STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Service Employees International Union, Local 73,	)	
Charging Party	)	
	)	Case No. S-CA-11-126
and	)	
State of Illinois Secretary of State,	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On March 2, 2011, the Service Employees International Union, Local 73 (Charging Party or Union), filed an unfair labor practice charge with the State Panel of of the Illinois Labor Relations Board (Board), alleging that the State of Illinois Secretary of State (Respondent or Employer) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Relations Act, 5 ILCS 315 (2012), as amended (Act). The charge was investigated in accordance with Section 11 of the Act, and on November 17, 2011, the Board's Executive Director issued a Complaint for Hearing.

The case was heard in Springfield, Illinois, on March 13, 2012, at which time the parties were given an opportunity to participate, adduce relevant evidence, examine witnesses, argue orally, and file written briefs. After full consideration of the parties' stipulations, motions, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate and I find that:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5 of the Act.
3. At all times material, the Respondent has been subject to the Act pursuant to Section 20(b) of the Act.
4. At all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.
5. At all times material, the Charging Party has been the exclusive representative of a bargaining unit composed of certain of the Respondent's employees (Unit).
6. At all times material, the Respondent has employed Kristy Elmore, a public employee within the meaning of Section 3(n) of the Act, in the title of Public Service Representative, and as such, she is included in the Unit.
7. At all times material, Regional Manager Reggie Freeman has been an employee of the Respondent, and has been authorized to carry out his duties and responsibilities on behalf of the Respondent.

II. ISSUES AND CONTENTIONS

The issue is whether the Secretary of State violated Sections 10(a)(1), (2), and (3) of the Act when it issued an oral warning to Kristy Elmore, a bargaining unit member, in retaliation for her active and visible support for the Union, including serving as a Union steward, and/or in retaliation for her filing an unfair labor practice charge against the Respondent.[1]

The Union argues that the Respondent issued the oral warning in order to make Elmore ineligible for a promotion. The Respondent contends that the Union has not shown that Elmore was engaged in protected activity. In addition, the Respondent argues that the oral warning was

[1] The complaint did not allege a violation of Section 10(a)(3), and Charging Party did not expressly amend the complaint to allege a violation of Section 10(a)(3). However, the record supports such a claim and the alleged Section 10(a)(3) violation was included in the underlying unfair labor practice charge. Therefore, I have exercised the discretion under Section 1220.50(f) of the Rules to amend the complaint to conform to the evidence presented.

issued for cause, in that Elmore was insubordinate and refused to follow the directive of a supervisor, and that past practices allow the employer to deny a promotion based upon an employee's disciplinary record. The Respondent also argues that the Respondent could not have issued the oral reprimand in order to prevent Elmore from receiving a promotion because it was not aware of Elmore's interest in the promotion when the oral warning was issued, nor was it aware that discipline could prevent an employee from receiving a promotion.

III. FINDINGS OF FACT

The Secretary of State (Respondent) maintains a Driver Services Division, which includes 130 facilities throughout the state. The Division issues and maintains the records of driver's licenses and state identification cards. The Division is organized into several regions throughout the state. Region 9 includes the Streator, LaSalle, Ottawa, Princeton, and Roanoke facilities. Reggie Freeman is the Regional Manager for Region 9. Each facility is supervised by a Driver Facility Manager I.

Kristy Elmore has been employed as a Public Service Representative at the Streator location since 1998. Elmore's duties include administering road and written driver's examinations, performing cashier functions for driver's license fees, balancing cash and checks to assure that fees are accurately accounted for, preparing deposit records, reviewing and completing motor vehicle title and registration applications, and preparing reports for her supervisor. Elmore performs these duties under the direct supervision of the Driver Facility Manager I at Streator.

Elmore is a member of the bargaining unit represented by the Charging Party. Since 1999, Elmore has served as the Union's chief steward. Elmore has filed approximately 30

grievances on behalf of herself and other Union members in her time as the chief steward. Elmore has also been a member of the Union's negotiating team.

A. Transfer Arbitration Decision

In 2002, Elmore was transferred from the Region's Streator location to its LaSalle location. In response to the transfer, the Union filed a grievance on Elmore's behalf, arguing that the transfer was retaliatory and in violation of the parties' collective bargaining agreement. The matter proceeded to arbitration and the arbitrator found that the decision to transfer Elmore was in retaliation for her filing grievances and complaints against the Respondent. The arbitrator ordered the Respondent to transfer Elmore back to the Streator facility.

B. Rosengren's Compensatory Time

In 2006, Regional Manager Freeman issued a directive that Driver Facility Managers were not allowed to earn more than 15 minutes of compensatory time for performing opening or closing procedures. Employees from the Ottawa facility contacted Elmore, claiming that the Driver Facility Manager at the Ottawa location, Christine Rosengren, was receiving an "astronomical" amount of compensatory time.[2] Elmore contacted Freeman regarding the matter. Freeman informed Elmore that Rosengren was not in fact receiving compensatory time, because Freeman had not provided the necessary approval.

