STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Michael Montemayor, Charging Party and Village of Barrington Hills (Police Department), Respondent	)	Case No. S-CA-11-059

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 18, 2010, Michael Montemayor (Charging Party) filed an unfair labor practice charge in Case No. S-CA-11-059 with the State Panel of the Illinois Labor Relations Board (Board) alleging that the Village of Barrington Hills (Police Department) (Respondent or Village), engaged in an unfair labor practice within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act). Subsequently, the charge was investigated in accordance with Section 11 of the Act and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On December 20, 2010, the Board's Executive Director issued a Complaint for Hearing. The case was then heard on August 25, August 26, and September 8, 2011 in Chicago, Illinois by Administrative Law Judge John Clifford. Both parties appeared at the hearing and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Written briefs were timely filed on behalf of both parties. 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, at all times, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.

2. The parties stipulate and I find that, at all times, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5 of the Act.

3. The parties stipulate and I find that the Charging Party was a patrolman for the Village from March of 1997 to August of 2005 and in August of 2005 the Charging Party was promoted to sergeant for the Village.

4. The parties stipulate and I find that, at all times, the Metropolitan Alliance of Police (MAP) has been a labor organization within the meaning of Section 3(i) of the Act.

5. The parties stipulate and I find that the Charging Party's discharge was effective September 9, 2010.

6. The parties stipulate and I find that, at all times material, the Charging Party was a supervisor within the meaning of the Act.

II. ISSUES AND CONTENTIONS

The Complaint for Hearing centrally contends that the Respondent discriminated against a public employee in order to discourage membership in or support for a labor organization in violation of Sections 10(a)(2) and (1) of the Act when the Respondent discharged Montemayor in order to retaliate against him for his perceived union support. In general, the Respondent contends that it did not violate Sections 10(a)(2) or (1) of the Act.

III. FINDINGS OF FACT

Montemayor served as a patrolman for the Village from March of 1997 until he was promoted to sergeant in August of 2005. Following this promotion, Montemayor served as a sergeant until his employment was terminated on September 9, 2010. From November of 2005 until this September 9, 2010 termination, Montemayor ultimately reported to Michael Murphy, the Village's current chief of police.

During a November 2005 telephone call, Montemayor informed Chief Murphy that the Village's previous chief of police had given Montemayor his permission to solicit funds for Montemayor's son's sports teams. Responding, Chief Murphy stated that he would review the police department's policies and procedures. Subsequent to this exchange, in November or December of 2005, Montemayor announced to Chief Murphy that he would be sending out letters soliciting funds for his son's sports teams. Chief Murphy then told Montemayor that this was fine and indicated that Montemayor should keep it to himself.[1]

On September 3, 2009, a female driver was involved in a one-car accident. On his way to assist a Village patrol officer who was present at the site of this accident, Montemayor improperly violated the speed limit, disobeyed a red light, and failed to use his emergency lights or siren. While at the accident site, Montemayor was alerted of a burglar alarm call associated with a particular Village residence. Before proceeding to that Village residence to respond to its burglar alarm, Montemayor improperly directed the female driver into the back of his squad car and then dropped her off at the police station. On his way to the site of the alarm, Montemayor did not exceed the speed limit or use his emergency equipment. Shortly after responding to the burglar alarm call and returning to the police station, Montemayor improperly left the Village's

[1] No other police officers have asked Chief Murphy for his permission to solicit funds for their children's extracurricular activities.

limits while on duty in order to travel to his residence in Lake Zurich, Illinois for personal reasons.

Later, an individual associated with the aforementioned Village residence sent Chief Murphy a letter asking him to determine why it took the police department such a long time to respond to his burglar alarm on September 3, 2009. Accordingly, Chief Murphy, with the assistance of Lieutenant Joseph Colditz, reviewed the in-car video and GPS data associated with Montemayor's squad car on the night of the burglar alarm call. Because of this review, on September 22, 2009, Montemayor was issued two separate one-day suspensions and a written reprimand for his actions on September 3, 2009. At that time, Montemayor was also advised that his performance would be monitored.

