

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

James Pino,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-08-131
)	
Village of Oak Park,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On November 19, 2007, James Pino (Charging Party) filed an unfair labor practice charge in Case No. S-CA-08-131 with the State Panel of the Illinois Labor Relations Board (Board) alleging that the Village of Oak Park (Respondent or the Village), engaged in unfair labor practices within the meaning of Sections 10(a)(2) and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act).

The charge was investigated in accordance with Section 11 of the Act and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On February 4, 2009, the Board’s Executive Director issued a Complaint for Hearing. The case was heard on August 18 and 20, 2009 and October 15, 2009, in Chicago, Illinois, by Administrative Law Judge Sylvia Rios. Both parties appeared at the hearing and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Timely written briefs were filed on behalf of both parties. Subsequently, the case was reassigned to the undersigned Administrative Law Judge. After full consideration of the parties’ stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

1. The parties stipulate, and I find, that Respondent is a public employer within the meaning of Section 3(o) of the Act.
2. The parties stipulate, and I find, that Respondent is subject to the jurisdiction of the State Panel of the Board, pursuant to Section 5 of the Act.
3. The parties stipulate, and I find, that Respondent has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act.
4. The parties stipulate, and I find, that Respondent employed Charging Party as an equipment operator for Respondent's Department of Public Works.
5. The parties stipulate, and I find, that Charging Party has been a public employee within the meaning of Section 3(n) of the Act.
6. The parties stipulate, and I find, that the International Brotherhood of Teamsters, Local 705 (Union), is a labor organization within the meaning of Section 3(i) of the Act.
7. The parties stipulate, and I find, that the Union has been the historic exclusive bargaining representative of the employees in Respondent's Department of Public Works, Street Services Division, including its equipment operators.
8. The parties stipulate, and I find, that each of the following individuals has been an agent of Respondent, authorized to act on its behalf, and by occupying the position or positions¹ set forth opposite his name:

Robin Jones	Street Superintendent
Michael Fenwick	Street Supervisor and Street Superintendent
Scott Brinkman	Street Supervisor

¹ Jones was the Street Superintendent from April 2006 until his resignation in November 2007. During this period, Fenwick held the position of Street Supervisor. Following Jones' resignation, Fenwick, on December 14, 2007, became Street Superintendent, and Brinkman, a Union steward, was promoted to Street Supervisor.

John Wielebnicki Director of Public Works

Ray Wiggins Deputy Village Manager

9. The parties stipulate, and I find, that each of the following individuals has been an agent of the Union, authorized to act on its behalf, and occupying the position or positions set forth opposite his name:

Edward J. Burke Attorney and Chief Negotiator

Bill Sullivan Business Agent

II. ISSUES AND CONTENTIONS

Charging Party centrally alleges that Respondent engaged in unfair labor practices within the meaning of Sections 10(a)(2) and (1) of the Act when Respondent terminated his employment in August 2008. Respondent asserts that it did not violate Sections 10(a)(2) or (1) of the Act when it terminated Charging Party's employment.

III. FINDINGS OF FACT

Pino worked for five and a half years as an equipment operator for the Village's Street Services Division. The Street Services Division is a division of the Village's Public Works Department. During this time, Pino was also a member of the International Brotherhood of Teamsters, Local 705, the union that exclusively represented bargaining unit employees within the Street Services Division.²

The employees of the Street Services Division generally receive their assignments during a daily group meeting at the beginning of each shift. During a normal daily group meeting, an

² The Union and the Village have been party to two separate collective bargaining agreements. The initial collective bargaining agreement was effective from January 1, 2004 to March 31, 2008. The successor collective bargaining agreement was effective from April 1, 2008 to March 31, 2010.

employee could be directed to pick up litter (assigned to “litter pickup”), operate a snow plow or street sweeper, or conduct street repairs, for example.

Street Services Division employees assigned to litter pickup may be directed to pick up litter in different sections of the Village or other priority areas. These employees can also be directed to clean a particular area in response to a written complaint filed by a member of the public or a Village official.

Employees assigned to litter pickup generally use a Village pickup truck to drive to their assigned areas. Upon arrival, the employee walks a route and removes all of the litter in the assigned area. By the end of a shift, the employee is expected to accurately record where he picked up litter on a Daily Productivity Report. Every Daily Productivity Report contains a map of the Village. Each employee has been instructed to indicate his work route by marking that work map with a highlighter or pen. Additionally, an employee’s GPS-equipped work phone can generate a GPS report indicating that employee’s daily work route.

All employees of the Public Works Department that operate a Village vehicle are also expected to accurately fill out Vehicle Inspection Reports on a daily basis. These employees are instructed to document their mileage as indicated by the vehicle’s odometer at the beginning and the end of a shift. Vehicle Inspection Reports also help to document a vehicle’s physical problems.

Supervisors have discussed the Vehicle Inspection Report policy with Street Services Division employees during group meetings. Testimony also indicates that Street Services Division employees were informed by their supervisors that a failure to accurately document

mileage could result in discipline or termination.³ Nevertheless, additional testimony suggests that these employees did not always fill out these reports with perfect accuracy.

From time to time, new or revised policies are distributed to employees during group meetings. These policies can also be placed directly in an employee's work folder. In either case, employees are expected to follow these policies. In addition, superiors may review the new or revised policies with their subordinate employees. When a policy is distributed, each employee is expected to read and sign the provided documentation.

Discipline Policy and Grievance Procedure

The Village generally applies progressive discipline and may impose a variety of disciplinary actions including oral reprimands, written reprimands, suspensions, and discharges. Oral reprimands, for example, may be issued when an employee commits his first offense.⁴ Not all improper performance initially results in an oral reprimand, however. Oral reprimands are not issued for very serious offenses. Further, Street Services Division supervisors commonly counsel or communicate with subordinates in order to correct their work. Following such a counseling, if an employee does not correct his mistakes, a supervisor may continue with further discipline.

