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

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| Service Employees International Union, Local 73, | ) | |
| Charging Party | ) | Case No. L-CA-11-043 |
| and | ) | |
| City of Chicago (Independent Police Review Authority), | ) | |
| Respondent | ) | |

## ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On March 4, 2011, the Service Employees International Union (Charging Party or SEIU) filed a charge with the Illinois Labor Relations Board's Local Panel (Board) alleging that the City of Chicago (Respondent or City) engaged in unfair labor practices within the meaning of Section 10(a)(3), (2), and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2012), as amended. The charge was investigated in accordance with Section 11 of the Act and on June 2, 2011, the Board's Executive Director issued a Complaint for Hearing. A hearing was conducted on March 26 and 27, 2013, in Chicago, Illinois, at which time SEIU presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. 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. 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 a unit of local government under the jurisdiction of the Board pursuant to Section 5 of the Act.
3. At all time material, the Respondent has been subject to the Act pursuant to Section 20(b) of the Act.

4. At all times material, SEIU has been a labor organization within the meaning of Section 3(i) of the Act.
5. Nathaniel Freeman was a public employee within the meaning of Section 3(n) of the Act while employed by the Respondent.
6. On or about January 12, 2011, the Board conducted a hearing in connection with the representation petition filed by the Charging Party in Case No. L-RC-11-006.
7. On or about January 12, 2011, Nathaniel Freeman testified on behalf of the Charging Party at the hearing in Case No. L-RC-11-006.
8. On or about February 9, 2011, the Respondent discharged Freeman, effective February 25, 2011.

## II. ISSUES AND CONTENTIONS

The first issue is whether the Respondent violated Sections 10(a)(2) and (1) of the Act when it issued Freeman unsatisfactory performance evaluations and terminated his employment allegedly because Freeman actively supported SEIU's organizing campaign. The second issue is whether the Respondent violated Sections 10(a)(3) and (1) of the Act when it took those same actions allegedly to retaliate against Freeman for his testimony before the Board on behalf of SEIU.

SEIU argues that the Respondent violated these sections of the Act because it knew of Freeman's protected activity and took adverse action against Freeman soon after his protected conduct, under suspicious circumstances. First, the Union notes that the Respondent issued Freeman negative evaluations a couple weeks after Freeman testified before the Board and that it terminated his employment shortly thereafter.

Next, SEIU contends that the Respondent treated Freeman disparately by delaying to issue him one negative evaluation and rushing to issue him another. In support, SEIU argues (1) that the Respondent did not issue performance evaluations to other Supervising Investigators at the same time as it issued evaluations to Freeman, (2) that the Respondent issued Freeman his evaluation for the July-December 2010 rating period before it issued evaluations for that rating period to other Supervising Investigators, and (3) that the Respondent deviated from its established practices by issuing Freeman's last two evaluations at around the same time.

Further, SEIU contends that the Respondent did not give Freeman proper notice of his inadequacies until after he testified before the Board and then fleshed out Freeman's negative evaluations with pretextual complaints. In particular, SEIU alleges that Freeman's evaluation from the January-June 2010 rating period contained reference to an incident from November 2009, which the Respondent could have mentioned earlier. SEIU implies that the Respondent's failure to address this issue in an earlier evaluation is evidence of pretext because the Respondent did not think the issue warranted mention until after Freeman engaged in protected activity.

In addition, SEIU argues that the Respondent conducted a "witch-hunt to malign Freeman's reputation" when it interviewed Freeman's subordinates about his management methods and failed to properly investigate the complaints Freeman lodged against his own supervisor who allegedly obstructed Freeman's oversight of the team. SEIU suggests that the results of Respondent's interviews (which reflect badly on Freeman) are not reliable because the Respondent conducted them in a coercive atmosphere by interviewing each subordinate investigator in the presence of two managers. In support, SEIU notes that one of the subordinates interviewed by the Respondent testified that she never previously complained about Freeman directly to Chief Administrator Ilana Rosenzweig and had no problems with Freeman's supervisory skills.[1]

Notably, SEIU does not assert in its brief or in its opening statement that the Respondent's agents made remarks which constitute direct evidence of animus toward the Union or towards Freeman's protected activity. Nor does SEIU assert that the Respondent targeted union supporters.

Finally, SEIU argues that the Respondent failed to demonstrate that it would have taken the same action notwithstanding Freeman's protected activity because it did not demonstrate that it took the adverse actions absent animus, did not provide Freeman an opportunity to correct his deficiencies, and did not plan to terminate Freeman until after he testified at the representation hearing before the Board. SEIU concludes that the Respondent cannot justify Freeman's negative evaluations or his termination because Rosenzweig once wrote a positive letter of recommendation on Freeman's behalf which shows that Freeman was "not a completely lousy and lackluster employee."

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[1] SEIU also objects to the fact that the Respondent only called one of the three investigators who participated in the interview process to testify at hearing.

The Respondent argues that it did not violate the Act when it issued Freeman negative evaluations and terminated his employment because it took such action as a result of Freeman's poor performance and not because of his union activities. As a preliminary matter, the Respondent contends that SEIU did not meet its prima facie burden to show that the Respondent acted out of union animus. In support, the Respondent asserts that it did not have knowledge of Freeman's organizing activities until September 2010, long after Freeman's evaluation ratings began to decline. The Respondent notes that there is no evidence that it targeted union supporters or treated Freeman disparately. Further, the Respondent asserts that the Board should disregard another employee's testimony concerning the office's hostile atmosphere, and consider it a matter of personal opinion, unsupported by objective evidence.

Next, the Respondent states that its proffered reason for the adverse action is legitimate and nonpretextual because the record shows that Freeman's performance began to decline prior to his protected activity and that the comments on Freeman's performance evaluations, drafted after his protected activity, are consistent with those drafted before Freeman's protected activity. The Respondent notes that it repeatedly informed Freeman of his deficiencies, explained the improvements that the Respondent required of him, and offered him assistance in performing his job.

In the alternative, the Respondent argues that it would have taken the same adverse action against Freeman, regardless of his protected activity, because Freeman showed no signs of developing as an adequate supervisor, despite sufficient guidance and repeated feedback over a four-year period.

## III. FINDINGS OF FACT

1. Independent Police Review Authority – Structure and Function

The Independent Police Review Authority (IPRA) receives and investigates allegations of misconduct made by members of the public against officers of the Chicago Police Department (CPD). It also investigates officer-involved shootings and extraordinary occurrences in custody. IPRA must determine whether the accused officers violated the general orders of the police department.

Chief Ilana Rosenzweig heads IPRA. She oversees the first deputy and the coordinators. A coordinator or a deputy chief oversees approximately 8 to 10 Supervising Investigators. Each

Supervising Investigator manages a team of investigators. The office employs approximately 50 investigators. There are three levels of investigators at IPRA, Investigator Is, IIs, and IIIs. Investigator IIIs are most senior; Investigator Is are least senior.[2]

Supervising Investigators must ensure that investigators act in a timely manner so that they do not lose evidence. They also help investigators manage their case load and ensure that the investigators move their cases along. Supervising Investigators help investigators close cases by performing case management and signing necessary forms. When performing case management, the Supervising Investigators review their subordinates' cases to ascertain the status of the case, to answer the investigators' questions, and to develop strategy for the investigation. An investigator might ask his supervisor whether an interview is necessary, whether it must be performed in person, whether it is necessary to subpoena witnesses, or whether the investigator must perform another follow-up. Further, Supervising Investigators must sign off on allegations before an investigator may interview an officer.

Investigators classify cases as "sustained," "not sustained," or "unfounded." A case is "not sustained" if the evidence is equivocal and investigators cannot determine whether or not the officer in question engaged in misconduct. A case is "unfounded" if the preponderance of the evidence shows that the officer did not engage in misconduct. A case is "sustained" if the preponderance of the evidence demonstrates that the officer engaged in misconduct.

The Supervising Investigator reviews all cases classified as "not sustained" or "unfounded" to ensure that the investigator performed enough work on them. If the Supervising Investigator deems the investigation sufficient, he signs off on the investigation to close the case. If a Supervising Investigator does not sign off on the investigators' cases, the cases remain open and IPRA accumulates a backlog.[3]

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[2] Freeman testified that a team with more Investigator IIIs is more productive because those investigators need less supervision. However, Rosenzweig testified that Investigators IIIs are not necessarily better investigators than Investigator Is and IIs; they just have more seniority.

