

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

Kevin Sroga,)	
)	
Charging Party)	
)	
)	Case No. L-CA-13-023
and)	
)	
Forest Preserve District of Cook County,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On September 13, 2012, Charging Party, Kevin Sroga, filed a charge with the Local Panel of the Illinois Labor Relations Board (Board) in Case No. L-CA-13-023, alleging that Respondent, Forest Preserve District of Cook County (Employer or District), engaged in unfair labor practices. On December 4, 2012, the Board’s Executive Director issued a Complaint for Hearing alleging that the Respondent violated Section 10(a)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act). Respondent filed a timely answer.

On July 12, 2013, the Charging Party filed a Request for Appointment of Counsel pursuant to Section 5(k) of the Act and Section 1220.105 of the Board Rules and Regulations, 80 Ill. Admin. Code Part 1200 through 1300 (Rules). A hearing on the matter was conducted on June 11, 2014, in Chicago, Illinois. The Charging Party and Respondent presented evidence through witness testimony, documentary exhibits, oral argument and written briefs. After full consideration of the parties’ stipulations, evidence, arguments and briefs, I recommend the following.

I. PRELIMINARY FINDINGS

The Charging Party and the Respondent stipulate, and I find, as follows:

1. The Forest Preserve District of Cook County is a public employer within the meaning of Section 3(o) of the Act.
2. During the time he worked for the Respondent, Kevin Sroga was a public employee within the meaning of Section 3(n) of the Act.
3. The Forest Preserve District of Cook County is a unit of local government under the jurisdiction of the Local Panel of the Illinois Labor Relations Board pursuant to Section 5 of the Act.
4. Kevin Sroga's direct supervisor was Recreation Supervisor II, John Jekot.
5. John Jekot's direct supervisor was Director of Recreation, Volunteer Resources and Permits, Daniel Betts.
6. On August 23, 2012, Kevin Sroga met with the Special Assistant to the Superintendent for Labor Matters, Lisa Lee.
7. On August 24, 2012, Kevin Sroga met with John Jekot and Daniel Betts.
8. On August 24, 2012, Sroga was given a letter indicating his employment was terminated, effective that day.

II. ISSUES AND CONTENTIONS

The Charging Party alleges that the Respondent violated Section 10(a)(1) of the Act when it terminated him in retaliation for engaging in protected activity. The Charging Party claims that he engaged in protected concerted activity when he talked to the lifeguards at Whealan Aquatic Center about organizing and forming a union on at least three occasions during the summer of 2012. The Charging Party argues that the Respondent was aware of Sroga's activity because a

lifeguard twice told Sroga's supervisor, John Jekot, that Sroga was trying to organize the lifeguards. The Charging Party alleges that the Respondent possessed anti-union animus because when Jekot was told about Sroga's protected activity the second time, he became angry and vowed Sroga would do no such thing. The Charging Party claims that the Respondent's reasons for firing Sroga are all pre-textual and were manufactured in an attempt to justify Sroga's termination because he was truly terminated in retaliation for his protected activity.

The Respondent alleges that it did not violate Section 10(a)(1) of the Act when it terminated Sroga. The Respondent argues that none of their agents were aware of Sroga's protected activity before the decision was made to terminate him. The Respondent also argues that they had many legitimate business reasons to terminate Sroga and his numerous performance deficiencies are the sole reason he was terminated. The Respondent claims that even if they terminated Sroga, in part, because of his protected activity, they would have terminated him anyway because he committed numerous actions throughout the summer that endangered the public and damaged District property.

