

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

Donna Barnes,)	
)	
Charging Party)	
)	
)	Case No. L-CA-13-007
and)	
)	
County of Cook,)	
)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On July 9, 2012, Donna Barnes (Barnes or Charging Party) filed a charge with the Illinois Labor Relations Board’s Local Panel (Board), alleging that the County of Cook (County or Respondent) engaged in unfair labor practices within the meaning of Sections 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 October 5, 2012, the Board’s Executive Director issued a Complaint for Hearing. A hearing was conducted on December 4 and 5, 2013 and January 3, 2014, in Chicago, Illinois, at which time the Charging Party 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

The parties stipulate and I find that:

1. County of Cook is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act.
2. County of Cook is a unit of local government subject to the jurisdiction of the Board’s Local Panel pursuant to Section 5(b) of the Act.

3. County of Cook is a unit of local government subject to the Act pursuant to Section 20(b) of the Act.
4. At all times material prior to November 30, 2011, the Charging Party was a public employee within the meaning of Section 3(n) of the Act.
5. At all times material, the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME) has been a labor organization within the meaning of Section 3(i) of the Act.
6. On or about May 5, 2010, AFSCME filed a representation petition with the Board in Case No. L-RC-10-027 seeking certification as the representative of the Respondent's employees in the title of Nurse Supervisor I.
7. On or about August 24 and August 25, 2010, the Board conducted a hearing in connection with AFSCME's petition in Case No. L-RC-10-027.
8. The Charging Party testified at this hearing before the Board in Case No. L-RC-10-027.
9. On November 30, 2011, the Respondent laid off the Charging Party.
10. Associate Administrator of Nursing Ellen Costello, testified at the hearing regarding AFSCME's petition in Case No. L-RC-10-027. Costello testified for the County in opposition to AFSCME's petition to represent the Nurse Supervisor Is.
11. Nurse Supervisor II positions are not union positions.

II. ISSUES AND CONTENTIONS

The first issue is whether the Respondent violated Sections 10(a)(2) and (1) of the Act when it allegedly required the Charging Party to formally apply and interview for employment, after having laid her off, and failed and refused to reassign, rehire, or otherwise reemploy the Charging Party to retaliate against her for her active and visible support of AFSCME. The second issue is whether the Respondent violated Sections 10(a)(3) and (1) of the Act when, by that same alleged conduct, it retaliated against the Charging Party for her testimony before the Board on behalf of AFSCME.

Barnes asserts that the Respondent retaliated against her for engaging in protected activity when it refused to grant her a nursing position after it laid her off. In support, Barnes states that the Respondent knew of her protected activity because she testified at the Board

hearing. Further, Barnes asserts that the Respondent's unlawful motive is evident from both direct and circumstantial evidence.

According to Barnes, the Respondent's agents expressed animus towards union activity because they stated that the Respondent would not consider hiring unionized Oak Forest Nurse Supervisor Is (NS Is) for non-union nursing positions at Stroger Hospital ("Stroger"). In the same vein, Barnes asserts that the Respondent targeted union supporters by refusing to consider them for NS II positions. Further, Barnes argues that the Respondent offered pretextual reasons for refusing to hire her as a Stroger Nurse Supervisor II (NS II). First, Barnes claims that the Respondent falsely asserted that it had filled the position when in fact there were four vacant NS II positions left. Second, Barnes asserts that the Respondent hired a union-opponent for the position, even though she had less experience than Barnes, and later refused to consider Barnes for the vacancy once that employee left. Finally, Barnes argues that the Respondent failed to provide any legitimate non-discriminatory reason for refusing to hire Barnes as a Stroger NS II.

Barnes also notes that the Respondent treated her differently from similarly situated employees because it denied her a phone interview for a nursing position at Cermak Hospital and required her to complete a full formal interview process instead. Likewise, Barnes claims that the Respondent sabotaged Barnes's interview for a nursing position at Oak Forest Hospital because interviewer Cathy DiGangie directed the interview in a manner that handicapped Barnes.

The Respondent denies that it committed an unfair labor practice and asserts that it treated Barnes in the same manner as it treated all other NS Is by requiring Barnes to interview for open positions. The Respondent claims that it did not hire Barnes for an NS II position because she did not interview well and lacked the requisite certifications and experience. The Respondent notes that it offered Barnes a Clerk V position as part of the layoff/recall process but states that Barnes declined that position. Finally, the Respondent concludes that it did not violate the Act because it recalled Barnes into a position on October 2, 2013.

III. FINDINGS OF FACT

On or about May 5, 2010, AFSCME filed a representation petition with the Board in Case No. L-RC-10-027 seeking certification as the representative of the Respondent's employees

in the Nurse Supervisor I (NS I) title¹ at Oak Forest Hospital. NS I Sharon Coburn distributed authorization cards to other NS Is and signed one herself. NS Is Joy Vance and Barnes also signed authorization cards in support of AFSCME. Barnes testified that Arrenia Walker, Coburn, Florence Edmon, and Tia Gustafson were likewise involved in seeking to obtain AFSCME as the NS Is' representative.

Barnes testified that NS I Elaine O'Keefe did not support the union. Further, she stated that NS Is Robin Weaver and Kathleen Stadler did not sign authorization cards. Barnes recalled that sometime between 2007 and 2009, Weaver stated that "professionals don't need a union."