[3] Rosenzweig herself reviews all sustained cases before IPRA closes them.

2. Nathaniel Freeman

Nathaniel Freeman began working for IPRA in 2004. In August 2008, Rosenzweig assigned him to supervise a team of four or five investigators.[4] Freeman was responsible for mentoring, reviewing, assisting, and providing direction to his team. He helped members of his team determine whether the claims filed against members of the CPD were legally sufficient.

Rosenzweig testified that she assigns good investigators to every new Supervising Investigator so that the investigators can effectively train their supervisor. To that end, she assigned Freeman three strong investigators to help Freeman learn his job. Rosenzweig also arranged training for Freeman to help him function in his new position.

In August 2008, Rosenzweig assigned each team a number of districts. The teams received cases which arose out of incidents that occurred in their assigned districts.[5] Rosenzweig periodically reassessed the distribution of districts approximately every 10 to 14 months. She also reassessed assignments if someone voiced a concern that there was an imbalance in case load or if IPRA hired new investigators.

In 2008, Freeman applied to be a presenter at the conference for National Association of Civilian Law Enforcement (NACOLE), an organization of entities and individuals who perform civilian oversight of law enforcement. Rosenzweig received funding to send all the Supervising Investigators to the conference in 2008. She encouraged supervisors to submit proposals for panel presentations and, according to Freeman, stated that it would be a "feather in the office's cap" if someone from the office were chosen to present at the conference.

On July 28, 2008, Freeman received a performance evaluation for the rating period July – December, 2007, written by Michael Duffy. Duffy rated Freeman good overall. However, under "planning and organizing," Duffy noted that Freeman "need[ed] to improve planning and organizational skills." Under "control and follow-up," Duffy noted that "once planning and organizational skills develop, control and follow-up will follow." Under "staff selection and development," Duffy stated that Freeman was "still learning his position so any assistance in developing staff is not at a level expected."

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[4] At the time, the office was called the Office of Professional Standards. In November 2007, the Office of Professional Standards became the Independent Police Review Authority.

[5] Before August 2008, IPRA assigned investigations to teams based on the complexity of the cases.

At supervisors meetings between 2008 and 2009, Rosenzweig stated that she did not believe the current evaluations were formatted to accurately reflect the Supervising Investigators' work and that she wanted to upgrade the evaluations.[6] To achieve more balanced and accurate evaluations, Rosenzweig instructed evaluators to provide specific feedback. As a result, supervisors provided extensive type-written explanations along with their subordinates' evaluations. Further, she instructed evaluators to give their subordinates warning of their deficiencies before marking them as marginal.

Rosenzweig reads all evaluations before the employees receive them. The evaluator subsequently gives the employee his evaluation, asks him to sign it, and then signs and dates the document to verify its delivery. The evaluator next sends the evaluation to Rosenzweig for her signature. Rosenzweig sometimes signs the evaluation immediately. Other times, she does not.

In 2009, NACOLE chose Freeman to present at the NACOLE conference. Rosenzweig was pleased to hear it.

In August 2009, management sought to change the IPRA intake aides' hours.[7] The intake aides are represented by AFSCME Council 31. Supervising Investigator Paula Tillman suggested to Rosenzweig that management should give aides an incentive to accept management's offer to change their hours. Tillman testified that Rosenzweig said that she (Rosenzweig) did not care what the Union thought, that she was running the office, and that she would change the intake aides' hours. Tillman further testified that Rosenzweig expressed that the union "was not a big issue" for her because she was running the office. Rosenzweig, on the other hand, testified that she did not remember speaking those words. However, she noted that when she joined IPRA, there was a sense in the office that management could not take certain action against police officers represented by the Fraternal Order of Police (FOP) and Police Benevolent and Protective Association (PBPA) because the union would object. Rosenzweig wanted to change that mentality and expressed that IPRA employees would do their jobs and follow the peace officers' contract.

In addition, Rosenzweig testified that the City never intentionally violates the AFSCME contract and instead follows standard procedure before altering employees' terms and conditions of employment. First, the City addresses its business needs. Then, the City reviews the contract

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[6] Based on these statements, Freeman thought that Rosenzweig did not give the evaluations significant weight.

[7] Intake aides answer phone calls, process letters, process complaints and help gather documentation.

to determine whether its proposed change is permissible. Next, the City discusses the intended change with the law department. With respect to the change at issue, Rosenzweig noted that she met with the intake aides to obtain their feedback concerning the planned change in their hours. Rosenzweig implemented the change in their schedule. No intake aides ever grieved the change.

On March 10, 2009, Freeman received a performance evaluation for the rating period July-December 2008, written by Duffy. Duffy rated Freeman good overall. However, under "quality of work," Duffy stated that "to remain at this level for the next rating period, [Freeman] needs to demonstrate that he is grasping the application of General Orders and Rules and Regulations to specific situation[s]." Further, under "planning and organization," Duffy stated that Freeman "needs to be more thorough with case management by having more sessions, following up on assignments and planning an investigative strategy. Under "control and follow-up," Duffy stated that Freeman "needs to establish better practices for follow up after case management sessions."

Sometime in 2009, Freeman approached Rosenzweig and requested that she write a letter of recommendation on his behalf for the position of New Orleans Monitor, a position equivalent to the Chief Administrator at IPRA.

On June 1, 2009, Rosenzweig drafted the letter Freeman requested. Rosenzweig explained that she agreed to write the letter because she hoped that Freeman would succeed in the office and she believed that if she refused, that Freeman would lose some enthusiasm for his work. Rosenzweig's recommendation letter states that Freeman is an effective supervisor who is dedicated to thorough investigations and who can be counted on to follow up and ensure that investigation leads are not lost. Rosenzweig testified that her letter was accurate because Freeman was still receiving good evaluation ratings at the time. Rosenzweig further stated that her opinion of Freeman changed in July 2009, a month later, when she met with her subordinates and reviewed his next evaluation.

In 2009, Freeman's area of responsibility increased from four districts to seven districts. No other team in the office had responsibility for more than four districts and many of them had responsibility for only three.

On or about September 3, 2009, Freeman received a performance evaluation for the rating period January-June 2009, written by Duffy. In particular, Duffy rated Freeman's performance as marginal overall. Freeman received a rating of marginal in three categories,

"quality of work," "ability to work with others," "ability to learn," and "supervisory accountability."

Under "quality of work," Duffy noted that "Freeman [did] not demonstrate that he ha[d] improv[ed] as a supervisor." He further stated that "while the investigators in [Freeman's] team are capable and able to work independent of supervision, Supervisor Freeman still does not understand the basics in conducting a thorough investigation...[and] has to ask whether canvasses are needed in a specific investigation."[8] Further, Duffy remarked that Freeman "still needs to ask questions about who is required to sign an affidavit for an investigation to go forward"[9] and "still needs to ask about the appropriate rule violations and findings."

In addition, Duffy noted that Freeman had "a disproportionate[ly] large number of cases being returned from Command Channel Review with non-concurrences as to the findings" and that Freeman "[n]eed[ed] to improve the number of positive findings in his team." Rosenzweig explained that when IPRA completes an investigation, IPRA sends the file to the accused officer's command staff. When command staff does not agree with IPRA's findings, they mark the file as a non-concurrence and return the case to IPRA for review by the deputy or coordinator. In the evaluation, Duffy noted that command staff had returned a large number of Freeman's cases.

Under "ability to work with others," Duffy stated that "Supervisor Freeman['s] skills as a supervisor are marginal," that he is "unable to gain the necessary confidence from his investigators because of his lack of leadership skills," and that "investigators are reluctant to approach Supervisor Freeman with work related questions because they are not confident with the advice and guidance they will receive."

Under "ability to learn," Duffy noted that he had warned Freeman that his rating would decline unless he "grasp[ed] the application of General Orders and Rules and Regulations to specific situations." Duffy noted that Freeman's failure to do so was "obvious [from] discussing strategy with Freeman on specific cases and the fact that his investigators [were] still not comfortable with seeking his advice."

