

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

Frank Marasco,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-13-075
	)	
Oak Brook Park District,	)	
	)	
Respondent	)	

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

On December 17, 2014, Administrative Law Judge Kelly Coyle issued a Recommended Decision and Order dismissing a charge filed by non-union employee Frank Marasco (Charging Party) against the Oak Brook Park District (Respondent or Employer), which alleged that the Respondent violated Section 10(a)(1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2012), when it discharged the Charging Party allegedly in retaliation for voicing concerns over the Respondent's decision to terminate certain employees.

The Charging Party filed timely exceptions to the Administrative Law Judge's Recommended Decision and Order pursuant to Section 1200.135 of the Illinois Labor Relations Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. The Respondent timely filed cross-exceptions and the Charging Party filed a response. After reviewing the exceptions, the cross-exceptions, the response, and the record, we accept the Administrative Law Judge's recommendation to find that Charging Party had not engaged in concerted activity. We dismiss the complaint for that reason.

BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL

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

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

/s/ John R. Samolis  
John R. Samolis, Member

/s/ Keith A. Snyder  
Keith A. Snyder, Member

/s/ Albert Washington  
Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois on April 14, 2015; written decision issued in Chicago, Illinois on April 28, 2015.

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

Frank Marasco,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. S-CA-13-075
	)	
Oak Brook Park District,	)	
	)	
Respondent	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On November 20, 2012, Frank Marasco (Charging Party or Marasco) filed a charge in Case No. S-CA-13-075 with the State Panel of the Illinois Labor Relations Board (Board) alleging that the Oak Brook Park District (Respondent or Park District) engaged in unfair labor practices within the meaning of Section 10(a)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) as amended (Act). 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). The Board’s Executive Director issued a Complaint for Hearing on November 27, 2013.

The case was heard on March 5, 2014 by Administrative Law Judge (ALJ) Michelle Owen. Both parties appeared at the hearing and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. ALJ Owen left the Board and this case was ultimately reassigned to the undersigned. Written briefs were timely filed on behalf of both parties. After full consideration of the parties’ stipulations, evidence, arguments, and upon the entire record of this case, I recommend the following.

## **I. PRELIMINARY FINDINGS**

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5 of the Act.
3. At all times material, the Charging Party was a public employee within the definition of Section 3(n) of the Act.
4. The Charging Party was employed by the Respondent from October 30, 2006 until June 7, 2012.
5. Laure Kosey has been the Respondent's Executive Director since March 2010.
6. Nancy Strathdee has been the Respondent's Director of Finance and Human Resources since 2008.

## **II. ISSUES AND CONTENTIONS**

The Charging Party's Complaint alleges that the Respondent violated Section 10(a)(1) of the Act by terminating him in retaliation for his concerted activities. The Complaint alleges that the Charging Party's concerted activities consisted of several conversations with agents of the Respondent in which he voiced his concerns over the Respondent firing or removing certain employees.

The Respondent argues that the Charging Party cannot prove a prima facie violation of Section 10(a)(1). It contends that the Charging Party did not engage in concerted activity and cannot establish a casual nexus between the alleged activity and its decision to terminate him.

The Respondent also asserts that it had a legitimate non-discriminatory reason for terminating the Charging Party.

### **III. FINDINGS OF FACT**

Marasco worked for the Park District for almost six years as a custodian, reporting to several different people in that time period. His most recent direct supervisor, from May 2011 until June 2012, was Clint Lauderdale. Executive Director Laure Kosey oversees the Park District. She has been Executive Director since 2008. Director of Finance and Human Resources Nancy Strathdee, employed by the Respondent since November 2008, is one of the individuals responsible for drafting and enforcing Park District personnel policies. All four people testified at the hearing.