On November 23, 2009, Robert Abboud, the president of the Village, encountered Montemayor in the roll call room of the police station. According to President Abboud's testimony, at that time, Montemayor privately expressed his concerns to President Abboud about the discipline Montemayor had received in September 2009 and told President Abboud that, in order to establish a "black mark" on Chief Murphy's record, Montemayor was helping the Village's patrol officers form a union during Chief Murphy's tenure. However, according to Montemayor's testimony, during this November 23, 2009 conversation, Montemayor actually told President Abboud that the patrol officers were considering forming a union, in part, because they were upset with Chief Murphy's actions.

After this initial November 23, 2009 conversation, President Abboud told Chief Murphy that he had spoken privately with Montemayor and asked Chief Murphy "to be proactive and receptive to an open conversation" with Montemayor. Around this time, during a November 25, 2009 command meeting, Chief Murphy formally advised those in attendance of the collective

bargaining rights of the Village's employees. Montemayor signed off on the minutes for this command meeting.

On November 30, 2009, Montemayor and President Abboud met in a local restaurant and engaged in a second private conversation. According to President Abboud's testimony, during this particular conversation, President Abboud and Montemayor discussed, inter alia, Montemayor's September 2009 discipline, Montemayor's relationship with Chief Murphy, and Montemayor's fear of being fired by Chief Murphy. Allegedly, Montemayor also indicated to President Abboud that he would continue to help the patrol officers with their organizational efforts until a union was formed. However, according to Montemayor's description of this November 30, 2009 conversation, Montemayor asked President Abboud why he would not accept Montemayor's appeal of a September 3, 2009 suspension and President Abboud replied that he would reexamine the issue. In addition, Montemayor testified that, during this second conversation, President Abboud requested that Montemayor ask patrol officers to consider talking to President Abboud before proceeding with their organizational efforts. Nonetheless, President Abboud's testimony asserts that, during the course of this second conversation, he never asked Montemayor to approach the patrol officers in this way.

According to Patrol Officer Gary Deutschle's testimony, at some point before a majority interest representation petition was filed on December 4, 2009, Montemayor encouraged the patrol officers to think about what they were doing and share their concerns with Abboud before forming a union. Yet, Patrol Officer Deutschle also testified that he did not feel that Montemayor was intimidating, coercing, or interfering with his ability to unionize and file a representation petition. Similarly, Patrol Officer Erik Stokes' testimony alleges that Montemayor did absolutely nothing to support the formation of the patrol officers union. In fact,

according to Patrol Officer Stokes's testimony, in October or November of 2009, Montemayor actually discouraged him from joining a union and suggested that Patrol Officer Stokes should discuss his issues with President Abboud. However, Patrol Officer Stokes also testified that he never felt like these comments were intimidating or that Montemayor interfered with the organizing process.

In any case, on December 4, 2009, MAP filed a representation petition pursuant to a showing of majority interest in Case No. S-RC-10-049. This petitioned-for unit, which was later certified by the Board on June 7, 2010, exclusively includes the Village's patrol officers.[2] On December 19, 2009, President Abboud sent a letter to the Board requesting an independent investigation of the formation of this patrol officers union. Among other things, this letter asserted that a "disgruntled" sergeant improperly participated in the patrol officers' organization process. Although President Abboud was in fact concerned about Montemayor's actions at the time, Montemayor was not specifically named in this letter.

Later, on December 23, 2009, President Abboud and Montemayor engaged in a third private conversation in President Abboud's office. During this conversation, the two discussed President Abboud's December 19, 2009 letter to the Board. According to President Abboud's testimony, Montemayor then assured President Abboud that, prior to this third conversation, he had actually worked to convince the patrol officers to not sign majority interest cards and that, in response, President Abboud informed Montemayor that this kind of activity was improper. However, according to Montemayor's testimony, during this third conversation, Montemayor actually informed President Abboud that he had made an effort to "bring the two sides together"

[2] Accordingly, Montemayor, a former sergeant, has never been represented by the patrol officers union.

and, in response, President Abboud stated that he appreciated Montemayor's efforts and assured Montemayor that his job was not in danger.

