

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

Illinois Fraternal Order of Police,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-11-095
)	
City of Naperville,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On November 12, 2010, the Illinois Fraternal Order of Police Labor Council (Charging Party) filed a charge with the State Panel of the Illinois Labor Relations Board (Board) in Case No. S-CA-11-095, alleging that the City of Naperville (City) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). These charges were investigated pursuant to Section 11 of the Act and on January 27, 2011, the Executive Director of the Board issued a Complaint for Hearing. On February 18, 2011, the Board received the City’s Answer to the Complaint for Hearing.

A hearing in this case was held on October 6, 7 and November 28, 2011 in the Chicago office of the Illinois Labor Relations Board. 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.¹ After full consideration of the

¹ After the Charging Party’s case-in-chief, the City motioned to dismiss the charges in this matter. The undersigned granted, in part, and dismissed, in part, the City’s motion. The undersigned granted the City’s Motion to Dismiss the charge that the City violated Section 10(a)(4) of the Act. On October 1, 2013, the undersigned reopened the case and allowed the parties to brief the issues related to

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 City of Naperville (City) has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the City has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a) of the Act.
3. At all times material, the City has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act.
4. At all times material, Illinois Fraternal Order of Police, Labor Council (Charging Party) has been a labor organization within the meaning of Section 3(i) of the Act.
5. At all times material, Charging Party has been the exclusive representative of the bargaining unit composed of City's employees including those employed in the job title of police officer.

II. ISSUES AND CONTENTIONS

The first issue for hearing is whether the City failed and refused to bargain in good faith when it agreed to wage proposals that it knew would lead to layoffs, in violation of Section 10(a)(4) of the Act. The Charging Party argues that the City failed and refused to bargain the layoffs of its bargaining unit members in good faith violating Section 10(a)(4) and derivatively (1) of the Act. Specifically, the Charging Party argues that layoffs are a mandatory subject of bargaining and the City failed and refused to bargain in good faith when it failed to give the

the City's alleged violation of Section 10(a)(4) of the Act. The parties submitted supplemental post-hearing briefs on December 10, 2013.

Charging Party notice and opportunity to bargain layoffs. Moreover, the Charging Party contends that the layoff provision the parties' agreed to in the collective bargaining agreement does not waive the Charging Party's right to bargain layoffs.

The second issue for hearing is whether the City violated Section 10(a)(2) of the Act by laying off six bargaining unit members without suggesting to the Union, during bargaining, that wage increases would result in said layoffs, in an effort to discourage support for the Union by its members.

The City contends that it did not fail and refuse to bargain in good faith. The City does not deny that layoffs are a mandatory subject of bargaining. The City claims that the parties bargained layoffs and that it gave the Charging Party the requisite notice regarding its decision to layoff, as it is stated in the parties' collective bargaining agreement. Lastly, the City maintains that it did not know that the wage increase agreement would lead to layoffs until after the parties' agreement, and even if it did, the City maintains that it does not owe the Charging Party a duty to inform it of the possibility of layoffs during negotiations.

III. FINDINGS OF FACT

The City and the Charging Party are parties to a collective bargaining agreement in which all sworn Peace Officers in the rank of Patrol Officer employed by the City are represented by the Charging Party. The Parties have negotiated six collective bargaining agreements over the years.

The City has 13 collective bargaining units, including the unit at issue in this matter covering approximately 130 police officers. The City has a City Council (Council) and a City Manager. The Council consists of nine members and is the legislative body that determines policy and decides on revenue sources and approves all budgets. At all times material, the City

Manager has been Doug Krieger, who has held the position since November 2008. Krieger is responsible for the day-to-day operations of the City, which includes preparing the budgets for the Council's approval and all personnel-related matters. Krieger also issues a monthly memorandum to the Council informing them of budget and revenue developments and other financial updates. Krieger has no authority to increase the City's revenues.

By law the City is required to approve a balanced budget each year. The Council approves the budget prior to the start of the fiscal year, which is May 1, of every year. At issue is the budget in fiscal year 2011 beginning May 1, 2010 through April 30, 2011 (FY11).

The City maintains a "General Fund" from which its operating and services budgets derive. The top five revenue sources for the General Fund are sales tax, property tax, utility tax, income tax and real estate transfer tax. The City maintains that budgeting is based on estimated revenues projected for the next fiscal year. The City Manager tracks revenue amounts on an ongoing basis through internal mechanisms and the Illinois Department of Revenue website to ensure levels are sufficient to cover expenditures. As such, if revenues do not meet budgeted levels, expenditures must be reduced.

Since November 2008, Krieger maintained the practice of keeping the City's employees informed of the its financial condition. All financial information was publicly available and emails were sent to employees. In January 2009, the City instituted a reduction in force (RIF) to balance the fiscal year 2010 budget. Fifty-four positions were eliminated including eleven from the police department.

In March 2009, the City and the Charging Party began bargaining their successor agreement. During the same time the City began bargaining with several other unions. By fall 2009, the City had reached agreement with several other unions including the Firefighters, Public

Works Equipment Operators and the Water Department. The firefighters agreed to a two-year, 2% wage increase (1.5% from the City and the additional cost was offset by permanent position eliminations within the department) and the other two unions agreed to a one-year, 1.5% wage increase.