On September 28, 2010, the Board conducted a hearing in connection with AFSCME's petition in Case No. L-RC-10-027.² AFSCME subpoenaed Barnes to appear as a witness and to testify on AFSCME's behalf at the hearing. At hearing, Barnes testified that the NS I positions' duties were not managerial. Associate Administrator of Nursing Ellen Costello testified for the County in opposition to AFSCME's petition. At hearing, Costello testified that the NS I positions were managerial.

On January 11, 2011, the Illinois Labor Relations Board's Local Panel certified AFSCME as the NS Is' exclusive representative. The Board's written decision issued on May 3, 2011. Barnes noted that Weaver began to refer to AFSCME as "that fucking union" after the Union became certified as the NS Is' exclusive representative. However, she also testified that Weaver made such statements earlier, approximately 10-20 times between 2007 and 2011. Vance testified that Weaver stated she was not in favor of the Union.

In 2011, Chief Operating Officer of the Cook County Health and Hospital System developed a reorganization plan entitled "Strategic Plan, Vision 2015." As part of that plan, the County sought to downsize Oak Forest Hospital and convert it to a regional outpatient center. Pursuant to the reorganization, Oak Forest Hospital would employ only three supervisors.

On May 3, 2011, Barnes received a notice of layoff, which stated that the County would eliminate Barnes's position on May 20, 2011. A number of other NS Is including Joy Vance also received layoff notices at around the same time.

¹ Some witnesses use the terms Nurse Coordinator and NS I interchangeably. For example, Donna Barnes refers to her position as an NC I on her AFSCME selection sheet and Cathy DiGangie refers to the unionized NS Is as nurse coordinators.

² I take administrative notice of this fact.

AFSCME's seniority list is dated November 11, 2011. It provides that Arrenia Walker is the most senior, followed by Vance, Coburn, Florence Edmon, Arnette Jennings, Robin Weaver, and Barnes. Barnes is the least senior NS I on the list. Kathleen Stadler and Elaine O'Keefe do not appear on the seniority list.

Stroger and Oak Forest operate under separate budgets. Although O'Keefe and Stadler worked out of Oak Forest, the County compensated them out of the Stroger budget. The Oak Forest layoff did not affect individuals compensated under the Stroger budget.

The County permitted non-union Oak Forest Hospital employees, laid off pursuant to the reorganization, to select other County positions based on availability. However, the unionized NS Is could not choose to transfer to vacant positions because they were the only unionized NS Is in the County, and any vacant position was a non-union position. DiGangie testified that she was informed that the County could not transfer bargaining unit members into non-union positions. As a result, management encouraged Oak Forest NS Is to apply for positions throughout the County.

Sometime in August 2011, Barnes approached O'Keefe in the staffing office and stated "don't worry, we are going to get a job." According to Barnes, O'Keefe stated "I don't need no Union because I got me a job at Stroger."

Around that time, Barnes applied for an NS I position at Cermak. She did not receive this position. The County eliminated all NS I positions County-wide as a result of the reorganization. Accordingly, the position to which Barnes applied was no longer available.³

The County delayed the layoffs until August 31, 2011. The displacements followed the parties' contract.

In November 2011, Barnes tried to obtain an NS II position at Cermak Hospital. Human Resources Specialist Chris Taggart informed Barnes that she could apply to this position by performing a phone interview.

On November 28, 2011, Barnes arrived at the Human Resources Department and waited from 7 am to 7 pm for an interview. Robin Weaver and Joy Vance also waited for phone interviews that day. Vance additionally applied online as the County had directed her.

³ Barnes testified that the County eliminated the NS I positions, Countywide, because they were associated with the Union. In fact, the NS Is at Oak Forest were the only unionized NS Is in the County.

That same day, the County offered Barnes a Clerk V position pursuant to her layoff and recall rights. Barnes signed an AFSCME selection sheet stating that she declined to select the vacancy and that she would therefore be laid off effective November 30, 2011. The Clerk V position paid substantially less than the NS II position. Barnes declined the Clerk V position because she preferred to take an NS position that paid more.

On November 29, 2011, Barnes and Weaver returned to wait for phone interviews. Weaver interviewed that day, but Barnes did not. At 7 pm, a County agent informed Barnes that she should come back the following day for her interview.

On November 30, 2011, Barnes again returned to wait for an interview. Taggart explained that Barnes could not perform a phone interview because the County interviewer told him that Barnes should be subject to an in-person interview and that she was required to undergo "the entire interview process." There is no evidence as to the identity of the County interviewer. Taggart further informed Barnes that she was laid off and that there was no guarantee that she would obtain another County position.

Some time at the end of November or early December 2011, Vance informed Costello that she wished to stay at Oak Forest, as was her right under the contract.⁴ Costello told Vance that she did not have sufficient credentials to remain at Oak Forest because she did not have Advanced Cardiac Life Support certification. When Vance replied that she did in fact have that certification, Costello informed Vance that she had no record of it. The following day, Costello informed Vance that she did not have another qualification for the Oak Forest position. Vance subsequently obtained it.

On December 1, 2011, Costello locked Vance's office and instructed her secretary to tell Vance to leave the building and return home until further notice. Vance asked security to open her office door and discovered that someone else had moved into her office. The next day, Vance informed the Union that Costello was harassing her.

Around this time, Vance considered the possibility of taking an open NS I position at Stroger. She stated that there was hostility between her, Costello, and the Union during the week of November 30, 2011 and that she did not like "being in the middle of it." Director of Nursing at Stroger, Antoinette Williams, spoke with Vance over the phone to ascertain whether she

⁴ Vance was more senior than Weaver and could have bumped Weaver to remain an Oak Forest.

possessed some of the minimum qualifications for an open NS I position at Stroger. Williams determined that she did.

