STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Hazel Crest Professional Firefighters Association, IAFF, Local 4087,	)	
Charging Party	)	
and	)	Case No. S-CA-13-005
Village of Hazel Crest,	)	
Respondent	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On May 15, 2013, Administrative Law Judge (ALJ) Martin Kehoe issued a Recommended Decision and Order (RDO) in the above-captioned case, recommending that the Illinois Labor Relations Board, State Panel (Board) dismiss the complaint alleging that the Village of Hazel Crest (Respondent) violated Section 10(a)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) (Act), by ordering the removal of a banner hung in Respondent's fire station and vehicle decals placed on its fire trucks by the Hazel Crest Professional Firefighters Association, IAFF, 4087 (Charging Party).

Charging Party filed timely exceptions to the RDO pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. Respondent did not file a response. After reviewing the record and exceptions we uphold the ALJ's recommendation with the following modifications.

Charging Party is the exclusive representative of a bargaining unit of Respondent's firefighters. In or before 2002, Charging Party hung one of its banners in the vehicle bay of Respondent's fire station and subsequently placed its decals on Respondent's fire trucks.

In August 2011 a new village manager, James Whigham, began to work for Respondent. In late fall of that year Whigham learned about the Charging Party banner and vehicle stickers. As part of an inquiry into whether the banner and stickers were appropriate, Whigham examined the parties' collective bargaining agreement, Respondent's personnel and municipal codes and the past five or six years of the minutes of Respondent's trustee meetings. Additionally, Whigham discussed the issue with the current fire chief and deputy fire chief and in late 2012 had a similar discussion with the former village manager. At the end of his inquiry, Whigham decided that the banner and vehicle stickers should be removed and instructed the deputy fire chief to order Charging Party's president to do so.

After removing the stickers and banner, Charging Party's president sent an e-mail to Whigham asking why he had made that decision. Whigham responded with the following e-mail which states in relevant part:

> All government operations adhere to established, universal and reasonable workplace policies and conditions. Because something has occurred in the past, but is well beyond what is proper and authorized, is not an excuse. As I'm sure you are fully aware, the fire station, all of the equipment and apparatus, furniture and their appendices are the sole and exclusive property of the taxpayers vis a vis the Village of Hazel Crest. Outside of [government flags], any and all references to secular, private, organizational, fraternal or non-Village entities is inappropriate and not allowed. Taxpayer dollars cannot and will not be utilized to subsidize the acknowledgment, promotion, growth or activities of any organizational effort other than the Village's activities. So, just as the police, clerical, public works, administrative, my office and all the Village's various units and all of its employees, including its manager, we (including fire personnel) shall adhere to a policy of respecting taxpayer dollars, respecting labor and union obligations for bulletin board space and notifications and respecting not publicly forcing union recognition on the public who pay for Village facilities... [L]ike it or not government cannot engage in promotional activities during work hours or utilizing publicly funded government facilities.

The ALJ found that Charging Party's hanging of its banner and displaying its decals, though concerted activity under the Act, was not protected activity. We agree with this

conclusion. While we may typically take a broad view of what constitutes protected activity within the meaning of the Act, there are limits to even that broad view. Village of New Athens, 29 PERI ¶ 27; (ILRB-SP 2012); Village of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). One such limitation concerns the balancing of the right of public employees to engage in protected, concerted activity and an employer's property rights, an accommodation which must be made "with as little destruction of one as is consistent with maintenance of the other." Lechmere, Inc. v. NLRB, 500 U.S. 527 (1992). The National Labor Relations Board (NLRB) has struck that balance in favor of the employer's property rights in several opinions concerning an employee's or union's use of employer-owned equipment in furtherance of the exercise of otherwise concerted, protected activity under Section 7 of the National Labor Relations Act. In Guard Publishing Co., 351 NLRB 1110 (2007), enforced in relevant part 571 F.3d 53 (D.C. Cir. 2009), the NLRB considered whether employees had a right to use an employer's e-mail system for union related business and concluded that:

> Consistent with a long line of cases governing employee use of employer-owned equipment, we find that the employees here had no statutory right to use the [employer's] e-mail system for Section 7 matters....Accordingly, we hold that [an employer] may lawfully bar employees' nonwork-related use of its e-mail system, unless [the employer] acts in a manner that discriminates against Section 7 activity.[1]

The ALJ found no such discrimination in this case. Charging Party argues otherwise.