The parties met approximately seven times in 2009 and impasse was declared by the Charging Party on November 4, 2009. The parties proceeded to mediation and engaged in two mediation sessions in 2009. The Charging Party initially proposed a 6% annual wage increase and the City expressed its financial conditions and challenges. In May 2009, Krieger presented its financial condition and challenges to the Charging Party's Executive Board members, its attorney Tamara Cummings and its financial analyst Becky Dragoo. The City countered offering instead 2% per year including 0.5% from the Chief's position to offset the amount over 1.5%. By fall 2009, the Charging Party responded with an offer of 4.5% wage increases for officers at the top of the step plan and 2% for officers in the plan.

In January 2010, the City implemented another RIF. Twenty-two employees lost their jobs and twenty-seven vacant positions were eliminated. Of those laid off, the City laid off two police officers who had recently completed the police academy. The Charging Party attended the January 19, 2010, Council meeting and spoke to protest the layoffs. At that time, the parties were still negotiating its successor contract.

The parties had agreed on several tentative agreements including Section 12.3 "Effects of Layoff" provision. In this provision the parties agreed to extend benefits to employees on layoff in the same manner that was afforded to other employees. The parties were unable to reach agreement and by April 2010, the Charging Party formally demanded interest arbitration. The parties proceeded to arbitration October 27 and 28, 2010. The Charging Party maintains that the

open issues presented in interest arbitration involved experience pay, wages, insurance premiums, insurance plan design, work period, and overtime. The Charging Party also acknowledges that the parties had reached tentative agreements regarding discipline, continuing insurance in the event of layoffs, switching shifts, canine unit, and call-in overtime.

Krieger routinely kept the residents informed of City-related developments and events in the City-published monthly newsletter "Bridges." Each issue carries a message from Krieger on the cover page. In January/February 2010, Krieger's message in Bridges reported the City made significance progress in "closing its projected financial gap." In the March/April issue, Krieger informed residents that a large portion of the FY11 deficit had been addressed, including cutting \$5.7 million by the RIFs and implementing new revenue sources. In the May/June issue, Krieger informed residents that a balanced budget was approved for FY11.

From August through October 2010, the City was engaged in bargaining with several other unions including Electric, Water, and the Public Works Equipment Operators Union. The City proposed an increase in employee contributions for medical insurance to 15% and then 20% effective 2012. The agreements with the Electric and Water departments were ratified with said language in January 2011. Those agreements also included a wage freeze for 2010.

In September 2010, the Charging Party offered to increase the health insurance premium contribution to 12.5%. When the parties met again on October 4, 2010, present at the meeting were the Charging Party's bargaining team and its counsel Tamara Cummings, the City's attorney Dwight Pancottine, and Krieger. During this meeting the Charging Party also proposed protection against layoffs as a term of the agreement. Krieger informed the Charging Party that it would not be able to agree to only a 12.5% increase for insurance premiums or to no layoffs. On October 13, 2010, the Charging Party's representative (via email and text message) proposed

a counteroffer to the City's that included, among other terms, the following wage increase over the next three years: 3.2% the first year, 3% the second year, and 3.5% the third year. The proposal also included a 15% employee contribution in medical and no layoffs. The City rejected this offer. The parties continued to negotiate and the City proposed wage increases at 3.3%, 3%, and 3% and raising the employee medical contribution from 10% to 15% effective November 1, 2011. The Charging Party agreed to the proposal and the City asked for a consent award.

On October 29, 2010, the parties jointly drafted and agreed to, and the arbitrator issued the consent award. A consent award is where the parties make specific recommendations regarding the resolution of the collective bargaining agreement to the arbitrator and the arbitrator, based on those recommendations and the statute, issue an interest award. The terms of the award, of pertinence, state that Charging Party's members would receive wage increases of 3.3%, 3%, and 3% for a 3-year agreement and increased the employee insurance contributions from 10% to 15% effective November 1, 2011. The parties also agreed to the following provision:

Article 12.1 "The City, in its discretion, shall determine whether layoffs are necessary. If it is determined that layoffs are necessary, employees covered by this Agreement will be laid off in accordance with their length of service as provided in Illinois Compiled Statutes, 65 ILCS 5/10-2.1 1-18.

Except in an emergency, no layoff will occur without at least fifteen (15) calendar days notification to the Lodge. This City agrees to consult the Lodge, upon request, and afford the Lodge an opportunity to propose alternative to the layoff, though such consultation shall not be used to delay the layoff."

At the November 3, 2010, City Council meeting, City Councilman Furstenau made a comment about the interest arbitration process "killing" the

City. On November 4, 2010, the City issued a press release where Krieger conveyed the following message:

While we are pleased that the process has come to a conclusion, we are frustrated that the arbitration process mandated by Illinois Law has resulted in wage increases beyond what we [the City] wanted to pay or believe can reasonably afford. The interest arbitration process does not adequately consider the economic crisis that the State of Illinois and municipalities like ours are currently undergoing. Throughout the bargaining process we informed the police officers that they should be responsive to the City's declining revenues. Our police officers are second to none, but we simply don't currently have the financial resources to pay these wage increases to all the union police officers. Given the weak economy, we are not in a position to raise taxes or implement new revenues to pay for the police raises.