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[8] A canvass requires the investigator to go to the scene of the incident on the day of its occurrence, knock on doors to find witnesses, and see if there are video cameras from which to retrieve video evidence.

[9] Rosenzweig explained that, in most cases, IPRA requires investigators to obtain a signed affidavit before they may serve an officer with allegations.

In addition, Duffy rated Freeman marginal under "supervisory accountability." Within that category, under "planning and organization," Duffy noted that Freeman's case management skills were weak. Similarly within that category, under "control and follow-up," Duffy stated that Freeman "does not thoroughly follow up with case management."

Freeman also received some positive ratings in this evaluation under "quantity of work" and under "initiative and acceptance of responsibility." With respect to "quantity of work," Duffy noted that Freeman worked late to eliminate his backlog of cases.

After September 3, 2009, Duffy informed Freeman that IPRA would place Freeman on a performance improvement plan (PIP).

Sometime in 2009, Freeman told Chief Administrator Rosenzweig, First Deputy Chief Administrator Mark Smith, Carlos Weeden, and Coordinator Mike Duffy, that his team was disproportionately burdened. Members of management informed Freeman that they would look into it.

In 2010, Freeman met with members of management to discuss the increase in his team's responsibility. Freeman testified that he only had three full-time investigators on his team during that year. In response to Freeman's complaints, Rosenzweig took Freeman's team out of the case -assignment rotation for the months of January, February, March, April, and June of 2010.

On March 12, 2010, Freeman received an evaluation for the period between July and December 2009, written by Duffy. Duffy rated Freeman as marginal overall. Specifically, Duffy rated Freeman marginal in "ability to learn," "ability to work with others," and "supervisory accountability." Duffy rated Freeman unsatisfactory for his "quality of work." This was the first evaluation in which Freeman received an unsatisfactory rating in one of the evaluated categories.

Under "quality of work," Duffy stated that Freeman "failed to demonstrate that he is able to perform the duties required of an IPRA supervisor." He further noted that "investigations that [Freeman] has approved as closed are still riddled with the exact same mistakes that he was making when he was first hired as a supervisor." Specifically, Freeman still had questions regarding the differences between an unfounded finding and a not sustained finding. Duffy noted that "whether these questions arise due to a lack of understanding or a failure to thoroughly review an inappropriate finding that is submitted to him, both are related to areas in which a supervisor is expected to be proficient." He further explained that Freeman "approves closing

investigations that have missing and/or misidentified attachments; allegations and/or findings in the electronic (CLEAR) file do not match what is written in the Summary Report." Rosenzweig explained that Supervising Investigators must ensure that the electronic tracking system (CLEAR) matches the paper investigation and that if investigations are not up to date in CLEAR, it indicates that the Supervising Investigator has not followed up with his subordinates on their cases. Rosenzweig testified that it is important for a Supervising Investigator to follow up with his subordinates' cases and keep the CLEAR case management system up to date because it allows Rosenzweig to immediately look into a case if she is questioned about it.

In addition, Duffy remarked that "Freeman does not document his case management sessions which raises the questions of whether he is holding regular case management sessions with his investigators or whether the sessions are being conducted in a productive manner." Similarly, he explained that Freeman "had problems evaluating a marginal subordinate because he did not maintain the appropriate supervision of subordinates, particularly in areas where direct supervision is critical." Duffy concluded that "positive findings are still too few in numbers."

Further, under "ability to work with others," Duffy stated that "Freeman has yet to demonstrate that he possesses the qualities of a team leader…[t]he investigators on his team are still reluctant to go to him with their questions which is a problem that was pointed out [in] the last rating period." Duffy also stated that "until [Freeman] can demonstrate that he has enough knowledge of the entire investigative process that his subordinates see him as their primary source of guidance, they will continue to seek guidance from other sources."

Under "ability to learn," Duffy stated that Freeman "remains a marginal because he has not demonstrated that he has the ability to adequately discharge his duties as an IPRA supervisor." It further stated that "the quality of his work dropped from a marginal to unsatisfactory this rating period which is a reflection of his ability to learn." The evaluation warned that "if Supervisor Freeman is unable to improve the quality of his working during the next…rating period, his rating in this category will be lowered to unsatisfactory." Rosenzweig noted that she did not see an improvement in Freeman's knowledge of the investigations, of the general orders, and the differences between unfounded and not sustained cases.

In this same evaluation, Freeman received positive ratings under the category of "quantity of work" and "acceptance of responsibility." Under "acceptance of responsibility," the evaluation referenced Freeman's presentation before NACOLE.

On February 17, 2010, Rosenzweig sent out a memo to all non-union personnel which stated the following:

> "the City of Chicago has requested that I distribute the enclosed document to you. This is intended to answer certain questions. If you have other questions, the document has contact information for the Illinois Labor Relations Board."

The enclosure contained the City's official answers to certain questions concerning representation. Rosenzweig drafted this document because AFSCME had initiated an organizing drive and the City had started to negotiate the implementation of furlough days with certain unions.

On May 4, 2010, IPRA issued Freeman a memo officially informing him that he would be placed on a Performance Improvement Plan (PIP). The memo stated that "for the last two (2) Performance Evaluations that you received (January thru July 2009 and July thru December 2009), your overall rating was 'Marginal.' An employee who receives a rating of 'Marginal' is expected to improve their performance by the next rating period. In order to assist you in improving your overall rating, a Performance Improvement Plan ("PIP") was developed."[10]

In addition, the PIP directed Freeman to review the IPRA standard operating procedures manual and the use of force policy. It noted that Duffy would attend Freeman's case management sessions with Freeman's subordinate investigators. Further, it stated that Duffy would randomly review his cases. In addition, it instructed Freeman to create a time management tool that Freeman and Duffy could evaluate and discuss. Rosenzweig testified that, to her knowledge, Freeman never created a time management tool. Freeman testified that he did create a time management tool pursuant to the PIP, but that he never presented it to Duffy. Freeman noted that Duffy never requested the document. Finally, the PIP stated that if Freeman believed that he needed additional training then he should inform management. Freeman never asked for additional training.[11]

Duffy did not meet with Freeman one-on-one to discuss his cases or particular concerns he had about Freeman's case management. Further, he did not provide Freeman with any additional written feedback on his work performance. However, Duffy answered Freeman's

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[10] When Rosenzweig received the PIP, it had no date. Duffy informed Rosenzweig that he delivered it to Freeman on May 4, 2010. Rosenzweig wrote that date on the document.

[11] Freeman did not submit a rebuttal to the performance improvement plan.

questions, observed Freeman's case management sessions and participated in them, pursuant to the PIP.

In June or July, 2010, Rosenzweig spoke to the Supervising Investigators about the City's financial status during a supervisor's meeting. She stated that the Supervising Investigators were considered managers and that they would not be eligible for union membership.

On July 10, 2010, Freeman filed a complaint against Duffy with the Commission on Human Relations asserting that Duffy created a hostile work environment. This complaint was unrelated to Freeman's union membership or union organizing.[12] Freeman testified that after July 10, 2010, Duffy ceased to have contact with Freeman and stopped being available for Freeman.

Supervising Investigator Joseph Fakuade also spurred an Inspector General investigation into Duffy. Freeman gave a statement on Fakuade's behalf in that investigation. Duffy knew of Freeman's participation in the investigation initiated by Fakuade.

Tillman testified that the Supervising Investigators, including Fakuade, herself, and Freeman, first began "exploring unionization amongst themselves" in mid- to late-summer of 2010. In late summer of 2010, Tillman contacted SEIU to ask them to help with their certification process.

Freeman's testimony contradicts Tillman's because Freeman stated that Supervising Investigators began discussing the possibility of joining a union far earlier, at the end of 2009 and the beginning of 2010.[13] I credit Tillman's testimony based on her demeanor and the fact that Rosenzweig informed the Supervising Investigators in July that management believed they were ineligible for union membership, around the same when the Supervising Investigators first explored the possibility of joining a union, according to Tillman's testimony.