In or around December 2006, Elmore received an envelope containing a printout of Rosengren's work hours for October and November 2006. The printout indicated that Rosengren received 108.5 hours of compensatory time for each month, averaging approximately 12.5 hours per week. Elmore contacted Freeman and informed him of this information. Freeman again denied that Rosengren was earning compensatory time over the allotted 3.5 hours per week.

[2] Rosengren is a member of a professional bargaining unit represented by the Charging Party.

Elmore then contacted Union Representative Joe Richert who stated that he would handle the matter going forward.

C. 2007 Oral Warning and Termination

In 2007, Elmore sent a letter to the Inspector General stating that she felt that the Respondent's residency requirements were not uniform or consistent and should be addressed. In March 2007, Freeman and Barb Brewster, the Driver Facility Manager for the Streator facility, met with Elmore and issued her an oral warning for an altercation she had with a fellow employee. Freeman did not inform Elmore of the other employee involved in the altercation.[3] During the meeting, Freeman instructed Elmore regarding the Division's chain of command. Freeman told Elmore to never call the Inspector General's Office again. Elmore then told Freeman that she believed that she was receiving the oral reprimand because of her investigation into Rosengren's compensatory time. Elmore left the facility after the meeting.

The next day, Elmore went on Family and Medical Leave Act (FMLA) leave for approximately two weeks. When Elmore returned from her leave, Freeman instructed Elmore to return her keys to the facility, gather her personal belongings, and leave the premises. Later, Elmore received a notice of termination, which stated that the Respondent had not received her FMLA request and therefore she had abandoned her job.

In June 2007, the Union, on Elmore's behalf, filed an unfair labor practice charge with the Board against the Respondent regarding the oral warning and the termination. The Employer and the Union came to a settlement of the charge which resulted in the oral warning being rescinded, Elmore being reinstated, and the Employer posting a notice that it "will not retaliate

[3] Freeman testified that this oral warning was because of an "infraction she had with the manager." A copy of this oral warning is not in the record, but based on Freeman and Elmore's testimony it appears that the oral warning was issued because of an issue Elmore had with Brewster.

and discriminate against any employee for engaging in union activity; retaliate and discriminate against any union steward, including Kristy Elmore, for conducting union activities; [or] interfere with the exercise of any of the rights guaranteed under the Illinois Public Labor Relations Act."

D. Streator Driver Facility Manager Position

In January 2010, Driver Facility Manager Brewster went on medical leave. Elmore was instructed to "act up" as the manager for the Streator facility. She received additional compensation for doing so. When acting up, Elmore was working out of her class as a public service representative. On or around February 15, 2010, Freeman began rotating Driver Facility Managers from other facilities to fill in for Brewster because even the Employer thought Elmore was doing a good job, it would not continue to pay for Elmore to work out of her class.[4]

On February 24, 2010, Elmore completed an application for the Driver Facility Manager position at Streator and submitted it to Jill Patterson at the Respondent's Department of Personnel, which was responsible for grading the application based upon the applicant's years of service, experience, and veteran status. Elmore received a Grade A, the highest grade. The application and grade was kept on file with the Department of Personnel, and any applicants with the minimum required grade were then placed on an eligibility list to be utilized when the position opened for applicants. After Driver Facility Managers from other facility's began rotating to Streator, Elmore made Freeman and Sheila Bourland, her liaison at the Department of Personnel, aware that she was interested in being promoted to the Driver Facility Manager position at Streator when it became available to applicants.

[4] Brewster never returned to her position as the Driver Facility Manager at Streator.

In March 2010, Elmore filed an Equal Employment Opportunity complaint with the Department of Personnel regarding an altercation she had with a co-worker. Elmore emailed the complaint to Jeanine Stroger at the Department of Personnel, and copied Freeman, Union Representative Richert, and Steve Roth, the Director of the Department of Personnel. In the e-mail, Elmore expressed her fear that the altercation would jeopardize her chance of being considered for the Driver Facility Manager position. Elmore also noted in the email that she had previously called Freeman to express her interest in the position.

On September 9, 2010, Elmore emailed Freeman informing him that members of the public had been requesting that application forms obtained from the Roanoke facility be processed even though the forms were out of date. Elmore told Freeman that she had contacted the Roanoke facility regarding the outdated forms. On September 10, 2010, Rosengren, who was acting as the Driver Facility Manager at Streator, also informed Freeman of the issue with the application forms. Freeman's supervisor, Ed Smith then contacted Freeman and directed him to inform Elmore that other facility's operations were not Elmore's responsibility, and if Elmore had concerns in the future she should bring them to Freeman. Freeman then instructed Elmore that in the future she needed to speak with the Driver Facility Manager before contacting another facility, and if he or she was not available, she was to contact Freeman.