The City maintains that once the parties reached an agreement on the terms of the contract, the City's Finance Director calculated that the wage increases amounted to a \$2.6 million deficient over the next three years and a \$5.45 million gap in the FY12 (May 1, 2011 through April 30, 2012) budget. On November 8, 2010, Krieger issued a letter to the Charging Party notifying bargaining unit employees of the City's intent to lay off at least six patrol officers who would be paid for their scheduled shifts through November 22, in compliance with the 15-day contractual notification requirement. Accordingly, the City maintains that these layoffs saved \$1.28 million toward FY12 budget deficit.

At the next City Council meeting, on November 16, 2010, several hundred police officers and their supporters protested the layoffs. During this meeting City Councilman Furstenau mentioned that when dealing with the unions the City could "cut heads." City Councilman Wehrli stated that he was not prepared to vote on a resolution regarding the number of police officers because he believed there should be more give-and-take and he needed more information. City Councilman Hinterlong noted that public safety was the City's highest priority and the police department should be the last place to balance its budget.

At this same meeting the Charging Party's President and Vice President submitted a proposal to the Police Chief for a retirement incentive plan to entice higher paid officers to retire so that officers who were recently laid off could be recalled. As openings occurred due to retirements, the six laid off officers were eventually all recalled to duty by April 29, 2011.

IV. DISCUSSION

i. Failure to Bargain in Good Faith

The Complaint issued against City alleges violations of Sections 10(a)(4) and (1) of the Act. Those sections provide, in pertinent part:

It shall be an unfair labor practice for an employer or its agents: (1) to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay... (4) to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, the discussing of grievances with the exclusive representative[.] 5 ILCS 315/10(a)(2012).

a. Failure to Bargain Layoffs in Good Faith

In determining whether a party has fulfilled its duty to bargain in good faith, the Board looks to the totality of circumstances. City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); City of Springfield, 6 PERI ¶ 2051 (IL SLRB 1990); City of Burbank, 4 PERI ¶ 2048 (IL SLRB 1988). Conduct indicative of a failure to bargain in good faith may include delaying tactics, failure to appoint an agent with sufficient authority to engage in meaningful bargaining, withdrawal from tentative agreements and attempting to bypass the union and bargain directly with employees. County of Woodford and Woodford County Sheriff, 8 PERI ¶ 2019 (IL SLRB 1992).

The City acknowledges that layoffs are a mandatory subject of bargaining. The Charging Party has provided no evidence that the City failed or refused to bargain layoffs in good faith.

There is no evidence that the City made unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, engaged in efforts to bypass the union, failed to designate an agent with sufficient bargaining authority, withdrew already agreed-upon provisions, or arbitrarily scheduled meetings. To the contrary the Charging Party's case provided overwhelming evidence that the parties met regularly, discussed and exchanged proposals, reached tentative agreements on many issues, and agreed to a jointly drafted consent award. Moreover, the evidence is clear that the Charging Party proposed changes to the layoff provision within the collective bargaining agreement and the City responded to those proposals.

Although there is evidence that the City did not agree to the no layoff provision proposed by the Charging Party, this isolated act is not sufficient to establish a failure to bargain in good faith when viewing the City's conduct as a whole. Moreover, failure to have a meeting of the minds, or the City to budge on its position does not amount to a failure to bargain in good faith in violation of the Act. Lake County Circuit Clerk, 29 PERI ¶ 179 (IL LRB-SP 2013) (the Board found no violation of the Act where the employer failed to budge on its position of fair share fees but negotiated all other provisions in the contract). Furthermore, the evidence presented confirms that the City did in fact bargain the effects of layoffs in Section 12.3 of the contract when it agreed to extend certain benefits to members who were laid off. Lastly, the parties signed and agreed to a collective bargaining agreement that included the layoff provision, Article 12.1.

Thus, the Charging Party failed to prove its prima facie case that the City failed and refused to bargain layoffs in good faith.

b. Failure to Give Notice and Opportunity to Bargain

An employer violates its duty to bargain in good faith when it makes unilateral change of a mandatory subject of bargaining without granting notice and an opportunity to bargain. Cnty. of Lake, 28 PERI ¶ 67 (IL LRB-SP 2011); City of Chicago (Department of Police), 21 PERI ¶ 83 (IL LRB-LP 2005); Cnty. of Perry and Sheriff of Perry Cnty., 19 PERI ¶ 124 (IL LRB-SP 2003). The duty to bargain arises upon request of the exclusive representative when it receives timely notice that the employer intends to change a condition of employment. Chicago Hous. Auth., 7 PERI ¶ 3036 (LLRB 1991) (citing, Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017-8 (1982) enf'd, 722 F.2d 1120 (3rd Cir. 1983); Cnty. of Cook (Cook Cnty. Forest Preserve Dist.), 4 PERI ¶ 3012 (IL LLRB 1988); Clarkwood Corp., 283 NLRB 1172 (1977)); Vermilion Cnty., 3 PERI ¶ 2004 (IL SLRB 1986).

The employer must first give actual notice of the intended change to a union official with authority to act. City of Berwyn, 8 PERI ¶ 2038 (IL SLRB 1992). No particular form of notice is required. Chicago Hous. Auth., 7 PERI ¶ 3036 (no formal notice required); see also, McGraw-Hill Broadcasting Co. Inc., KGTV, 355 NLRB 1283 (2010), Forest Preserve Dist. of Cook Cnty., 4 PERI ¶ 3012 (IL LLRB 1988), Medicenter, Mid-South Hosp., 221 NLRB 670 (1975) and Hartmann Luggage Co., 173 NLRB 1254 (1968).