Charging Party asserts that Whigham's discriminatory motive in his decision to remove the banner and vehicle stickers is evident by the timing of that decision. Charging Party notes that Whigham made that decision on January 27, 2012, not long (five months) after he was hired and only three months before the parties' collective bargaining agreement was to expire. But

[1] We rely on Guard Publishing rather than the decision in NLRB v. Windemuller Electric Inc., 34 F.3d 383 (6th Cir. 1994), cited by the ALJ. Though the NLRB has not expressly reversed Windemuller, it is clear that the NLRB no longer relies on the Windemuller rationale.

Whigham first became aware of the vehicle stickers and banner sometime in the fall of 2011 and subsequently undertook an extensive examination of Respondent's ordinances, personnel code and five to six years of minutes of Respondent's trustees' meetings to determine if the stickers and banner were appropriate. These facts offer a more reasonable explanation for the date Whigham made his decision than the upcoming expiration of the parties' agreement. In any event, timing alone is insufficient to establish the requisite animus. State of Illinois, Treasurer, 29 PERI ¶164 (ILRB-SP 2013); County of Cook, 29 PERI ¶152 (ILRB-LP 2013).

In addition to timing, Charging Party also finds evidence of animus in Whigham's e-mail to the president of Charging Party's local explaining why Whigham ordered removal of the vehicle decals and banner. In particular, Charging Party notes Whigham's references to "organizational effort," "promotional activities" and "not publicly forcing union recognition on the public." However, in context, the terms "organizational effort" and "promotional activities" include those of any organization rather than solely those of Charging Party or a union. While the last reference expressly mentions not forcing union recognition, any argument that it is an expression of Respondent's union animus is unpersuasive when the e-mail is read as a whole. Whigham's e-mail makes it clear that Respondent's restriction on employees utilizing employer-owned property for non-work related matters applies to all such purposes and to all Respondent departments and employees.

Charging Party further asserts as evidence of Respondent's union animus, Whigham's shifting explanations for his decision to remove the vehicle stickers and banner. Charging Party correctly asserts that Whigham initially stated his reasons for that decision were the Respondent's property rights in determining how to utilize its fire station and vehicles and that the banner and stickers were not authorized. Charging Party states that at hearing Whigham

supported his decision with references to provisions of Respondent's personnel rules and municipal code which he had not previously cited and which do not concern the use of Respondent's property to display union banners or decals.[2] However, these provisions all relate to some aspect of Respondent's right to maintain control over the use of its property. Therefore, contrary to Charging Party's conclusion, Whigham's reliance on these provisions is not a departure from his original or initial explanation for his decision [3]

Charging Party objects to the ALJ's failure to make a specific finding that for at least a period of nine years Respondent had granted Charging Party permission to hang the banner at the fire station and place decals on Respondent's vehicles.[4] Charging Party further asserts that the ALJ did not give sufficient weight to this past practice in determining whether the use of the banner and decals was protected, as well as concerted, activity. Charging Party misinterprets the nature of the past practice. As Charging Party admits, when the banner was first displayed it sought and obtained Respondent's permission to do so and that without objection it has complied with Respondent's request to move the banner to another location. Charging Party further admits it sought and twice received Respondent's permission to place decals on Respondent's

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[2] The absence of any provision of Respondent's personnel rules or municipal code specifically referring to the display of union banners or vehicle decals is irrelevant as Respondent's authority to exercise control over its property is not derived from such provisions but is an inherent managerial right.

[3] Charging Party claims that Respondent's union animus is evident in the testimony of Respondent's fire chief that he decided to change the fire department logo once he found out that it was being used by Charging Party. Charging Party fails to explain how that testimony relates to the instant charge since there is no record of what, if any, role or influence the fire chief had in Whigham's decision to remove the Charging Party stickers and banner.