E. Oral Reprimand

On September 11, 2010, Rosengren, who was acting as the Driver Facility Manager at Streator, instructed Elmore to prepare the "motor vehicle work" for the day. The motor vehicle work is a spreadsheet that keeps track of cash receipt for title and registration processing and temporary registration permits. Elmore gathered the motor vehicle work paperwork and placed it into an envelope. Elmore testified that her understanding of preparing the "motor vehicle work"

did not include auditing the paperwork. Rosengren testified that the motor vehicle work included auditing the paperwork before putting it into the envelope. When Rosengren asked Elmore why she had not audited the paperwork as Rosengren instructed, Elmore stated, "I did do what you told me to do, I prepared the motor vehicle work." Rosengren stated, "[N]o, I wanted you to do it all and finish it and audit it." Elmore replied, "[I]t's been nine months since I've done this." Elmore then informed Rosengren that Freeman had been at the Streator facility the previous week when Gregg Schneider had been acting as the Driver Facility Manager, and Freeman had stated that the public service representatives would be getting training in auditing of the motor vehicle work in case there was an emergency or a manager was not available. Elmore also informed Rosengren that Union Representative Richert had recently told Elmore that public service representatives were not to do motor vehicle work unless the Driver Facility Manager was on extended leave, and if those circumstances were to arise, training would be provided prior to being required to perform motor vehicle work. Rosengren replied, "Joe Richert, huh, the Union, huh? We'll just see about that. Just forget about it. I'll do the work." Rosengren completed the audit, and told Elmore to finish closing.

Rosengren then called Freeman and told him that she had asked Elmore to complete a task and Elmore had refused. Per Freeman's request, Rosengren completed the following report of the incident, and e-mailed it to Freeman on September 14:

> I had been closing everything down[.] . . . I asked [Elmore] to get the motor veh[icle] and get it ready to mail. [Elmore] then walked into the office and got an envelope for the work. I asked her if she finished it before she put it in the envelope and was told that was auditor's work and that she is not an auditor. I told her it was not auditors work. She told me that it was auditor's work which is the responsibility of the manager. She told me that Joe [Richert,] the union rep[resentative] was here and told all of [the PSRs] not to do any of that work as it was not in their job description. I told her to forget it that I would do it. I did finish the [work] and mailed it when I left. I did leave at 12:27, to get the mail in

> the box. When I left I told [Elmore] to lock up. She was busy on the computer looking up the union contract when I left. What are [the PSR's] duties on Sat[urday] from 12 - 12:30? The last Sat[urday] that I was here with Marcy alone, she spent 30 minutes in the break room.

After receiving the report, Freeman contacted his supervisor, Ed Smith. Freeman informed Smith that Elmore was refusing to complete some of her assigned duties and this needed to be addressed. Freeman then forwarded Smith the e-mail from Rosengren. Freeman did not recommend that Elmore be disciplined.

On September 21, 2010, Freeman informed Elmore that he had received information that Elmore had violated the computer usage procedures during the previous week. Elmore told Freeman that her computer use did not violate procedures and that she had discussed the matter with Rosengren. Elmore also informed Freeman that Rosengren had "spent most of her days last week in the office talking on her personal cell phone taking call after call and also on the SOS Cisco phone talking to other managers and gossiping," and had printed map directions for her personal use.

On September 24, 2010, upon the direction of the Department of Personnel, Freeman issued Elmore an oral reprimand for inattention to duty related to the motor vehicle work incident, which stated:

> On September 11, 2010, at approximately 12:15pm [Elmore's] manager asked [her] to get the motor vehicle work and prepare it for mailing. [Elmore] got an envelope to place the work in, and [Rosengren] asked [Elmore] if [she] had finished the work. [Elmore] answered that the work was auditor's work, which is the responsibility of the manager, and that it was not in [Elmore's] work description. [Elmore] did not follow the instructions given to [her] by [her] manager. [She] violated Chapter 1, Number 1, Article 5(d) incompetence or inefficiency in the performance of a duty, or inattention to duty. A copy of this

> oral warning will be placed in [Elmore's] personnel file and may be used in considering further disciplinary action.[5]

F. Driver Facility Manager Position Posting

On November 4, 2010, the Respondent issued a notice of intent to fill the Driver Facility Manager position at Streator. The posting instructed applicants to contact the personnel liaison for the department listed on the notice. On that same day, Elmore applied for the position. As a part of the application process, Elmore submitted an email expressing her interest in the position to several people, including Freeman and Roth.