The Supervising Investigators designated Freeman to collect the union cards and to post official notices. Freeman testified that throughout the summer of 2010, while the Supervising Investigators were looking into unionization, the administration was "not really supportive of [their] efforts." Specifically, Freeman testified that the administration made no effort to assist the Supervising Investigators in their unionization process.

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[12] The charge before the Chicago Commission on Human Relations was dismissed on September 25, 2012 because there was no substantial evidence to support the complaint.

[13] Freeman further stated that the Supervising Investigators discussed the matter openly with the administration at supervisors meetings during that time.

On August 12, 2010, Rosenzweig again reduced Freeman's workload by reducing the number of districts assigned to Freeman's team from eight to four.

On September 17, 2010, the Supervising Investigators made the administration officially aware of their unionization efforts. On that date, Freeman sent an email to Rosenzweig which stated that "IPRA supervisors have officially begun exploring the possibility of Union representation."[14] The letter further stated that Supervisor Joseph Fakuade was selected as the "designate" to discuss any union-related matters with the administration. The letter concluded by thanking management for the "support and encouragement [they had] expressed to [the Supervising Investigators] thus far" and stated that the Supervising Investigators "hope[d] to continue to receive it in the future."

On September 20, 2010, Fakuade sent an internal memo to Rosenzweig which stated that "beginning September 23, 2010, Supervisor Nathaniel Freeman will serve as the Supervisors' Liaison to the Administration regarding all Union related issues."

Freeman testified that the office atmosphere became tense after the Supervising Investigators notified Rosenzweig of their unionization efforts. Similarly, Tillman testified broadly that there was a sense of "fear and trepidation" in the office after the Supervising Investigators announced their intention to seek representation because Rosenzweig had a reputation for being vindictive.

Freeman noted that members of management had no immediate response to the Supervising Investigators' September 17, 2010 email. However, some time later, Michael Duffy slid a document under someone's door and giggled. Freeman could not recall what the document was and did not produce a copy of the document at hearing. However, he testified that "without being obviously hostile[, it] was a document that conveyed a sentiment that left the supervisors feeling intimidated and apprehensive about the unionization process."

On October 26, 2010, Freeman wrote a letter to Rosenzweig in which he asked her to remove Duffy as his supervisor and reassign his team to a different coordinator. He stated that Duffy was engaging in a pattern of "inappropriate and unprofessional" behavior. Specifically,

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[14] According to Freeman's testimony, management received formal notice of the Supervising Investigators' intent to join the union somewhat earlier in September because the Supervising Investigators had "signed [their] union cards, and [they had to let [management] know that." Notably, the petition itself was filed a few weeks later on October 27, 2010. See City of Chicago, 28 PERI 86 (IL LRB-LP 2011).

Freeman noted that Duffy failed to provide significant guidance on cases and met with Freeman's investigators without his knowledge. Further, he stated that Duffy gave direction to Freeman's investigators without Freeman's input or approval. In addition, Freeman noted that Duffy abruptly stopped meeting with Freeman and his investigators for case management, without providing further direction as to cases and that this hindered the team's ability to timely close cases. Freeman concluded that it was a conflict for Duffy to continue to supervise and rate him in light of the complaint Freeman filed against him with the Commission on Human Relations.

Rosenzweig met with Freeman after she received his letter to discuss Duffy's supervision of Freeman's team. Rosenzweig told Freeman that she would look into the matter but she did not tell him how she would proceed.

On December 13, 2010, Rosenzweig and Smith met with three of Freeman's investigators, Soto, Davis, and White, to determine whether there was any validity to Freeman's complaints against Duffy. The goal of the meeting was to help management understand how Freeman's team functioned overall.

Rosenzweig and Smith, together, met with each investigator separately. They asked the investigators "what was going on with" the team. Smith and Rosenzweig received consistent responses from each investigator. Rosenzweig determined that Freemans' investigators contradicted the statements Freeman made in his October 26, 2010 letter. As a result, Rosenzweig determined that Duffy would remain Freeman's supervisor.[15]

On January 12, 2011, Freeman testified on behalf of SEIU before the Board in the representation hearing concerning IPRA Supervising Investigators. Tillman also testified on behalf of SEIU.

On January 19, 2011, Freeman received a performance evaluation for the rating period January-June 2010, written by Duffy.[16] Duffy rated Freeman unsatisfactory overall. Specifically, Duffy rated Freeman unsatisfactory in his "quality of work," "supervisory

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[15] Duffy remained employed by IPRA during this time, although he had announced his retirement and had begun using up his accrued benefit time.

[16] The document states that Michael Duffy signed the evaluation on November 24, 2010. Freeman testified that when he received the evaluation on January 19, 2011, he did not remember noticing that Duffy had already dated the document. Freeman further stated that he would have noticed if Duffy had signed it earlier because Duffy was not supposed to sign the document until he presented it to Freeman.

accountabilities," and "ability to learn." He rated Freeman marginal in his "ability to work with others," and "initiative and acceptance of responsibility."

Under "quality of work," Duffy noted that Freeman "received an unsatisfactory in this category last rating period and [did not] demonstrate...sufficient improvement to have his rating raised." The evaluation referenced specific cases by number and pointed out Freeman's deficiencies. In one case, Freeman did not perform many of the investigative steps. For instance, he did not include reports on forensic evidence, did not attempt to interview witnesses even though they were identified, never conducted a canvass despite witnesses' accounts that the offender fired a weapon before the police arrived, and did not trace the weapon as required. The evaluator noted that such failings were apparent in multiple of Freeman's cases.

In addition, Duffy referenced a concern that he had raised in Freeman's last evaluation. He noted that Freeman was not conducting regular case management with his investigators as required by his performance improvement plan. Duffy noted that two investigators stated that they had never had a case management session with Freeman during this evaluation period and that one other investigator stated that he had met with Freeman only once to discuss his cases. Duffy also implied that the case management sessions were not productive because he found that numerous investigations were not up to date in the CLEAR system.

Under "ability to work with others," Duffy stated that Freeman's "subordinates still are reluctant to seek out Supervisor Freeman as their primary source of guidance." He further warned that "if Supervisor Freeman does not improve his quality of work[,] his subordinates will never see him as their primary source of guidance." Yet, Duffy also pointed out that "on a positive note, Supervisor Freeman does try and be helpful with his fellow supervisors."

Under "ability to learn," Duffy stated that "there has been no measurable improvement [in this category] which is documented in the quality of work comments."

Under "supervisory accountabilities," Duffy noted that "during case management sessions with Supervisor Freeman's team, seven (7) cases were brought to my attention that did not have any extension requests approved during the rating period which prevented the assigned investigator from electronically submitting the investigation for review." Duffy further stated that "there were numerous investigations that were not up to date in CLEAR" and that "some of these cases had [had] no documents scanned into CLEAR for over a year."

However, Freeman received a good rating for "quantity of work." Specifically, Duffy noted that Freeman's team closed 114 investigations. However, he also stated that 66 of those were closed with "no conversion." Investigators close cases and label them as "no conversion" because they are unable to obtain affidavits; such cases do not require a full investigation and are therefore easier to close.[17]

On January 25, 2011, Smith drafted an addendum to Freeman's evaluation (rating period July-December, 2010) which described his interview with Freeman's subordinate investigators on December 13, 2010. The addendum provided that the investigators "expressed numerous similar experiences working for Supervisor Freeman." They each "cited a lack of guidance from Supervisor Freeman indicating that they were largely required to be self-sufficient or to rely on other investigators, supervisors, and/or coordinators in seeking answers to their questions about their investigations." Further, the addendum provided that each investigator stated that Freeman "did not know how to do Case Management with them in a way that would add any value to their investigations" and stated that Case Management consisted mainly of them reporting what had already been done and what was needed to be done on a given case." However, they stated that Freeman was "not able to give guidance on how to complete an investigation more efficiently or identify what was missing from an investigation in order to deem it complete." They further stated that "coordinator [Duffy] was not 'jumping' Supervisor Freeman by going directly to them to discuss investigations." Instead, the investigators would sometimes attempt to initiate contact with the coordinator and the coordinator would require them to include Freeman as part of that contact. The addendum further stated that "there seemed to be a hesitation or unwillingness of Supervisor Freeman's part to approach his coordinator with questions" and that "this would cause delays for the investigators" which would "prompt…them to seek answers elsewhere."