[4] Charging Party has made several exceptions to the ALJ's credibility findings or failure to assess credibility. The Board's established policy is not to overrule an Administrative Law Judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the findings are incorrect. As we have previously stated, credibility resolutions are peculiarly within the province of the Administrative Law Judge, who has the opportunity to observe the witnesses' testimony and demeanor. State of Illinois, Dep't of Cent. Mgmt. Servs., 12 PERI 2037 (IL SLRB 1996); County of Jersey, 7 PERI 2023 (IL SLRB 1991); City of Chicago (Dep't of Streets and Sanitation), 6 PERI 3012 (IL LLRB 1990) see also Standard Dry Wall Products, 91 NLRB 554 (1950) enf'd. 188 F.2d 362 (3d Cir. 1951); C. Overaa and Co., 291 NLRB 589 (1988). We have carefully examined the record and find no basis for reversing the findings.

fire trucks. In light of these facts, under the parties' past practice Respondent retained the right to control whether the banner and decals would be displayed on its property. Consequently, Whigham's decision is consistent with the parties' past practice. Even if it were not so, Charging Party would not prevail absent persuasive evidence that Whigham's decision was motivated by animus towards Respondent employees' exercise of concerted, protected activity. Weyerhaeuser Co., 359 NLRB No. 138 (2013); Guard Publishing Co., 351 NLRB 1110 (2007), enforced in relevant part 571 F.3d 53 (D.C. Cir. 2009).

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/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 August 13, 2013; written decision issued at Chicago, Illinois on September 4, 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Hazel Crest Professional Firefighters Association, IAFF Local 4087,	)	
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and	)	
	)	
Village of Hazel Crest,	)	
	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On July 16, 2012, the Hazel Crest Professional Firefighters Association, IAFF Local 4087 (Charging Party or Union) filed an unfair labor practice charge in Case No. S-CA-13-005 with the State Panel of the Illinois Labor Relations Board (Board) alleging that the Village of Hazel Crest (Respondent or Village) engaged in unfair labor practices within the meaning of Section 10(a)(1) 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 November 28, 2012, the Board's Executive Director issued a Complaint for Hearing. The case was then heard on February 21, 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, at all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. The parties stipulate and I find that, at all times material, the Respondent has been a unit of local government subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a) of the Act.
3. The parties stipulate and I find that, at all times material, the Respondent has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act.
4. The parties stipulate and I find that, at all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.
5. The parties stipulate and I find that, at all times material, the Charging Party has been the exclusive representative of a bargaining unit comprised of the Respondent's full-time employees in the job title or classification of firefighter/paramedic and in the ranks of lieutenant and below (Unit).
6. The parties stipulate and I find that the Unit was certified by the Board on April 2, 2001 in Case No. S-RC-01-039.
7. The parties stipulate and I find that, at all times material, the Charging Party and the Respondent have been parties to a collective bargaining agreement (CBA) for the Unit, which provides a grievance procedure culminating in arbitration.
8. The parties stipulate and I find that the CBA referenced above expired on April 30, 2012.

II. ISSUES AND CONTENTIONS

The Charging Party contends that the Respondent violated Section 10(a)(1) of the Act when the Respondent ordered the removal of a Union banner from a fire station and the removal of Union stickers from fire department vehicles. The Respondent disputes this contention.

III. FINDINGS OF FACT

During the hearing, Donald Reece, Jr., a lieutenant/paramedic employed by the fire department, testified that, at some point during the fall of 2002, the Union's executive board asked Donald Bettenhausen, an assistant chief of the fire department, for permission to hang a Union banner in the bay of fire station #2 (one of the fire department's two fire stations) and to affix Union stickers to fire department vehicles. According to Reece's testimony, Bettenhausen granted this request.[1] Subsequently, a large banner displaying the name of the Union and its insignia was purchased by the Union and then hung in the bay of fire station #2. Stickers displaying the Union's insignia were also affixed to a number of fire department vehicles.