III. FINDINGS OF FACT

The Forest Preserve District of Cook County (Employer or District) operates three Aquatic Centers that operate from on or before Memorial Day until on or after Labor Day each year. In the summer of 2012, the District employed Daniel Betts in the title of Director of Recreation, Permits and Volunteer Resources. Betts' job duties included managing the four divisions of Recreation, Permits, Concessions and Volunteer Resources. In the summer of 2012, the District employed John Jekot in the title of Recreation Supervisor II in the Recreation Division. Jekot reported directly to Betts and his job duties included overseeing the operations at the three Aquatic Centers. Each Aquatic Center had an Aquatic Center Manager, Lifeguards, a Head

Lifeguard (also referred to as a Lifeguard II) and Cashiers. These employees were all seasonal and probationary employees who worked for approximately three months when the Aquatic Centers were open. Being a probationary employee meant that the District could terminate them without notice or cause.

In the summer of 2011, the District hired Kevin Sroga in the job title of Lifeguard I at the Whealan Aquatic Center. Sroga worked as a lifeguard for the Chicago Park District from 1994 to 2000 and held many certifications necessary to work as a lifeguard. Sroga was certified by the Illinois Department of Public Health (IDPH) as a lifeguard and held certifications in safety, first aid, cardio-pulmonary resuscitation (CPR) and scuba diving. Sroga was also certified as an Emergency Medical Technician (EMT) and as a Certified Pool Operator (CPO). Before Sroga began work for the District in the summer of 2011, he attended a training and orientation session where the District stated that employees were expected to work 40 hours per week. Because of this expectation and to ensure availability, all employees were forbidden from working at another job that might require them to work more than 20 hours a week.

Before the summer of 2012, Sroga applied for the job of Aquatic Center Manager at the Whealan Aquatic Center. Sroga had a 25 minute interview with Betts and Jekot and was hired for the job. The Aquatic Center Manager supervises and trains staff, interacts with customers, operates the pool by maintaining proper chlorine levels and other readings and ensures that the pool is clean and safe. In the summer of 2012, Jekot imposed new rules for lifeguards which Sroga was in charge of implementing. On days when it rained and the pool was not open, lifeguards were sent home but had to remain on call and available to return if the weather cleared up. On weekends, Jekot called Sroga about two to three hours before the pool closed to get a head count. Jekot asked how many swimmers were there and how many lifeguards were

working. If Jekot thought there were too many employees, he told Sroga to send half of them home. In 2011, lifeguards remained at the aquatic center on rainy days and still received pay while they trained or cleaned up the aquatic center. These new rules resulted in lifeguards often not working 40 hours per week, receiving less pay than they received in the past and less pay than they expected to receive in 2012.

Lifeguards complained to Sroga about these new rules and he talked to them about organizing to ensure that they worked 40 hours per week, even if it rained, and to a raise every year. Sroga said that when he worked for the Chicago Park District, the lifeguards got a raise every year. Sroga spoke to a group of lifeguards in the lifeguard room at the Whealan Aquatic Center on four separate occasions in the summer of 2012 - first in the middle of June, next in the end of June or beginning of July, then in the middle of July and finally during the first week of August. Sroga himself contacted three unions to find out what the employees needed to do to get union representation. One of the union's employees told Sroga to determine how many employees at the District's three Aquatic Centers wished to be represented by a union. To this end, Sroga asked the lifeguards to write "yes" or "no" on their pay stub when they picked it up at the end of a pay period in the middle of August. He talked to Patrick Brewton, the Aquatic Center Manager at the Cermak Aquatic Center and asked him to determine whether the lifeguards there wanted to be represented by a union. Sroga also asked Brewton to contact the Aquatic Center Manager at the Green Lake Aquatic Center to gauge his employees' interest in representation. Brewton's employees overwhelmingly wrote "yes" in favor of union representation.

Jekot learned of Sroga's attempts to help the lifeguards organize two times in the summer of 2012. In early July, Lifeguard II Jenny O'Neill told Jekot that Sroga discussed organizing with

the lifeguards but Jekot did not have a negative reaction to the news. A few days before Sroga's termination, in the middle of August, O'Neill again told Jekot that Sroga was trying to organize the lifeguards. This time Jekot reacted angrily to the news. He said "that mother fucker is not going to do that" and quickly left the building.