On Friday December 4, 2011, Vance decided to accept the open NS I position at Stroger. She testified that she took this position because of her interactions with Costello and “going back and forth with the Union.” Costello arranged for the transfer by calling the Director of Nursing at Stroger and speaking with Taggart. Vance transferred to Stroger on December 7, 2011 and worked there for a few weeks.

Vance arrived for orientation at Stroger a few weeks after starting work there. The individuals heading the orientation informed Vance that they had no record of her and told her she was “not supposed to be [there].” Costello testified that she understood that Vance could not take the position at Stroger because her former NS I position was a union position and the position she accepted by virtue of her contractual layoff and recall rights was a non-union position. Williams testified that during a conference call between HR and AFSCME she was informed that the County could not transfer union members into non-union positions. There is no evidence as to whether the statement was made by a union agent or an agent of the Respondent. DiGangie similarly testified Oak Forest NS Is could not simply pick vacant NS positions in other parts of the County hospital system and be transferred into those positions because “any vacant position was a non-union position, and we were told that you can’t take a bargaining unit member and transfer them into a non-union position.”

Sometime in December, Union representative Leslie Carter informed Williams that there was a vacant NS II position at Stroger in the medical/surgical unit. The position required the following minimum qualifications: (1) three years of nursing work experience; (2) two years of recent supervisory nursing experience; (3) graduation from an accredited school of nursing; (4) a Bachelor’s degree in nursing from an accredited college or university; and (5) current Illinois RN licensure in good standing, or valid license in another state and eligibility for an Illinois RN license. The Oak Forest NS I position, previously held by Barnes, likewise required a Bachelor’s degree in nursing from an accredited college or university, graduation from an accredited school of nursing, and four years of nursing experience. Further, the Oak Forest NS I position provided Barnes with qualifying experience for the NS II position at Stroger because it required her to oversee and direct subordinates for the requisite period of time.

The testimony conflicts with respect to Barnes's actions concerning the NS II position at Stroger. Barnes testified that she interviewed for the position over the phone with Williams on December 12, 2011. Further, she stated that Williams offered her the position after the interview and that she accepted it. Barnes also testified that Williams concluded the interview by saying "welcome aboard." Barnes explained that a couple of days later, Director of Human Resources Angela Boone called her and instructed her to fill out a formal application for the NS II position at Stroger. Barnes then applied for the position online.

Williams, on the other hand, testified that she could not remember whether she had a conversation with Barnes concerning a position at Stroger.⁵ Over the course of four consecutive questions by Respondent's counsel, Williams maintained that she did not remember whether she had had a conversation with Barnes concerning the NS II Stroger position. Williams never clearly denied that she had performed an interview with Barnes and never clarified her testimony despite repeated attempts by counsel to shed light on its meaning. Williams also testified that no one informed her that Donna Barnes sought a position at Stroger. She further stated that she could not remember receiving any formal application from Barnes for the NS II position at Stroger.⁶

DiGangie testified that the County only interviews candidates for NS positions when they meet the minimum qualifications. She stated that "HR qualifies them during the application process." The nursing directors then review the applications to ascertain whether the applicants meet the minimum qualifications. They interview those who are qualified for the position and choose the best candidate.

On January 9, 2012, Barnes interviewed for a medical/surgical NS I position at Oak Forest Hospital with Cathy DiGangie, Divisional Nursing Director for the Cook County

⁵ A: I don't remember a phone conversation with Donna Barnes.

Q: One way or the other, you don't remember?

A: I don't remember speaking to Donna Barnes about the position.

Q: And to the best of your recollection, you had no such phone interview with Ms. Barnes.

A: Yes, I do not remember.

Q: As opposed to maybe you did but you're not sure one way or the other, that's what I'm trying to clarify?

A: I do not remember speaking to Mrs. Donna Barnes about any position at Stroger Hospital....

⁶ Q: Do you recall getting any other applications coming from HR to you for NS II positions between November of 2011 until approximately July, summer of 2012, other than the three that you have mentioned?

A: I do not remember any more. I do not remember any more.

Ambulatory Community Health Network, south suburban clinics.⁷ Barnes felt she did not perform well at the interview. DiGangie testified that Barnes was not able to answer some of her questions and that she scored in the bottom third of the nine individuals who interviewed. Barnes also filled out an application for this position. Barnes asserted that DiGangie purposely asked her questions concerning subjects of which she had no knowledge. DiGangie testified that she asked Barnes questions concerning tasks relevant to the position for which Barnes interviewed. The position required knowledge of pediatrics, infants, and contraceptives. By Barnes's own admission, she did not answer the questions on those topics adequately. Barnes did not receive the position. The County did not ultimately fill this position because it upgraded all NS I positions to NS II positions, County-wide. As a result, the County reposted the vacancy at a later date under the new title.

On April 20, 2012, Barnes spoke to Geri Evans of Human Resources and told Evans that she was still "waiting to hear from them" concerning the NS II position at Stroger. Evans informed Barnes that the position had been filled. Barnes called Williams to confirm this information. Williams informed Barnes that the position was still open and told Barnes to call HR Director Paris Partee and Assistant Director Gladys Lopez for clarification. Barnes left messages for both Partee and Lopez. Two days later, Barnes reached Partee on the phone and Partee referred her back to Evans. Barnes left Evans messages but Evans never returned her calls. Barnes did not receive the NS II position at Stroger.