In May of 2010, after noticing that Montemayor's 2009 evaluation did not account for the discipline Montemayor received in 2009, Chief Murphy directed Lieutenant Curt Underwood to include that discipline in Montemayor's 2009 evaluation and to change the evaluation's "Leadership" dimension rating from "Exemplary" to "Needs Improvement." Prior to this instance, Chief Murphy had not directed Lieutenant Underwood to change an evaluation. However, Chief Murphy commonly offers feedback concerning sergeants' job performances.

On June 24, 2010, Montemayor traveled to a Village residence in order to investigate a civil dispute involving a pair of individuals that shared a common driveway. While conducting an on-site investigation, Montemayor was approached by a pair of large German Shepherds. After one of the two dogs failed to halt its threatening approach, Montemayor struck the approaching dog on its head with a baton. When Montemayor struck this dog, he felt a pop in his right shoulder and a shooting pain in his collarbone.

Shortly after this incident, Montemayor returned to the police station and had a conversation with Chief Murphy in the police station's radio room. After hearing a brief explanation of the incident, Chief Murphy asked Montemayor if he was okay. According to the testimony provided by Montemayor and Patrol Officer Stokes, who was also present during this June 24, 2010 conversation, Montemayor responded to Chief Murphy's inquiry by stating that his shoulder was a little sore. However, according to Chief Murphy's testimony, at that time, Montemayor did not indicate that he had sustained a work-related injury or that he was sore or hurting.

Montemayor did not immediately fill out a Form 45 when he was injured while on duty on July 24, 2010. Generally speaking, a Form 45 is a workers' compensation form that must be filled out anytime there is an on-duty injury. According to Montemayor's testimony, an "immediate supervisor" (i.e., the "next highest ranking officer on duty") is supposed to fill out a Form 45 after an injury. Thus, during the hearing, Montemayor also testified that he felt he did not need to fill out a Form 45 on July 24, 2010 because, in his view, it should have been filled out by Chief Murphy, who was his immediate supervisor that day. However, according to the testimony provided by Lieutenant Richard Semelsberger, if Chief Murphy had filled out a Form 45, it would have been "a departure from past practices." Furthermore, as indicated by a police department general order and the testimony of Chief Murphy and Lieutenant Semelsberger, the "shift supervisor" is generally responsible for filling out a Form 45 after an injury. Montemayor was the shift supervisor at the time of his injury.[3]

Although Montemayor did not fill out a Form 45 on the day of his injury, he did prepare separate internal and incident reports on June 24, 2012. Both of these reports included a narrative section describing aspects of the June 24, 2010 incident. Yet, despite his on-duty injury, these reports did not indicate that Montemayor's shoulder was sore or injured when the reports were written. Similarly, when Montemayor used a sick day on June 28, 2010 and did not work that shift, he did not report that he used this sick day because of his on-duty injury.

Nonetheless, on July 2, 2010, Montemayor notified Lieutenant Semelsberger and Chief Murphy by telephone that he had sustained an on-duty injury on June 24, 2010. At this time, Montemayor was verbally instructed to fill out a Form 45 and proceed to the occupational health center for an examination of his injury. Later that day, Montemayor performed these tasks as

[3] To clarify, although Lieutenant Semelsberger would normally have been Montemayor's immediate supervisor and was the lieutenant in charge of the day shift on June 24, 2010, no lieutenant or deputy chief was on duty at the time.

instructed.[4] Because of his on-duty injury and a related doctor-imposed work restriction, Montemayor was temporarily reassigned to an administrative desk assignment. As alleged by Chief Murphy and Lieutenant Semelsberger, by failing to properly report his June 24, 2010 on-duty injury until July 2, 2010, Montemayor violated the police department's rules.