As with many employers, the Respondent has a personnel policy manual. Among the Respondent's various personnel policies is an employee conduct and discipline policy. There are a variety of ways an employee can violate the policy. For example, an employee would violate the policy by engaging in "[i]nsubordinate, uncooperative, hostile or discourteous attitude or conduct towards the employee's supervisor or supervisors, the district board, co-workers or members of the public." Should the Respondent feel the need to discipline an employee, Strathdee testified that the Respondent uses progressive discipline as much as possible. She also testified that it does not use separate tracks for different policy violations. All discipline is cumulative. Thus, an employee could get one strike for being late and then a second strike for having a discourteous attitude. Also, past discipline does not sunset. The Charging Party did receive a copy of the Respondent's policy manual when he was hired.

## **Charging Party's Work History**

Between January 2008 and March 2011, Marasco was disciplined on several different occasions. In January 2008, former Facility Manager Colleen Liebelt issued Marasco a written warning for violating Park District policy. More specifically, Liebelt stated that Marasco had been defensive and discourteous with her during a meeting; that when asked to complete a specific task, Marasco said that it was someone else's responsibility; and that he had been working after hours and off the clock.

Liebelt issued another written warning to Marasco in September 2008, this time as a result of a verbal altercation with employee Steve Schmidt. Liebelt wrote that, based on the report of Schmidt and another witness, Marasco had sworn at Schmidt and appeared aggressive. "Frank we have discussed this in the past and it still continues to be an issue. You have had these 'outbursts' with multiple people and departments in the past." Following the incident, Liebelt asked Marasco to go home for the day, but Marasco argued with Liebelt over her decision. Marasco testified that the incident started after he had confronted Schmidt for sending inappropriate emails to a female employee. As a result of the incident, Liebelt directed Marasco to an Employee Assistance Program.

In March 2009, Liebelt wrote up Marasco for unprofessional behavior and failing to follow directions. Marasco had been working outside of his scheduled shifts and after hours. When Liebelt asked Marasco about the issue, she found him defensive and uncooperative. Shortly thereafter, still in March 2009, Liebelt gave Marasco a two-day suspension for not following his work schedule. Liebelt stated in the write-up that "[a]ny additional personnel policy violations may result in further disciplinary action or even termination." A few months later, in August 2009, Liebelt gave Marasco a written warning, yet again, for working outside of

his scheduled shifts. This time, Liebelt warned Marasco that “[f]ailure to adhere to park district policies will result in immediate termination.”

On December 23, 2010, Marasco was involved in an incident with a member of the public. Marasco raised his voice to a male patron for not flushing the urinal in the men’s locker room. Even though the Respondent had previously issued Marasco a final warning and, according to Strathdee, discipline is cumulative, the Respondent did not immediately terminate the Charging Party. Instead, the Park District suspended Marasco for one day.

The following March, Marasco and Schmidt were involved in another verbal altercation. Both employees were brought into a meeting with Kosey and a member of Human Resources. In the warning issued to Marasco, Kosey stated that he “was not to become confrontational when discussing park district items. Frank is to act professionally at all times. If Frank is to become confrontational, angry, use foul language or act inappropriately, he will be terminated.”

Despite his past disciplinary issues, Marasco did have some positive relationships and experiences at the Park District. By all accounts, Marasco and Lauderdale had a good working relationship. On April 30, 2012, approximately five weeks before Marasco was fired, Lauderdale gave Marasco a performance evaluation. Overall, Lauderdale rated Marasco’s performance as “Far exceeds normal job expectations.” Lauderdale did note, however, that Marasco “needed to work on his temperament. Sometimes his emotion would get in his way.” When asked on direct examination what he meant by that, Lauderdale said Marasco “allowed emotional situations to affect him . . . . Frank was a wonderful worker for me. Never had any problems, but I could see that he had affection for other employees, other people, and at times when they were going through difficult situations, that would affect [him].” After his evaluation, Lauderdale and Kosey signed off on a five percent raise for Marasco.