On August 23, 2012, Sroga went to the Cook County building at 69 West Washington Street in Chicago with the intention of meeting with somebody to discuss the new work rules for lifeguards. He met with Assistant to the General Superintendent for Labor Matters Lisa Lee because she was available at the time he arrived. Sroga did not make an appointment or speak to anybody at the office before he arrived. Sroga told Lee he was concerned with the way Jekot was managing the District's Aquatic Centers that summer because it was unfair and contrary to what the employees had been promised when they were hired. Sroga also told Lee that he was trying to get union representation for the lifeguards. Additionally, Sroga mentioned that he had a problem with the fact that the pool hours on the District's website were inaccurate, that lifeguards were not allowed to work 40 hours per week and that he thought his performance evaluation would not be positive. Sroga also mentioned an incident on August 19, 2012 when he came to work on a day when he said he would not work. During this meeting, Lee took handwritten notes. After Sroga left, Lee sent an email to the Directors of Compliance, Human Resources and Recreation summarizing her meeting with Sroga. The Director of Compliance, Jennifer Lynn, responded to Lee's email and informed her that Jekot and Betts had already recommended Sroga for termination.

On August 24, 2012, Jekot called Sroga and asked him to come to the Forest Preserve headquarters as soon as he could. When Sroga arrived, there was a District police officer there

along with Jekot and Betts. Jekot gave Sroga a termination letter and when Sroga asked him why he was being terminated, Jekot told him that they did not need to give him a reason why.

During the summer of 2012, Jekot and other District employees had numerous issues with Sroga's performance. Jekot first came to Betts with issues regarding Sroga's performance in the end of June or beginning of July. Maintenance Supervisor III Leonard Dufkis had many conversations and email correspondences with Jekot about Sroga's performance during the summer of 2012. Dufkis and other maintenance employees complained to Betts. When Jekot told Betts about his problems with Sroga, Betts told Jekot to document future performance issues. Jekot's documentation of Sroga's poor performance began with an incident on July 6 when he spoke to Sroga about the pool running out of chlorine over the busy holiday weekend. The pool ran out of chlorine again on July 18 and July 30. These times, Dufkis told Jekot that there was little or no chlorine in either of the two tanks and they rushed to order more chlorine before the pool had to be shut down. On July 18, Jekot told Sroga to always order more chlorine when the first tank is empty. On August 7, Jekot told Sroga to not open the pool until the chlorine was at a certain level as confirmed by the plumber but Sroga opened the pool without waiting for the plumber's approval.

Sroga did not always make the lifeguards' work schedule according to Jekot's rules. On July 7, Jekot wrote a letter of concern for Sroga's personnel file detailing the problems and stating that he would stop by Whealan Aquatic Center every Thursday to ensure that the lifeguards' work schedule for the upcoming week was done. Sroga did not have a schedule prepared when Jekot stopped by on June 27 or July 5. After this incident, Jekot made the lifeguards' schedule himself. On July 27, Sroga poured muriatic acid on an area of slippery concrete in front of the changing area because 7 or 8 patrons had fallen there over the course of the summer. A week

before, Sroga asked Jekot to get somebody from the maintenance department to make the area less slippery but resorted to doing it himself when nobody acted. When Dufkis saw that Sroga poured acid on this area he asked a painter to neutralize it with another chemical and put “anti-slip strips” down. Dufkis told Jekot what happened and Jekot discussed the matter with Sroga.

