

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

Ronald Cox,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-09-108
)	
Greater Peoria Mass Transit District,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On October 22, 2008, Ronald Cox (Charging Party) filed a charge in the above-referenced case with the State Panel of the Illinois Labor Relations Board (Board) pursuant to Section 11 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules), alleging that Greater Peoria Mass Transit District (Respondent) had violated Section 10 of the Act. The charges were investigated in accordance with Section 11 of the Act and on November 3, 2009, the Executive Director of the Illinois Labor Relations Board issued a Complaint for Hearing.

A hearing in this case was held on June 13, 2011, via videoconference in Chicago and Springfield, at which time the Charging Party presented evidence in support of the allegations and all parties were given an opportunity to participate, adduce relevant evidence, examine witnesses, argue orally and file written briefs. After full consideration of the parties' stipulations, evidence, and arguments, and upon the entire record of the case, I recommend the following.

I. PRELIMINARY FINDINGS

The Parties stipulate and I find as follows:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Charging Party has been a public employee within the meaning of Section 3(n) of the Act.
3. At all times material, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Sections 5(a) and 20(b) of the Act.

II. ISSUES AND CONTENTIONS

The Charging Party argues that his rights were violated when the Employer failed to promote him to general foreman because he refused to resign as president of the bargaining unit. The Charging Party states that the Respondent's intentions were apparent when Doris Martin stated that she did not believe he could give both positions 100 percent during his interview for the promotion.

The Respondent denies that it discriminated against the Charging Party regarding the promotion to the general foreman title. The Respondent maintains that the interviewing committee made its decision without any discrimination or undue influence by Doris Martin. Moreover, the Respondent contends that the Charging Party has not met its prima facie case and therefore the complaint should be dismissed.

III. FINDINGS OF FACT

The Charging Party has been employed by the Respondent as the assistant general foreman for approximately 14 years. He is also the president of the bargaining unit that represents the Respondent's bus operators and maintenance employees. As president, the Charging Party assists bargaining unit members with grievances and contract and wage negotiations.

In June 2008, the Respondent posted a vacancy for the general foreman position and began interviewing candidates. The following five candidates were interviewed: Dan Lattimore, John Anderson, Karl Stone, Orville Skinner and Ronald Cox. Of the five candidates, the Charging Party and Karl Stone were the only officers in the union. Karl Stone held the officer title of vice-president of the bargaining unit.

The interviewing process for the general foreman position was a departure from past practices. In the past, the Respondent would simply promote assistants to vacant top-level positions without posting vacancies or interviewing other candidates. For the general foreman position, there was a job posting and candidates were interviewed by several members of the management team. Those individuals were Dennis Roe, Doris Martin, Tom Smith and Carina Johnson. At the time of the interviews, Dennis Roe was the Director of Maintenance; Doris Martin was the Assistant General Manager for First Transit¹; Tom Smith was the Safety and Security Director and Carina Johnson was the Human Resource Specialist. Johnson prepared several questions for the panelist to ask the candidates. Each panelist had a questionnaire on which he or she documented notes during the interviews. There was no evidence of a scoring system. Even though Doris Martin was the most supervisory member of the panel, each member had an equal vote.

When Karl Stone was interviewed, he offered to resign as a union officer for the promotion. Stone was not asked or pressured into resigning. Stone felt that there was a conflict of interest with him holding the general foreman position and being an officer in the union because he felt he could not discipline his subordinates and also represent them in grievance

¹ First Transit is a transit management company. Martin was the Assistant General Manager for Greater Peoria Mass Transit District as an employee of First Transit.

proceedings. In his position as vice-president of the union, Stone did not handle many grievances. After his term as union officer ended, Stone did not run again.

After Stone was promoted he received more than two weeks of training from David Ingram – the outgoing general foreman – on how to create spreadsheets and work orders. Ingram believes that during training Stone learned everything he needed to know to perform the job satisfactorily. Stone has not received any complaints about his job performance as general foreman. At the time of his interview, Stone did not have any specific management skills, any experience creating spreadsheets or work orders, and he was unsure if he met the minimum physical requirements because he had not been released from workman's compensation for a recent shoulder injury.