On July 7, 2010, Lieutenant Semelsberger issued a memorandum directing Montemayor to verify the date he realized he was injured, by what means that injury was reported to a supervisor, and if the sick day he used on June 28, 2010 was in relation to his on-duty injury. Montemayor's written response, provided later that day, clarified that Montemayor realized he was injured on June 24, 2010, the day of the incident; that he first reported this injury to a supervisor on July 2, 2010 by telephone; and that he used sick time on June 28, 2010, in part, because of his June 24, 2010 injury but also, in part, because of a migraine headache.[5] After reviewing Montemayor's response, Chief Murphy, on July 8, 2010, assigned the matter to Lieutenant Semelsberger for an internal investigation. Subsequent to this internal investigation, Lieutenant Semelsberger determined that Montemayor had violated the police department's rules and that further investigation was required.

On July 16, 2010, Montemayor, while on temporary reassignment, sent Lieutenant Colditz a memorandum in which Montemayor stated, in relevant part, that, while assigned to his desk, "filling eight hours a day can be challenging." According to his testimony, when Chief Murphy reviewed Montemayor's July 16, 2010 memorandum and read this statement, Chief Murphy wondered what Montemayor was doing all day on his Village-owned work computer.

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[4] When Montemayor originally filled out this Form 45, he erroneously indicated that he filled it out on July 1, 2010. This error was subsequently modified by Chief Murphy's administrative assistant to reflect the correct date. To be clear, this Form 45 was the first filed report that indicated that Montemayor injured his shoulder on June 24, 2010 while on duty.

[5] Later, on July 21, 2010, Montemayor clarified this initial July 7, 2010 response and indicated to Lieutenant Semelsberger by memorandum that, on June 24, 2010, he informed Chief Murphy that his shoulder was a little sore.

Thus, on July 20, 2010, Chief Murphy initiated an inspection of that computer. As outlined below, this inspection revealed several documents which indicated to Chief Murphy that Montemayor had violated various police department rules.[6]

Among other things, Chief Murphy's inspection revealed that Montemayor had improperly removed and disseminated Village records in violation of police department rules when Montemayor forwarded an internal police department e-mail to his wife on September 1, 2006. This e-mail contained a memorandum with an outline of a work-related incident involving a Village-employed police dispatcher, Montemayor's analysis of the incident, and a recommendation that this dispatcher be disciplined for his actions. Montemayor's wife was not employed by the Village.

In addition, Chief Murphy's inspection revealed that Montemayor had improperly authored separate letters of recommendation on May 1, 2007 and January 1, 2009. The May 1, 2007 letter recommended the wife of a Village police officer for a position with the school district of Belvidere, Illinois. The January 1, 2009 letter of recommendation was written for a former police dispatcher whose employment was terminated on November 28, 2008 for misconduct committed while a probationary employee. In each of these letters, Montemayor identified himself as a sergeant of the Village's police department. Because Montemayor did not have Chief Murphy's permission to issue these letters of recommendation in this manner, Chief Murphy determined that Montemayor had violated police department rules.

According to Chief Murphy, his inspection also revealed that Montemayor had improperly accessed and disseminated confidential police department records in violation of police department rules. Specifically, Chief Murphy's inspection revealed that, on August 22,

[6] Chief Murphy has not similarly inspected the work computers of other police officers.

2007, Montemayor received an e-mail from a friend (who is not a Village employee) requesting information about a specific female babysitter and another individual that friend purportedly believed was the babysitter's husband. Later that same day, Montemayor, using his police department e-mail account, replied that the babysitter did not have a record and that he couldn't find any information on the purported husband.[7]

Lastly, Chief Murphy's inspection further revealed that, between 2005 and 2009, Montemayor had routinely sent letters to a number of Village residents asking them to financially support Montemayor's son's sports teams. Notably, since June 1, 2007, the police department's rules of conduct have prohibited police department employees from soliciting contributions of any kind except as specifically authorized by the chief of police.[8] According to his testimony, Montemayor was aware of this rule, but believed that he did not need to ask for permission anew after this date because, in his mind, the permission verbally granted by Chief Murphy in 2005 had not been revoked. However, according to Chief Murphy's testimony, because Montemayor was expected to follow the most recent directives or seek reaffirmation of the previous authorization, but failed to do either, his solicitations issued after June 1, 2007 violated the police department's rules.