The Village's disciplinary process often begins with an initial investigation. After an employee is served an investigatory hearing notice, the Village conducts an investigatory meeting. The initial investigatory hearing notice does not propose a level of discipline. Rather, the purpose of the investigatory meeting is to gather facts and evidence related to the incident or

³ Pino acknowledged that he was familiar with the Vehicle Inspection Report policy and was aware that he was required to indicate his mileage on the report. However, Pino indicated that he was never informed that he would be subject to discipline if he did not accurately report that mileage. This testimony was contradicted by additional evidence, including, for example, the testimony of Jose Hernandez, an equipment operator called by Charging Party, which indicated that Pino and others were informed that a failure to accurately document mileage would result in discipline or termination.

⁴ If an oral reprimand is issued, the warning is recorded in writing and placed in the employee's disciplinary file.

performance in question. While live witnesses are not called during investigatory meetings, the employee and the Union are expected to inform the Village of evidence that supports the employee's position. After the investigatory meeting, the Village determines whether or not to proceed with formal discipline.

Prior to taking any final disciplinary action and concluding its investigation, the Village notifies the employee of the contemplated disciplinary action. A notice of hearing informs the employee of the Village's evidence. The hearing or meeting that follows provides the employee with an additional opportunity to explain or refute the Village's evidence.

Generally, discipline must be reviewed by the Village's Human Resources Director before it is issued. The Human Resources Director reviews the information that is brought to him by supervisors and determines whether the circumstances warrant discipline. He also considers whether that discipline can be supported by the evidence during grievance arbitration. After this review, the Human Resources Director presents his recommendation to the Village Manager or the Village Manager's staff. Subsequently, the discipline may be served upon the employee. If the Human Resources Director determines that the employee should not be disciplined, the initial charge or allegation is not recorded in the employee's disciplinary file.

Any disciplinary action imposed upon an employee, other than an oral reprimand, may be appealed through the grievance procedure. Traditionally, a grievance is first filed with the disciplined employee's immediate supervisor. If the grievance is not settled at this first step, the grievance can be appealed to the Director of Public Works. If the grievance is not settled at this second step, the grievance can be appealed to the Village Manager's level. At this third step, the Village is usually represented by the Human Resources Director. While the option is rarely

exercised in practice, if the grievance is not settled at the third step, the Union may refer the grievance to arbitration.

Chronology of Events

When Pino was hired by the Village on October 18, 2002, the Union did not have a steward. A month or so after Pino was hired, Pino recommended to Brinkman that Brinkman should serve as the Union's steward. Later, Brinkman was appointed steward by the Union.⁵ While Brinkman was steward, Pino and Brinkman regularly discussed a variety of issues related to the Union.

Pino never served as a steward for the Union. However, Pino was an active member of the Union that took a leadership role during private Union meetings. Pino also shared his opinions concerning collective bargaining proposals with other Union members.

Negotiations for the initial collective bargaining agreement began around November of 2003. Generally, at that time, Burke negotiated on behalf of the Union and was assisted by Brinkman. The Village presented its final offer to the Union in October of 2006. In November of 2006, the two bargaining teams reached a tentative agreement. The Union approved the initial collective bargaining agreement in December of 2006.

On February 3, 2005, Pino was issued a disciplinary notice documenting that Pino had received an oral reprimand for sleeping in his truck during snow removal operations on January 7, 2005. This oral reprimand was formally issued by James Maiworm, the Street Superintendent.

When Fenwick was initially hired as Street Supervisor in February of 2006, he felt that his employees' productivity could be improved. Accordingly, in March or April of 2006, Fenwick took additional steps to monitor the productivity of his employees.⁶ On occasion,

⁵ Brinkman served as steward until he was promoted to Street Supervisor in 2007.

⁶ Since 2006, Fenwick had also been instructed by Wielebnicki to monitor the productivity of employees.

Fenwick followed employees and took photographs of their work. Fenwick also discussed deficiencies with almost half of his employees. However, Fenwick did not immediately find deficiencies with Pino's work.

When Fenwick started checking odometers in 2006, he observed that the vehicles used during the night shift displayed abnormally high mileage. At that time, Pino picked up litter during the night shift and used a Village vehicle for his assignments. Furthermore, during that time period, Fenwick received reports concerning Pino's work performance from Village residents and another Village employee. Consequently, in the spring of 2006, Fenwick conducted an informal meeting with Pino and Brinkman to inform them of his observation of Pino's high mileage and other performance issues.⁷ Pino was not formally disciplined for his high mileage at that time.

After personally checking his employees' odometers for some time, in the spring of 2006, Fenwick revised and distributed a policy outlining the Public Works Department's reporting and inspection requirements. In particular, under the revised policy, employees were expected to document each vehicle's starting and ending mileage on a standard form during each shift. Fenwick took steps to notify his subordinates of these revisions. For example, all Street Services Division employees received a copy of the revised policy. The revised requirements were also discussed with the affected employees. When employees incorrectly filled out the provided forms, their work was corrected.

After Fenwick's initial discussion with Pino and Brinkman in the spring of 2006, Fenwick continued to monitor Pino's mileage and work performance. Fenwick indicated that he spoke with Pino about his mileage again during the summer of 2006. Around that time, Fenwick

⁷ According to the testimony of Fenwick and Brinkman, when confronted with this information, Pino indicated that he thought that the vehicles' odometers measured blocks instead of miles. However, during the hearing, Pino could not recall this exchange.

also corrected Pino's work when he observed that Pino's assigned areas had not been cleaned. In addition, Fenwick informally discussed his observations and concerns with Pino when Fenwick was alerted of other possible performance issues.