Investigator White testified that Smith's addendum to Freeman's evaluation reflected some of the issues that White raised in her interview with Smith and Rosenzweig. At hearing, she elaborated that Freeman did not always have answers to her questions and that he occasionally made her wait for his responses. Although White testified that she did not have any issues with Freeman, she noted that sometimes he was not around because of personal issues and

[17] Freeman testified that the number of no conversion cases closed by his team was about average as compared to the number of no conversion cases closed by other teams.

that sometimes he did not respond to her questions at all.[18] While White did not seek out Rosenzweig or Smith to address the concerns that she ultimately raised during the interview, White had, at times, initiated conversations with Rosenzweig about her concerns regarding Freeman and the fact that he was sometimes not around to answer her questions.

Similarly, Rosenzweig testified that Duffy's addendum to Freeman's evaluation truly and accurately reflected the statements made by investigators on December 13, 2010.

Smith did not corroborate the investigators' statements by checking the computer case tracking and management systems. Smith did not meet with Freeman regarding the investigators' concerns.

On January 26, 2011, Freeman received an evaluation for the period of July - December 2010, written by Duffy. Duffy rated Freeman unsatisfactory overall. Specifically, he rated Freeman unsatisfactory in "quality of work," "ability to learn," "initiative and acceptance of responsibility," and "supervisory accountabilities." Duffy rated Freeman marginal in his "ability to work with others."

Under "quality of work," Duffy stated that Freeman had not shown improvement over the past two rating periods. He explained that Freeman was still not conducting productive case management meetings. Duffy noted that IPRA had to reopen a case for additional investigation on May 13, 2010 and remarked that the "the last attachment before the case was returned was the Summary Report Digest that was scanned...[on] 20 May 2009." The evaluator stated that this investigation[19] was to be closed in August, but that it was still open five months later. Similarly, three other investigations[20] which should have been closed in August were likewise still open, even though all investigative steps had been completed with respect to two[21] of them. Further, in one of those investigations, the investigator never interviewed the sergeant under investigation. In addition, Freeman failed to ensure that a report was in the proper format. That same report did not list attachment numbers in the summary section and included the wrong reference number concerning an interview performed by the investigator. Next, Freeman failed

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[18] Under such circumstances, White would try and obtain the answers from other Supervising Investigators or other investigators.

[19] Log # 1023016.

[20] Log #s 1025351, 19025921, and 1026203.

[21] Log numbers 1025351 and 1025714. There were some cases in which the categories entered into CLEAR were wrong. One case was initially submitted without a canvass. Attachment numbers listed in the Summary Report did not correspond with the actual number of the attachments.

to ensure that his subordinate investigator requested a report from an officer. Further, Duffy noted that an investigation from November 23, 2009 was still pending in an investigator's queue. Finally, the evaluator stated that Freeman submitted a number of cases for review with a sustained finding and that most if not all of those cases did not follow the specified format. For example, the attachment numbers were not inserted at the end of the first sentence introducing new evidence, the dates of the interviews were not listed, and the conclusion section was not written in the proper format. For instance, in the conclusion section, the investigator was permitted to "lump more than on[e] allegation in the same paragraph, which does not allow for sufficient basis to explain the evidence supporting the finding for a particular allegation."

Under "ability to learn," the evaluation stated that Freeman showed "no noticeable improvement in [his quality of work] which leaves him at an unsatisfactory in [his ability to learn]."

Under "initiative and acceptance of responsibility," Duffy noted that Freeman's rating dropped from marginal to unsatisfactory in this category because Freeman "fail[ed]...to hold productive case management meetings" and consequently did not provide investigators with the "necessary guidance to conduct thorough and timely investigations."

Under, "supervisory accountabilities," Duffy stated that "there are still numerous cases that are not being investigated in a thorough and timely manner." Further, he stated that his rating of Freeman was "supported by the fact that there was no improvement in the quality of his work which [was] also reflect[ed] in an unsatisfactory rating in ability to learn coupled with the fact that Supervisor Freeman ha[d] not earned the trust of his team."

Under "ability to work with others," Duffy noted that the "situation with [Freeman's subordinates ha[d] not appeared to worsen." However, he also noted that there still "appear[ed] to...be reluctance on the part of his subordinates to seek out Supervisor Freeman as their primary source of guidance."

While Freeman received a good rating for "quantity of work," Duffy noted that approximately 46 percent of the cases closed were no affidavit cases, ones that take less time to close.

In February 2011, Tillman attended a supervisor's meeting in which Rosenzweig informed the supervisors that an arbitrator had ordered the reinstatement of an employee who

Rosenzweig had previously terminated.[22] She told the Supervising Investigators that she was "perturbed" that the arbitrator had put the employee back to work and instructed them to "write the employee up" if he did anything wrong because that employee "did not deserve to be" working at IPRA. Rosenzweig testified that she believe that her subordinates thought that the employee in question was untouchable now that the arbitrator reinstated him. Rosenzweig explained that she meant to send a message to the supervisors that they should treat the individual in question as they would treat any other employee if they violated the rules.

On February 9, 2011, Rosenzweig drafted Freeman's letter of termination. She delivered it to him in person on February 14, 2010. The letter informed Freeman that his employment at IPRA would be terminated as of February 25, 2011.

Tillman resigned her employment with IPRA in October 2012. At hearing, Tillman testified that she had suffered a constructive discharge. She explained that she felt harassed at the office and that the office had a hostile environment. She stated that Rosenzweig was "on [her] bumper" and that she believed Rosenzweig would eventually terminate her employment. On May 12, 2011, four months after she testified before the Board (January 12, 2011), Tillman received an overall good rating from her supervisor Weeden. Tillman never filed an unfair labor practice charge alleging that she received lower ratings because of her union activities. She did not file a complaint alleging constructive discharge. Tillman never filed a rebuttal to any of her evaluations alleging that she received lower ratings because of her union activity.

3. Information Concerning Alleged Comparables

SEIU introduced into evidence evaluations issued by the Respondent to other Supervising Investigators. SEIU sought to use this evidence to demonstrate that the timing of Freeman's last two negative evaluations demonstrates disparate treatment. The information presented by SEIU is summarized below. The Supervising Investigators are referenced by both number and letter.

Supervising Investigator A/(#1)'s evaluations and Supervisor B/(#7)'s evaluations are not included here because they did not cover the same rating periods as the other employees' evaluations. According to the evaluations in the record, the Respondent evaluated Supervising

[22] This individual had been employed by IPRA for a year. He was terminated for making over 1000 personal color prints on an office printer even though Rosenzweig directed employees not to use the color printer for personal use.

Investigator A for the period of January 2009 - February 2010 (evaluation received July 1, 2010) and July 1 – September 30, 2010 (evaluation received October 4, 2010). According to the evaluations in the record, the employer evaluated Supervising Investigator B for the period of January to December 2010 (evaluation receive April 14, 2011). SEIU did not submit evaluations for Supervising Investigators C and J.

| **Receipt of Evaluations by Supervising Investigators, by Rating Period** | | |
|---|---|---|
| Supervising Investigator | Receipt of Evaluation by Employee<br><br>Rating Period: **Jan. – June 2010** | Receipt of Evaluation by the Employee<br><br>Rating Period: **July – Dec. 2010** |
| D (#10) | No evaluation found | May 12, 2011 |
| E (#5) | Jan. 31, 2011 | Jan. 31, 2011 |
| F (#9) | Oct. 1, 2010 | No evaluation found |
| G (#4) | June 6, 2011 | June 6, 2011 |
| H (#2) | Oct. 5, 2010 | June 8, 2011 |
| I (#6) | No evaluation found | Jan. 31, 2011 |
| L (#3) | No evaluation found | Undated |
| K (#8) | No evaluation found | Jan. 31, 2011 |
| FREEMAN | Jan. 19, 2011 | Jan. 26, 2011 |

## IV. DISCUSSION AND ANALYSIS

1. Section 10(a)(2) and (1) allegation

The Respondent did not violate Sections 10(a)(2) and (1) of the Act when it issued Freeman negative evaluations and terminated his employment because SEIU has not demonstrated that the Respondent took such action because of Freeman's union activity.