The Driver Facility Manager position is an "intent to fill" position, which the Employer fills without using the bid process. The procedure for an "intent to fill" position is as follows: A notice that the Employer intends to fill the position is posted on bulletin boards in the work location, the Howlett Building, the Dirksen Parkway Building, and the Chicago Office for five (5) consecutive days. Next, the Department of Personnel reviews the eligibility list. If there is an applicant on the eligibility list that is a current employee, the department conducts a "file review" of the employee's personnel file, and looks into that employee's attendance. Then, the staff member reviewing the file writes up a form, which includes four categories under which the employee evaluation is based upon. Those four categories are skills and ability, attendance, disciplinary action, and job performance. After the staff member completes the form, it is reviewed by Marcia Swinford in the Career Services Division at the Department of Personnel, Teena Groves in the Records/Transaction Division at the Department of Personnel, and Roth, the Director of Personnel, who determine whether the employee will receive an interview or be

[5] The Charging Party and the Employer repeatedly state that Elmore was issued the oral warning for being insubordinate, and argue over whether her actions constitute insubordination. However, the oral warning itself was for "inattention to duty." Since Elmore was given the warning pursuant to a Department of Personnel provision that is not in evidence, there is insufficient evidence to question whether Elmore's actions violated that provision.

"bypassed for bid." If the employee is bypassed they do not get an interview and are not considered for the position.[6]

Elmore's evaluation form indicated that she had been a public service representative since May 1, 1998; she had received an oral warning on September 25, 2010 for "incompetence or inefficiency in the performance of a duty;" and she had received a 2.98 on her job performance within the last twelve months. The form did not indicate that Elmore had received a Grade A on her last examination, which had been taken in February.

On November 3, 2010, Elmore's evaluation form was submitted to Roth, Swinford, and Groves. On November 4, Roth, Swinford, and Groves decided that Elmore would be bypassed for bid because of the oral warning she had received. Roth testified that other applicants had been bypassed for positions when they had oral warnings in their file and that standard procedure was to look at the applicant's employment history for the last twelve months.

On November 9, 2010, Roth emailed Elmore and informed her that letters had been sent out to applicants who had been selected for interviews.

When Elmore did not receive a letter she contacted her job counselor, Jill Patterson. Patterson told Elmore that her application had been bypassed and she was not being considered for the position because she had received an oral warning. Elmore requested a formal letter stating that her application was being bypassed and not considered. Patterson informed Elmore that letters were no longer sent out to applicants who had been bypassed.

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[6] David Hiller, the vice president of the Union, testified that intent to fill positions should be filled using current employees. He testified that because the parties' collective bargaining agreement only has a provision regarding the bypass procedures for bid positions, not "intent to fill" positions, the Secretary of State cannot bypass applications for intent to fill positions. Hiller stated that he is only aware of two other situations in which current employees who had applied for intent to fill positions were not granted interviews. In those situations, Hiller contacted the Department of Personnel and the employees were then granted interviews.

Soon after the Respondent posted notice of the position, Rosengren and Karen Brewick, a public service representative, discussed who they thought would be hired for the position. Rosengren stated that she thought Elmore would run the facility "like a drill sergeant" and that she did not think that Elmore's military status was relevant to the position. Rosengren stated "I guarantee she is not getting the job, I've seen to that. There is nothing she can do about it."[7] Brewick testified that Rosengren had previously made negative comments regarding Elmore, specifically that Rosengren had stated that Elmore was "too union for [her] blood" and "[Elmore] talks about the union too much."

On November 17, Duane Calbow submitted his application for the Driver Facility Manager position at Streator. Calbow had not been previously employed by the Respondent. On November 22, 2010, Calbow was selected for the position. Elmore and Calbow were the only applicants, and Calbow was the only applicant interviewed for the position.

IV. DISCUSSION AND ANALYSIS

The Respondent did not violate Section 10(a)(1), (2), or (3) of the Act when it issued Elmore an oral warning and denied her a promotion.

Section 10(a)(1) prohibits an employer or its agents from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Act.[8] Section 10(a)(2)

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[7] Respondent argues that Brewick's testimony is not credible because Rosengren had given Brewick unfavorable performance reviews. However, Respondent failed to contradict Brewick's testimony at hearing.

[8] Section 10 of the Act states in relevant part:
(a) 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;
(2) to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization. Nothing in

prohibits an employer or its agents from discriminating in regard to any term or condition of employment in order to encourage or discourage membership or support for any labor organization. Section 10(a)(3) prohibits an employer or its agents from discharging or otherwise discriminating against an employee because the employee has signed or filed an affidavit, petition or charge, or provided any information or testimony in furtherance of the rights guaranteed under the Act.

The employer's motive or intention is usually not considered in a Section 10(a)(1) violation. However, when an alleged adverse employment action is taken against an employee for engaging in protected activity, the motivation of the employer must be examined using the framework applied in Section 10(a)(2) claims. Chicago Transit Auth., 30 PERI ¶ 9 (IL LRB-LP 2013); Chicago Park Dist., 7 PERI ¶ 3021 (IL LLRB 1991).