On October 31, 2006, Pino was issued an oral reprimand for poor work performance for being non-productive and in violation of the Village's break policy. The memorandum memorializing this oral reprimand also warned Pino that he should learn by this "lesson" or more serious measures may be taken to correct his negative behavior.

On December 8, 2006, Pino was issued a written reprimand for his poor work performance on November 30, 2006 and December 1, 2006 during a snow storm. Among other things, the memorandum memorializing this discipline warned Pino that he should learn by the lesson or more serious measures may be taken to correct his negative behavior, up to and including dismissal.

In late 2006 or early 2007, Mike Otters, another Street Services Division employee, found a battery pack for a portable DVD player in a street sweeper assigned to Pino. This discovery was brought to the attention of Fenwick. When Fenwick asked Pino about this battery, Pino said it was not his and indicated that he would return the battery to the owner.⁸ Though Fenwick was concerned that Pino might have been using a portable DVD player in the street sweeper during the night shift, Pino was not disciplined for this incident.

During several meetings, Pino was accused of tampering with his GPS-equipped work phone. Generally, it was alleged that Pino was intentionally not charging his work phone in order to avoid being tracked or located. Pino was also issued a number of memos reminding him to correctly charge his work phone. While Pino was confronted about this issue several times, he was not disciplined on every occasion. However, on January 9, 2007, Fenwick issued Pino an

⁸ During the hearing, Pino denied that this exchange occurred.

oral reprimand for poor or unacceptable work performance for Pino's failure to have his phone in operation. Again, the memorandum memorializing this oral reprimand warned that Pino should learn by the lesson or more serious measures may be taken to correct this negative behavior. During the hearing, Spataro indicated that, in his opinion, an oral reprimand was the highest level of discipline that would have been defensible during an arbitration of the matter.

On April 9, 2007, Pino struck a parking meter while driving a Village vehicle. This accident was reviewed on May 2, 2007 and was determined to have been preventable. On May 4, 2007, Pino was issued an oral reprimand for a preventable accident.

On or about June 25, 2007, Pino received a one-day suspension for driving a street sweeper with the brooms down. Pino denied the Village's allegation, but was nonetheless disciplined for the improper activity. While a grievance was filed, the Union did not appeal the grievance to arbitration.

On November 29, 2007, Fenwick issued Pino a memorandum accusing him of sleeping on the job. Fenwick brought this charge after allegedly personally observing Pino sleeping in a Village truck on November 28, 2007. The Village conducted a meeting concerning this charge on November 29, 2007. At the time, Pino was working within conditions set by a doctor's note that required certain accommodations. One of these accommodations required that Pino take a 10-minute break every half hour. In light of this information, the Village did not issue discipline in this instance.

According to Pino, during the meeting concerning this sleeping charge, Fenwick told Pino that he would "get" him. According to the testimony of Fenwick and Brinkman, however, Fenwick simply remarked to Pino that the Village would probably catch him sleeping again. In either case, the Village formally alleged that during this meeting, Pino called Fenwick a liar.

This alleged statement led to an investigatory meeting that took place on December 4, 2007. Pino denied making this accusation and ultimately Pino was not disciplined for the alleged insubordinate statement.

On or about December 8, 2007, Pino requested overtime work during a snow event. After speaking with Fenwick and Brinkman, Wielebnicki determined that Pino's light duty work restrictions did not allow Pino to complete the requested work. Accordingly, Wielebnicki denied Pino's overtime request.⁹

At some point in 2007, Pino allegedly got into an altercation with a White Hen Pantry employee while Pino was working the night shift. Fenwick thought that Pino should have been terminated for this incident and made this recommendation to the Human Resources Department. However, based on his review of the information available, Spataro determined that the Village should not pursue discipline.

On December 14, 2007, Fenwick was promoted to the position of Street Superintendent and Brinkman became the Street Supervisor.¹⁰ In early 2008, Fenwick directed Brinkman to commence an investigation of all Street Services Division employees because assignments were not being completed. Since that time, Brinkman has continued to investigate the work of his subordinates.

In January of 2008, Wiggins, the Deputy Village Manager, held a meeting with representatives of the Union to provide a clear picture of the Village's distressing economic circumstances. Wiggins also expressed the Village's desire to work collaboratively with the Union to find ways to reduce costs. Because Brinkman, the Union's former steward, had just

⁹ The Director of Public Works is responsible for approving overtime requests. On other occasions, Wielebnicki has denied overtime requests when an employee was on light duty and could not complete the requested work. In the winter of 2007, for example, Grant's overtime request was also denied because of his work restrictions.

¹⁰ Fenwick recommended Brinkman for the Supervisor position.

been promoted to Street Supervisor, the Village saw an opportunity to begin a more cooperative working relationship with the Union.

According to Wielebnicki, on a date before negotiations for the successor collective bargaining agreement had commenced, Wielebnicki stopped Pino in the parking lot of the Public Works building after Pino improperly parked a vehicle. After informing Pino of his error, Pino allegedly simply walked away. Wielebnicki found this behavior to be disrespectful and commenced an investigation. Subsequently, this incident was written up as a counseling.

In February or March of 2008, the Village and the Union began to negotiate the successor collective bargaining agreement. The two bargaining teams met regularly until the Village made its final offer to the Union on April 25, 2008. Following the presentation of this final offer, Wielebnicki was informed that the members of the Union would conduct a strike vote if the Union's members voted down the final offer. By the first week of July of 2008, the Union had rejected the Village's final offer. The Union also conducted a strike vote, which passed unanimously. However, the Union did not conduct a strike.