Montemayor was placed on paid administrative leave on July 21, 2010. Later, on August 3, 2010, Montemayor was notified of his administrative rights and the various charges against him and was ordered to appear for a formal interrogation. These particular charges were the result of the investigation of Montemayor's on-the-job injury and the documents that were removed from Montemayor's Village-owned work computer. Subsequently, on August 6, 2010,

[7] During the hearing, Montemayor testified that he only used publicly available Internet search devices to perform this search.

[8] In addition, since January 1, 2008, the Village's employee handbook has stated that Village employees are strictly prohibited from soliciting Village residents "unless as a result of an event sanctioned by the Village."

Montemayor appeared with an attorney and was interrogated by Chief Murphy and Lieutenant Semelsberger about his alleged improper acts.

On August 18, 2010, Lieutenant Semelsberger submitted a report to Chief Murphy that listed the allegations against Montemayor, summarized Lieutenant Semelsberger's investigative procedures and findings, and included a recommendation that Montemayor be demoted. This report also indicated that Lieutenant Semelsberger considered Montemayor's disciplinary history when making this recommendation. Later, on August 26, 2010, Chief Murphy completed an additional report which, like Lieutenant Semelsberger's prior report, detailed each of Montemayor's violations, summarized the relevant investigative procedures used, provided a summation of the investigation's conclusions and findings, and indicated that Chief Murphy reviewed Montemayor's disciplinary history. However, unlike Lieutenant Semelsberger's report, Chief Murphy's August 26, 2010 report concluded that Montemayor's employment should be terminated.

On August 30, 2010, Chief Murphy sent President Abboud a memorandum which stated that Chief Murphy, pursuant to internal investigations, had found that there was sufficient cause to terminate Montemayor's employment and that, accordingly, in the absence of referrals by President Abboud, it was Chief Murphy's intention to terminate Montemayor's employment no later than September 9, 2010.[9] Chief Murphy did not consult with President Abboud before he made this decision. After President Abboud reviewed Chief Murphy's analysis, he indicated to Chief Murphy that he agreed with his opinion.

[9] Chief Murphy's August 30, 2010 memorandum also asserted, in part, that the decision to terminate Montemayor's employment was the result of a careful assessment of the facts leading to the administrative charges against Montemayor as well as a review of his work and disciplinary records.

Ultimately, Montemayor's employment was terminated on September 9, 2010. According to the provided termination letter and related testimony, Montemayor's termination was based upon internal investigations which found that Montemayor violated a number of the police department's rules of conduct and a separate review of Montemayor's disciplinary history. Subsequently, Montemayor sent President Abboud a short e-mail indicating that he would like to appeal his termination. Once received, President Abboud simply forwarded this e-mail to an attorney representing the Village.

IV. DISCUSSION AND ANALYSIS

The Complaint for Hearing alleges that the Respondent violated Sections 10(a)(2) and (1) of the Act when it discharged Montemayor in order to retaliate against him for his "perceived support" for MAP's organizing efforts. In relevant part, Section 10(a)(1) provides that it shall be 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 or to dominate or interfere with the formation, existence, or administration of any labor organization. Thus, in order to establish a violation of Section 10(a)(1), the Charging Party must generally prove, by a preponderance of the evidence, that the Respondent attempted to or effectively did interfere with, restrain, or coerce its employees in such protected activity. Chicago Park District (Rundle), 8 PERI ¶3017 (IL LLRB 1992).