The Charging Party and Dennis Roe felt the Charging Party's interview was conducted with hostility and emphasis on whether he had the ability to handle disciplinary matters. The Charging Party had experience in the general foreman position as he was the acting general foreman when David Ingram was out of the office and on weekends. During his interview, Roe asked the Charging Party if he would be willing to resign as officer of the union for the general foreman position. The Charging Party declined. According to Charging Party, it was then that Doris Martin stated that she did not think he could perform both positions 100 percent. Roe explains that it was he who asked the question, even though it was not one of the questions prepared by Johnson, and he asked it because Stone offered to resign from his officer position during his interview and he wanted both Stone and the Charging Party to be on the same "playing field." Roe did not ask the question to try to hurt or discourage union activity. Roe testified that Martin's and Johnson's attitudes toward the Charging Party's were aggressive due to his union position. Roe stated that both Martin and Johnson made statements that if the

Charging Party held both positions he would possess too much power to be able to do the job correctly.

In December 2008, Dennis Roe was demoted from director of maintenance back to a mechanic position at the suggestion of Harry Beavers – a consultant hired by the Respondent to help improve the maintenance department. As a mechanic Roe became a member of the union and the Charging Party was still the president. It was not until March 2009, at the Charging Party's request, that Roe shared with the Charging Party his opinion on the events that occurred during the interview. Roe also assisted the Charging Party by writing a letter that accompanied the Charging Party's grievance against the Respondent. The grievance was dismissed at step three and never went to arbitration. Since his demotion, Roe has been promoted twice. There is no testimony as to whether Roe applied for or was interviewed for these promotions. Roe does not recall having to interview for the director of maintenance position. He was instead promoted from the assistant director of maintenance position after the director had retired.

Doris Martin did not remember making a comment after the Charging Party declined to resign from his officer position. Martin did express concern about how the general foreman would be able to handle discipline, and states that all interviewees stated they would write someone up and pass it along to the manager. Martin maintains that the maintenance department was desperately in need of changes because of the performance and quality problems they were experiencing. She believed Stone had new and fresh ideas on how to get back on track with preventive maintenance and therefore felt he was the best candidate. Martin testified that she did not state that she did not think the Charging Party would be able to give both positions 100 percent. With regards to the note on her questionnaire of "union business, time away", Martin asserts that the Charging Party's attendance was never an issue and the note was part of the

Charging Party's answer to the question of how he planned to fix issues in the department. Martin admitted that she did not exactly remember why she made the note. Martin, Roe and Johnson all made remarks on their questionnaires of the Charging Party's interview regarding his time away for union business.

Tom Smith, Doris Martin and Dennis Roe all testified that everyone on the interviewing committee had an equal vote and the majority voted for Karl Stone. Smith and Martin also stated that neither Doris Martin nor any other member of the interviewing committee expressed anti-union animus during any interview.

After Stone was promoted, the Charging Party spoke with Tom Lucek, General Manager for First Transit, and discussed his concerns with Doris Martin's questions and why the interviewing committee chose Karl Stone for the position. Lucek spoke with the members of the committee and they all agreed that the decision to promote Stone was not the product of any pressure or undue influence from Doris Martin. The Charging Party also filed a grievance for the change in promotional procedures and told Lucek that he would withdraw the grievance if he could be paid the same amount as the general foreman. The Charging Party also demanded that Martin be terminated. Although Lucek was willing to give the Charging Party the pay raise, he was advised by his attorney not to do so. Lucek also suggested that since Stone was still on probation, he would demote Stone back to mechanic and re-post the general foreman position so the Charging Party could reapply and be interviewed by different committee members. The Charging Party declined.

IV. DISCUSSION AND ANALYSIS

Section 10(a)(2) of the Act prohibits discrimination by an employer in order to encourage or discourage support for any labor organization. In City of Burbank v Illinois State Labor

Board, 128 Ill. 2d 335, 5 PERI ¶ 4013 (1989), the Illinois Supreme Court set forth the standard that must be applied in cases alleging a violation of Section 10(a)(2) of the Act. A charging party must first establish a prima facie case in support of the alleged violation of the Act, proving, by a preponderance of the evidence, that (1) he was engaged in union activity, (2) that the respondent had knowledge of such activity, and (3) that the respondent took adverse employment action against him as a result of his involvement in activity with or in support of a union, in order to encourage or discourage union membership or support. The Board may infer the requisite discriminatory motivation on the part of a respondent from either direct or circumstantial evidence including the timing of the adverse action in relation to the occurrence of the union activity, a pattern of a respondents' conduct directed at those engaging in union activity, that is, disparate treatment of employees, shifting explanations for a respondent's actions, and inconsistency in the reasons given for its actions against a charging party as compared to other actions by the particular respondent. 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.