Williams testified that there were four open NS II positions at Stroger between November 2011 and July or November 2012. Williams further testified that the County had a strong need to fill those vacant NS II positions. The County contracted with an outside agency, Ellen Mark, during 2012 to fill some of the NS II positions at Stroger while searching for permanent employees. Williams testified that she preferred full-time employees to fill the NS II positions at Stroger rather than using outside contractors. Stroger managers also performed the work of NS IIs while the County searched for permanent nurses.

Stadler received an NS II position at Stroger after she completed the interview and application process. Weaver received an NS II position at Stroger after she completed the phone interview process. O'Keefe likewise received an NS II position at Stroger. Neither Coburn nor

⁷ DiGangie identified this position as an NS I position. Barnes recalled that it was an NS II position.

Walker received a position at Stroger. The County filled the last vacant NS II position at Stroger sometime between July and November 2012.

On October 2, 2013, Barnes accepted a position of Business Manager I at Stroger Hospital. She took this position pursuant to her recall rights.

IV. DISCUSSION AND ANALYSIS

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

The Respondent did not retaliate against the Charging Party in violation of Sections 10(a)(2) and (1) of the Act when it required the Charging Party to formally apply and interview for employment, and when it failed and refused to reassign, rehire, or otherwise reemploy her.

To establish a prima facie case that the employer violated Section 10(a)(2) of the Act, the charging party 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. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989). The charging party may demonstrate the 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 charging party establishes a prima facie case, the employer can avoid a finding that it violated the Act 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.

Here, Barnes engaged in protected activity when she signed an authorization card in support of AFSCME's organizing campaign sometime prior to May 5, 2010. Sarah D. Culbertson Memorial Hospital, 21 PERI ¶ 6 (IL LRB-SP 2005) (employee engages in protected activity when he signs an authorization card for union membership).

However, there is no evidence that the Respondent knew of Barnes's protected union activity, as it is defined in Section 10(a)(2) of the Act.⁸ First, there is no evidence that Barnes spoke of her support for AFSCME in the presence of County agents. See Cnty. of Du Page and DuPage Cnty. Sheriff, 26 PERI ¶ 98 (IL LRB-SP 2010) (no evidence that decision-makers were aware of charging party's support for the union even where the charging party spoke about union matters with other deputies, while in the same room with unidentified superior officers). Barnes's conversation with O'Keefe in the staffing office is not evidence of her open support for the union because Barnes merely reassured O'Keefe that the NS Is would receive jobs after the layoffs. Second, there is no evidence or argument that the small plant doctrine applies, such that the Respondent's knowledge of Barnes's protected activity may be inferred. But see City of Sycamore, 11 PERI ¶ 2002 (IL SLRB 1994)(small plant doctrine applies where respondent's department qualifies as small work site and when the employee engages in union activity in a manner, and at such times, that an employer may be presumed to have noticed them); Champaign Cnty. Clerk of the Circuit Court, 8 PERI ¶ 2025 (IL SLRB 1992); Vill. of Glenwood, 3 PERI ¶ 2056 (IL SLRB 1987); Cnty. of Peoria, 3 PERI ¶ 2028 (IL SLRB 1987); see also Rockford Township Highway Dep't v. Ill. State Labor Rel. Bd., 153 Ill. App. 3d 863, 881 (1987) (in cases of mass discharge "the finding of an unlawful motivation does not depend on the employer's knowledge that each of the discharged employees was engaging in union activity where the respondent's entire pattern of conduct bespeaks an attempt to thwart the organizing efforts"; also applying the small plant doctrine).

Thus, the Charging Party failed to demonstrate that the Respondent retaliated against her, in violation of Section 10(a)(2) and (1) of the Act, because there is no evidence that the Respondent knew of the Charging Party's protected activity.

⁸ Barnes's decision to testify on behalf of AFSCME at the Board's representation hearing is analyzed separately under Section 10(a)(3).

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

The Respondent violated Sections 10(a)(3) and (1) of the Act when it failed and refused to rehire the Charging Party into the Stroger NS II position. However, the Respondent did not violate Sections 10(a)(3) and (1) of the Act when it denied Barnes a phone interview for the Cermak NS II position. Likewise, the Respondent did not violate those provisions of the Act when it allegedly refused to recall or reassign the Charging Party to a position comparable to the one she held prior to the layoff.

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 Charging Party must demonstrate that she 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 (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, Barnes engaged in protected activity within the meaning of Section 10(a)(3) of the Act when she testified before the Board on September 28, 2010 in support of AFSCME’s petition to represent the Oak Forest NS Is.

Next, County agent Costello knew of Barnes’s protected activity because she attended the hearing and testified on behalf of the employer. Further, this knowledge is imputed to other County decision makers in the absence of affirmative evidence that they did not know of Barnes’s testimony before the Board. See Macon Cnty. Bd. and Macon Cnty. Highway Dep’t., 4 PERI ¶ 2018 (IL SLRB 1988) (a manager's or supervisor's knowledge of an employee's union activities will ordinarily be imputed to the employer, but a finder of fact may not do so in light of affirmative evidence to the contrary). Accordingly, County decision-makers knew of Barnes’s testimony before the Board.