Most importantly, the employer's notice must be given sufficiently in advance of its actual implementation of the change. City of Chicago, 9 PERI ¶ 3001 (IL LLRB 1992) (citing Owens-Corning Fiberglas Corp., 282 NLRB 609, 609 fn. 1 (1987)). The National Labor Relations Board has held that an employer's notice, given even a relatively short period of time prior to the change, may constitute adequate advanced notice. Jim Walter Resources, 289 NLRB 1441, 1442 (1988) (ten days); Kentron of Hawaii, 214 NLRB 834 (1974) (three weeks); Cnty. of

Bond and Sheriff of Bond Cnty., 10 PERI ¶ 2024 (IL SLRB ALJ 1994) (two days notice insufficient). However, the employer does not give adequate notice if it implements the change before announcing it to the union. Chicago Hous. Auth., 7 PERI ¶ 3036.

Next, the employer must give adequate notice to the union of its planned change. In doing so, the union must be given sufficiently detailed notice of the contemplated change to give it the opportunity to make a meaningful response. Therefore, notice must be sufficient to initiate the bargaining process and it must be clear enough to advise the union of the scope and impact of the proposed change. Pinkston-Hollar Const. Serv. Inc., 312 NLRB 1004, 1005 (1993); Georgetown-Ridge Farm Comm. Unit School Dist. 4, 7 PERI ¶ 1045 (IL ELRB 1991) aff'd 239 Ill. App. 3d 428 (4th Dist. 1992) (notice is insufficient where union was aware that the employer was contemplating taking action to reduce its budget but where union had no specific information available as to what form those reductions might take)(citing, Metromedia. Inc. v. NLRB, 586 F.2d 1182 (8th Cir. 1978); Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir. 1978) cert. denied 439 U.S. 911 (1978)).

Lastly, the employer's notice must allow the union a reasonable opportunity to bargain. This element is comprised of two necessary and related components: (i) timeliness and (ii) intent. If both elements are not present, the employer is deemed to have presented the union with a fait accompli and the union would have no obligation to demand bargaining. Chicago Transit Auth., 15 PERI ¶ 3018 (IL LLRB 1999) (employer's statement that it would implement the change with or without the agreement of the union demonstrated that the employer presented the union with a fait accompli, even though the employer gave notice of the change 10 days prior to implementation) Cnty. of Cook and Cook Cnty. Sheriff, 12 PERI ¶ 3021 (IL LLRB 1996).

However, the burden is on the union to prove that the employer presented it with a fait accompli. Cnty. of Lake, 28 PERI ¶ 67 (IL LRB-SP 2011).

Here, actual and adequate notice was given when the City provided the specific individuals to be laid off and their union representative with notice. The Charging Party does not deny having received notification. Moreover, the notice was substantively adequate because it named the individuals to be laid off and pursuant the Article 12.1 of the parties' agreement gave the officers 15-day notification, including pay and benefits. Clarkwood Corp., 233 NLRB 1172, 1172 (1977) (employer provided sufficient actual notice when it posted memo informing employees of the planned change and where employees then notified union officials). Emhart Ind., 297 NLRB 215, 216 (1987), enf. denied on other grounds, 907 F.2d 372 (2nd Cir. 1990) (notice to union substantively sufficient where employer conveyed to union that it intended to affect employees' terms and conditions of employment when it told union agents it would begin reinstating employees post-strike starting on a definite date, although employer did not set forth the exact procedures for reinstatement); Clarkwood Corp., 233 NLRB at 1172 (posted memo constituted sufficient notice when it expressly stated nature of the change by informing employees that room with lockers and bathrooms would no longer be available for employee use as of a definite date).

The Charging Party also had an opportunity to bargain, and it did so when it presented the City with the option to allow early retirement of its more senior officers to save the positions of those police officers with less seniority. The City accepted the Charging Party's proposal and at least one position was saved prior to layoffs and subsequently all police officers laid off were rehired.

Moreover, there is no evidence that the City presented the Charging Party with a fait accompli. It is uncontested that the City actually waited 15-days prior to the implementation of layoffs. The time between a union's awareness of the change and the employer's implementation of it is key to determining whether the employer gave the union an opportunity to bargain or instead presented the union with a fait accompli. Vill. of Schaumburg (Police Dep't), 29 PERI ¶ 75 (IL LRB-SP 2012) (dismissing charge and noting that “it would be more than disingenuous” for the union to characterize respondent's conduct as a fait accompli where union had notice of respondent's planned change 12 days prior to its implementation but when it waited four months to demand bargaining); Vill. of Western Springs, 27 PERI ¶ 4 (IL LRB-SP 2011) (comparing date of notice to date of implementation in determining whether respondent presented the union with a fait accompli; finding no fait accompli where respondent's notice to the union took place months before the planned implementation date).

Charging Party also maintains that the City failed to give it notice because it agreed to wage increases knowing that they would lead to layoffs. Specifically, the Charging Party argues that the City “violated the Act by enticing the union to accept an economic package that it intended to use as a pretext to layoff bargaining unit members and by not telling the union of its intentions before the deal was concluded...[which] deprived the union of its right to meaningfully respond.”