To establish a violation of Section 10(a)(2), the charging party must show, by a preponderance of the evidence, that 1) the employee was engaged in protected, concerted or union activity, 2) the employer was aware of the employee's protected activity, 3) the employer took an adverse employment action against the employee, and 4) the employer's action was motivated, in whole or in part, by the employer's animus toward the employee's protected activity. Cook Cnty. v. Ill. Labor Relations Bd., 2012 IL App (1st) 111514 ¶ 25, citing City of Burbank v. Ill. State Labor Relations Bd., 128 Ill. 2d 335, 346 (1989); Pace Suburban Bus Div. of Reg'l Transp. Auth. v. Ill. Labor Relations Bd., 406 Ill. App. 3d 484, 495 (1st Dist. 2010).

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this Act or any other law precludes a public employer from making an agreement with a labor organization to require as a condition of employment the payment of a fair share under paragraph (e) of Section 6;

(3) to discharge or otherwise discriminate against a public employee because he has signed an affidavit or filed an affidavit, petition or charge or provided any information or testimony under this Act.

These same four steps are followed with respect to alleged violations of Section 10(a)(3) except that under Section 10(a)(3) the motivation for the alleged adverse action is the employee's participation in or use of the Board's regulatory functions or procedures rather than Section 10(a)(2)'s focus on protected, concerted or union activity. Vill. of Lisle, 24 PERI ¶ 53 (IL LRB-SP 2008), citing Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB 1990).

Here, the Charging Party has established that Elmore was engaged in continuous union activity in her capacity as chief steward of the Union. The record also established that Elmore was engaged in protected, concerted activity when she filed an unfair labor practice charge with the Board in 2007. Specifically, Elmore testified that she has been the chief steward for the Union for over 10 years and has filed approximately 30 grievances, and it is well settled that filing grievances is a protected, concerted activity. See Vill. of Calumet Park, 22 PERI ¶ 23 (IL LRB-SP 2006), citing NLRB v. City Disposal Syst. Inc., 465 U.S. 822 (1984); State of Ill. (Dept. of Human Servs. Ann Kiley Dev. Ctr.), 20 PERI ¶ 73 (IL LRB-SP 2004). The record also reflects that in her role as chief steward, Elmore investigated allegations that Rosengren was receiving excessive compensatory time to the detriment of other bargaining unit members. Elmore was also involved in the negotiation of at least one of the collective bargaining agreements that have been in effect while she has been a steward. Activities on behalf of a union and its membership are by their very nature concerted. See Cnty. of Cook, 21 PERI ¶ 53 (IL LRB-LP 2005).

Regarding the second prong, the record clearly indicates that the Respondent was aware of Elmore's union activity and her filing of an unfair labor practice charge. Specifically, Freeman was aware that in Elmore's role as chief steward, she had investigated Rosengren's compensatory time. Roth testified that Elmore negotiated on behalf of the union during

collective bargaining agreement negotiations. Also, Rosengren's statement that Elmore was "too union for [her] blood" demonstrates that Rosengren was aware of Elmore's union activity.

The third element is also satisfied because the oral warning that resulted from the motor vehicle report incident was an adverse employment action. An adverse employment action is an action that has a negative effect on the employee's terms and conditions of employment. Chicago Park Dist. (Grant Park Music Festival), 26 PERI ¶ 76 (IL LRB-LP 2010). A term or condition of employment is "something provided by an employer which intimately and directly affects the work and welfare of the employees." Vienna School Dist., 162 Ill. App. 3d 503, 507 (1987); City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012), quoting Atanus v. Perry, 520 F.3d 662, 675 (7th Cir. 2008); Chicago Park Dist., 26 PERI ¶ 76. Examples of adverse employment actions include, but are not limited to "discharge, discipline, assignment to more onerous duties or working conditions, layoff, reduction in pay, reduction in hours or benefits, imposition of new working conditions, or denial of advancement." Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶ 2022 (IL SLRB 1995). The oral reprimand was an adverse employment action because it was a disciplinary action and because it directly resulted in Elmore being bypassed for a promotion, which was a denial of advancement. See City of Chicago (Dep't of Bldg.), 15 PERI ¶ 3012 (IL LLRB 1999).

In regard to the fourth prong, unlawful intent may be established from direct evidence such as statements or threats, or by circumstantial evidence such as the employer's expressed hostility toward unionization coupled with the knowledge of the employee's union and protected, concerted activities; the timing of the adverse action; a pattern of disparate treatment of those engaging in union and protected, concerted activity; shifting explanations for the adverse action, or inconsistencies in the reasons given for its action against the employee and the employer's

other actions. See City of Burbank, 128 Ill. 2d at 345-346. Mere proof of union animus independent of an examination into causation is insufficient to establish discrimination. City of Springfield, 6 PERI ¶ 2004 (IL SLRB 1989).