Throughout the summer, Sroga turned the pressure on a water spraying apparatus in the pool higher than the recommended setting. When Sroga turned it up, Jekot, Dufkis or a maintenance employee turned it down to the appropriate level and talked to Sroga about it. Eventually, Dufkis marked the recommended level on the machine but Sroga still turned it up higher. Sroga also turned the water heaters off each day to make the water temperature 73 degrees rather than 76 to 82 degrees as recommended by the Illinois Department of Public Health. Sroga told HVAC Tech Frank Johnson that he did this every day. On August 21, Sroga disconnected the two water heater spark control boxes and they shorted out. Each box cost \$400 to replace. On August 22, many patrons thought the pool was going to open earlier than it was and they were waiting to get in. Sroga issued \$353 worth of free passes and let them all in for free, declaring it “open swim.” On August 12, Sroga forwarded an email to Jekot from a person complaining that a lifeguard bounced a check for a personal service. Jekot told Sroga that this was unrelated to work, he should have ignored the email and not gotten involved. On August 19, Sroga worked when he was scheduled to be off and told Jekot he would not be at work. This resulted in the District paying Sroga overtime for that week.

In the end of July, Jekot recommended that Betts terminate Sroga. After he made this recommendation, Jekot continued to document Sroga’s performance deficiencies to include in a written memo to Betts. In the beginning of August, Jekot asked Dufkis to write a memo detailing all of his incidents with Sroga. On August 22, Jekot met with Betts and presented him with a

written memo detailing all of the incidents that he and Dufkis observed throughout the summer along with emails from the time each incident occurred. Jekot then wrote on the emails when he talked to Sroga about it and what he said. Betts reviewed the memo and agreed to terminate Sroga. Jekot sent the memo to Human Resources Director Michele Gage that day. However, he altered it after August 22. On August 24, before Betts and Jekot met with Sroga to terminate him, Jekot added things Sroga did on August 22.

IV. DISCUSSION AND ANALYSIS

For the reasons described below, the Respondent did not violate Section 10(a)(1) of the Act because they proved that they would have terminated the Charging Party for legitimate business reasons absent any illegal motivation.

Section 10(a)(1) of the Act prohibits an employer from restraining or coercing an employee from engaging in exercise of rights guaranteed by the Act, such as supporting a labor organization or participating in and supporting its activities. Although the motive or intention of a public employer is not usually considered in the context of a Section 10(a)(1) violation, where an employee is allegedly discharged or laid off or suffers other adverse employment action for engaging in protected, concerted activity under the Act, the motivation of the public employer must be examined in the same manner as cases arising under Section 10(a)(2) of the Act. County of Jersey, 7 PERI ¶2023 (IL SLRB 1991), aff'd by unpub. order County of Jersey v. Illinois State Labor Relations Board, 8 PERI ¶4015 (1992); Kirk and Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990).

An Employer violates Section 10(a)(2) of the Act when it discriminates against an employee in order to discourage support of a labor organization. To establish a prima facie case that the Employer violated section 10(a)(2) of the Act, the Union must prove that: 1) the employees

engaged in union activity, 2) the Employer was aware of that activity, and 3) the Employer took adverse action against the employees for engaging in that activity in order to encourage or discourage union membership or support. City of Burbank v. Ill. State Labor Relations Bd., 128 Ill. 2d 335, 345 (1989). With respect to the last element, the Union must introduce evidence that the adverse action was based, in whole or in part, on union animus, or that union activity was a substantial or motivating factor. Id. Union animus can be demonstrated in the following ways: expressions of hostility toward unionization, together with knowledge of the employee's union activities; timing; disparate treatment or a pattern of conduct which targets union supporters for adverse employment action; inconsistencies between the reason offered by the employer for the adverse action and other actions of the employer; and shifting explanations for the adverse action. Id.

If by these various means a charging party establishes a prima facie case, the burden shifts to the respondent, who may demonstrate that even absent that prohibited motivation, it would have taken the same action against the charging party for legitimate business reasons. 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.

Concerted activity is activity undertaken jointly by two or more employees, or by one employee on behalf of others. County of Cook (Management Information Services), 11 PERI ¶ 3012 (IL LLRB 1995). To be protected, concerted activity must be for the purpose of collective bargaining, “other mutual aid or protection”, or aimed at improving the wages and terms and conditions of employment. Id. Public sector labor agencies generally take a broad view as to what constitutes protected activity. Village of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). “Where it can be shown that the complained-of employer actions directly affect their working

conditions, employees are permitted a wide range of protest.” *Id.* As long as the activities engaged in are lawful and the character of the conduct is not indefensible in its context, employees are protected by... the Act.” *Id.*, citing Reef Industries v. NLRB, 952 F.2d 830, 836 (5th Cir. 1991).