The City argues that at the time it agreed to the wage increases, it was not aware the wage increases would lead to layoffs. Moreover, the City maintains that even if layoffs had been a possibility of which the City were aware, it did not owe the Charging Party the duty to notify it of said possibility.

The evidence presented is such that the City did inform the Charging Party of its financial condition. The City notified the Charging Party that any wage increases over 2% (1.5% from the City and .5% from the restructure of the department) would have to come out of the department. The Charging Party was aware of the fact that the City made the same offers to several other unions bargaining at the same time. Particularly, the Charging Party knew that the fire department was receiving a 2% raise which included the 1.5% from the City and .5% from the Chief's position. The Charging Party was also aware of the City implementing RIFs to balance its budgets. The Charging Party provides no evidence that it was not aware of the City's financial condition or how the wage increases would affect its budget. Therefore, I find the Charging Party's argument unsupported.

ii. Retaliating Against Charging Party by Implementing Layoffs

The Charging Party argues that the City violated Sections 10(a)(2) and (1) of the Act by laying off six police officers, in retaliation for engaging in protected union activities.

A violation of Section 10(a)(2) occurs when a charging party establishes by a preponderance of the evidence that (1) public employees were engaged in union or protected, concerted, activity; (2) that the respondent had knowledge of that activity; (3) that the respondent took an adverse employment action against those employees and; (4) that such action was substantially motivated, in whole or in part, by the respondent's animus towards the employees' union activity. City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335 (1989). The charging party may prove the fourth prong of this test through direct or circumstantial evidence. Circumstantial evidence of an unlawful motive includes the timing of the employer's action in relation to the protected concerted activity, hostility toward protected concerted activities, disparate treatment, and shifting or inconsistent explanations for the adverse action. Id.

Once a charging party establishes a prima facie case that a violation has occurred, the burden then shifts to the respondent to prove by a preponderance of the evidence that it had a legitimate business reason for the adverse action and that that action would have taken place absent the employee's union activity. County of Cook, 2012 Ill App (1st) 111514, ¶ 25; City of Burbank, 128 Ill. 2d at 335. Merely offering a legitimate business reason for the adverse action does not end the inquiry, because the reason advanced by the employer must be bona fide and not pretextual. Pace Suburban Bus Division, 406 Ill. App. 3d 484, 500 (1st Dist. 2010); Cnty. of Rock Island and Sheriff of Rock Island, 14 PERI ¶ 2029 (IL SLRB 1998), aff'd, Grchan v. Illinois State Labor Relations Board, 315 Ill. App. 3d 459, 16 PERI ¶ 4008 (3rd Dist. 2000), appeal denied, 192 Ill. 2d 687 (2000). Merely proffering a legitimate business reason for the adverse action will not satisfy a respondent's burden, however, as it must also be determined that the reason or reasons advanced are not a mere litigation figment and that they were in fact relied upon as the basis for the respondent's actions. If these requirements are not met, the respondent's explanation for its actions will be determined to be pretext and the respondent will be found to have violated the Act. City of Burbank, 128 Ill. 2d at 335.

In this case, it is undisputed that the Charging Party engaged in protected union activities, by bargaining their successor collective bargaining agreement, and that the City was also aware of said activities. In addition, the record clearly demonstrates that the Charging Party was adversely affected when the City decided to layoff six bargaining unit members. State of Illinois. Dep't of Central Mgmt Serv. (Dep't of Employment Security), 11 PERI ¶ 2022 (IL SLRB 1995) (examples of adverse employment action include discharge, discipline, assignment to more onerous duties, or working conditions, layoff, reduction in pay, hours or benefits, imposition of

new working conditions or denial of advancement). Thus, the question that remains is whether the City's decision to layoff the police officers was done with unlawful motive.

As stated above, unlawful motive can be inferred from either direct or circumstantial evidence including: timing of the adverse action in relation to the occurrence of the union activity; a pattern of the respondent's conduct directed at those engaging in union activity; disparate treatment of employees; shifting explanations for a respondent's actions; and inconsistency in the reasons given for the respondent's actions against the charging party as compared to other actions of the respondent. City of Burbank, 128 Ill. 2d at 339; Circuit Court of Winnebago County, 17 PERI ¶ 2038 (IL LRB-SP 2001); North Main Fire Protection District, 16 PERI ¶ 2037 (IL SLRB 2000).

a. Timing

The Charging Party has established proximity in time between its protected activities and the adverse employment action. In March 2009, the parties began negotiating a successor agreement that resulted in impasse. Although the parties were scheduled for interest arbitration October 27 and 28, 2010, instead, on October 25, 2010, the parties presented proposals to resolve their interest arbitration. These proposals included wage increases that the City accepted. The parties drafted, and the arbitrator signed and issued the consent award on or around Friday, October 29, 2010.