To establish a prima facie case that the employer violated section 10(a)(2) of the Act, the Union must prove by a preponderance of the evidence that: 1) the employee engaged in union activity, 2) the employer was aware of that activity, and 3) the employer took adverse action against the employee in whole or in part because of union animus or that it was motivated by the

employee's protected activity. City of Burbank v. ISLRB, 128 Ill. 2d 335, 345 (1989). The union may demonstrate an employer's animus through circumstantial or direct evidence including expressions of hostility toward union activity, together with knowledge of the employee's union activities; timing; disparate treatment or targeting of union supporters; inconsistencies in the reasons offered by the employer for the adverse action; and shifting explanations for the adverse action. Id.

Once the union establishes a prima facie case, the employer can avoid a finding that it violated section 10(a)(2) by demonstrating that it would have taken the adverse action for a legitimate business reason notwithstanding the employer's union animus. Id. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. Id. If the proffered reasons are merely litigation figments or were not in fact relied upon, then the employer's reasons are pretextual and the inquiry ends. Id. However, when legitimate reasons for the adverse employment action are advanced, and are found to be relied upon at least in part, then the case may be characterized as a "dual motive" case, and the employer must establish, by a preponderance of the evidence, that it would have taken the action notwithstanding the employee's union activity. Id.

First, Freeman engaged in protected activity when he helped collect cards in support of SEIU's organizing campaign in mid- to late-summer of 2010 and expressed his interest in joining the union to his supervisors on September 17, 2010. Cnty. of Cook, 7 PERI ¶ 3017 (IL LLRB 1991)(solicitation of authorization cards and voicing interest in joining union to supervisors constitutes protected activity); Chicago Bd. of Educ., 6 PERI ¶ 1107 (IELRB 1990)(seeking application for union membership constitutes protected activity).

Second, the Respondent knew of Freeman's protected activity because Freeman sent Rosenzweig an email on September 17, 2010 announcing the Supervising Investigators' intent to join the union.

Third, Freeman suffered an adverse employment action when the Respondent issued him negative evaluations and terminated his employment. Vill. of Oak Park, 28 PERI ¶ 111 (IL LRB-SP 2012) (termination is an adverse employment action); City of Burbank, 17 PERI ¶ 2039 (IL LRB-SP 2001) (poor evaluation constituted adverse action).

However, there is insufficient evidence to demonstrate that the Respondent took these adverse actions because of Freeman's protected activity since there is no evidence of union animus or a requisite causal nexus.[23]

First, there is no proximity between Freeman's union organizing efforts and Respondent's adverse actions against him. Here, Freeman first engaged in protected activity in mid- to late-summer 2010 and the Respondent had knowledge of it no later than September 17, 2010. Yet, the Respondent took its adverse action against Freeman between four to five months later, in January, when it issued Freeman negative evaluations, and then again in February, when it terminated Freeman's employment. Such a gap between Freeman's protected activity and the Respondent's adverse action does not support a finding of suspicious timing. See City of Highland Park, 18 PERI ¶2012 (IL LRB-SP 2002) (four month gap between protected activity and adverse action was not sufficiently close to demonstrate suspicious timing).

Second, there is no evidence of disparate treatment here based on the timing of Freeman's two unsatisfactory evaluations because the Respondent issued its evaluations to all Supervising Investigators on variable dates. As such, the Respondent's timing of Freeman's evaluations merely reflects these inconsistencies. An employer's personnel decisions and practices, no matter how flawed or ill-considered they might be, are nevertheless lawful under the Act so long as they are promulgated and administered without animus toward statutorily protected concerted activities. City of Decatur, 13 PERI ¶ 2017 (IL SLRB 1997).

Here, the Respondent did not treat Freeman disparately when it issued him his first unsatisfactory performance evaluation on January 19, 2011, even though the Respondent issued no other evaluations on that date, because the Respondent issued all Supervising Investigators

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[23] SEIU does not argue that the Respondent's agents made statements which constitute direct evidence of animus towards the Union or towards Freeman's protected activity. Similarly, SEIU does not argue that the Respondent targeted union supporters. Accordingly, these issues are not addressed below and are waived on appeal. See Vill. of Bensenville, 10 PERI 2009 (IL SLRB 1993) aff'd by unpub. order, Docket No. 2-94-0089 (2d Dist. 1995) (Respondent waived the argument that employee conduct was unprotected since it violated the contractual no-strike clause because the Respondent did not argue the issue before the ALJ); Cnty. of Cook (Juvenile Detention Center), 14 PERI 3008 (IL LLRB 1998)(Respondent waived its argument that that its duty to bargain should be based solely on statutory law relating to the detention center's operations where the Respondent did not raise the argument at hearing); see also Cnty. of Cook and Sheriff of Cook Cnty., 12 PERI ¶ 3008 (IL LLRB 1996) ("where central questions of fact and law have not been litigated," they are waived)(emphasis added); but see, Cnty. of Boone and Sheriff of Boone Cnty., 19 PERI ¶ 74 (IL LRB-SP 2003) (employer argued on brief that petitioned-for employees were supervisors and managers; thus, before the Board, the employer waived the argument that petitioned-for employees were peace officers who did not need to meet the preponderance of time requirement).

their evaluations for that rating period on different dates, sometimes months apart.[24] For example, the Respondent issued two Supervising Investigators their evaluations earlier (S.I. F/(#9) – October 1, 2010; S.I. H/(#2) - Oct. 5. 2010); it issued one Supervising Investigator his evaluation around the same time as it issued Freeman's (S.I. E/(#5) – January 31, 2011); and it issued another Supervising Investigator his evaluation many months later (S.I. G/(#4) – June 6, 2011). Accordingly, the Respondent's failure to issue Freeman's evaluation on the same day as it issued some of the others does not demonstrate disparate treatment where the Respondent issued several of the evaluations at vastly different times.

Similarly, Respondent's six-month delay in issuing Freeman this first unsatisfactory evaluation (January, 19. 2011) does not demonstrate disparate treatment because the Respondent also delayed issuing other employees their evaluations for that rating period.[25] For example, the Respondent waited 7 months before it issued Supervising Investigator E/(#5) his performance evaluation on January 31, 2011. Further, the Respondent waited a full year to issue Supervising Investigator G/(#4) his performance evaluation on June 6, 2011. Thus, the Respondent did not treat Freeman disparately when it delayed issuing his first unsatisfactory evaluation because the Respondent delayed issuing that rating period's evaluation to at least two other Supervising Investigators.

Likewise, the Respondent did not treat Freeman disparately when it issued Freeman his January-June 2010 evaluation five days earlier than it did to three other Supervising Investigators because the Respondent issued that evaluation to employees on variable dates. Indeed, for this rating period, the Respondent issued a total of six evaluations (excluding Freeman's) on four different days, in three separate months (January 31, 2011 – three evaluations; May 12, 2011 – one evaluation; June 6, 2011 – one evaluation; June 8, 2011 – one evaluation).[26] Accordingly, the fact that Freeman received his evaluation first, by a mere five days, does not indicate disparate treatment where the Respondent did not even issue every such evaluation in the same season.

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[24] The rating period addressed here is January – June, 2010.
[25] The rating period addressed here is January – June, 2010.
[26] Contrary to SEIU's assertion, there is no indication that the Respondent ever issued its evaluations in alphabetical order by employee last name. Respondent's failure to follow such alphabetical order with respect to the July – December 2010 evaluations is thus immaterial.

Further, the Respondent's timely issuance (January 26, 2011) of Freeman's second unsatisfactory evaluation, approximately one month after the end of the rating period (July – December 2010), does not indicate disparate treatment because the Respondent issued three other Supervising Investigators their evaluations in January and in a timely manner (S.I. E/(#5); S.I. I/(#6); S.I. K/(#8)).

Finally, the Respondent did not treat Freeman disparately when it issued his final two negative evaluations in quick succession because the Respondent similarly issued two other Supervising Investigators consecutive evaluations in close proximity. The Respondent issued Supervising Investigator E/(#5) evaluations for both the January-June 2010 and the July-December 2010 rating periods on January 31, 2011. Similarly the Respondent issued Supervising Investigator G/(#4) evaluations for both the January-June 2010 and the July-December 2010 rating periods on June 6, 2011.