Pino served as a member of the Union's bargaining team from the onset of negotiations for the successor collective bargaining agreement until he was placed on administrative leave on May 20, 2008. This was the first time that Pino represented the Union in an official capacity. While a member of the Union's bargaining team, Pino was able to review and prepare proposals and attend negotiation sessions. Pino also reported what occurred during negotiations to the other Union members. After Pino was placed on administrative leave, Pino continued to attend private Union meetings and privately communicate with the steward, James Larson, who also served as a member of the Union's bargaining team.

On April 3, 2008, Wielebnicki was informed of a complaint that concerned the conditions of a particular area within the Village.¹¹ Wielebnicki forwarded this complaint to Fenwick, who passed it to Brinkman. After receiving the complaint, Brinkman investigated the complained of area in person. Brinkman determined which areas were intended to be cleaned and concluded that the description in the complaint was in error. Subsequently, Brinkman assigned this task to Pino and provided him with a copy of the complaint along with verbal instructions clarifying the error and the debris at issue.

Brinkman later observed that Pino had not picked up the assigned area. The morning after this discovery, Brinkman questioned Pino about the issue. Pino replied that he had followed the text of the complaint and could not find the debris Brinkman had described. Pino also indicated to Brinkman that he had never cleaned that kind of area in the past.

Because Pino failed to appropriately perform what Brinkman viewed as an important assignment, Brinkman wondered what other tasks Pino was not performing. Accordingly, in the spring of 2008, when Brinkman traveled around the Village to check on his employees' work, he closely observed the areas assigned to Pino. In particular, Brinkman observed that the areas assigned to Pino were not clean. Brinkman reported his concerns about Pino's work to Fenwick. Fenwick responded by instructing Brinkman to continue monitoring all of his employees' work.

When Brinkman directed employees to pick up litter in particular sections of the Village, he reviewed these employees' GPS reports and work maps and followed up on these reports by visiting the designated areas. During these investigations, Brinkman also took photographs of the employees' assigned areas. Based on these observations, Brinkman concluded that, on a regular basis, Pino was not completing his work.

¹¹ Wielebnicki was alerted of this complaint through an e-mail from Robert Cole, Assistant to the Village Manager. The original complaint came from David Pope, the President of the Village Board.

During a number of group meetings occurring around April of 2008, Brinkman stressed to his subordinates the importance of accurately filling out mileage reports. Brinkman also monitored the mileage and driving habits of his employees. After observing Pino's driving habits, checking Pino's odometer, and comparing the actual mileage with the mileage reported in Pino's Vehicle Inspection Reports, Brinkman determined that Pino was not accurately reporting his mileage. More specifically, Brinkman concluded that, consistently, Pino accurately reported his ending mileage but inaccurately recorded his beginning mileage.

While Brinkman's investigation of Pino was occurring during the spring of 2008, Brinkman discussed his investigations with Fenwick and Wielebnicki. In turn, Wielebnicki informed Wiggins of the information that was being collected concerning Pino's work performance. Based on the information provided to him, Wielebnicki supported terminating Pino's employment.

At some point during this period, it was determined that the Human Resources Department should be included in the discussions of Pino's work in order to determine the appropriate discipline. Consequently, in April of 2008, Brinkman and Fenwick shared their concerns about Pino's work with Spataro. Brinkman and Fenwick indicated to Spataro that they had collected evidence demonstrating that Pino was not performing his work and was not truthfully reporting that work or his mileage. Brinkman also provided Spataro with the documentation corroborating these concerns, which included the relevant photographs, work maps, GPS reports, and Vehicle Inspection Reports.

When Spataro received the provided documentation, Spataro discussed Pino's work with Wiggins and Wielebnicki. Wiggins directed Spataro to continue looking into these issues and to prepare the information for disciplinary action. Wiggins approved of a termination based on his

review of the provided documentation. Spataro directed Fenwick and Brinkman to continue their investigation.

Because of the serious nature of the issues, on May 20, 2008, Pino was placed on paid administrative leave pending the results of an investigation into his conduct.¹² On May 22, 2008, the Village issued Pino a memorandum acknowledging that the Village had collected information indicating that during the period of April 18, 2008 to May 21, 2008, Pino had engaged in misconduct that included falsification of Village records, false representation to Street Services Division management as to work performed, and repeated failure to perform assigned job duties including the repeated failure to pick up litter and debris in areas Pino was specifically assigned to clean.¹³

When Pino returned to work on August 14, 2008, a meeting was held concerning Pino's misconduct. At the meeting, the Village presented Pino with the collected documentation. Pino explained that he had been picking up litter and indicated that Charles Vetro, an equipment operator, could support his position. However, Vetro was not called at that time. According to Spataro, regarding the inaccurate mileage reports, Pino indicated that his allergies made it difficult for him to read an odometer.

After the August 14, 2008 meeting, the Village considered the explanations Pino had provided and determined that those explanations were not credible. Spataro discussed the Village's position with Wiggins and recommended termination. After obtaining Wiggins' approval, on August 20, 2008, Spataro sent a letter to Pino which indicated that another meeting would be held to address the Village's contemplated termination action.

¹² After May 20, 2008, Brinkman continued to monitor the other Street Services Division employees.

¹³ The May 22, 2008 memorandum was hand-delivered to Pino at his residence on May 24, 2008. This memorandum also indicated that a meeting was scheduled for May 27, 2008 to provide Pino an opportunity to respond to the information the Village had collected. However, after issuing this notice, the Village was informed that Pino was on medical leave and would be unable to attend the scheduled meeting. The meeting was subsequently rescheduled to coincide with Pino's return on August 14, 2008.