The Charging Party argues that there is evidence that the Respondent issued the oral warning because of Rosengren and Freeman's animus toward Elmore's union and protected, concerted activity. However, since neither Rosengren nor Freeman made the decision to issue the oral warning, it must also be determined whether any animus on the part of Rosengren or Freeman can be imputed to the Respondent decision maker, and whether the decision maker itself was motivated by union animus or animus toward Elmore's protected, concerted activity.[9] See Cnty. of Menard v. Ill. State Labor Relations Bd., 202 Ill. App. 3d 878, 892 (4th Dist. 1990), affirming Cnty. of Menard, 6 PERI 2006 (IL SLRB 1989).

A. Rosengren

Here, while Rosengren's statements provide sufficient evidence that she harbors union animus, I find that there is insufficient evidence to establish a causal link between Rosengren's animus and the issuance of Elmore's oral warning. Rosengren's statements are direct evidence that she harbored union animus, specifically she had a negative opinion of Elmore, at least in part, because Elmore was "too union for [Rosengren's] blood." However, the Charging Party has not shown that Rosengren reported the motor vehicle incident to Freeman due to Rosengren's animus. In other words, the Charging Party has not established that unlawful animus was a motivating factor in Rosengren's decision to contact Freeman regarding the motor

[9] The record reflects that Rosengren informed Freeman of the motor vehicle work incident, Freeman informed his supervisor Ed Smith of the incident, but Freeman did not recommend to Smith that Elmore be disciplined. Freeman testified that the Department of Personnel directed him to issue the oral warning. Freeman did not identify who within the Department gave him this direction. Roth, the Director of Personnel, also did not testify to the involvement of the Department in issuing the oral warning.

vehicle report incident. The Charging Party argues that when Rosengren stated "I guarantee [Elmore] is not getting that job, I've seen to that. There is nothing she can do about it," Rosengren was specifically referring to the fact that she initiated the oral warning against Elmore in order to disqualify her for the position, and that this statement constitutes direct evidence of Rosengren's illegal motives. This is not direct evidence because it requires an inference that Rosengren was in fact referring to the oral warning, and an inference that any intentional action she may have taken was because of Elmore's protected activity. The Charging Party has failed to submit evidence to establish this causal link.

Regarding the employer's expressed hostility toward unionization coupled with the knowledge of the employee's union activities, Rosengren did express hostility towards Elmore's union activities when she stated that Elmore was "too union for [Rosengren's] blood" and "talks about the union too much."

In regard to the timing of the oral warning, Elmore has been continuously engaged in union activity. Thus, there is proximity in time between her protected activity and the complained of action. However, the Board has held that mere proximity in time by itself is insufficient to support an inference that an employer's conduct was motivated by unlawful animus. City of Kewanee, 23 PERI ¶ 110 (IL LRB-SP 2007); Vill. of Lisle, 24 PERI ¶ 53.

The evidence fails to establish that the Respondent had a pattern of disparate treatment toward employees engaged in union and protected, concerted activity. The Charging Party argues that Rosengren specifically targeted Elmore for discipline by reporting three separate infractions during September 2010. As previously stated, Smith directed Freeman to instruct Elmore not to contact the Roanoke facility. Thus, this information did not come from Rosengren. Charging Party has also failed to establish that Rosengren was not reporting similar

infractions made by other employees less active in the union. Actually, when Rosengren informed Freeman of the motor vehicle report incident, she also reported that another employee had spent 30 minutes in the break room during closing on another day.

Also, since no other explanation has been submitted for why Elmore was issued the oral warning other than because of the motor vehicle report incident, there is no evidence that this explanation is shifting or inconsistent. See City of Burbank, 128 Ill. 2d at 345-346.

Given that circumstantial evidence is not limited to the Burbank factors, I do find that Rosengren's statement "I guarantee she is not getting that job, I've seen to that. There is nothing she can do about it" indicates that she took some retaliatory action against Elmore. Since the Respondent made no effort to refute or even explain these comments, I will infer that the retaliatory action involved Rosengren reporting the motor vehicle report incident.[10] Considering Rosengren's statements and the Respondent's lack of explanation, I do find that Rosengren's reason for reporting Elmore's actions regarding the motor vehicle incident was at least in part motivated by Rosengren's animus for Elmore's protected, concerted activity.