Further, Barnes suffered an adverse employment action when the Respondent failed and refused to reassign, rehire, or otherwise reemploy the Charging Party to a position comparable to the one she held prior to the layoff. To prove an adverse employment action, the Charging Party

must show that there was some effect on the employee's terms and conditions of employment. Chicago Park Dist. (Grant Park Music Festival), 26 PERI ¶ 76 (IL LRB-LP 2010) (change in hours supported finding of adverse action because it affected employee's terms and conditions of employment). While the definition of an adverse employment action is generous, the Charging Party must show either some qualitative change in the terms or conditions of employment or some sort of real harm. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012); Dep'ts of Cent. Mgmt. Serv. and Agriculture, 6 PERI ¶ 2012 (IL SLRB 1990) (refusal to recall employee constitutes an adverse action). Nevertheless, an action does not need to have an adverse tangible result or adverse financial consequences to constitute adverse employment action sufficient to satisfy the third prong of the 10(a)(2)-type analysis. City of Chicago v. Illinois Local Labor Rel. Bd., 182 Ill. App. 3d 588, 594-95 (1st Dist. 1988); Chicago Transit Auth., 30 PERI ¶ 9 (IL LRB-SP 2013); City of Lake Forest, 29 PERI ¶ 52; Circuit Court of Winnebago, 17 PERI ¶ 2038 (IL LRB-SP 2001) (absence of negative financial consequences resulting from charging party's transfer did not defeat her Section 10(a)(2) claim). Here, the County's failure to rehire, recall, or otherwise reemploy Barnes to a position comparable to the one she held prior to the layoff constitutes an adverse employment action because it deprived Barnes from earning the level of compensation she enjoyed as an NS I.

However, Barnes did not suffer an adverse employment action when the Respondent informed Barnes on November 30, 2010 that she would be required undergo "the entire interview process" in-person because Barnes did not demonstrate that she suffered any real harm as a result. First, there is no evidence that the Respondent subjected Barnes to heightened scrutiny when it informed her that she would be required to undergo the "entire interview process." Indeed, there is no evidence that other applicants did not undergo the "entire interview process," albeit by telephone. Finally, there is no evidence or allegation that the Respondent ultimately denied Barnes an interview or prevented her from applying for this position.⁹ Thus, the Respondent's failure to permit Barnes to perform a phone interview does not constitute an adverse employment action because the Charging Party has failed to show that it adversely affected her prospects for obtaining the position.

⁹ ALJs at the National Labor Relations Board have found a respondent's denial of an interview to a charging party to constitute an adverse employment action. See Lancaster Fairfield Comm. Hosp., 1992 WL 1465356 (N.L.R.B. Div. of Judges).

3. County's Motivation for the Adverse Actions

i. Denial of the phone interview

There is no need to examine the County's motivation for its decision to deny Barnes a phone interview for the Cermak NS II position because this decision does not constitute an adverse employment action, as noted above. Accordingly, Respondent's decision to deny Barnes a phone interview does not violate the Act.

ii. Failure to Recall

Barnes has failed to demonstrate that the County acted with an unlawful motive when it refused to recall her into a position comparable to the one she held prior to the layoff.

First, there is no direct evidence of animus, even though Costello and Williams stated they could not transfer bargaining unit members into non-bargaining unit NS II positions. First, the agents' motivation for making these statements stems from instructions they received from a third party and therefore does not represent any personal anti-union bias. Indeed, both witnesses testified that they "were told" of this rule. More importantly, the ambiguity as to the source of these instructions makes it impossible to determine whether the witnesses acted as mouthpieces for a biased Respondent. County witness Williams attributes the instruction to a conference call between HR and AFSCME, in which she participated. Yet, there is no evidence that the instruction for this course of action originated with HR because the Charging Party failed to show that the statement was not made by an AFSCME agent. Cnty. of Lake, 28 PERI ¶ 67 (IL LRB-SP 2011) (Union bears the burden of proving the factual allegations in an unfair labor practice complaint). As such, Costello's and Williams's statements cannot indicate animus where the motivation for making them can be traced to instructions from a third party, but where the identity of that third party could as easily be an agent of the Union as of the County.

Second, Barnes has not demonstrated that the County treated her differently from similarly situated bargaining unit employees because she has identified no employee who is comparable to her. Where an employee is unique with respect to her employment circumstances, she cannot demonstrate disparate treatment based on her protected activity. Am. Fed. of State, Cnty. and Mun. Empl., Council 31 v. Ill. State Labor Rel. Bd., 175 Ill. App. 3d 191, 198 (1st Dist. 1988); Vill. of Oak Park, 28 PERI ¶ 111 (IL LRB-SP 2012)(employee could not

demonstrate disparate treatment where he had “comparatively unique circumstances and background”); City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997) (charging party bears the burden of demonstrating employees who engaged in protected activity received disparate treatment). Seniority is the relevant factor in determining employees’ recall rights. Here, Barnes has a unique seniority date and therefore cannot show disparate treatment.

Third, Barnes did not show that the County targeted Union supporters by refusing to transfer or recall them into nursing positions. In fact, the County treated employees equally in this regard because it did not recall or transfer any NS Is into NS II positions. Although the County did fill some Stroger positions with former Oak Forest NS Is, it rehired them after they completed the application process and did not grant them the positions pursuant to a recall or transfer.¹⁰ Thus, there is no targeting of Union supporters here. City of Chicago, 28 PERI ¶ 52 (IL LRB-LP 2011) (no retaliation or disparate treatment found where charging parties were treated the same as other employees).