The Charging Party has established that he was engaged in protected activity of which the Respondent had knowledge. In their testimony, Roe, Martin and Smith admitted that they knew that both the Charging Party and Karl Stone were union officers. This information was volunteered by Karl Stone during his interview and Dennis Roe solicited this information from the Charging Party during his interview. The Charging Party testified, and the Respondent agreed, that as president of the union the Charging Party handled most grievances from bargaining unit members against the Respondent. The Respondent also admitted that as

president, the Charging Party represented Dennis Roe, and other bargaining unit members, with contract and wage negotiations. Therefore, the Charging Party has established that he was engaged in protected union activity, that the Respondent had knowledge of his activities and that his not being promoted was an adverse employment action.

This leaves the Respondent's motivation for not promoting the Charging Party as the one remaining element of the alleged violation of Section 10(a)(2) and (1) to be considered. Although the evidence is slender, the Charging Party made a sufficient showing of a causal connection between his protected activity and the adverse action. The existence of such a causal link is a fact-based inquiry and may be inferred from direct or circumstantial evidence, including: the timing of the employer's action in relation to the protected activity; expressions of hostility toward protected activities; disparate treatment of employees or a pattern of conduct that targets union supporters for adverse employment action; inconsistencies between the proffered reason for the adverse action and other actions of the employer; and shifting or inconsistent explanations for the adverse employment action. City of Burbank v. ISLRB, 128 Ill. 2d 335, 5 PERI ¶ 4013 (1989). Several of these factors are present in this case.

Although the Charging Party did not give specific examples or timeframes regarding his union activities, the proximity of time between his activities and the interview/non-promotion is apparent. It is undisputed that the Charging Party assisted bargaining unit members in grievances and contract and wage negotiations as president of union. At the time of his interview, and currently, the Charging Party held the position of president of the union. During his interview, his union business and handling grievances became a topic of concern.

Doris Martin's statement and Martin's and Johnson's "aggressive" attitudes toward to the Charging Party, during his interview because of his union activities, are examples of expressed

hostility toward unionization. Although Martin and Smith testified that they did not remember Martin making any statement regarding the Charging Party's ability to handle both jobs, the fact that Martin, Roe and Johnson all alluded to "time away for union business" on their questionnaires of the Charging Party's interview makes it evident that the topic was discussed. Their testimony is inconsistent with what was actually documented on their notes during the interview. Roe also testified that both Martin and Johnson were aggressive toward the Charging Party and that they were concerned that he would have too much power if he possessed both positions. Although Roe's testimony comes only after he was asked by the Charging Party to assist him in his grievance and after he was demoted, his testimony, along with the evidence presented, is enough to show the Respondent did express hostility toward the Charging Party's protected activities.

Lastly, and perhaps the strongest evidence, is the Respondent's inconsistent explanations for the adverse employment action. The Respondent alleges that it did not discriminate against the Charging Party as an officer of the union because they hired Stone who was also an officer of the union. Although that is a fact, the testimony also makes it clear that Stone was not relied on by bargaining unit members to assist with grievances. The opposite is true of the Charging Party's position in the union. It is also unlikely that the Respondent promoted Stone over the Charging Party because he offered one good idea consistent with the changes in the department the Respondent intended to make, even though he did not meet the minimum job requirements. It is unordinary for an employer to promote an unqualified employee over a qualified employee just because he offered one good idea. That logic is also inconsistent with the Respondent's purpose in setting standards and requirements for any open position. As such, the Charging Party has met its prima facie case.

In finding that the Charging Party established a prima facie case, the burden now shifts to the Respondent. The Respondent has not established that the Charging Party would not have been promoted for legitimate business reasons notwithstanding his protected union activity. City of Burbank, 128 Ill. 2d at 346. 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. If the proffered reasons are merely litigious figments or were not, in fact relied upon, then the employer's reasons are pretextual and the inquiry ends. But 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 the action would have been taken notwithstanding the employee's union activity. Id.