While Rosengren's union animus was a motivating factor in her reporting the motor vehicle incident to Freeman, this animus cannot be imputed to the Respondent because Rosengren did not recommend discipline nor was she sufficiently involved in Elmore's resulting discipline to taint the disciplinary decision. If an adverse employment action results from a recommendation or the involvement of an employer representative who harbors unlawful

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[10] Brewick testified regarding Charging Party's Exhibit #13, a document she prepared detailing Rosengren's statements over the course of 2010. This document provides that "I realized that [Rosengren] had lied about [Elmore] to keep her from the job." The exhibit provides that based upon the information Elmore and Rosengren provided to Brewick, Brewick concluded that Rosengren lied to prevent Elmore from being promoted to the DFM I position. The Respondent cross-examined Brewick regarding this exhibit in detail, and only demonstrated that Brewick's conclusion was based upon Elmore's version of the motor vehicle report incident, but did not attempt to negate this conclusion.

animus, the employment action is unlawful even if the public employer's governing body does not harbor unlawful animus. City of Harvey, 18 PERI ¶ 2032 (IL SLRB 2002); North Maine Fire Protection Dist., 16 PERI ¶ 2037 (IL LRB-SP 2000), City of Harvey, 9 PERI ¶ 2041 (IL SLRB 1993); Vill. of Lyons, 5 PERI ¶ 2007 (IL SLRB 1989). An employer representative's illegal motive will be imputed to the employer when the representative recommends the adverse action or is involved in the resulting adverse action, thereby tainting the employer's decision. North Maine Fire Protection Dist., 16 PERI ¶ 2037 (supervisor's unlawful animus tainted the decision maker's promotion decision, where supervisor provided negative comments regarding an employee, which were not legitimately based upon the employee's qualifications and experience, and these comments were relied upon by the board of commissioners in denying the employee a promotion); City of Harvey, 9 PERI ¶ 2041 (supervisor's unlawful animus tainted decision maker, where decision to lay off employees was based upon erroneous report from supervisor, and supervisor had direct input into decision to lay off employees); Cnty. of Menard, 3 PERI ¶ 2043 (IL SLRB 1987) (supervisor's recommendation that the employee be terminated tainted the unbiased board's decision to discharge an employee active in the union).

The Charging Party argues that Rosengren effectively recommended discipline based on the motor vehicle report incident. However, Rosengren's phone call and e-mail to Freeman relaying the events of the incident were not recommendations that Elmore be disciplined. Per Freeman's testimony, Rosengren's phone call constituted her informing Freeman that Rosengren asked Elmore to complete a task and Elmore refused, and Freeman requesting that she send him a written account of the incident.[11] She makes no recommendations as to what action, if any,

[11] Neither the Charging Party nor the Respondent addressed Rosengren's conversation with Freeman during her testimony. Also, neither party asked Freeman to go into further detail regarding the specific allegations Rosengren made in their telephone call.

Freeman should take, and even asks Freeman what the duties of the public service representatives entail during closing procedures. There is no indication that Freeman required or even solicited Rosengren's opinion or recommendation on whether Elmore should be disciplined.

Rosengren's phone call and e-mail to Freeman do not constitute involvement sufficient to impute any animus she may have harbored to the Respondent because her involvement was limited to apprising Freeman of the incident, and that account is factually accurate. Unlawful animus may be imputed to the employer even if the representative did not recommend discipline, if the representative made false allegations that formed the basis for the discipline. See City of Harvey, 9 PERI ¶ 2041. Here, the unlawful animus should not be imputed to the Respondent because there is no evidence that Rosengren conveyed false or inaccurate information regarding the motor vehicle incident. Rosengren's account of the incident is largely undisputed. Thus, Rosengren's involvement is insufficient to impute her unlawful animus to the Respondent. As such, the Charging Party has failed to establish a causal link between Rosengren's unlawful animus and the issuance of the oral warning.

B. Freeman

Freeman's actions do not satisfy the fourth prong of the Burbank test because there is no evidence that Freeman harbored unlawful animus toward Elmore because she engaged in union and protected, concerted activity. Charging Party argues that Freeman's hostility is evidenced by the fact that he lied to Elmore about Rosengren receiving compensatory time in 2006, and evidenced by his issuing Elmore an oral warning in 2007. Freeman's denial that Rosengren was not receiving compensatory time is not an expression of hostility, and there is no evidence that Freeman issued Elmore the oral warning because of any union animus. While the oral warning

was the basis of Elmore's 2007 unfair labor practice charge, the charge was settled with no determination made by the Board.

Freeman did express hostility toward Elmore when she went outside the "chain of command" and contacted the Inspector General directly regarding residency requirements. However, this incident took place more than three years prior, and there were no expressions of hostility after 2007.

The Charging Party argues that the timing of the oral warning is suspicious because it was issued less than two months before the Driver Facility Manager I vacancy was posted. The timing of the posting is not relevant to the timing of the oral warning because there is no evidence that Freeman had any influence over, or any knowledge of, when the job vacancy would be posted.