In sum, the Respondent's timing of Freeman's last two evaluations does not indicate that the Respondent harbored animus towards Freeman's protected activity because SEIU has not shown that the Respondent treated Freeman differently than any other Supervising Investigator. Instead, SEIU's evidence merely underscores the fact that the Respondent treated all the Supervising Investigators in a similar manner—by issuing them their evaluations at inconsistent and variable times—and undermines SEIU's argument that the Respondent treated Freeman disparately.

Third, the Respondent has offered an unshifting and non-pretextual reason for issuing Freeman negative evaluations and for terminating his employment. Here, the Respondent has consistently asserted that Freeman performed poorly and that he did not improve despite repeated and detailed feedback. The trajectory of Freeman's decline in performance and the overall consistency of Freeman's evaluations support the legitimacy of the Respondent's proffered reason.

First, the decline in Freeman's performance began well prior to his June-September 2010 organizing activities. In fact, Freeman received an overall marginal evaluation on September 3, 2009, almost a year earlier.[27] Later in 2009, Duffy informed Freeman of management's decision

[27] The rating period addressed here is January- June 2009.

to place Freeman on a Performance Improvement Plan.[28] On March 12, 2010, the Respondent again evaluated Freeman's performance as marginal, but noted that the quality of Freeman's work deteriorated to an unsatisfactory level. On May 4, 2010, the Respondent implemented the Performance Improvement Plan based on the deficiencies referenced in Freeman's last two evaluations. Accordingly, the Respondent's reason for its adverse actions against Freeman is legitimate and non-pretextual because Freeman's performance declined well before he engaged in protected activity. City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997) (no proximity between worsening of evaluations and charging party's protected activity where evaluation ratings declined prior to charging party's protected activity).

Second, the evaluations issued by the Respondent prior to Freeman's protected activity[29] are remarkably consistent both with each other and with those issued by the Respondent after Freeman's protected activity.[30] First, the Respondent issued Freeman two negative evaluations before he engaged in protected activity and both of them reference the same deficiencies in performance. On September 3, 2009, the Respondent issued Freeman an evaluation which rated him as marginal overall and marginal in "quality of work," "ability to work with others," "ability to learn," and "supervisory accountabilities." The comments explained that Freeman did not demonstrate improvement from the prior rating period, did not understand the basics of conducting a thorough investigation, and still asked questions about appropriate rule violations and findings. They further noted that investigators were reluctant to approach him with questions because they were not confident in the accuracy of his answers. Similarly, on March 12, 2010, the Respondent issued Freeman an evaluation which again rated him as marginal overall, marginal in "ability to work with others," "ability to learn," and "supervisory accountabilities," and unsatisfactory in "quality of work." The comments echoed those of the previous evaluation and stated more specifically that Freeman still had questions about the differences between unfounded and not sustained findings, that he did not update cases in the electronic tracking system, that he approved the closure of cases even though they had missing or

[28] Notably, although the Respondent did not immediately act on its intent to place Freeman on a Performance Improvement Plan, Respondent nevertheless initiated the plan prior to Freeman's protected activity. Accordingly, any lag in implementing it cannot support a finding of animus.
[29] These issued on September 3, 2009 and March 12, 2010.
[30] These issued on January 19, 2011 and January 26, 2011.

misidentified attachments, and that he did not document his case management sessions with his investigators.

Moreover, the Respondent's evaluations of Freeman, issued after he engaged in protected activity, reiterate these very problems. On January 19, 2011, the Respondent rated Freeman unsatisfactory overall, marginal in his "ability to work with others" and "initiative and acceptance of responsibility," and unsatisfactory in "quality of work," "ability to work with others," and "supervisory accountability." The comments explained that Freeman approved the closure of cases without attaching reports of forensic evidence, without interviewing witnesses, and without conducting canvasses. Further, they state that he did not update investigations electronically and that his case management was lacking. Similarly, on January 26, 2011, the Respondent rated Freeman unsatisfactory overall, marginal in his "ability to work with others," and unsatisfactory in "quality of work," "ability to learn," "initiative and acceptance of responsibility," and "supervisory accountabilities." These comments repeat the deficiencies identified in the prior three evaluations and support the ratings with reference to particular cases and dates. Thus, the continuity of these evaluations demonstrates that the Respondent's proffered explanation for the adverse actions is legitimate and not a product of union animus. City of Chicago (Dep't of Public Health), 17 PERI ¶ 3006 (IL LRB-LP 2001) (no animus found where negative evaluation issued prior to charging party's protected activity documented similar deficiencies to those for which she was discharged); but see State of Ill. Dep't of Cent. Mgmt. Serv. Dep't of Mental Health and Developmental Disabilities), 12 PERI ¶ 2037 (IL SLRB 1996) (Employer's assertion that it discharged employee for poor performance was pretextual where the only reliable evidence of such poor performance was a single note about the employee was a written record of an oral reprimand that was not even forwarded to the personnel office.) and Cnty. of Dekalb and State's Attorney of Dekalb Cnty., 6 PERI ¶ 2053 (IL SLRB 1990) (Employer's assertion that it discharged employee for poor performance was pretextual where the only pieces of evidence to show employee poor performance were two memos prepared after she was removed from her regular duties.)

Contrary to SEIU's contention, nothing in the record undermines the legitimacy of the Respondent's reason for taking adverse action against Freeman or otherwise suggests that the Respondent's reason is pretextual.

First, there is no evidence that the Respondent failed to give Freeman adequate notice of his deficiencies and an opportunity to correct his performance, even though it delayed six months to issue Freeman his first unsatisfactory performance evaluation. Indeed, Freeman knew the Respondent judged his performance to be inadequate and possessed detailed documentation which outlined the Respondent's expectations of him at least eight months before he received that unsatisfactory evaluation on January 19, 2010. On September 3, 2009, over a year earlier, Freeman received his first detailed marginal evaluation. On March 12, 2010, Freeman received a second, similarly detailed and more negative evaluation. On May 4, 2010, Freeman received a performance improvement plan (PIP) which contained specific instructions from the Respondent on how to adjust his performance. After May 4, 2010, the Respondent implemented the PIP, at least in part, by ensuring that Duffy attended and participated in Freeman's case management sessions. In light of this extensive and consistent feedback, it is immaterial that Duffy failed to meet with Freeman one-on-one pursuant to the PIP and that Rosenzweig failed to follow up with Duffy concerning Freeman's performance.[31] Thus, the Respondent's delay in issuing Freeman his first unsatisfactory evaluation does not demonstrate animus because Freeman had adequate notice concerning his poor performance and sufficient guidance on how to improve it. City of Chicago (Dep't of Public Health), 17 PERI ¶ 3006 (IL LRB-LP 2001) (No animus found where Respondent terminated charging party's employment when charging party failed to improve several months after Respondent informed her of her performance deficiencies); but see Cnty. of Williamson and Sheriff of Williamson Cnty, 14 PERI ¶ 2016 (IL LRB-SP 1998) (finding Respondent's reason for the adverse action was pretextual where Respondent never told employee that the conduct for which he was disciplined was prohibited and where the Respondent had in fact permitted other employees to engage in such conduct without adverse consequences) and City of Evanston, 8 PERI ¶ 2001 (IL SLRB 1991) (employer's failure to tell employee, prior to performance evaluation, how he was failing to perform duties and refusal to respond to employee's inquiries about the evaluation afterward indicated animus).

[31] Notably, Duffy's failure to meet with Freeman one-on-one does not demonstrate Duffy's own animus towards Freeman's protected activity where Freeman attributed that behavior to the complaint he filed against Duffy with the Human Rights Commission, and not to his protected activity. See Police Dep't Educ. and Training Academy, 20 PERI ¶ 95 (IL LRB-LP 2004) (Employee failed to prove retaliation for protected activity where she asserted the employer retaliated against her for other reasons, namely, a complaint she made against her supervisor for verbal and emotional abuse).