The Village purchased additional fire department vehicles in 2008. The testimony of Reece and William Wojtanowski, a firefighter/paramedic employed by the fire department, suggests that, at that time, Wojtanowski asked for and was granted permission to affix Union stickers to these additional vehicles by Charles Jackson, the chief of the fire department. However, Jackson testified that Wojtanowski never asked him for his permission to do this. Whether or not Jackson's permission was in fact granted, it is undisputed that Union stickers were affixed to the new vehicles.

[1] Bettenhausen is no longer employed by the Village and was not called to provide testimony during the hearing.

On August 15, 2011, James Whigham, Sr. became the village manager. Subsequently, in the fall of 2011, Whigham learned of the Union banner and stickers noted above and started to investigate the propriety of the same. Whigham's investigation included, inter alia, an examination of the parties' CBA, the Village's personnel and municipal codes, and the minutes of five or six years of meetings of the Village's board of trustees. Additionally, during the fall of 2011, Whigham allegedly discussed the Union banner and stickers with Jackson and Samuel Hunter, Jr., a deputy chief of the fire department. Later, in the winter of 2012, Whigham had a related discussion with Robert Palmer, the former village manager. Ultimately, Whigham determined that the Union banner and stickers were inappropriate and should be removed.

On January 27, 2012, Whigham informed Hunter of his determination and instructed Hunter to have the Union banner and stickers removed. Later that day, Hunter ordered Wojtanowski (the Union's president at the time) to remove the Union banner and stickers. Shortly after the order was given, Hunter informed Wojtanowski that the order came from Whigham. In accordance with Hunter's order, the Union banner and stickers were removed.

After the removal, Wojtanowski sent an e-mail to Whigham. In this e-mail, Wojtanowski asked Whigham why having the Union banner in the bay and having Union stickers on fire department vehicles "was such a big deal." Wojtanowski's e-mail also stated that Wojtanowski would like the opportunity to discuss the matter with Whigham if possible. Whigham responded to Wojtanowski's e-mail a few hours later. In his e-mail response, Whigham explained his position and offered to meet with Wojtanowski in order to discuss the matter. Wojtanowski did not accept this offer.[2]

[2] No related grievance has been filed.

IV. DISCUSSION AND ANALYSIS

The Charging Party alleges that the Respondent violated Section 10(a)(1) of the Act when the Respondent's agents ordered the removal of the Union banner and stickers. Section 10(a)(1) provides, in relevant part, that it shall be an unfair labor practice for an employer or its agents to interfere with, restrain, or coerce its employees in the exercise of rights guaranteed in the Act or to dominate or interfere with the formation, existence, or administration of any labor organization. Understandably, the Charging Party's post-hearing brief centrally contends that the Respondent unlawfully interfered with employees in the exercise of their Section 6 rights, as Section 6 of the Act sets forth the basic statutory expression of the rights guaranteed to public employees.[3] City of Chicago, 20 PERI ¶17 (IL LRB-LP 2003). However, it is ultimately unclear precisely how or which of these protected rights were unlawfully interfered with in this instance. Accordingly, I find that the Charging Party has not demonstrated, by a preponderance of the evidence, that the Respondent violated the Act.

While it is fairly axiomatic that the employees' use of the Union banner and stickers could be considered concerted activity, not all acts done in concert with other employees constitute protected concerted activities. County of Cook, 27 PERI ¶57 (IL LRB-LP 2011); Midstate Telephone Corporation, 262 NLRB 1291, 1297 (1982).[4] In one sense, the right of employees to "display" union insignia at work has often been recognized as a legitimate form of

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[3] Section 6 of the Act grants public employees the right to "form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment, not excluded by Section 4 of [the] Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion."