On August 20, 2008, Wiggins met with Larson and Sullivan after an unrelated grievance meeting. At that time, Wiggins indicated that he had been authorized to carry out a formal process by which the Village would receive formal bids for services within the scope of the Street Services Division's work. Wiggins invited and expected the Union to participate in this bidding process.¹⁴

The meeting concerning the Village's contemplated discipline occurred on August 22, 2008. During this meeting, Pino was provided an opportunity to rebut the Village's provided reasons for the proposed discipline. According to Spataro, at that time, Pino denied that the evidence the Village had presented constituted misconduct. Once again, the Village did not believe Pino's explanations.

Spataro reviewed Pino's disciplinary history and determined that there was a pattern of poor work, failure to complete assigned tasks, and failure to properly use equipment. Wiggins concurred with Spataro and directed Spataro to draft a termination notice. On August 22, 2008, Pino was hand-delivered a termination notice summarizing the Village's determination. Though a grievance was filed, the Union did not refer the matter to arbitration.

After further negotiation concerning the successor collective bargaining agreement, the Village and the Union reached an agreement in May or June of 2009. Some work of the Street Services Division was contracted out under this agreement.

¹⁴ At the time of this meeting, the Village had not yet collected bids. On September 12, 2008, the Union filed an unfair labor practice charge (Case No. S-CA-09-051) related to the August 20, 2008 meeting. By early 2009, the Village had collected private vendor bids and shared these with the Union. Several weeks after this information was shared, the Union provided its own response. A Complaint for Hearing was issued on May 11, 2009, but was later withdrawn by the Union on July 9, 2009.

IV. DISCUSSION AND ANALYSIS

Alleged Section 10(a)(1) Violation

Charging Party argues that Respondent's termination of Pino's employment violated Section 10(a)(1) of the Act. Section 10(a)(1) of the Act states, in relevant part, that it is an unfair labor practice for an employer or its agents to interfere with, restrain, or coerce public employees in the exercise of the rights guaranteed in the Act.¹⁵ In order to establish a violation of Section 10(a)(1) of the Act, Charging Party must prove, by a preponderance of the evidence, that Respondent attempted to or effectively did interfere with, restrain, or coerce the employees in such protected activity. Chicago Housing Authority (Kirk), 6 PERI ¶3013 (IL LLRB 1990).

Proof of Respondent's motivation is conclusive but is not indispensable in this regard. Put another way, the Board has held that, in general, proof of illegal motivation is unnecessary in establishing a Section 10(a)(1) violation. Village of Schiller Park, 13 PERI ¶2047 (IL SLRB 1997); see also City of Chicago (Green and Warns), 3 PERI ¶3011 (IL LLRB 1987); Chicago Housing Authority (Gale), 1 PERI ¶3010 (IL LLRB 1985). Thus, if Respondent's actions have the clear effect of restraining employees' exercise of protected rights, and those actions are not independently justified, a Section 10(a)(1) violation may be established even though illicit motivation is not proved. Chicago Housing Authority (Kirk), 6 PERI ¶3013; City of Chicago (Green and Warns), 3 PERI ¶3011; Chicago Housing Authority (Gale), 1 PERI ¶3010.

More narrowly, Charging Party notes that an employer's threat of discipline and other reprisals directed toward employees engaging in union activity amounts to an unfair labor

¹⁵ Under Section 6 of the Act, public employees have, and are protected in the exercise of, the right of self-organization, and may form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, and other conditions of employment, not excluded by Section 4 of the Act, and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid and protection, free from interference, restraint, or coercion. Section 10(a)(1) of the Act makes it an unfair labor practice for an employer or its agents to interfere with, restrain, or coerce public employees in the exercise of their Section 6 rights. City of Chicago (Mulligan), 11 PERI ¶3008 (IL LLRB 1995).

practice because the employer's conduct reasonably tends to coerce employees in the exercise of their rights, regardless of whether it does, in fact, coerce. See Chicago Transit Authority v. Illinois Labor Relations Board, 386 Ill. App. 3d 556, 572, 898 N.E.2d 176, 190 (1st Dist. 2008). Subsequently, concerning this alleged Section 10(a)(1) issue, Charging Party concludes, "Based on the evidence at the hearing, it is clear the actions taken against Pino would reasonable [sic] tend to coerce employees in the exercise of the rights, such as going forward with the strike vote instead of settling on a contract with less benefits as the previous one."

Initially, Charging Party implicitly alleges that Respondent coercively "threatened" layoffs and outsourcing during the negotiations for a successor collective bargaining agreement. However, consistent with the objective evaluation outlined above and pursuant to the protected speech provision in Section 10(c) of the Act, an employer's statements do not violate Section 10(a)(1) of the Act unless a reasonable employee would view the statements as conveying a promise of benefit or threat of reprisal or force.¹⁶ City of Mattoon, 11 PERI ¶2016 (IL SLRB 1995); City of Chicago (Department of Health), 10 PERI ¶3031 (IL LLRB 1994).

Indeed, the record indicates that on August 20, 2008, Wiggins met with Larson and Sullivan in order to inform the Union of the process by which the Village would receive bids. Without providing additional detail, Charging Party also notes that, during the hearing, Sullivan indicated that Wiggins threatened layoffs. Wiggins, however, generally denied suggesting to the Union at that time that layoffs were going to occur.

Under these circumstances, Charging Party has not effectively articulated how this allegedly threatening conduct reasonably tends to interfere with the free exercise of employee rights under the Act. Viewed in the total context, no reasonable employee would view the

¹⁶ Section 10(c) of the Act provides, in pertinent part, "The expressing of any views, argument, or opinion or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

alluded to statements as conveying either a promise of benefit or threat of reprisal or force. These alleged threats do not appear to have been truly disciplinary in nature or directed toward employees because of their union activity. See Chicago Transit Authority, 386 Ill. App. 3d at 573, 898 N.E.2d at 190. Further, it is not immediately clear how these events are particularly connected with Pino or the termination of his employment. Consequently, Charging Party has not demonstrated an unfair labor practice in these instances.