Second, the contents of Freeman's January 19, 2010, evaluation do not demonstrate pretext because there is no evidence that the Respondent padded the evaluation with incidents of poor performance that it could have raised earlier. Although this evaluation does contain reference to a 2009 date, as the Union asserts, it does not cite a failing that the Respondent should have noted earlier and instead describes a policy instituted in November of that year which Freeman had neglected to follow in the rating period at issue.

Third, the addendum to Freeman's final evaluation, based on the Respondent's interview of Freeman's subordinates, does not evidence pretext or animus because the Respondent had a reasonable basis for performing the interviews, conducted them in a reasonable manner, and did not fabricate the interviewees' responses. First, the Respondent reasonably initiated its interview of Freeman's subordinates because they were the only impartial observers who could verify or refute Freeman's formal accusation that Duffy interfered with Freeman's management of his subordinates' cases. Contrary to SEIU's contention, the interviews did not constitute a Respondent-initiated "witch hunt" because they were prompted by Freeman's own complaint. Next, the Respondent conducted the interviews in a reasonable manner by separately interviewing Freeman's subordinates, without Duffy present, to ensure independent and accurate answers. Contrary to SEIU's contention, the mere presence of two members of management during the interview does not demonstrate a coercive effect where the accused supervisor was not one of them, where there is no evidence that the Respondent threatened the investigators, and where the matter did not concern a pending unfair labor practice charge. Bd. of Educ. of the City of Chicago, 22 PERI ¶ 129 (IL ELRB E.D. 2006) (Pre-arbitration interview not deemed coercive where employer did not threaten employees with discipline if they failed to answer questions and where the employer restricted its questions to those necessary to prepare its case; distinguishing between interrogations concerning statements or affidavits given to Board agents which are inherently coercive). Finally, there is no indication that the Respondent fabricated the interviewees' responses because one investigator corroborated the addendum's contents at hearing. Investigator White testified that the addendum accurately reflected some of the issues that she raised with Smith and Rosenzweig during her interview. She further independently testified that Freeman was sometimes not around because of personal issues, did not respond at all to her questions, and occasionally made her wait for his responses when he did answer.[32]

[32] SEIU's brief omits this testimony.

Thus, the Respondent's addendum to Freeman's final evaluation, which references such failings, does not evidence pretext or animus.

Finally, Rosenzweig's letter of recommendation does not undermine the legitimacy of these evaluations or Respondent's decision to terminate Freeman's employment, based on that documented poor performance, because Rosenzweig wrote the letter before she knew Freeman's performance had declined. Here, Rosenzweig drafted her positive letter on June 1, 2009 at a time when the Respondent had rated Freeman's performance good overall. By July, however, Rosenzweig's opinion of Freeman changed because she met with Freeman's superior and discussed his January-June 2009 performance evaluation which rated him marginal overall.[33] Accordingly, Rosenzweig's letter of recommendation is consistent with her knowledge of Freeman's performance up to that point and does not call into question the actions taken by the Respondent after Freeman's performance deteriorated.

Thus, SEIU failed to establish a prima facie case that the Respondent retaliated against Freeman, in violation of Section 10(a)(2) and (1) of the Act, when it issued Freeman negative evaluations and terminated his employment because SEIU has presented no evidence of union animus.

2. Section 10(a)(3) and (1) allegation

The Respondent did not violate Sections 10(a)(3) and (1) of the Act when it issued Freeman negative evaluations and terminated his employment because SEIU has not demonstrated that the Respondent took such action because of Freeman's testimony before the Board.

Section 10(a)(3) provides that "it shall be an unfair labor practice for an employer or its agents to discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition or charge, or provided any information or testimony under this Act." 5 ILCS 315 (2012). The same analysis set forth above for a Section 10(a)(2) allegation applies to a Section 10(a)(3) allegation, except that the Union must demonstrate that the employee in question engaged in the particular protected activity described in Section 10(a)(3) of the Act. Sheriff of Jackson Cnty., 14 PERI ¶ 2009 (IL SLRB 1998); Vill. of Ford Heights, 26 PERI ¶ 145

[33] The Respondent issued that evaluation to Freeman on September 3, 2009.

(IL LRB-SP 2010) (citing City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989) and applying the court's 10(a)(2) analysis to 10(a)(3)); Cook Cnty. Sheriff and Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB 1990).

Here, Freeman engaged in protected activity within the meaning of Section 10(a)(3) when he testified before the Board in support of the Supervising Investigators' representation petition on January 12, 2011. Next, Rosenzweig knew of Freeman's protected activity because she attended the hearing and testified on behalf of the employer. See City of Chicago, 28 PERI ¶ 86 (IL LRP-LP 2011) (the Chief Administrator of IPRA testified on the Employer's behalf to exclude the Supervising Investigators from the unit). Further, Freeman suffered an adverse employment action when the Respondent issued him negative evaluations and terminated his employment.

However, there is insufficient evidence to demonstrate that the Respondent took such action to retaliate against Freeman for his protected activity because the only evidence of suspicious circumstances here is the proximity between Freeman's testimony before the Board and the adverse actions. Proof of suspicious timing does not alone demonstrate that a respondent took adverse action against an employee because of an unlawful motive. Pace Suburban Bus Division v. Ill. State Lab. Rel. Bd., State Panel, 406 Ill. App. 3d 484, 498 (1st Dist. 2010) (timing alone is not enough to prove unlawful motivation).

As a preliminary matter, the Union has shown a temporal proximity between Freeman's testimony and the adverse actions. Freeman testified before the Board on January 12, 2010, and the Respondent issued Freeman two negative evaluations within one and two weeks of his protected activity, respectively (January 19 and 26, 2010). Further, Respondent decided to terminate Freeman on February 9, 2011, within one month of Freeman's testimony before the Board. See Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007) (three weeks between protected activity and adverse action sufficient to demonstrate suspicious proximity); Sarah P. Culbertson Memorial Hosp., 25 PERI ¶ 11 (IL LRB-SP 2009) ("few weeks" between employees' testimony before board and adverse action sufficient to demonstrate suspicious proximity); but see City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012) (one year gap between protected activity and adverse action does not demonstrate suspicious circumstances); City of Highland Park, 18 PERI ¶2012 (IL LRB-SP 2002) (four month gap between protected activity and adverse action not sufficiently close to demonstrate suspicious timing).

Nevertheless, SEIU has presented no other evidence to suggest that the Respondent acted out of animus towards Freeman's protected activity. As discussed above, SEIU has not shown that the Respondent treated Freeman disparately or that it offered pretextual and/or shifting reasons for its adverse actions. Further, SEIU has not argued that the record contains direct evidence of union animus or that the Respondent targeted union supporters. Under these circumstances, SEIU cannot meet its prima facie burden because proof of suspicious timing does not alone prove that the Respondent harbored an unlawful motive. Pace Suburban Bus Division, 406 Ill. App. 3d at 498 (timing alone is not enough to prove unlawful motivation), Cnty. of Cook and Sheriff of Cook Cnty., 28 PERI ¶ 155 (IL LRB-SP 2012)(Respondent did not violate the Act when it demoted employee less than a week after she engaged in protected activity where evidence demonstrated that employer was motivated solely by employee's unsatisfactory job performance); but see Cnty. of Williamson and Sheriff of Williamson Cnty, 14 PERI ¶ 2016 (IL LRB-SP 1998) (finding that discharge which occurred contemporaneously with employee's active participation in union and protected activities raised an inference of discriminatory motive where the Union also showed that Respondent targeted union supporters, committed several recent unfair labor practices, and attempted to have the employee expelled from contract negotiations).

Thus, SEIU failed to establish a prima facie case that the Respondent retaliated against Freeman, in violation of Section 10(a)(3) and (1) of the Act, when it issued Freeman negative evaluations and terminated his employment because SEIU has presented no evidence of the Respondent's animus towards Freeman's protected activity.

## V. CONCLUSIONS OF LAW

1. The Respondent did not violate Sections 10(a)(3), (2), and (1) of the Act when it issued Freeman negative evaluations and terminated his employment.

## VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the instant complaint be dismissed.

## 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 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 August, 2013**

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

/S/ *Anna Hamburg-Gal*

**Anna Hamburg-Gal**
**Administrative Law Judge**