[4] In light of the similar language in parallel sections of the Illinois Public Labor Relations Act, the Illinois Educational Labor Relations Act, and the National Labor Relations Act, I find that certain decisions of the Illinois Educational Labor Relations Board, the National Labor Relations Board, and the federal courts, while not binding on the Board, provide useful guidance in this case. State of Illinois, Departments of Central Management Services and Corrections, 25 PERI ¶12 (IL LRB-SP 2009); Metropolitan Sanitary District of Greater Chicago, 4 PERI ¶3018 (IL LLRB 1988); Board of Education of Schaumburg Community Consolidated School District 54 v. Illinois Education Labor Relations Board, 247 Ill. App 3d 439, 455, 616 N.E.2d 1282, 1292 (1st Dist. 1993).

union activity. City of Lake Forest, 29 PERI ¶52 (IL LRB-SP 2012); State of Illinois, Departments of Central Management Services and Corrections, 25 PERI ¶12 (IL LRB-SP 2009); Board of Trustees of the University of Illinois, 15 PERI ¶1053 (IL ELRB 1998); Pleasurecraft Marine Engine Company, 234 NLRB 1216, 1225 (1978). However, this right is not without limits. Meijer, Incorporated v. National Labor Relations Board, 130 F.3d 1209, 1215 (6th Cir. 1997); The Kendall Company, 267 NLRB 963, 965 (1983). Notably, unions have no general statutory right to post union materials on employers' property. Saginaw Control and Engineering, Inc., 339 NLRB 541, 565 (2003).

Employer property rights are significant and due some protection. National Labor Relations Board v. Babcock and Wilcox Company, 351 U.S. 105, 111, 76 S. Ct. 679, 684 (1956). In National Labor Relations Board v. Windemuller Electric, Inc., 34 F.3d 384, 394 (6th Cir.1994), a case in which an employer asked that union stickers be removed from employer-owned hard hats, it was said that employees who are union supporters have no general right to make use of an employer's personal property for the purpose of communicating union messages, as long as the employees can make effective use of their own property for that purpose. In the same case, it was also said that a union has no general right to make use of an employer's real property for the purpose of communicating union messages, as long as the employees are not beyond the reach of reasonable union efforts to communicate with them by means that do not trespass upon the employer's property rights. In sum, the employees did not have an unequivocal right to use the employer's property as "billboards" for the union.

Considering these principles, I note that, in the instant case, the Respondent has evidently made no attempt to block or discourage employees from displaying Union stickers or logos on their own property. Indeed, this alternative sort of display does occur and has been observed by

the Respondent. Additionally, I note that, despite the Respondent's removal order, the Charging Party is able to communicate with its members via a pair of Union bulletin boards hanging in fire station #2.[5] I also suspect that other, conventional methods of communication, such as in-person discussions, mail, telephone calls, and visits to the homes of Union members, are still available as well.

In addition to the principles outlined above, I would note that, while an employer has a general right to safeguard its property from misuse, an employer may not discriminatorily remove union materials while leaving other posted items of a personal and/or non-business nature. Saginaw Control and Engineering, Inc., 339 NLRB at 565; J. C. Penny, Inc., 322 NLRB 238, 239 (1996); Halliburton Services, 265 NLRB 1154, 1184 (1982); Pleasurecraft Marine Engine Company, 234 NLRB at 1225; Standard Oil Company of California, Western Operations, Inc., 168 NLRB 153, 162 (1967). Here, however, it does not appear that the Respondent has done so. In fact, the record presents no evidence that indicates that the Respondent has inconsistently permitted other groups to similarly hang large banners or affix stickers to Village-owned property.

Arguably, the foregoing analysis is somewhat complicated by the fact that the Respondent's past practice was, at least in effect, to permit the display of the Union materials at issue. However, I find that the Respondent's "sudden" concern is fairly easily explained by the relatively simultaneous arrival of Whigham, the clear source of the removal order. I also find that Whigham has fairly consistently presented a sufficiently reasonable justification for his determination that the Union materials were inappropriate and should be removed. Moreover, I am not convinced that Whigham's justification is pretextual.

[5] One of the Union bulletin boards is guaranteed by the parties' CBA. According to the CBA, "[t]he Union shall limit all postings to this bulletin board."

V. CONCLUSIONS OF LAW

I find that the Charging Party failed to prove, by a preponderance of the evidence, that the Respondent violated Section 10(a)(1) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the complaint in this case be dismissed in its entirety.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 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 at Chicago, Illinois, this 15th day of May, 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Martin Kehoe
Administrative Law Judge