Usually, whether an employer has violated Section 10(a)(1) does not depend on the employer's motive. Rather, the test is whether the employer's conduct, viewed objectively from the standpoint of a reasonable employee, had a tendency to interfere with, restrain, or coerce the employee in the exercise of a right guaranteed by the Act. See Chicago Transit Authority, 18

PERI ¶3021 (IL LRB-LP 2002); Chicago Park District, 7 PERI ¶3021 (IL LLRB 1991). However, I find that this objective test cannot be utilized where, as here, the charging party claims that the respondent was improperly motivated when it took adverse action against him or her on account of his or her perceived support for a union's organizing efforts. In this case, it must be determined whether the Respondent's action was in fact illegally motivated. Consequently, the analysis of this Section 10(a)(1) violation must follow the criteria arising under Section 10(a)(2) of the Act regarding the right to engage in union activity. Thus, in this instance, the requirements for finding a Section 10(a)(1) violation will largely track those used in cases arising under Section 10(a)(2). See Chicago Park District (Jones), 9 PERI ¶3016 (IL LLRB 1993); Chicago Park District (Rundle), 8 PERI ¶3017; Chicago Park District, 7 PERI ¶3021; Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990). Inasmuch as the same standard applies for the two Section 10(a) violations alleged in this case and these allegations arise from the same set of facts, this analysis will discuss those alleged violations together.

Section 10(a)(2) of the Act provides, in part, that it shall be an unfair labor practice for an employer or its agents to "discriminate in regard to hire or tenure of employment or any terms or condition 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 City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 538 N.E.2d 1146 (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. See City of Kewanee, 23 PERI ¶110 (IL LRB-SP 2007). 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 Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149; City of Chicago, 11 PERI ¶3008 (IL LLRB 1995). The failure to prove such a causal connection precludes a finding of a violation. See Chicago Park District (Jones), 9 PERI ¶3016; Chicago Park District, 7 PERI ¶3021.

Addressing the first element of this City of Burbank standard, the Respondent argues that the Charging Party is unable to establish a violation because Montemayor "has freely admitted that he did not engage in union or protected, concerted activity." Indeed, during the hearing, Montemayor affirmatively indicated that he did "absolutely nothing" to assist the patrol officers in forming their union and "was in no way involved" in the organization of the same. According to Montemayor's own testimony, he merely told President Abboud that the patrol officers were considering forming a union and made an effort to bring both sides together.

Assuming, arguendo, that the Charging Party's testimony is accurate, the Charging Party has not demonstrated, and I do not find, that these actions constitute union or protected, concerted activity. Significantly, instead of specifying Montemayor's protected, concerted activity, the Charging Party simply highlights testimony which suggests that a patrol officer and others allegedly felt that Montemayor was terminated, in part, because the patrol officers formed a union. Such general, conclusory evidence clearly fails to demonstrate a violation of the Act. Moreover, this evidence does not highlight in what allegedly protected activity Montemayor was engaged.[10]

[10] The Charging Party also compares the instant circumstances to those of O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1987). However, the central issue of that case (whether or not a public employer violated the United States Constitution) is clearly distinguishable from that of the instant matter (whether or not the Respondent violated the Act) and is surely beyond the reach of the Board's limited jurisdiction. Similarly, I also find that the Charging Party's various references to "Illinois retaliatory discharge" cases are largely misplaced.

Elsewhere, it has been suggested that, to protect the rights of employees to engage in union and/or protected, concerted activities, employees must be protected even when the employer only mistakenly believes they engaged in such activities. See Lemont Fire Protection District, 14 PERI ¶2037 (IL SLRB 1998); City of Harvey, 9 PERI ¶2041 (IL SLRB 1993). Yet, in this case, it must also be recognized that the Complaint for Hearing specifically alleges that the Respondent discriminated against Montemayor, a purported "public employee" within the meaning of the Act, in order to discourage membership in or support for a labor organization in violation the Act. To be clear, Section 3(n) of the Act, which provides the Act's definition of a public employee, generally excludes supervisors from its definition and, notably, both parties have stipulated that, at all times material, Montemayor was a supervisor within the meaning of the Act.