Next, there is no proximity between the adverse action and Barnes’s protected activity. The County’s refusal to recall Barnes into a comparable position to the one she held prior to the recall occurred after November 30, 2011, over a year after her testimony before the Board on September 28, 2010. Accordingly, the adverse action is too far removed from Barnes’s protected activity to warrant an inference of unlawful motive. See Cnty. of Cook (Mgmt. Info. Servs.), 11 PERI ¶ 3012 (IL LRB-LP 1995) (proximity in time not found where termination occurred four months after employee’s last concerted activity).

Finally, the County offered an unshifting and non-pretextual reason for refusing to recall Barnes into a comparable nursing position because it suggested that there were no such positions available to Barnes through the recall process. The County explained that it eliminated the NS I class and that it could not recall NS I bargaining unit members into NS II, non-bargaining unit positions. Moreover, the County consistently held to this position. Consequently, the County’s proffered reason for taking the adverse action fails to show that the County acted out of animus.

Thus, the County did not violate Section 10(a)(3) and (1) of the Act when it failed and refused to recall Barnes into a position comparable to the one she held prior to the layoff.

¹⁰ Although the County initially transferred Vance into non-union Stroger nursing position by virtue of her recall rights, the County informed her that the transfer was a mistake and that she would be required to interview for the NS II positions along with other Oak Forest NS Is.

iii. Failure to rehire or reassign or otherwise reemploy

1. Oak Forest NS I Position

Barnes has failed to demonstrate that the County acted with an unlawful motive when it refused to hire Barnes into the Oak Forest NS I position.

First, there is no direct evidence of animus. Contrary to Barnes's contention, and as discussed above, statements made by Costello and Williams concerning the transfer of bargaining unit NS Is into non-bargaining unit positions is not indicative of an unlawful motive.

Second, the County followed its hiring procedures and Barnes has not shown that the process was designed to discourage union support or to discriminate against union supporters. Chicago Park Dist., 16 PERI ¶ 3008 (IL LLRB 1999) (employee must show that the hiring process was discriminatory or must show animus through other means).

Third, there is no evidence of disparate treatment because Barnes introduced no information concerning other applicants for this position. It is therefore impossible to perform an analysis of comparables or similarly situated employees. Am. Fed. of State, Cnty. and Mun. Empl., Council 31, 175 Ill. App. 3d 191, 198 (1st Dist. 1988); City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997) (charging party bears the burden of demonstrating employees who engaged in protected activity received disparate treatment).

Contrary to Barnes's contention, there is no evidence that DiGangie sabotaged Barnes's interview for the Oak Forest position by purposefully asking her questions to which she would not know the answers. Rather, DiGangie testified that she asked Barnes questions relevant to the position for which Barnes interviewed. Barnes confirmed that the position required knowledge of pediatrics, infants, and contraceptives, but admitted that she did not provide adequate answers to the questions posed on those topics. Thus, DiGangie's conduct at the interview does not demonstrate that she harbored animus towards Barnes's protected activity.

Finally, the County provided unshifting and non-pretextual reasons for refusing to hire Barnes into the Oak Forest NS I position: Barnes was unqualified and the County's reorganization eliminated that position. First, the County explains that Barnes was unqualified for the position because she scored in the bottom third of applicants. Pace-West Division, 8 PERI ¶ 2023 (IL SLRB 1992) (charge of discriminatory failure to promote was dismissed where charging party was not qualified for the position and where there was no evidence that the promotional test was administered to adversely affect him). Second, the County asserts that it

eliminated all NS I positions pursuant to the reorganization and therefore hired no one for that job. Notably, the reorganization itself was legitimate because it had broad affects on the County hospital systems which were not limited to Barnes or union members. Although the reorganization eliminated all NS I positions, only the Oak Forest NS Is were unionized. Vill. of Schaumburg (Police Dep't), 29 PERI ¶75 (IL LRB-SP 2012) (reorganization which affected union employees was deemed consistent with employer's other conduct and legitimate when it involved both union and non-union positions). Consequently, the County's reasons fail to demonstrate that the County acted with an unlawful motive because they are unshifting and legitimate.

Thus, the County did not violate Section 10(a)(3) and (1) of the Act when it failed to hire Barnes into the Oak Forest NS I position.

2. NS II Position at Stroger

The County acted out of animus towards Barnes's protected activity when it failed to rehire Barnes into the Stroger NS II position.

This case requires two preliminary findings: One concerns Barnes's threshold qualifications for the position—a matter of fact. The other concerns the sequence of events surrounding Barnes's application for the position—a matter of credibility.

First, Barnes met the announced or generally known requirements of the Stroger NS II position because the Oak Forest NS I position she formerly held required the same educational and licensing credentials as the NS II position for which she applied. Further, Barnes likewise met the NS II position's experience requirements because she acted in a supervisory capacity as an Oak Forest NS I for well over three years. See FES (A Division of Thermo Power) ("FES"), 331 NLRB 9 (2000) (in refusal to hire cases, charging party must initially prove that she had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer did not adhere uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination).