## **The Events Leading to Charging Party's Termination**

In May 2012, Kosey posted a memo in the employees' lunch room regarding organizational changes within the Park District. The memo stated that due to these changes, Respondent employee Marianna Celia would be phased out of her position. Celia had been a front desk supervisor. Marasco was upset that Celia was being let go and testified that Celia was a friend of his. He also testified that he had concerns about a number of other employees who had been let go prior to Celia. Lauderdale's testimony confirmed that Marasco's concerns extended beyond Celia. Lauderdale testified that "I guess he probably collectively [was] concerned that, you know, these people aren't here anymore, but I tried to make it a point that Frank should be concerned about himself and not worry about others."

On May 24, 2012, Marasco and Kosey passed each other in a hallway at work. Kosey asked how Marasco was doing. Marasco said that he was not happy because Celia had been let go. Kosey's and Marasco's testimony conflicts as to whether or not Marasco mentioned any other employees during their conversation. Kosey testified that Marasco had not mentioned any other employees. By contrast, Marasco testified that he had also "mentioned all the other people that were let go, full-time people," Joe Nidea, Colleen Liebelt, Steve Schmidt, Cathy Fallon, Colleen Conroy, Sherell, and Randolph. Marasco also testified on cross examination that Celia, Nidea, and Fallon were members of management. Kosey testified that Schmidt was a supervisor. No other testimony was introduced as to the basis for Marasco's statements that these individuals were supervisors or members of management. There is also little evidence in the record as to these individuals' actual job duties.

The next day, May 25th, Marasco had a similar conversation with Strathdee. It is uncontested that Marasco, at the very least, mentioned his concerns over Celia. But, as with the

conversation between Marasco and Kosey, Marasco's and Strathdee's testimony conflicts as to who else Marasco mentioned. Marasco testified that he "mentioned about some of the past people. I said you need to start protecting some jobs around here." However, according to Strathdee, Marasco did not refer to any other employees.

On June 6, 2012, Kosey met with Strathdee and Lauderdale to discuss Marasco. Kosey said that Marasco looked upset and unhappy. The three of them made plans to meet with Marasco the following day. All three testified that the stated purpose of the meeting was to find out if Marasco was happy working for the Respondent. Someone brought up the idea of having a police officer present during their meeting with Marasco in case he became uncontrollably upset. Kosey testified that "it seemed that Frank was unhappy, so we talked about having this meeting and it was recommended that we call the police in case he became escalated and hostile or angry." Kosey called the police to request an officer and spoke to the officer when he arrived on the morning of June 7th.

On June 7, 2012, Kosey, Strathdee, and Lauderdale met with Marasco in Kosey's office while a police officer sat outside the office door. Strathdee took notes during the meeting, later transferring her notes into an electronic document. Kosey started the meeting by asking Marasco if he was happy working at the Park District. Marasco stated that it had been rough since Celia had been let go. Marasco testified that he had also "brought up a bunch of other people that lost their jobs." Strathdee testified that she did not believe that Marasco mentioned anyone specifically besides Celia. However, in her memo, Strathdee wrote that Marasco said "[w]hy are all these good people no longer at the park district' (Joe, Colleen, Marianna, Cathy Fallon, Tyrell and so on)." When asked why she had listed these names if Marasco had not mentioned them during the meeting, Strathdee said she listed them "[b]ecause on previous

discussions with Frank in Laure's office that one question had always come up where he would specifically talk about the individuals." Kosey also testified that she was aware that Marasco had concerns about people being let go. Strathdee's memo also makes a reference to Marasco discussing Celia losing her job with another executive director outside of the Park District.

Without addressing Marasco's comments, Kosey went on to ask him about two anonymous emails sent to the Respondent. Kosey did not show or read Marasco the emails but said that the emails related to personnel issues. Kosey did not directly accuse Marasco of sending the emails but said that personnel issues should not be shared with individuals outside of the Park District.

