in court did not apply to complaints filed before the Human Rights Commission because the Commission was an administrative agency, not a court). As such, a collateral attack upon an underlying order before the same administrative agency that issued the underlying order is improper. McLean Cnty. Unit Dist. 5, a/k/a Bd. of Educ. of McLean Cnty. Unit Dist. 5, 29 PERI ¶174 (IELRB 2013)(finding that because the IELRB issued a final order certifying a union as the employees' bargaining agent and the employer had not sought administrative review of that decision, a collateral attack of the union's standing to bring an unfair labor practice before the IELRB was improper) *rev'd. on other grounds* Cnty. Unit School Dist. No. 5 v. Ill. Educ. Labor Rel. Bd., No. 4-13-0294, 2014 WL 2535338, at *8-9 (affirming the IELRB's jurisdiction, but reversing the IELRB's finding that the employer committed an unfair labor practice). In issuing the Board's Final Order, the Board implicitly determined that it possessed the jurisdictional authority to determine the unfair labor practice cases. The Appellate Court has not overturned the Board's Final Order through judicial review, and the Park District has not collaterally attacked the Board's Final Order in any court. Pursuant to the Board's Final Order in Case Nos. S-CA-12-197, S-CA-112-201, S-CA12-211, at all times material, McCullough was a public employee within the meaning of the Act, and the Board possessed subject matter jurisdiction to decide the unfair labor practice charges McCullough brought against the Park District.

There are no remaining issues for resolution through the Board's compliance proceeding. Since the question of McCullough's standing as a public employee is not properly before me, I make no findings regarding the factual allegations presented in the Park District's brief, and for that reason have not included those alleged facts in this recommended decision and order. Pursuant to the Rules, objections to the Compliance Order are to specifically identify the finding, order, or omission to which the party objects. See Rules Section 1220.80(e)(1). "Any objection to a finding, order or omission not specifically urged shall be deemed waived." Rules Section 1220.80(f). The Park District does not object to any of the Compliance Officer's findings, but only to the Compliance Officer's authority to issue the Compliance Order on the basis that the

Board's Final Order is void. As I have already determined that this objection is improper, and there are no objections to any findings, I interpret any such arguments waived and will address neither the Compliance Officer's findings nor any orders based upon those findings.

IV. RECOMMENDED ORDER

IT IS HEREBY ORDERED that Harvey Park District comply with the Compliance Order as written, modified only to reflect the additional accrual of backpay and the additional accrual of interest on all awards due to Tyron McCullough.

V. EXCEPTIONS

Pursuant to Section 1200.135 of the Rules, parties may file exceptions to the Administrative Law Judge's Recommended Compliance Decision and Order in 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 this Recommendation. Within seven 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, IL 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 of 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 16th day of July, 2014.

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



**Deena Sanceda
Administrative Law Judge**