The record also demonstrates that following the April 25, 2008 presentation of the Village's final offer, the Village's management was informed that a strike vote would be presented to the Union's members if the Union rejected the final offer. As Charging Party observes, according to Larson, at that time, Burke indicated to Wielebnicki that Larson and Pino would present a strike vote to the Union members. When describing this exchange, however, Wielebnicki testified that he merely asked if it was normal for the Union to take a strike vote. Wielebnicki did not believe that he asked what role any individual on the Union's bargaining team was going to play in presenting the strike vote. Similarly, Sullivan could not recall Burke informing Wielebnicki that Pino and Larson would lead the strike vote.

Because of this ambiguity, the record does not readily demonstrate that the Village was aware of Pino playing a special role in the presentation of the Village's final offer or a strike vote. Furthermore, even if Larson's version of this exchange is accurate, the record, in this context, does not demonstrate that the actions taken against Pino (including the subsequent termination of Pino's employment) reasonably coerced or had a clear effect of restraining the exercise of protected rights.¹⁷ Accordingly, Charging Party has not proven, by a preponderance

¹⁷ Charging Party also notes that Larson indicated that he believed "the members were watching, or concerned, or interested in what was happening with Mr. Pino." However, this selection does not persuasively demonstrate a Section 10(a)(1) violation.

of the evidence, that Respondent attempted to or effectively did interfere with, restrain, or coerce the employees in such protected activity.

Alleged Section 10(a)(2) Violation

Separately, Charging Party also argues that Respondent's termination of Pino's employment violated Section 10(a)(2) of the Act. Section 10(a)(2) of the Act provides, in part, that it is an unfair labor practice for an employer or its agents to "discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization." In this context, the Board has ruled that to establish a 10(a)(2) violation, a charging party must show that an employer discriminated against an employee based on his membership in a union or because of his union organizing activities. City of Chicago (Mulligan), 11 PERI ¶3008 (IL LLRB 1995).

In the instant case, both Charging Party and Respondent apply the standard established by the Illinois Supreme Court in City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 538 N.E.2d 1146 (1989). Under that standard, in order to establish a prima facie case of employer discrimination based on an employee's protected activities, a charging party must prove by a preponderance of the evidence: (1) that the employee engaged in union or protected, concerted activity; (2) that the employer had knowledge of such activity; and (3) that the employee's protected conduct was a motivating factor in the adverse employment action. City of Chicago (Mulligan), 11 PERI ¶3008; City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149.

Charging Party has demonstrated that Pino engaged in union or protected, concerted activity in that he was actively involved in private Union meetings and served as a member of the Union's bargaining team during the negotiations for the successor collective bargaining agreement. By Respondent's necessary participation in activities such as the negotiations for the

successor agreement, Respondent knew Pino was engaged in protected activity and the record indicates as much. The Charging Party has also clearly satisfied the component requiring an adverse action by proving, for example, that Respondent terminated Pino's employment. However, the evidence does not so clearly demonstrate that Respondent took this adverse action in order to retaliate against Pino for exercising his rights under the Act. Nonetheless, Charging Party claims that Respondent was improperly motivated by animus when it took adverse action against him on account of his concerted, protected activities. Thus, it must be determined whether Respondent's actions were, in fact, improperly motivated.¹⁸

As Charging Party notes, since motive is a question of fact, the Board may infer discriminatory motivation from either direct or circumstantial evidence. City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149. Antiunion motivation may reasonably be inferred from a variety of factors, such as an employer's expressed hostility toward unionization, together with knowledge of the employee's union activities; proximity in time between the employee's union activities and his discharge; disparate treatment of employees or a pattern of conduct which targets union supporters for adverse employment action; inconsistencies between the proffered reason for discharge and other actions of the employer; and shifting explanations for the discharge.¹⁹ Id. (citations omitted).

¹⁸ Respondent argues that Charging Party has not shown that the Village was aware of his alleged union activity prior to his participation in the contract negotiations beginning in March of 2008. This argument is generally supported by the record. Moreover, Respondent appropriately suggests that Charging Party's claim will fail to the extent that Charging Party failed to provide evidence that Respondent's decision-makers were ever aware of Pino's union activities. See Chicago Park District, 16 PERI ¶3008 (IL LLRB 1999). While some knowledge of Pino's union activity could theoretically have been transferred to the Village's management through the promotion of Brinkman, for example, like Charging Party's post-hearing brief, this analysis will generally focus on Respondent's adverse employment actions occurring after or concurrently with Pino's activities related to the Union's bargaining team.

¹⁹ Charging Party does not particularly allege, and I do not find, that Respondent has offered shifting explanations for the termination of Pino's employment.

Direct admissions by an employer that a discharge was related to union activity will establish illegal motive, but no such evidence has been presented. See Village of Lyons, 5 PERI ¶2007 (IL SLRB 1989), citing National Labor Relations Board v. Armstrong Circuit, Inc., 462 F.2d 355 (6th Cir. 1972). Furthermore, the instant record does not provide an obvious example of expressed hostility toward unionization or other union activity which could be used to infer a discriminatory motivation. While alleging a Section 10(a)(1) violation, Charging Party notes that according to Sullivan, at some point after Pino's employment was terminated, Brinkman commented to Sullivan that "the rest of the people had settled down" because of Pino's termination. Charging Party alleges that this comment "suggests anti-union sentiment on behalf of management." Nevertheless, I find that this selection does not independently demonstrate improper motivation.