At hearing, the Respondent introduced the two emails as rebuttal exhibits. The first email was sent in April 2012 to Kosey and signed "Oak Brook resident." In essence, the email states that the resident was concerned that the Respondent was employing a dishonest person in the marketing department. The email does not specify whom the resident is talking about or how the resident may have discovered this dishonest employee. The Respondent received the second email June 5, 2012, two days before the Respondent's meeting with Marasco. The June 5th email was signed "Oakbrook Mornin Patrons." In this email, the Patrons praised the work performance of George Calvino. Both Strathdee and Kosey testified that they did not believe that Marasco sent the emails. Kosey also stated that she had asked other employees about the emails as well.

In addition to bringing up the two anonymous emails, Kosey also brought up Marasco's past disciplinary issues. Marasco became upset and accused Kosey of being "the mouthpiece of [Park District Board President] John O'Brien." According to Strathdee's memo, Marasco also said "[a]ll these good people that were hired by previous Executive Directors are no longer at the Park District." Marasco never yelled at Kosey but was visibly upset. Strathdee described

Marasco's tone as agitated and angry and that "[h]is voice was raised from his normal tone." Kosey characterized his behavior as "[d]efensive, agitated, and starting to get escalated." After Marasco became upset, Kosey told Marasco he could either resign or be terminated. When he refused to resign, Kosey terminated Marasco. Kosey and Strathdee testified that the Respondent fired Marasco for being unprofessional and insubordinate. Strathdee also testified that the Park District usually creates a termination letter prior to termination meetings, but had not prepared one for the meeting with Marasco. Even though Lauderdale testified that he supported Kosey's decision to fire Marasco, he gave Marasco a positive reference.

The police officer present at the meeting filed a report with the Oak Brook Police Department. The officer wrote "[o]n 06/07/12 at 1125 hours I arrived at 1450 Forest Gate (Oak Brook Family Recreation Center) for an employee termination. I spoke with Executive Director, Laure Kosey, who requested a police stand by while employee, Frank L Marasco (employed 12 years as a custodian) was terminated."

#### **IV. DISCUSSION AND ANALYSIS**

The Complaint for Hearing alleges that the Respondent violated Section 10(a)(1) of the Act by terminating the Charging Party in response to his complaints to the Respondent about the removal of certain employees. Section 10(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce its employees in the exercise of their rights guaranteed by the Act. Usually, a violation of Section 10(a)(1) does not depend on a finding of unlawful motive. Pace Suburban Bus Div. of Reg'l Transp. Auth. v. Ill. Labor Relations Bd., State Panel, 406 Ill. App. 3d 484, 494 (1st Dist. 2010). But, when an employer has allegedly retaliated against an employee for the employee's protected, concerted activities, the charging party must prove his

case under the framework of a Section 10(a)(2) violation. Thus, in order to demonstrate a prima facie Section 10(a)(1) retaliation case, the employee must prove by a preponderance of the evidence that (1) the employee engaged in protected, concerted activity; (2) that the employer knew of the activity; (3) that the employer took adverse action against the employee; and (4) that the employee's protected, concerted activity was a substantial or motivating factor in the adverse employment action. City of Burbank v. Ill. State Labor Relations Bd., 128 Ill. 2d 335, 345 (1989).

In this case, there is no question that the Respondent took adverse action against the Charging Party by terminating his employment. All other elements are in dispute. For the reasons below, I find that the Charging Party has not proven a prima facie case.

**A. Did the Charging Party Engage in Concerted Activity**

The threshold issue in this case is whether the Charging Party engaged in protected, concerted activity when he, as an individual, complained to the Respondent about the termination or removal of certain employees. An employee can only establish the first element if the activity in question is both concerted *and* protected. As to the concerted prong, an individual's actions are concerted if the employee was "acting on behalf of employees in addition to himself in furtherance of a group concern." Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). It is well settled that an employee can act concertedly as an individual; an employee grievance is probably the most well recognized example. When an employee's activities do not involve a collective bargaining agreement, the activities are only concerted if "it is engaged in with, or on authority of other workers and not solely on behalf of the employee himself." Pace West Division (Watson), 13 PERI ¶ 2027 (IL SLRB 1997). The Board has not frequently addressed the threshold issue in this case. Given the similarities between the Public