On November 8, 2010, following a press release issued by Krieger on November 4, 2010, the City issued layoff notices to several of the Charging Party's bargaining unit members. The approximate one-week gap between the issuance of the parties' consent award and the City's notification of intent to layoff bargaining unit employees, is evidence of proximity to demonstrate animus. City of Burbank, 128 Ill. 2d at 349 (discharge which occurred two days

before union's certification was “telling” and contributed to a finding of animus); Sarah P. Culbertson Memorial Hosp., 25 PERI ¶ 11 (IL LRB-SP 2009) (a “few weeks” between employees' testimony before Board and adverse action sufficient to demonstrate proximity indicative of animus); Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007) (three weeks demonstrates proximity); cf. Forest Preserve Dist. of Cook Cnty., 7 PERI ¶ 3016 (IL LLRB 1991) (four-month time span between protected activity and adverse action did not demonstrate proximity to support a finding of anti union animus). However, the mere coincidence of the union activity to the timing of the adverse action, alone, is insufficient to establish a prima facie case. County of Williamson, 13 PERI ¶ 2015 (IL SLRB 1997); see also City of Kewanee, 23 PERI ¶ 110 (IL LRB-SP 2007); Broadway Motors Ford, Inc. v. National Labor Relations Board, 395 F.2d 337, 340 (8th Cir. 1968).

b. Disparate Treatment

The Charging Party has not demonstrated that the City treated its bargaining unit employees disparately from other employees because it has introduced no evidence of employees who were similarly situated, yet treated more favorably. Am. Fed. of State, Cnty. and Mun. Empl., Council 31, 175 Ill. App. 3d 191, 198 (1st Dist. 1988); City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997) (charging party bears the burden of demonstrating employees who engaged in protected activity received disparate treatment).

The Charging Party contends that the City treated it differently than other unions when it extracted insurance concessions from it during bargaining and laid off its members as a message to other unions. There is no evidence that the City did not present insurance concessions proposals to other unions while bargaining successor agreements during the same in which it was bargaining with the Charging Party. It is also uncontested that the City had laid off several

bargaining unit employees to balance its budget when it implemented RIFs in 2009 and 2010. Although it is clear that the Charging Party was the only union who experienced layoffs at the conclusion of negotiating its successor agreement, it is also clear that the Charging Party was the only union that received wage increases of over the 1.5% that the City offered to all bargaining units negotiating at the time. Therefore, I find there is no evidence of other employees, similarly situated, being treated any differently than the Charging Party's members.

c. Expressed Hostility

The Charging Party points out several statements made by the City's Councilmen before and after the City implemented layoffs as evidence of hostile expressions of union animus. The City argues that the statements made (both at Council meetings and through written emails) are lawful protected speech pursuant to Section 8(c) of the Act which provides:

The expressing of any views, argument, or opinion or dissemination thereof, whether in written, printed, graphic, or visual form, 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.
5 ILCS 315/8(c) (2012).

The City argues that its statements are protected because they "contain no threat of reprisal or force or promise of benefit" in accordance with the Act. The City also maintains that it was Krieger who had the authority to initiate the layoffs and that there is no evidence of Krieger demonstrating or expressing hostility or union animus.

Whether such comments had the effect of coercing, restraining, or interfering with activity protected by the Act depends upon whether a reasonable employee would have viewed the comments as conveying a promise of benefit or a threat of reprisal or force. City of Mattoon, 1 PERI ¶ 2016 (IL SLRB 1995); City of Chicago (Dep't of Health), 10 PERI ¶ 3031 (IL LLRB 1994); City of Chicago, 3 PERI ¶ 3011 (IL LLRB 1987); Chicago Housing Auth., 1 PERI ¶

3010 (IL LLRB 1985). Hostile or anti-union animus can be used to infer improper motivation. See City of Mattoon, 10 PERI ¶2036 (IL SLRB 1994) (statement “you have your union buddies to thank for this” and comments blaming union for layoff characterized as evidence that anti-union animus caused layoff); Clerk of the Circuit Court, Court of Champaign Cnty. 8 PERI ¶ 2025 (1992).

However, the Board has held that to establish unlawful discrimination under Section 10(a)(2) of the Act, it is not enough to merely demonstrate that some supervisory or managerial personnel were hostile to the union or made anti-union statements. There must be convincing evidence connecting the union animus to an employer or agent with the authority and responsibility to effectively recommend or carry out the adverse action. See St. of Ill Dep’t of Central Mgmt. Serv. (Dep’t of Public Health), 10 PERI ¶ 2034 (IL SLRB 1994); Vill. of Lyons, 5 PERI ¶ 2007 (IL SLRB 1989); Macon Cnty Bd and Macon Cnty Highway Dep’t., 4 PERI ¶ 2018; County of Menard, 3 PERI ¶ 2043 (IL SLRB 1987); Vill. of Skokie and Skokie Bd. of Fire and Police Commissioners, 13 PERI ¶ 2011 (IL SLRB G.C. 1997); cf. North Maine Fire Protection Dist., 16 PERI ¶ 2037 (decision-makers' promotional decisions wholly and directly attributable to unsupported, animus-tainted recommendations); Pleasantview Fire Protection Dist., 18 PERI ¶ 2054 (IL LRB-SP G.C. 2002) (decision-makers' elimination of rank directly attributable to anti-union recommendation).

Here, the Charging Party contends that the Council made several statements about the Charging Party, the negotiation process, and the layoffs. The Charging Party submitted statements from several Council meetings² as evidence. Highlighted below is the list of statements made that the Charging Party contends express hostility.

² The Charging Party’s evidence included four CDs of video taken at four different Council meetings, each approximately four hours long.