Here, the Respondent admits that the Charging Party was qualified but suggests that Stone was promoted over the Charging Party because he had "big bus" experience and because he had fresh and new ideas to make the necessary changes in the department. Again, I find these reasons to be pretextual. Both Stone and the Charging Party had "big bus" experience. More importantly, Stone admitted to not having management experience, having no knowledge of spreadsheets or generating daily work reports and not knowing whether he was physically capable to meet the minimum requirement of lifting 100 pounds until he was released from workman's compensation. On the other hand, the Respondent stipulated that the Charging Party was qualified for the position at the time of his interview.

The general manager's actions are also very significant. Tom Lueck was willing to both pay the Charging Party the difference in his pay and that of the general foreman and demote Stone so that the Charging Party could re-apply for the position. Again, if Stone would have

been promoted regardless of the Charging Party union activities, it would have been futile for the Respondent to offer to increase the Charging Party's pay and demote Stone so the Charging Party could apply and be interviewed again. The Respondent admits that the decision came down to Stone or the Charging Party. But for the Respondent's fear of the Charging Party having too much power holding the union position and the general foreman position, the Charging Party would have been promoted. The Respondent did not provide a legitimate business reason in promoting Stone over the Charging Party.

In view of the foregoing findings and analysis, I find that the Charging Party has established, by a preponderance of the evidence, that Respondent discriminated against Charging Party when it failed to promote him to general foreman due to his union and protected concerted activities. I find that but for the Charging Party's union activities; he would have been promoted to general foreman. I also find that the Respondent's proffered reasons fail to establish that the Charging Party was not promoted for a legitimate, nondiscriminatory business reason. Accordingly, I find that Respondent violated Sections 10(a)(1) and 10(a)(2) of the Act.

V. CONCLUSION OF LAW

The Respondent, Greater Peoria Mass Transit District, violated Section 10(a)(2) and, derivatively, (1), of the Act, by failing to promote Charging Party, Ronald Cox, due to his union activities and failing to provide a legitimate reason for not promoting him.

VI. RECOMMENDED ORDER

The Board's policy in unfair labor practice cases is to order a make-whole remedy and restore the status quo ante, that is, place the parties in the same position they would have been in had the unfair labor practice not been committed. Village of Dolton, 17 PERI ¶ 2017 (IL LRB-

SP 2001). On the basis of the foregoing findings of fact, conclusions of law, and the entire record, issuance of the following Order is recommended:

Order

IT IS HEREBY ORDERED that the Greater Peoria Mass Transit District, its officers and agents, shall:

1. Cease and desist from discriminating against the Charging Party, Ronald Cox, due to his protected union activities.
2. Take the following affirmative action designed to effectuate the purpose and policies of the

Act:

- a. Promote Ronald Cox as General Foreman of the Greater Peoria Mass Transit District.
- b. Make Ronald Cox whole for any losses incurred by reason of the failure to promote, including back pay with interest computed at the rate of seven percent per annum as allowed by the Act, calculated from the date in which the general foreman position became filled until the date of being made whole.

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 the 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 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 cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 27st day of September, 2011

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



**Elaine L. Tarver
Administrative Law Judge**

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

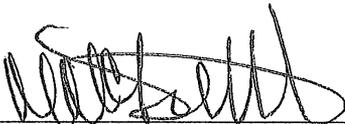
Ronald Cox,)	
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Charging Party)	
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And)	Case No. S-CA-09-108
)	
Greater Peoria Mass Transit District,)	
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Respondent)	

AFFIDAVIT OF SERVICE

I, Melissa L. McDermott, on oath state that I have this 27th day of September, 2011, 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 5:00 p.m., copies thereof in the United States mail at 100 West Randolph Street, Chicago, Illinois, addressed as indicated and with postage for regular mail.

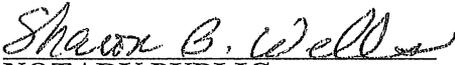
Mr. Ronald Cox
8514 South Shryock
Glasford, Illinois 61533

Mr. William Wombacher
Attorney at Law
416 Main Street
Suite 700
Peoria, Illinois 61602-3118



Melissa L. McDermott, ILRB

SUBSCRIBED and SWORN to
Before me this 27th day of
September, 2011.


NOTARY PUBLIC