Labor Relations Act, the Educational Labor Relations Act, and the National Labor Relations Act, I find the applicable Board and court decisions provide useful guidance.<sup>1</sup>

Federal courts and the National Labor Relations Board (NLRB) have found that for an employee to satisfy the “concerted” requirement, he must, on some level, involve other employees. The NLRB has held that for conduct to be concerted it must “be engaged in with or on the authority of other employees.” Meyers Indus. (Meyers I), 268 NLRB 493, 497 (1984), rev’d sub nom. Prill v. N.L.R.B., 755 F. 2d 941 (D.C. Cir. 1985), cert. denied, 474 U.S. 971 (1985), decision on remand sub nom. Meyers Indus. (Meyers II), 281 NLRB 882 (1986), enf’d, 835 F. 2d 1481 (D.C. Cir. 1987). In its opinion affirming the NLRB’s decision in Meyers II, the D.C. Circuit Court further explained the definition of concerted activity.

A worker no longer takes “concerted” action by himself unless he acts on the authority of his fellow workers. Unlike the Board’s reasoning in *Alleluia*, the Board's new position is that the “concerted activity” prong and the “mutual benefit or protection” prong of section 7 are two distinct factual inquiries that are to be analyzed separately. Concerted action cannot be imputed from the object of the action. *In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement.* As under the old standard, however, a worker is still deemed to have taken concerted action when he acts with the actual participation or on the authority of his co-workers.

Prill v. N.L.R.B., 835 F.2d 1481, 1483 (D.C. Cir. 1987) (emphasis added) (internal citations removed).

The Illinois Appellate Court found the Illinois Educational Labor Relations Act’s definition of the term “concerted” had a similar requirement. Bd. of Educ. of Schaumburg Cmty. Consol. Sch. Dist. 54 v. Ill. Educ. Labor Relations Bd., 247 Ill. App. 3d 439 (1st Dist. 1993). In

---

<sup>1</sup> For a thorough legal history of individual employee concerted conduct, see ALJ Sharon Wells’ detailed summary of the relevant Illinois and federal labor law cases in her Recommended Decision and Order in City of Chicago, 11 PERI ¶ 3008 (IL LLRB 1995). I will highlight several of those cases.

Schaumburg, the Illinois Educational Labor Relations Board (IELRB) found that a teacher had been involved in concerted activity during a meeting with her principal to discuss her evaluation. Id. at 457. Since the teacher’s complaints were rooted in a section of the Illinois School Code related to evaluations, the teacher’s complaints were a group concern. Id. Therefore, under the IELRB’s reasoning, this activity was concerted. Id. It stated that “we shall presume, in the absence of contrary evidence, that a concern, gripe or complaint about wages, hours, terms and conditions of employment is concerted if it is based on a group concern.” Id. at 455. The Appellate Court rejected the IELRB’s conclusion. Id. at 454.

The court stated that the IELRB’s “conclusion that activity is protected whenever it involves a ‘group concern’ eliminates from section 3 the requirement that the activity be concerted.” Id. at 456. It went on to state that concerted activity is “in effect a jurisdictional requirement . . . . It would be odd, indeed, if this essential quasi jurisdictional predicate might be supplied by a presumption admittedly resting on no factual base but predicated on a purely theoretical assumption.” Id. (citing Krispy Kreme Doughnut Corp. v. N.L.R.B., 635 F.2d 304, 310 (4th Cir. 1980)).

Our precedent appears to follow the above reasoning. In City of Decatur, the ALJ concluded that an employee had engaged in concerted activity when she wrote a letter to the city council criticizing department management, as well as her department’s working conditions. 14 PERI ¶ 2004 (IL SLRB 1997). Another employee read the letter and made some minor edits. Id. Citing to its decision in Vill. of Bensenville, as well as the decision in Meyers II and Schaumburg, the Board found that this was not concerted activity. Id.