Here, Sroga engaged in protected, concerted activity when he discussed organizing with the lifeguards, contacted labor organizations to see if they were willing to represent the lifeguards, discussed organizing the lifeguards with the Cermak Aquatic Center Manager and took a poll to gauge the lifeguards’ interest in organizing. Sroga did all of these things in an effort to improve wages, hours and working conditions for other employees. Sroga was acting with and on behalf of other employees. His actions fit squarely within the very definitions of protected and concerted activity.

While Sroga clearly engaged in protected, concerted activity, the Respondent asserts that none of its agents knew of this activity before Betts made the final decision to terminate Sroga on August 22. The Charging Party did not present clear evidence showing that Betts or Lee knew about Sroga’s activity before the decision was made to terminate him. However, the Charging Party presented a witness, Lifeguard Kelli Caruvana, who twice saw Jekot being informed that Sroga was trying to organize the lifeguards. The second time he was told, Caruvana saw Jekot become angry and exclaim that Sroga would not organize the lifeguards. Jekot disputes these accounts and claims he was not aware of Sroga’s activity until after the decision was made to terminate him. Caruvana was still employed by the Respondent in June of 2014 when she testified that Jekot was aware of Sroga’s activity and angry about it. That was in the middle of the season with almost three months remaining for the Respondent to take an adverse employment action against her in retaliation for her testimony. Caruvana stood to gain nothing

by offering the testimony she did and could have suffered adverse consequences as a result. Because Caruvana had no reason to lie, I conclude that her testimony was accurate and Jekot was aware of Sroga's activity as early as the beginning of July 2012 and angry about it as early as the middle of August 2012.

Jekot's August statement of "that mother fucker is not going to do that" when he was told about Sroga's activity establishes that he possessed anti-union animus. In City of Burbank, the first two factors used to infer anti-union motivation are expressed hostility to unionization together with knowledge of the employee's union activities and timing of the adverse action in relation to the occurrence of the activity. City of Burbank, 128 Ill. 2d at 346. Jekot clearly expressed hostility towards unionization and Sroga was terminated shortly after Jekot's statement. Jekot drafted his memorandum to Betts recommending Sroga's discharge after this expressed hostility towards Sroga's activity. This memo informed Betts and was the foundation for his decision to terminate Sroga.

Although Jekot did not have the authority to make the final decision to terminate Sroga, Betts made his decision based on Jekot's recommendation and the evidence Jekot presented in the memo recommending Sroga's termination. Betts did not observe any of the conduct that Jekot described in his memo. Sroga would not have been terminated if Jekot did not bring the recommendation and supporting evidence to Betts. In a case where the ultimate decision maker is neutral and does not harbor anti-union animus, a Charging Party can still make a prima facie case by showing the adverse action "results from" the recommendation or the involvement of an employer representative who harbors unlawful animus. City of Harvey, 18 PERI ¶ 2032 (ILRB SP 2002). In this situation, Jekot's animus is imputed to Betts and the Respondent itself. State of Illinois (Secretary of State), 31 PERI ¶ 7 (IL SLRB 2014). Because Jekot's anti-union animus is

imputed to the Respondent, the evidence supports the Charging Party's claim that the Respondent decided to terminate Sroga at least, in part, based on animus towards him and his protected concerted activity. Therefore, I find that the Charging Party has proven this element.