Second, Barnes's account of her interview and application process is more credible than Williams because Barnes's testimony is clear and unequivocal while Williams's is not. Accordingly, the preponderance of the evidence shows that Barnes received an offer of

employment from Williams after her interview and that Barnes followed the interview with an online application. Here, Barnes clearly stated that she interviewed with Williams on December 12, 2011 by phone for the Stroger NS II position, that Williams offered her the position after the interview, and that she accepted it. Barnes further notes that Williams concluded the interview by telling Barnes, “welcome aboard.” Barnes additionally stated that she followed her phone interview with a formal application online according to the specific instructions she received from Director of Human Resources Angela Boone. By contrast, Williams’s testimony concerning this event was unclear, despite counsel’s attempt to clarify it; further, Williams’s memory was faulty. Williams repeatedly testified that she “could not remember” whether she had spoken with Barnes on the phone concerning the Stroger NS II position. Similarly, Williams stated that she “could not remember” receiving any formal application from Barnes concerning the NS II position. Yet, Williams never denied that she conducted an interview of Barnes for the NS II position, that she offered Barnes the position over the phone, that she welcomed Barnes “aboard,” or that Barnes accepted the position. The clearest part of Williams’s testimony was her blanket assertion that no one ever informed her that Barnes sought a position at Stroger. However, given the hazy character of Williams’s earlier testimony, I credit Barnes to the extent that the testimonies of Barnes and Williams conflict.¹¹

In light of these preliminary findings, the County’s unlawful motivation is evidenced by its disparate treatment of Barnes, the suspicious circumstances that surrounded its refusal to rehire her, and the inconsistencies between the County’s actions in this regard and its concurrent actions.

First, the County treated Barnes disparately from similarly situated employees because it revoked its offer of employment to Barnes but did not revoke the offers extended to applicants who did not testify before the Board. Barnes is similarly situated to O’Keefe, Stadler, and Weaver, because she completed a successful phone interview, submitted an online application, and received an offer of employment for the Stroger NS II position. Of those nurses, only Barnes testified on AFSCME’s behalf at the representation hearing in Case No. L-RC-10-027.¹² Thus, the County disparately treated Barnes when it failed to rehire Barnes into the Stroger NS II

¹¹ Notably, the County never argued on brief that the Board should credit Williams’s testimony over Barnes’s. In fact, the County does not even point to the conflict in the testimonial evidence, let alone attempt to resolve it.

¹² I take administrative notice of this fact.

position because the only relevant distinguishing factor between Barnes and the successful applicants was Barnes's testimony before the Board.

Contrary to the County's anticipated contention, the applicants' seniority dates do not serve as a basis for distinction because seniority did not factor into the hiring decision. The applicants for the NS II Stroger position did not receive their positions as result of their contractual recall rights and instead were selected and hired, irrespective of their seniority dates. Accordingly, the fact that Barnes was the least senior of the Stroger NS II applicants is immaterial to this analysis.

Similarly, the source of the applicants' compensation while working as NS Is at Oak Forest does not serve to distinguish Barnes from the others. Although the County rehired Oak Forest NS Is who had been compensated out of the Stroger budget (O'Keefe and Stadler), the County also hired nurses who had been compensated out of the Oak Forest budget (Weaver). According, the fact that the County compensated Barnes out of the Oak Forest budget does not justify the County's decision to revoke its offer of employment to Barnes.

Finally, the fact that Barnes submitted her online application after her interview, rather than before, likewise does not serve as a distinguishing factor because the County did not view this difference as relevant at the time. Indeed, Williams interviewed Barnes, offered her the position, and welcomed her aboard, even though she had not yet submitted an online application. Accordingly, the County demonstrated that it viewed the online application as a mere formality in Barnes's case and not a prerequisite to granting her an interview and offering her the position.

In sum, the County disparately treated Barnes when it extended then revoked its offer of employment for the NS II position at Stroger because Barnes was the only applicant who testified on behalf of AFSCME at the Board hearing and the County revoked no other offers of employment extended to the other similarly situated NS Is who applied for the Stroger NS II position.

In addition, the County revoked Barnes's offer of employment for the NS II Stroger position under suspicious circumstances because it never explained its decision to Barnes. An employer's failure to provide the Charging Party with an explanation for the adverse employment action supports a finding of animus. Cnty. of DuPage and DuPage Cnty. Sheriff, 30 PERI ¶ 115 (IL LRB-SP 2013) (Respondent's failure to explain its reason for removing employee from special operations unit and continued failure to provide him with an explanation

for the adverse action demonstrated animus); City of Evanston, 8 PERI ¶ 2001 (IL SLRB 1991) (Respondent's failure to provide an explanation for Charging Party's removal, implemented just days after he engaged in protected activity, supported a finding of animus); Cnty. of DeKalb, 6 PERI ¶ 2053 (IL SLRB 1990) (rejecting employer's justification that he did not give a written reason for employee's discharge because he was not a labor lawyer). Here, Barnes inquired into the status of her position at Stroger on April 20, 2012, in a phone call with Evans. Although Evans informed Barnes that the position had been filled, Evans never explained why the County had filled the position with another applicant when Williams had earlier offered the position to Barnes.¹³

Similarly, the County likewise revealed its unlawful motivation by taking action that was inconsistent with its other, concurrent actions. Inconsistencies between an employer's reasons for the adverse action and other actions of the employer suggest animus. Cnty. of DeKalb and State's Attorney of DeKalb County, 6 PERI ¶ 2053. Here, the County revoked its offer of employment to Barnes at a time when the County had an admittedly "strong need" to fill the vacant Stroger NS II position. Indeed, Stroger managers were performing NS II duties at the time. Further, the County had hired an outside contractor to perform NS II work, though Williams stated that the County preferred permanent employees to contractors. Thus, it is suspect that Williams initially deemed Barnes qualified for the position ("welcome aboard"), yet revoked that offer of employment despite the County's stated need and preference for permanent employees.