The Board stated that while there was evidence that the letter involved matters of group concern, there was insufficient evidence to demonstrate that the employee’s “actions were

undertaken ‘with or on the authority of’ [her] co-workers at the communications center and that [the employer] had knowledge that [her] actions were authorized or supported by other communications center employees.” Id. It said that the co-worker’s minor editing was not sufficient to show that the co-worker or any other employee supported the charging party’s actions. Id. To be concerted, the evidence must prove that at least two employees “agreed to do something about their jointly held complaints.” Id. While the Board made it clear that the employees do not need to formally select a specific employee to complain on their behalf, “the employee must be actually, not impliedly, representing the views of other employees.” Id. See also State of Ill., Dep’t of Cent. Mgmt. Servs. (Corrections) (Crafton), 31 PERI ¶ 23 (IL LRB-SP 2014); City of Waukegan, 24 PERI ¶ 77 (IL LRB-SP 2008) (noting “not concerted protected activity where there was no evidence that [employee] was acting as a spokesperson for a group of employees.”).

In this case, the Charging Party, without discussing his intentions or overall concerns with any other employee, told the Respondent that he was concerned about its removal of certain employees.<sup>2</sup> I also find that the Charging Party was acting almost entirely out of altruistic reasons. However, based on the relevant case law and Board precedent, I cannot conclude that the Charging Party’s actions were concerted as required by the Act.

The Charging Party points out in his post-hearing brief that the Act does not require an employee to be formally selected by other employees to act concertedly. Although I agree with this premise, I do find that for an employee to act concertedly, he must interact with another

---

<sup>2</sup> The parties dispute whether or not the Charging Party only mentioned Celia in his discussions with Kosey and Strathdee or if he named other former employees as well. Because I find that his actions were not concerted, the specific list of people the Charging Party gave to Kosey and Strathdee is unnecessary to my ultimate conclusion in this case and I decline to make a finding on this issue. I would note, however, that I do find that the Charging Party discussed Celia with both Kosey and Strathdee. I also find that Kosey and Strathdee were aware of his concerns regarding the other employees, regardless of whether or not he mentioned them on May 24th and 25th.

employee *at some point*. There simply is insufficient evidence in the record to establish that the Charging Party spoke to any other fellow employees about his concerns, that any other employees shared his concerns, or that he presented himself to the Respondent as the employees' representative. Presumably, the employees who lost their jobs felt the Respondent's decisions were unfair and would have supported the Charging Party's actions, but I cannot base my finding on a "theoretical assumption." Therefore, I must find that the Charging Party's actions were not concerted as required by the Act.<sup>3</sup> Since he has not established a prima facie case, I recommend that the Charging Party's Complaint alleging the Respondent violated Section 10(a)(1) be dismissed.

Because I have determined that the Charging Party has not demonstrated that he engaged in concerted activity, my analysis of the Complaint could end on this point. However, for the Board's convenience should it conclude that the Charging Party's conduct was concerted, I will continue with my analysis.

#### **B. Did the Charging Party Engage in Protected Activity**

The Respondent also argues that the Charging Party's conduct was not protected because his complaints related to its hiring or firing of supervisor or managerial employees. Employee conduct is protected by the Act if the purpose of the conduct is to engage in mutual aid and protection or if the conduct relates to the employees' terms and conditions of employment. State of Ill., Dep't of Central Mgmt. Servs. (State Police), 30 PERI ¶ 70 (ILRB-SP 2013). Under the National Labor Relations Act, employee protests of the hiring or removal of a supervisor are not

---

<sup>3</sup> Both the Charging Party and the Respondent spend portions of their post-hearing briefs addressing the two anonymous emails sent to the Respondent. I also note that these emails are listed in the Complaint as a statement of fact. Nevertheless, the Complaint does not allege that these emails were part of the Charging Party's alleged concerted activity or that the Respondent considered these emails concerted activity. Furthermore, the Charging Party did not argue in his brief that these emails were concerted activity or that the Respondent considered them as such. Therefore, I will not consider whether these emails could be construed as concerted activity.

protected because the selection of a supervisor is a management right and unrelated to terms and conditions of employment. Bob Evans Farms, Inc. v. N.L.R.B., 163 F.3d 1012, 1021 (7th Cir. 1998). Employee protests are protected if the employees protest the hiring or firing of their immediate supervisor. Id.

