STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Tyron McCullough, Charging Party and Harvey Park District, Respondent	Case No. S-CA-11-127-C

COMPLIANCE ORDER

On February 6, 2013, Charging Party, Tyron McCullough, filed a petition for enforcement with the State Panel of the Illinois Labor Relations Board. In the petition for enforcement, Charging Party requested the Board seek enforcement of its order in the unfair labor practice case filed against Respondent Employer, Harvey Park District, in Case No. S-CA-11-127. Charging Party alleges Respondent has not complied with the interim order issued on July 13, 2011 by Administrative Law Judge ("ALJ") Elaine L. Bell. After an investigation conducted pursuant to the Act and Section 1220.80 of the Board's Rules and Regulations, 80 Ill. Admin Code Sections 1200-1240, (Rules) the compliance officer hereby directs Respondent to take certain actions to facilitate full compliance.

I. BACKGROUND AND FACTS

On December 22, 2010, Charging Party filed an unfair labor practice charge alleging Respondent Employer, Harvey Park District, violated Section 10(a)(1) of the Act by suspending him without pay on December 17, 2010 for having engaged in protected concerted activity because he had voiced employment concerns on behalf of himself and others. On February 24, 2011, a Complaint for Hearing issued setting the matter for hearing before Administrative Law

Judge, Eileen Bell. On March 16, 2011, Respondent filed a timely answer to the complaint that issued February 24, 2011.

On April 12, 2011, ALJ Bell issued an Interim Order granting Charging Party's Motion to Amend the Complaint. The Amended Complaint alleged a violation of Section 10(a)(3) and (1) of the Act when Respondent terminated Charging Party's employment effective February 17, 2011 because he filed the instant unfair labor practice charge. Respondent failed to file an answer to the Amended Complaint. Prior to the ALJ issuing her decision, on May 31, 2011 Respondent reinstated McCullough to his former position.

On July 23, 2011, in accordance with Board precedent regarding failure to answer a Complaint, ALJ Bell found that Respondent's failure to file an answer to the Amended Complaint due May 9, 2011 waived Respondent's right to a hearing and moreover, was an admission of the material facts alleged in the Amended Complaint. To remedy Respondent's illegal conduct, ALJ Bell ordered Respondent to take the following affirmative action to effectuate the policies of the Act.

> a) Effective immediately, rescind the termination of Tyron McCullough issued on or about February 17, 2011, and make him whole for any and all wages he suffered from February 17, 2011 until his return to work on May 31, 2011 including back pay plus interest at a rate of seven percent per annum.
> b) Remove from Tyron McCullough's personnel file any and all documents and references to his termination on or about February 17, 2011.
> c) Post at all places where notices to employees are normally posted, copies of the notice attached hereto. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. Respondent will take reasonable efforts to ensure that the Notices are not altered, defaced or covered by any other material.
> d) Notify the Board in writing, within 20 days from the date of this Decision, of the steps Respondent has taken to comply herewith.

As no party filed exceptions to the Recommended Decision and Order, on September 15, 2011 the Illinois Labor Relations Board declined to take the matter up on its own motion, and the

Board's General Counsel issued an Order stating that the Administrative Law Judge's Recommended Decision and Order was final and binding on the parties.

On February 6, 2013, Charging Party, Tyron McCullough, filed a Petition for Enforcement of the Board's Order. The enforcement of the petition was assigned to the undersigned compliance officer. McCullough maintains Respondent has failed to: make him whole for back wages; remove references to the termination from his personnel file; and post the required Notices.

II. DISCUSSION

The general principle underlying this report is simply to restore Charging Party to the position he would have been in absent the commission of the unfair labor practice involving his illegal termination. Under Section 80 Ill. Admin. Code, Section 1220.80 of the Board's Rules, the compliance officer is directed to investigate the Petition for Enforcement and issue an order dismissing the Petition, directing specifically the actions to be taken by Respondent and Charging Party, or set the matter for hearing before an Administrative Law Judge. This approach conforms to those principles enunciated by the Board in several other compliance cases (see *State of Illinois, Dept. of Corrections, Gerald Morgan*, 3 PERI ¶2057, (Il. SLRB 1987); *City of Crest Hill*, 4 PERI ¶2030 (IL SLRB 1988)).