- November 3, 2010, City Councilman Furstenau stated that the interest arbitration process is “killing” the City.
- November 16, 2010, City Councilman Furstenau stated that when dealing with unions we can “cut heads.”
- November 16, 2010, Councilman Wehrli stated he was “not prepared to vote on a resolution regarding the number of police officer because [he] believed there should be more give and take with the Union and because [he] needed more information.”
- December 7, 2010, according to the Charging Party, Councilman Furstenau stated that the City needed cooperation from other groups, and that he had not seen it from certain groups. (The Charging Party believes he was specifically referring to the police officers). He also stated other City employee groups were watching the police officers, and that they should not think they would end up with all of the money in the long run. Furstenau stated the Krieger had the Council’s full support and he was doing exactly what the City Council was instructing him to do.
- December 7, 2010, Councilman Krause suggested that self-interest was preventing the City from achieving its goals.
- December 7, 2010, Councilman Wehrli stated that the six officers could come back to work if the police officers took 0% raises for the duration of the contract and stated that because of the bargaining law, the City had to give the police over 3% raises.

- December 7, 2010, Council Furstenuau recommended that because the Labor Board declared the sergeants were not supervisors, the City should demote some of them back to patrol and promote the others to lieutenants depriving them of their rights to unionization.³
- December 7, 2010, Councilman Krause stated that if all of the City's unions wanted to be part of the same team and on the same ship they should agree to take 0% wage increases.
- December 7, 2010, Councilman Fiessler questioned the city Manager about the layoff of only police officers.
- December 7, 2010, Councilman Boyajian complained about the interest arbitration process stating that the "labor process" was not fair and he wished he could snap his fingers and have a different system in Illinois and that he was not happy with the outcome of the arbitration.

The Charging Party provides these examples to infer improper motivation by the City.

While the record shows the City's Councilmen made these statements, one or two Councilmen alone do not have the authority or responsibility to carry out or recommend adverse actions against the Charging Party. To pass Council, all nine members of the Council were required to vote on the layoffs. Because the possibly hostile statements were made by less than half of the City Councilmen, I find that is not enough to conclude a causal connection between the statements made and the layoff of the police officers, as evidence of union animus.

Lastly, the record makes clear that Krieger was the person with the authority to layoff the police officers. However, the record provides little evidence which addresses Krieger's state of

³ At the time this statement was made, the City's Mayor immediately repudiated the suggestion.

mind. Krieger's email statement to all City employees is characterized as protected speech as a reasonable person would not view any comments as a threat of reprisal or force or promise of benefit. As such, the record lacks any revealing evidence which suggests that Krieger has voiced animosity or showed hostility toward the Charging Party or collective bargaining.

d. Inconsistent Reasons and Shifting Explanations

The Charging Party maintains that the City gave inconsistent or shifting reasons for laying off the police officers. To support its contention, the Charging Party provides several examples where the City made statements alluding to its good financial standing, planning to make major purchases, and having the ability to give tax breaks residents in the. According to the Charging Party, in the City's newsletters from January 2010 through June 2010, it reported "significant progress" in closing the next year's financial gap, planned to raise revenue without raising taxes, completely balanced the FY11 budget set to begin May 1, 2010, made the safety and well-being of the community its highest priority, made no plans to implement another reduction in force, and made internal reductions to close the reported one million dollar budget gap for FY11.

The Charging Party maintains that the City could not have laid off the Charging Party's bargaining members due to financial constraints because at the December 13, 2010 Council meeting, the Councilmen alluded to \$8 million dollar budget surplus and the City's \$20-21 million dollar "Rainy Day Fund." The Charging Party also argues that the Councilmen confirmed that the City had too much cash on hand and because of that, contemplated giving a tax decrease at this meeting.

The Charging Party argues that it is clear that the City was financially solvent because of its ability to maintain its AAA rating with Standard & Poors and Moody's, it being able to save

money when it implemented the first two reductions in force, and its implementation of new revenue sources.⁴ The City's ability to match an \$11 million dollar grant, open a new fire station, and complete road construction throughout the City are also examples the Charging Party provided to show the City's positive financial condition prior to the layoffs and implementation of the wage increases.

Lastly, the Charging Party points to the City's plans to purchase the DuPage Children's Museum for \$3 million dollars in September 2010. Thus, the Charging Party argues that the City's contention that it needed to lay off its members was pretext because the layoffs only saved the City \$851,000.

The City maintains that the examples of financial solvency argued by the Charging Party all relate to the City's FY11 budgeting efforts and the deficit due to the wage increases affected the FY12 budget. Moreover, the City states that the purchase of the museum did not affect the General Fund because the funds came from the City's Capital and Burlington Funds. The City also contends that the Charging Party merely disagrees with the way the City spends its money and that it has provided no evidence to refute the City's inability to afford the wage increases. Lastly, the City states that the layoffs helped the City save \$851,000 and it also moved funds from other sources to help close the gap.

Here, the City provided only one reason for the layoff of the Charging Party's bargaining unit members and that was due to the increase in the City's deficit caused by the wage increases negotiated. A finding of inconsistent or shifting explanations can be made where an employer implies that it may or may not take action solely on its own initiative for reasons unrelated to economic necessities, and known only to the employer. Village of Frankfort, 15 PERI ¶ 2012 (IL

⁴ The new revenue sources included \$.02 per gallon gas tax, \$2 refuse fee, and a reallocation of .25% of the food and beverage tax to the general fund.