Here, the vast majority of the evidence supporting the Respondent's contention that these individuals were supervisors or managers under the Act is the witnesses' conclusory statements at hearing, including the Charging Party's. This could be taken as the Charging Party's concession of the issue. The Board has certainly accepted a party's concession or stipulation to an individual's status in past representation cases. See Cnty. of Kankakee and Coroner of Kankakee Cnty., 28 PERI ¶ 21 (IL LRB-SP 2011); State of Ill., Dep't of Central Mgmt. Servs. (Department of Corrections), 18 PERI ¶ 2068 (IL LRB-SP 2001) (analyzing whether position was a statutory supervisor after finding union had not conceded issue). In many, if not all, of those cases, it was either a union or employer making the concession or stipulation. These types of parties are arguably in a better position to assess whether a position could be excluded. The possibly conceding party in this case was a custodian. I would also point out that there is little evidence suggesting what basis he has for knowing whether these individuals were supervisors or managers.

There is some evidence in the record suggesting that certain individuals perform some of the Act's enumerated supervisory functions. However, there is insufficient evidence to satisfy all of the Act's requirements for any of the statutory exclusions. What the evidence does establish is that the Charging Party took issue with the firing or removal of certain individuals. His actions were designed to give mutual aid and protection, a topic explicitly protected by the Act. Should the Board decide to reach this issue, I would recommend that it find there is insufficient evidence

to demonstrate that the individuals were statutorily excluded. I also recommend that it find the Charging Party's actions were protected.

**C. Was the Respondent Aware of the Charging Party's Concerted Activities**

Since I have found that the Charging Party did not engage in concerted activity, the Respondent could not have been aware of any concerted activity. Should the Board find that the Charging Party did engage in concerted activity, I would point out that the evidence does not suggest that Kosey, the decision maker in this case, was aware of the conversation between Marasco and Strathdee. I do find, however, that Kosey was aware of the Charging Party's concerns regarding other employees besides Celia. Both Kosey and Strathdee testify that Kosey was aware of the Charging Party's concerns over why certain employees were being let go from the Park District.

**D. Did the Respondent Fire the Charging Party Because of his Concerted Activities and, if so, did the Respondent Establish its Proffered Legitimate Reason**

Finally, should the Board find that the Charging Party engaged in concerted activity, I recommend that the Board also find that the same activity was the substantial motivating factor in the Respondent's decision to terminate the Charging Party. Motive is a question of fact and can be inferred from various factors including timing, disparate treatment, and inconsistencies in the employer's explanation. City of Burbank, 128 Ill. 2d at 345-346. I find that the Charging Party's conversation with Kosey was a substantial factor in Kosey's decision.<sup>4</sup>

Timing is certainly in the Charging Party's favor. At the end of April, Lauderdale gave Marasco a positive performance evaluation, and both Lauderdale and Kosey signed off on Marasco's five percent raise. One month later, May 24th, Marasco had the conversation with Kosey. On June 7th, he was terminated. The timing in this case creates a strong inference that the

---

<sup>4</sup> I do not find that the Charging Party's conversation with Strathdee was a motivating factor in his termination because the record does not indicate that Kosey, the decision maker in this case, was aware of the conversation.