Citing Village of Oak Park, 18 PERI ¶2019 (IL LRB-SP 2002), Charging Party observes that the Board has recognized that a sudden pattern of harsh or successive discipline on the heels of a long-term employee's protected, concerted activities constitutes persuasive evidence sufficient to raise an inference of retaliatory motive. As noted above, prior to his termination in August of 2008, Pino had worked for the Street Services Division for five and a half years. Furthermore, Pino's ultimate termination occurred a relatively short period of time after he began his public participation in negotiations on behalf of the Union. However, the mere coincidence of the employee's union activity and his discharge will not support a charge of discrimination. County of Williamson, 13 PERI ¶2015 (IL SLRB 1997); see also Broadway Motors Ford, Inc. v. National Labor Relations Board, 395 F.2d 337, 340 (8th Cir. 1968). Moreover, despite the relatively proximate timing of the final disciplinary action, the instant record cannot easily be characterized as a "sudden pattern of harsh or successive discipline."

Charging Party argues, in part, that Pino was terminated after six days of observation by Brinkman. While Pino's termination may have been driven by Brinkman's observations to some degree, in this instance, Charging Party's view generally ignores other aspects of Pino's disciplinary record. In addition to his termination in 2008, the record indicates that Pino has also been disciplined, on a number of occasions, since early 2005. While this prior discipline was admittedly not as severe as his ultimate termination, as outlined above, Pino's disciplinary record includes, for example, a variety of formal reprimands, counseling, and a one-day suspension. Testimony also suggests that the Village's management received additional reports about Pino's conduct prior to Brinkman's 2008 investigation. Further, the record does not demonstrate a larger "pattern" of discipline or antiunion conduct in this case. To the contrary, other Union employees that engaged in related protected activity, such as Larson and Brinkman, were not similarly disciplined.

Charging Party also alleges that the Village failed to apply progressive discipline when it brought the charges that led to Pino's termination. Indeed, according to the Village's initial collective bargaining agreement, "Discipline shall be progressive and corrective, designed to improve behavior and not merely to punish." While this agreement notes that the Village shall have the option to assess penalties including oral reprimands, written reprimands, suspensions, and discharges "when the Employer believes just cause exists," it does not otherwise articulate exactly how these penalties should be issued.

Generally, within a system of progressive discipline, rather than terminating an employee for a minor or first offense, an employer applies incremental or escalating levels of discipline in order to correct improper work. However, the discipline issued by the employer may depend on the frequency or severity of that improper behavior. According to the Village's progressive

discipline policy, an oral reprimand, for example, would be improper in the case of a serious offense. Here, the record indicates that the falsification of work records and the inaccurate documentation of mileage were considered significant offenses by the Village. Presumably, the Village's progressive discipline policy permits the issuance of comparably serious discipline in those instances.

Also suggesting a progressive system, Pino's termination was preceded by instances of lesser forms of discipline. For example, in addition to counseling Pino or merely correcting his incomplete work, on several occasions, the Village issued Pino formal reprimands for his poor or unacceptable work performance. In particular, one memorandum memorializing such a reprimand, issued on December 8, 2006, specifically warned that more serious measures may be taken to correct his negative behavior, up to and including dismissal.

The Village appears to have maintained clear and well known policies concerning the accurate documentation of mileage and other reporting requirements. Moreover, the relatively straightforward mechanics of the litter pickup assignment are not in dispute. The Village also generally appears to have thoroughly investigated and documented Pino's conduct and weighed Pino's responses to its charges. To this extent, it is not entirely clear that the Village altogether failed to adhere to its established progressive discipline policy.

When issuing discipline, the Village considers each employee's disciplinary and performance history. However, importantly, no rigid set of progressive steps has been established in the record. Although Pino had never been suspended, for example, for the falsification of records, making a false representation to management as to work performed, and a repeated failure to pick up litter in an assigned area, under these circumstances, I do not find the Village's elected progression to be suspicious or indicative of a discriminatory motivation.

Similarly, I do not find that Pino should have been issued a particular number of suspensions before termination was appropriate within the Village's disciplinary scheme.

Charging Party further suggests that the Village's disparate treatment of other employees guilty of the same misconduct as Pino signifies a discriminatory motive. In order to prove disparate treatment giving rise to an inference of unlawful animus, the charging party bears the burden of demonstrating that employees who allegedly committed similar offenses, but had not engaged in union or protected, concerted activity, were not similarly disciplined. City of Decatur, 14 PERI ¶2004 (IL SLRB 1997), citing American Federation of State, County and Municipal Employees, Council 31 v. Illinois State Labor Relations Board, 175 Ill. App. 3d 191, 197, 529 N.E.2d 773, 776 (1st Dist. 1988).

A memorandum issued on August 20, 2008 suggests that Pino's ultimate termination was based, in part, on the Village's finding that (1) on a series of dates, Pino failed to perform his assigned duties of picking up litter and debris in his assigned work area, and (2) on these dates, Pino signed and submitted false work reports that indicated that he had cleaned certain assigned areas. Subsequently, this second element suggests that Pino also signed and submitted Vehicle Inspection Reports that significantly understated the mileage actually driven or, on other dates, submitted no Vehicle Inspection Report, in order to spend his workday driving around in his Village assigned vehicle rather than performing his assigned duties. Furthermore, as indicated in Pino's August 22, 2008 notice of termination, when the Village determined that Pino's actions merited termination, it also took into account other factors such as Pino's overall disciplinary and performance history as well as the information Pino provided at the meetings on August 14 and 22, 2008.

An inference of antiunion animus based upon disparate treatment can be made if the only difference between two differently treated employees is the illegitimate criteria at issue (i.e., union activity). See Asarco, Inc. v. National Labor Relations Board, 86 F.3d 1401, 1408 (5th Cir. 1996). Here, even if other employees who did not serve on the Union's bargaining team may have failed to perform assigned duties or falsely reported their work and were treated more leniently than Pino, these other employees were not similarly situated in all respects. In this way, Pino's comparatively unique circumstances and background complicate a traditional disparate treatment analysis. Absent such comparable evidence, the record will lack a factual basis for finding that the Village subjected Pino to unequal treatment when it terminated his employment.