SLRB 1999), aff'd by unpub. order, 16 PERI ¶ 4005 (2000). Consistent with the City's arguments, prior to the layoffs, the City informed its employees, through newsletters, that it had a \$2.5 million dollar deficit for FY12.

There is no conclusive evidence that that City's financial deficit did not increase due to the wage increases. The City provided evidence that the General Fund had a \$2.5 million dollar deficit prior to the agreement and the settlement of collective bargaining agreements and a reduction in the property tax levy raised the City's deficit to approximately \$5 million. Although the City states that it did not know the wage increases would lead to layoffs, it does maintain that it notified Charging Party and all other unions that it would not be able to agree to wage increases over 1.5% across the board and anything over that would have to come out of that department.

I find that the City consistently articulated that the reason for the layoffs was directly attributed to the deficit in the General Fund. The examples of financial solvency provided for by the Charging Party were before the wages increases and not directly attributed to the City's General Fund. Moreover, there is no evidence that suggests that the City has or can move funds from any other budget line to the General Fund to balance its budget deficit. Because the City has not implied that the layoffs were attributed to anything other than to balance the budget, I find no evidence that the City gave inconsistent reasons or shifting explanations. Village of Frankfort, 15 PERI ¶ 2012 (IL SLRB 1999), aff'd by unpub. order, 16 PERI ¶ 4005 (2000); see also City of Evanston, 5 PERI ¶ 2046 (IL SLRB H.O. 1989); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

In light of the foregoing, I find that the Charging Party has not met its burden and has failed to establish, by a preponderance of the evidence, that the City provided inconsistent or

shifting reasons for the layoffs. Even if the Board finds that the City's shifting explanations are sufficient to demonstrate pretext, the City's "sole" motive – economics – is not pretextual because the City relied on its financial condition when making its decision to lay off bargaining unit members. In fact, the City presented evidence of economic hardship prior to the agreement and further hardship because of it. Village of Barrington, 29 PERI ¶ 15 (IL LRB-SP 2012) (where pretext was found when the employer did not rely on its economics and there were no changes in its economics before making the decision to revoke wage increases).

Because the Charging Party has not sufficiently established a prima facie case of retaliation, I must hold that it has not proven, by a preponderance of the evidence, that the City unlawfully laid off bargaining unit employees.

iii. Stand Alone Violation of Section 10(a)(1) of the Act

Lastly, the Charging Party argues that the City's acts independently violated Section 10(a)(1) of the Act.⁵⁵ Charging Party argues that City's layoff of the police officers 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. 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, 6 PERI ¶3013 (IL LLRB 1990).

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 Chicago Housing Authority, 1 PERI ¶ 3010 (IL LLRB 1985). Thus, if a

⁵⁵ Although a standalone 10(a)(1) is not charged in the Complaint for Hearing, for a complete record, the undersigned addresses all of the Charging Party's arguments.

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, 6 PERI ¶ 3013; City of Chicago, 3 PERI ¶ 3011; Chicago Housing Authority, 1 PERI ¶ 3010.

The Charging Party argues that the City interfered with employees' right to self-organization, the right to join or assist any labor organization and the right to bargain collectively through representatives of their own choosing on wages, hours, and other conditions of employment, when it laid off six employees as a direct result of negotiating wage increases. The Charging Party maintains that the City used it to secure significant concessions on insurance premiums to use against other unions, which violated the Act because, when viewed objectively from the standpoint of an employee, these actions reasonably had the effect of coercing, restraining, or interfering with the exercise of protected rights.

Here, the City's actions did not have the clear effect of restraining employees' exercise of rights. There is no evidence that the City interfered with the Charging Party's, or its members', right to bargain collectively their wages, hours and other conditions of employment. In fact, the Charging Party did just that. The Charging Party agreed to proposals and the collective bargaining agreement when it agreed to the consent award. Within that agreement, the Charging Party agreed to a layoff provision that gave the City the right to lay off employees.

The Charging Party also claims that the City laid off the police officers as a direct result of the Charging Party asserting its right to interest arbitration. The Charging Party relies strictly on timing to substantiate this argument. The City did not refuse to go to interest arbitration or refuse to comply with the consent award. The City bargained the right to layoff bargaining unit

employees and exercised its right to lay off the police officers based on purely economical reasons.

Lastly, the Charging Party asserts that the City coerced and restrained it into making significant concessions regarding insurance premiums in exchange for concessions that it did not intend to pay, and used it as an example against other unions showing them how it will treat employees who assert their rights. The Charging Party again provides no support for its contentions. The parties bargained to impasse which is evidence that that parties both presented offers that neither were prepared to accept or expected concessions. There is no evidence that the City has not paid the wage increases it agreed to in the consent award. Moreover, the parties' bargaining tactics are of no consequence in this matter. I cannot conclude that a reasonable employee would feel coerced or restrained in exercising his/her rights after successfully agreeing to a collective bargaining contract that included provisions that benefited the Charging Party.

V. CONCLUSIONS OF LAW

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

VI. RECOMMENDED ORDER

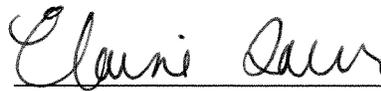
IT IS HEREBY ORDERED that the complaint in this case be dismissed in its entirety.

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

Issued at Chicago, Illinois, this 18th day of March, 2014.



Elaine L. Tarver
Administrative Law Judge
Illinois Labor Relations Board