As a general rule, supervisory employees are not entitled to union representation under labor relations acts without the agreement of the employer and thus are not often protected by those acts against retaliation by an employer because of union or protected activity. Like the National Labor Relations Act, the Act here largely excludes supervisors from its coverage, and reflects that public employers should be free to demand that supervisors refrain from union activism. Indeed, under both statutes, a supervisor who participates in pro-union activity may generally be fired for such activity. See Forest Preserve District of Cook County, 5 PERI ¶3002 (IL LLRB 1988); State of Illinois, Department of Central Management Services, 4 PERI ¶2004 (IL SLRB 1987); City of Chicago, Mayor's Office of Employment and Training, 4 PERI ¶3005 (IL LLRB G.C. 1988). Consequently, only in certain "exceptional circumstances" should protection be extended to supervisors, if at all. See City of Hickory Hills, 6 PERI ¶2014 (IL SLRB 1990). As no such exceptional circumstances have been presented by the Charging Party

or have otherwise been demonstrated in this instance, it appears that the Respondent's action was not prohibited by Section 10(a)(2) or (1) of the Act. See County of Dupage and Dupage County Sheriff, 6 PERI ¶2018 (IL SLRB 1990).

Separately, I also note that, in relevant part, the Charging Party appears to generally allege that Montemayor's termination had a "chilling effect" on the members of the patrol officer union and that Montemayor was terminated in order discourage membership in the patrol officers' union or support for MAP's organizational campaign. However, the scant testimony provided by the Charging Party in support of these positions merely suggests that, in one patrol officer's mind, Montemayor's termination may have "reinforced" union members' preexisting, pro-union beliefs. Further, during the hearing, this same patrol officer also testified that Montemayor's termination "in no way had a chilling effect" on the organizing effort, deterred him from his efforts to bargain collectively on behalf of the union's membership, or interfered with or prevented him from exercising his rights under the Act. Moreover, by the date of Montemayor's termination, the patrol officers had already submitted a majority interest petition apparently demonstrating unanimous union support and the MAP union had already been certified by the Board. Thus, while it is already relatively unclear in what protected activity Montemayor was engaged, it is also not clear what, if any, protected rights have allegedly been interfered with, restrained, or coerced in this instance.

In light of the foregoing, I find that the burdened Charging Party has failed to satisfy the first element of the City of Burbank standard. To this extent, the Charging Party, therefore, cannot demonstrate that the Respondent had knowledge of any protected activity and that this protected activity was a motivating factor in the adverse employment action. Accordingly, the Charging Party has necessarily failed to prove a prima facie case of discrimination and, thus, has

failed to prove, by a preponderance of the evidence, that the Respondent has violated Section 10(a)(2) or (1) of the Act.

Continuing for the sake of argument, I also conclude that, even if it is found that the Charging Party has proven the first two elements of the City of Burbank standard (despite Montemayor's supervisory status and the Charging Party's questionable reliance on the Respondent's mistaken beliefs) the Charging Party must also demonstrate that the Respondent's termination of Montemayor's employment was motivated by his protected conduct but has failed to do so. City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149.[11] Ostensibly in an effort to demonstrate "suspicious timing," the Charging Party's post-hearing brief largely attempts to dispute the merits of the Respondent's various disciplinary findings that lead to his termination. Granted, an inference of improper motive exists when a respondent's reasons for its adverse actions are discredited. See County of Williamson and Sheriff of Williamson County, 14 PERI ¶2016 (IL SLRB 1998). However, in sum, I find that the burdened Charging Party's personal interpretations of the police department's rules, even if correct, do not convincingly demonstrate that Montemayor's allegedly protected conduct was a motivating factor, as these debatable determinations do not independently or effectively evidence an improper motivation in this instance.

In general, anti-union motivation may be inferred from the proximity in time between the employee's union or protected, concerted activity and his or her discharge. Town of Decatur, 4 PERI ¶2003 (IL SLRB 1987). In this case, if Montemayor did in fact engage in protected

[11] In discriminatory discipline and discharge cases, a charging party may establish the requisite unlawful intent from direct evidence, such as statements or threats, or circumstantial evidence, such as the timing of the employer's action in relation to the protected activity, expressed hostility toward protected activities, disparate treatment of the alleged discriminatee in comparison to other employees, and shifting, pretextual or inconsistent explanations for the adverse action. See City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149; Sheriff of Jackson County, 14 PERI ¶2009 (IL SLRB 1998); County of Williamson and Sheriff of Williamson County, 14 PERI ¶2016 (IL SLRB 1998). In this instance, the Charging Party has failed to establish the requisite causal connection with either type of evidence.