Regarding the pattern of disparate treatment, the Charging Party argues that Elmore was previously targeted for a transfer, issued an oral warning, and terminated. However, Freeman was not involved in the transfer because he was not the Regional Manager in 2002 when the transfer occurred. Further, although Freeman did issue Elmore the 2007 oral warning and termination, the record does not reflect that Freeman made the decision to issue the oral warning or termination, or recommended that these occur. There is also no evidence in the record that Freeman has discriminated against other union supporters.

Regarding shifting explanation, Freeman has not provided any explanation for his reason to pass Rosengren's report on to Smith. Freeman testified that he informed Smith that "something needed to be done" about Elmore's refusal to complete the motor vehicle work, but he did not explain what his reason for this was.

Regarding inconsistencies, the Charging Party argues that this factor is satisfied because the Respondent issued an oral reprimand without investigating Elmore's account of the motor vehicle work incident, although previously Freeman had investigated Elmore's accounts of the computer usage incident and the Roanoke facility incident. The record does not reflect whether Freeman investigated those other complaints on his own accord, or at the direction of his supervisor, and thus it cannot be determined whether Freeman's actions are inconsistent with his previous actions. Thus, there is insufficient evidence to establish that Freeman acted with animus when he reported the motor vehicle incident to his supervisor, or when he issued the oral warning as directed by the Department of Personnel.

Similar to Rosengren, even if Freeman was motivated by union animus or animus toward Elmore's protected, concerted activity when he contacted his supervisor, his involvement is not sufficient to impute any animus he may have harbored to the Respondent decision maker. Freeman did not recommend discipline, he merely informed his supervisor that Elmore "was refusing to do some of the duties that were assigned to her and that needed to be addressed." Freeman recommended that the Respondent take action, but the record does not indicate what action, and Freeman specifically denies recommending discipline. The information Freeman provided to his supervisor and the e-mail he forwarded from Rosengren are factually accurate depictions of the incident in question. Thus, Freeman's actions are not sufficient to impute any illegal motivation to the employer. City of Harvey, 9 PERI ¶ 2041.

C. Respondent decision maker

Absent a causal link between Rosengren or Freeman's motivations and the Respondent's actions, it is necessary to evaluate whether there is any direct or circumstantial evidence that the Respondent decision maker acted with animus independent from Rosengren or Freeman in its

decision to discipline Elmore. However, the Charging Party has not established the identity of the decision maker. The record indicates that the Department of Personnel directed Freeman to issue Elmore an oral warning. The logical inference is that the decision maker was someone within the Department, but there is no evidence as to whom, or what information this person or persons utilized in making this decision. Therefore, the discussion must be limited to the actions of Rosengren and Freeman. Since Rosengren did not recommend discipline and she was not sufficiently involved in the issuance of Elmore's oral reprimand, Rosengren's animus toward Elmore's union and protected, concerted activities cannot be imputed to the Respondent decision maker. Since there is insufficient evidence that Freeman harbored union animus, there is no animus that can be imputed. Thus, I find that that the Charging Party has failed to establish that the Respondent violated Sections 10(a)(1), (2), and (3) when it issued Elmore an oral warning.

The Charging Party also argues that the Respondent's denial of Elmore's promotion was itself an independent violation of the Act. As previously noted, the Charging Party has established the first three prongs of the Burbank test in that Elmore was engaged in protected activity, the Respondent was aware of this activity, and the denial of a promotion was an adverse action. See City of Burbank, 128 Ill. 2d at 345-346; Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶ 2022. However, the Charging Party does not satisfy the fourth prong because it has not established that the denial of the promotion was motivated by unlawful animus. The Charging Party argues that the Department of Personnel denied Elmore the promotion solely because of the oral warning. Thus in order for the denial of the promotion to be a separate violation of the Act, the oral warning must have been given because of union animus. However, as previously found, the oral warning was not based upon union animus, and the Charging Party does not argue, and the record does not show independent animus on the part

of the Personnel Board when it bypassed Elmore's application. Therefore, the Charging Party has failed to demonstrate that the Respondent violated Section 10(a)(1), (2), and (3) the Act when it bypassed Elmore for a promotion.

V. CONCLUSIONS OF LAW

The Charging Party failed to prove, by a preponderance of evidence, that the Respondent violated Section 10(a)(1), (2), and (3) of the Act.

VI. RECOMMENDED ORDER

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

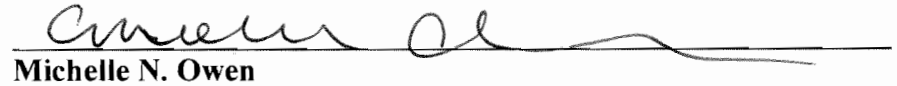
VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order in 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 seven (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, IL 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 of 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 13th day of January, 2013.

STATE OF ILLINOIS
ILLINIOIS LABOR RELATIONS BOARD
LOCAL PANEL



Michelle N. Owen
Administrative Law Judge