While alleging disparate treatment, Charging Party alludes to testimony indicating that Jeff Kuta, another equipment operator, was disciplined, but not terminated, after falsely accusing Brinkman of committing misconduct during a March 14, 2008 disciplinary meeting. Charging Party also argues that other employees that have been issued more suspensions than Pino were still employed by the Village. Because of the obvious factual differences, however, these examples do not serve as especially useful tools for comparison. On the other hand, the contrasting discipline issued to Ordie Grant for related performance issues functions as a more effective comparison.

Shortly after Brinkman shared his concerns about Pino's work, Brinkman similarly shared his concerns about Grant's work with superiors such as Fenwick, Wielebnicki, and Spataro. In general, like Pino, Grant demonstrated a pattern of poor productivity during the investigatory period. Brinkman also observed that both Grant and Pino were misreporting that they had cleaned particular areas and inaccurately documenting their mileage.

In April of 2008, Brinkman and Fenwick suggested to their superiors that Grant should be disciplined. However, after reviewing documentation that included Grant's reports and photographs of Grant's work, the Village determined that Grant's performance was not as poor or "blatant" as Pino's and did not justify termination. Testimony consistently suggests that, at the time, Grant's poor performance was viewed by the Village as more sporadic than Pino's "chronic misconduct." Unlike Pino, Grant was not regularly assigned to litter pickup. The evidence also indicates that the Village considered Grant's contrasting work and disciplinary history when making its determination. In addition, during the ongoing investigation of Grant's conduct, Brinkman's superiors were informed and recognized that Grant's performance and accuracy had greatly and abruptly improved after Pino was placed on administrative leave.²⁰

While I do find this particular comparison somewhat compelling, because the considered factors plausibly distinguish Pino's conduct and history from Grant's to some degree, it is not immediately clear that Pino was inappropriately treated more severely than his fellow Union member. Certainly, at some level, the evidence demonstrates that the Village tolerated certain conduct from Grant but did not do so for Pino. However, the burdened Charging Party has altogether failed to address the divergent circumstances, including the extent of that improper conduct.

In light of the foregoing, I find that Charging Party has not introduced sufficient evidence establishing that Respondent's discipline demonstrates that Pino was disparately treated by Respondent because of his union activity. To this extent, the instant circumstances do not demonstrate that the Village's real motive for terminating Pino's employment was its antiunion animus. Furthermore, because Charging Party has not sufficiently established a prima facie case

²⁰ Grant was not consistently assigned to litter pickup until after Pino was placed on administrative leave.

of discrimination, I hold that Charging Party has not proven by a preponderance of the evidence that Respondent unlawfully terminated Pino's employment.

Because Charging Party has not established the necessary prima facie case, the additional phases of the burden-shifting City of Burbank standard need not be fully explored in this analysis. Moreover, as Charging Party has failed to establish all of the required elements of a prima facie case, the complaint in this matter should be dismissed in its entirety. However, if it is determined that Charging Party has demonstrated, for example, that Pino's union activity was a motivating factor in the termination of his employment, it must be found that Charging Party has proven a prima facie case of discrimination under Section 10(a)(2) of the Act. See City of Burbank, 128 Ill.2d at 345, 538 N.E.2d at 1149.

According to the City of Burbank standard, once a charging party has established a case of discharge based in part on antiunion animus, the employer can avoid a finding that it violated the statute by demonstrating that the discharged employee would have been fired for a legitimate reason notwithstanding the employer's antiunion animus. Id.; see also County of Menard v. Illinois State Labor Relations Board, 177 Ill. App. 3d 139, 144, 531 N.E.2d 1080, 1083 (4th Dist. 1988). Even if it is determined that Charging Party has met its initial burden, I recommend that Respondent has rebutted a possible presumption of discrimination by asserting and demonstrating that it acted for legitimate reasons in its discipline of Pino. As the above analysis makes clear, substantial evidence suggests that, when making the disciplinary determination at issue, the Village relied upon a variety of largely undisputed factors, including, particularly, Pino's documented misconduct and consistently poor performance. Furthermore, I find that the record does not indicate that Respondent's proffered reasoning is pretextual or a "mere litigation figment." See City of Burbank, 128 Ill. 2d at 346, 538 N.E.2d at 1150. Thus, I recommend that

the instant record suggests that Pino's employment independently could have been terminated absent his involvement with the Union.

V. CONCLUSIONS OF LAW

I find that Charging Party failed to prove, by a preponderance of the evidence, that Respondent violated either Section 10(a)(1) or Section 10(a)(2) of the Act.

VI. RECOMMENDED ORDER

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

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that

the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Springfield, Illinois, this 11th day of October, 2011.

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

Martin Kehoe

**Martin Kehoe
Administrative Law Judge**

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

James Pino,

Charging Party

and

Village of Oak Park,

Respondent

Case No. S-CA-08-131

DATE OF
MAILING: **October 11, 2011**

AFFIDAVIT OF SERVICE

I, Shannon Trumbo, on oath, state that I have served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** issued in the above-captioned case on each of the parties listed herein below by depositing, before 1:30 p.m., on the date listed above, copies thereof in the United States mail pickup at One Natural Resources Way, Lower Level Mail Room, Springfield, Illinois, addressed as indicated and with postage prepaid for first class mail.

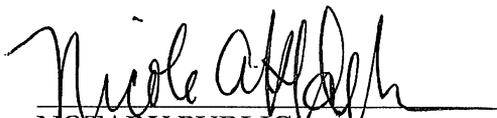
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Shannon Trumbo

SUBSCRIBED and SWORN to
before me, **October 11, 2011**


NOTARY PUBLIC