Now, the burden shifts to the Respondent to prove that it would have terminated Sroga absent any illegal motivation and that it would have terminated him for legitimate business reasons. Here, the Respondent, through Jekot's August 22 memo and all the emails attached to it, presented numerous legitimate business reasons to terminate Sroga. The Charging Party claims that this memo, and the many justifications for Sroga's termination, were drafted as a pretext to hide the Respondent's true reason for terminating Sroga. The testimony and evidence on the record do not definitively prove that Jekot drafted the memo to Betts at the time that he claims he did. The memo is dated August 22, 2012, but the Respondent only presented the testimony of Jekot and Betts to prove the document was created on this date. The incidents of Sroga's alleged misconduct are dated in the memo and most, if not all, occurred before Jekot was aware of Sroga's activity and angry about it. However, the attached emails show complaints and concerns about Sroga's work performance well before his protected activity came to light. These emails also reflect complaints from people other than the only one of Respondent's agents shown to possess anti-union animus, John Jekot. In fact, Dufkis complained about Sroga's performance throughout the summer and made these complaints to both Jekot and Betts.

Neither party presented evidence of another seasonal employee who allegedly engaged in misconduct and was or was not terminated. The Respondent claims this is because no other employee committed actions as egregious as Sroga's during Betts' three seasons. The Charging Party alleges that it is important that no other seasonal employee was terminated during these three seasons. The fact remains that Sroga was the only seasonal employee terminated in season

during those three years, and he also engaged in protected concerted activity under the Act. The absence of a comparable situation can not be read against either party. It only means that Sroga's case must be evaluated on its own merits and not in comparison to any other.

During the summer of 2012, Sroga was in charge of a pool that ran out of chlorine on at least three occasions; could not complete the lifeguard schedule; repeatedly unplugged equipment to lower the temperature of the pool water below a safe temperature; repeatedly turned the water pressure higher than recommended even after the equipment was clearly marked; improperly gave out \$353 of free passes under the guise of "open swim;" caused property damage of \$800 while tampering with the water temperature; and poured unsafe acid on a slippery area where patrons regularly walked in his own attempt to fix a problem. All of these actions presented the Respondent with a legitimate business reason to terminate Sroga. Even though his protected concerted activity was likely part of the reason the Respondent decided to terminate his employment, Sroga's other actions during the summer of 2012 make it more than likely that the Respondent would have terminated him anyway. Accordingly, I find that the Respondent has met its burden.

Similarly, I find that the Charging Party has failed to show that the legitimate business reason for his termination was pretext for unlawful discrimination. This determination is vital because "if the suggested reasons are a mere litigation figment, or were not relied upon, then the determination of pretext concludes the inquiry." City of Burbank, 128 Ill. 2d at 346. Sroga's poor performance as cited in Jekot's memo was an issue all season. Sroga discussed some, if not all, of the issues in the August 22 memo with Jekot, Dufkis and other employees when they happened. The Respondent did not become concerned with Sroga's performance only after they became aware he engaged in protected activity. Sroga was disciplined in the form of a letter of

concern on July 7 when he did not complete the lifeguard schedule according to Bett's rules. Although he was not formally disciplined again until he was terminated, Jekot, Dufkis and other employees had numerous subsequent email correspondences regarding Sroga's poor performance. The Respondent did not create these concerns regarding Sroga's performance and the emails documenting them as pretext to discharge him or to defend this charge because those concerns already existed. An employer's justifications are pretextual if the record fails to establish that the employer actually relied on any of the proffered business justifications. County of Union, 20 PERI ¶ 9 (ILRB SP 2003). Here, the record shows that Betts made the decision to terminate Sroga based on Jekot's August 22 memo listing Sroga's performance deficiencies from the summer. These performance deficiencies are the heart of the Respondent's justifications.

V. CONCLUSIONS OF LAW

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

VI. RECOMMENDED ORDER

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

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-

exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago Illinois 60601-3103 and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions **will not** be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 27th day of April, 2015.

STATE OF ILLINOIS LABOR RELATIONS BOARD

LOCAL PANEL

A handwritten signature in cursive script, appearing to read "Thomas R. Allen", is written over a horizontal line.

Thomas R. Allen, Administrative Law Judge