activity, it would allegedly have occurred before or around the beginning of December of 2009.[12] Yet, Montemayor was not terminated until September 9, 2010, a date I find, under these circumstances, to be too remote give rise to an inference of retaliation. Moreover, even such a coincidence in timing would not be enough to salvage the Charging Party's case when there is no other evidence of a causal connection. See County of Williamson, 13 PERI ¶2015 (IL SLRB 1997); Chicago Park District, 8 PERI ¶3017 (IL LLRB 1992); Broadway Motors Ford, Inc. v. National Labor Relations Board, 395 F.2d 337, 340 (8th Cir. 1968).

In addition, it is undisputed that Montemayor's full disciplinary history also chronicles a variety of discipline that was issued prior to the patrol officers' organizational efforts. Despite the fact that the police department does not apply progressive discipline, this discipline nonetheless includes a number of supervisory counseling sessions, performance improvement plans, written and oral reprimands, and suspensions. Separately, I note that generally it is not the function of the Board or its administrative law judges to substitute the agency's judgment for that of the employer in the discipline of its employees. County of Rock Island and Sheriff of Rock Island County, 14 PERI ¶2029 (IL SLRB 1998). However, I also submit that, as detailed above, for each of the relevant instances of discipline, the Respondent and its agents have consistently presented a fairly plausible interpretation and application of its own published rules. Further, it generally appears that Montemayor was provided a meaningful opportunity to respond to each accusation of misconduct. All of these observations suggest that the Respondent's action was not improperly motivated.[13]

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[12] Although this aspect of the record is somewhat unclear, both parties' post-hearing briefs and the Complaint for Hearing generally assert that the union began its campaign to represent the patrol officers in December of 2009.

[13] Separately, I note that the record does not provide an example of expressed hostility toward unionization or other activity which could be used to infer a discriminatory motivation. Likewise, I find that the Charging Party has altogether failed to provide any meaningful evidence demonstrating disparate treatment or that the Respondent has otherwise improperly targeted union supporters.

Because the Charging Party has not sufficiently established a prima facie case of discrimination, I must necessarily hold that that the Charging Party has not proven by a preponderance of the evidence that the Respondent unlawfully terminated Montemayor's employment. Accordingly, the Complaint for Hearing should be dismissed in its entirety. However, if the Board determines that the Charging Party has demonstrated that Montemayor's activity was protected and was a known, motivating factor in the termination of his employment, it must be found that the Charging Party has proven a prima facie case under Sections 10(a)(2) and (1) of the Act. City of Burbank, 128 Ill.2d at 345, 538 N.E.2d at 1149. Yet, 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 nonetheless 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).

In this case, even if it is determined that the Charging Party has met its initial burden in this case, I find that the Respondent has convincingly rebutted a possible presumption of discrimination by asserting and demonstrating that it acted for legitimate reasons in its discipline of Montemayor. In general, I find that the evidence largely suggests that, when making the disciplinary determination at issue, the Village actually relied upon Montemayor's documented misconduct. Put differently, I find that the record does not indicate that the 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; Village of Oak Park, 28 PERI ¶111 (IL LRB-SP 2012). Thus, I recommend that the instant record suggests that Montemayor's employment independently could have been terminated absent any actual or perceived involvement with the patrol officers 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 22nd day of August, 2012.

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

Michael Montemayor, Charging Party and Village of Barrington Hills (Police Department), Respondent	)	Case No. S-CA-11-059

DATE OF
MAILING: August 22, 2012

AFFIDAVIT OF SERVICE OF

I, Lori Novak, 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 5:00 p.m., on the date listed above, copies thereof in the United States mail pickup at the corner of Monroe and Fourth Streets, Springfield, Illinois, addressed as indicated and with postage for first class mail.

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Lori Novak

SUBSCRIBED and **SWORN** to
before me, **August 22, 2012**

NOTARY PUBLIC

OFFICIAL SEAL
JODI M. MARR
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8-30-2014