Further, although there is no close proximity between Barnes's protected activity (September 2010) and the adverse action (April 20, 2012), this alone does not doom her case in light of the remaining evidence because timing alone is just one factor in analyzing an employer's motive in taking an adverse employment action. North Shore Sanitary Dist. v. Illinois State Labor Rel. Bd., 153 Ill. App. 3d 863, 897-898 (1994) (discharges that occurred one and three years after the employees' protected activity nevertheless violated the Act where the employer exhibited a pattern of conduct, including disparate treatment, that demonstrated union animus); see also City of Burbank, 128 Ill. 2d at 346. Here, the suspicious circumstances surrounding the County's decision to revoke its offer of employment to Barnes, combined with

¹³ Contrary to Barnes's assertion, there is no evidence that Evans lied when she told Barnes that the County had filled this position. Rather, it is equally likely that Evans was simply mistaken.

its disparate treatment of Barnes demonstrates animus towards Barnes's protected activity, even though the adverse action is temporally removed from the protected activity.

Contrary to the County's contention, the County's decision to recall Barnes on October 2, 2013 pursuant to the County's contract with AFSCME does not demonstrate that it acted lawfully with respect to its refusal to hire Barnes into the Stroger NS II position. Cnty. of Jersey, 7 PERI ¶ 2023 (IL SLRB 1991) (the fact that Respondent properly followed the procedure outlined in the parties' contract regarding layoff and discharge did not affect the Respondent's motive for taking the adverse action at issue); See also Bd. of Trustees of Southern Ill. University-Carbondale, 21 PERI ¶ 57 (IL ELRB 2005) (employer can still be found to have an unlawful motive even where the employer adhered to the collective bargaining agreement).

Thus, Barnes has satisfied her prima facie case burden and the County must now present a legitimate business explanation for taking the adverse action, upon which it relied.

iv. The County's Explanation

The County has provided no legitimate business reason for refusing to hire Barnes into the NS II position.

Contrary to the County's contention, Barnes was in fact qualified for the position because she met its threshold eligibility requirements and received an offer of employment from Williams.

In light of this evidence, the County cannot justify its refusal to hire Barnes based on Barnes's failure to file an application prior to the interview. The Board has held that an employee's failure to follow certain protocols must be viewed in light of the Respondent's own conduct. Where a Respondent effectively informs an employee of the futility of his actions, or otherwise indicates that it expects an employee to deviate from established practice, it cannot then rely on the employee's failure to justify the adverse action. Vill. of Barrington Hills, 29 PERI ¶ 15 (IL LRB-SP 2012) (Respondent could not premise its refusal to reimburse employee for educational expenses on his failure to file requisite forms when it "effectively informed him" that submitting them would be fruitless). Here, the Respondent effectively informed Barnes that it did not matter that she failed to complete the online application prior to the interview—as protocol required—because it granted Barnes the interview anyway. The County could not have

expected different conduct from Barnes where it essentially condoned the course of action she undertook.

Thus, Barnes demonstrated, by a preponderance of the evidence that the County retaliated against her for testifying before the Board by refusing to rehire her as an NS II at Stroger, in violation of Sections 10(a)(3) and (1) of the Act.

V. CONCLUSIONS OF LAW

1. The County violated Sections 10(a)(3) and (1) of the Act when it failed and refused to rehire the Charging Party to a position comparable to the one she held prior to the layoff, in order to retaliate against her for her testimony before the Board on behalf of AFSCME.
2. The County did not violate Sections 10(a)(3) and (1) of the Act when it required Barnes to formally apply and interview for employment, after having laid her off, and failed and refused to recall her to a position comparable to the one she held prior the layoff.
3. The County did not violate Sections 10(a)(2) and (1) of the Act by requiring Barnes to formally apply and interview for employment, after having laid her off, and when it failed and refused to reassign, rehire, or otherwise reemploy the Charging Party.

VI. RECOMMENDED ORDER

- 1) Cease and desist from:
 - a) Retaliating against Donna Barnes, or any of its other employees, for engaging in union or protected concerted activity.
 - b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act.
- 2) Take the following affirmative action necessary to effectuate the policies of the Act:
 - a) Offer Donna Barnes the NS II position at Stroger, which the County initially offered her in December 2011, or a substantially equivalent position.
 - b) Make Barnes whole for any losses resulting from the County's retaliatory refusal to rehire Barnes into the Stroger NS II position, plus seven percent interest per annum.

- c) Post, for 60 consecutive days, at all places where notices to employees are normally posted, signed copies of the attached notice. The Respondents shall take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.
- d) Notify the Board in writing, within 20 days of the date of this decision of the steps Respondent has taken to comply herewith.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 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 28th day of April, 2014

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

/S/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**

NOTICE TO EMPLOYEES

FROM THE ILLINOIS LABOR RELATIONS BOARD

Case No. L-CA-13-007

The Illinois Labor Relations Board, Local Panel, has found that the County of Cook has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from retaliating and discriminating against Donna Barnes, or any of our other employees, for engaging in union or protected concerted activity.

WE WILL cease and desist from in any like or related manner, interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL offer employee Barnes the NS II position at Stroger that we initially offered her in December 2011, or a substantially equivalent position, and make her whole in accordance with this decision, for any loss of earnings she may have suffered because of the retaliatory refusal to rehire her, including back pay plus interest at a rate of seven percent per annum.

DATE _____

County of Cook,
(Employer)

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor

Springfield, Illinois 62702

(217) 785-3155

160 North LaSalle Street, Suite S-400

Chicago, Illinois 60601-3103

(312) 793-6400

**THIS IS AN OFFICIAL GOVERNMENT NOTICE
AND MUST NOT BE DEFACED.**