May 24th conversation prompted Marasco's termination. Usually, timing alone is insufficient to establish an employer's improper motive. But, there are several other facts which support a finding that the May 24th conversation and the Respondent's decision to fire the Charging Party are connected.<sup>5</sup>

Specifically, I find that Kosey made the decision to fire the Charging Party before the June 7th meeting. Kosey's decision to have an officer present and the officer's police report support my conclusion that Kosey made her decision prior to the meeting. First, having an officer present immediately suggests that the Respondent had convened the meeting for reasons other than to check on the Charging Party's emotional state. The Respondent states that it had the officer present in case the Charging Party became uncontrollably emotional after being asked if he was happy working for the Park District. I find the Respondent's reasoning for having the officer present incredible. It is undisputed that the Charging Party has had disciplinary issues while working for the Respondent, and a large number of those disciplinary issues were related to his unprofessional attitude. He had two different verbal altercations, one with another employee and one with a member of the public. The Charging Party's discipline suggests that he could be defensive and had a temper. But I do not find that this past discipline indicates that Marasco was so emotionally volatile as to require a police officer in attendance for what the Respondent claims was a meeting with a benign purpose.

Moreover, the Charging Party's most recent performance evaluation was very positive. Lauderdale made one critique of the Charging Party's attitude, stating that he could be overly affected by the issues of his co-workers. However, this did not appear to affect Lauderdale's conclusion that Marasco was an above average employee. Shortly after his review, Lauderdale

---

<sup>5</sup> As I stated above, although discussed in their statement of facts, neither party argues that the two anonymous emails were related to the Respondent's decision. Since they do not raise this issue, I will not address it.

and Kosey signed off on a five percent raise for Marasco. If, as the Respondent claims, Marasco could not be trusted to control himself when asked if he was happy working for the Park District, presumably that would have been reflected in his evaluation.

Second, the officer's report specifically states that he was at the Park District at Kosey's request because the Respondent was about to fire Marasco. The Respondent had pointed out at hearing the officer listed the wrong number of years the Charging Party worked for the Park District in the police report. I do not find that this error significantly affects the weight of this evidence.

If I had concluded that the Charging Party's activities were concerted, the burden would shift to the Respondent to demonstrate a legitimate business reason for firing the Charging Party at this point. City of Burbank, 128 Ill. 2d at 346. However, simply stating that it had a legitimate business reason does not end the analysis. Id. "[I]t must be determined whether the reasons advanced are *bona fide* or pretextual. If the suggested reasons are a mere litigation figment or were not relied upon, then the determination of pretext concludes the inquiry." Id.

I recommend that the Board find the Respondent's proffered reason for terminating the Charging Party is pretextual. The Respondent argues that it fired the Charging Party because he was insubordinate and unprofessional. However, as I explained above, I conclude that the Respondent's decision to fire the Charging Party occurred prior to the December 7th meeting. Thus, anything that occurred on December 7th was not relevant to Kosey's decision. As I stated above, I believe the timing of the adverse action and the presence of the police officer during the June 7th meeting are sufficient to establish that the Charging Party's complaints were the motive behind the Respondent's decision.

In sum, I would find that the Charging Party's complaints to Kosey were the motivation behind his termination and that the Respondent's stated reasoning is pretextual. Nevertheless, because the Charging Party has not demonstrated that this conduct was concerted, the Respondent cannot have violated the Act by firing him for engaging in this activity.

**V. CONCLUSIONS OF LAW**

I find that Respondent did not violate Section 10(a)(1) of the Act when it terminated Marasco because Marasco did not engage in concerted activity.

**VI. RECOMMENDED ORDER**

IT IS HEREBY ORDERED that the Complaint for Hearing be dismissed in its entirety.

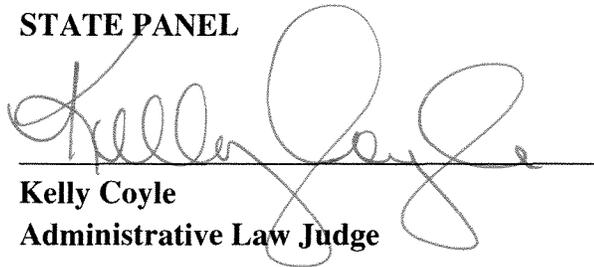
**VII. EXCEPTIONS**

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 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 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 on December 17, 2014**

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



**Kelly Coyle  
Administrative Law Judge**