The parties disagree about whether there has been compliance. During the compliance investigation, Respondent produced a "withdrawal letter" dated October 7, 2011 signed by McCullough which was addressed to the then Executive Director of the Harvey Park District, John Arrington, and to Jerald Post, General Counsel for the Illinois Labor Relations Board (ILRB), in which McCullough requested the withdrawal of the unfair labor practice charge because the "matter was settled and fully resolved." I take administrative notice that ILRB mail logs do not show that McCullough's withdrawal letter was logged in and received by the Board. Moreover, there is no record in the case file or data entered into the Board's case tracking system

that the unfair labor practice charge was ever withdrawn. Had the unfair labor practice charge been withdrawn, the case file would have been closed and would have precluded Charging Party's use of the Board's compliance procedures. Here, although McCullough may have signed a settlement agreement, he failed to effectuate that settlement by not pursuing it with the Board and thereby is able to avail his right to compliance proceedings before the Board.

As well as the "withdrawal letter" provided the compliance officer, Respondent presented a payroll register showing McCullough was issued a check deposited directly to his bank account on October 7, 2011 for a net amount totaling $3,094.88 (gross payment - $4,019.00). Respondent claims the check was for back pay for the time period from February 17, 2011 to May 31, 2013, when McCullough had been terminated. In response to my request to ensure McCullough's personnel file had been cleansed of objectionable documents referencing the February 17, 2010 illegal termination, Respondent's Executive Director, Dionne Cooper, asserted she personally reviewed McCullough's personnel file and found that there were no documents in the file referencing the termination. Finally, Ms. Cooper contends that the Notice to Employees had previously been posted in conformance with the Board's Order.

McCullough admits he spoke with Executive Director Arrington about withdrawing the unfair labor practice charge, however, Arrington knew that McCullough was disputing the amount of back pay owed and that there was no agreement that he was withdrawing the charge.[1] According to McCullough, he was not aware that Respondent had deposited the money to his direct deposit account until after Respondent made the deposit. McCullough contends he continued to dispute the amount of back pay to no avail. McCullough argues that the make whole remedy in this matter should have been from December 17, 2010 when Respondent suspended him without pay and not the later date when he was terminated on February 17, 2011. McCullough originally filed the unfair labor practice charge alleging he was suspended without

[1] Arrington is no longer employed by the Harvey Park District.

pay on December 17, 2010 in violation of Section 10(a)(1) of the Act. In February, 2011 McCullough filed an amended charge alleging he was terminated on February 17, 2011 in violation of Section 10(a)(3) and (1) of the Act. McCullough claims that he had not perfected the settlement with Arrington because he was seeking pay back to December 17, 2010 and the issue had not resolved.

There are two additional issues in dispute. The issue of Notice posting is still in question; as is the issue of whether objectionable documents have been removed from McCullough's personnel file. McCullough argues that despite Respondent's assertion to the contrary, the Notice was never posted. And, although Respondent has reviewed McCullough's personnel file finding that there is no objectionable material in the file, McCullough has not checked his personnel file and does not have knowledge whether there are documents referencing the February 17, 2011 termination in the file.

During the compliance investigation, McCullough stated he was paid $13.00 per hour and his typical work week consisted of a 20 hours of work a week. Respondent's payment of back pay to McCullough of $4,019.00 approximates 309 hours of work. The 309 hours of work closely matches what McCullough contends he would have worked if not for being terminated (from February 17, 2011 to May 31, 2011). I find Respondent paid McCullough in accordance with what the Board ordered (from February 17, 2011 to May 31, 2011), absent the payment of interest calculated at 7% per annum. Any formula that approximates the amount a discriminatee would have earned absent the discrimination is acceptable if not unreasonable or arbitrary under the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994) enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Consequently, the Board may use as close an approximation as possible, and may adopt formulas reasonably designed to produce such approximations. *NLRB v. Overseas Motors*, 818 F.2d 517, 521 (6th Cir. 1987), citing *Brown v. Rook*, 311 F.2d at 447, 52 LRRM 2115 (8th Cir. 1963).

Although Respondent returned McCullough to work on May 31, 2011 his pay was not restored until October 17, 2011, 129 days later. The amount paid by Respondent did not include the interest on the back pay as directed by the Board in its Order. The amount Respondent should have paid on October 7, 2011 was $4,200.26 (total back pay = $4,019.00 back pay + $181.26 interest ($4,019.00 X .0001944 daily interest factor X 232 days – February 17, 2011 to October 7, 2013)). Since Respondent paid McCullough only $4,019.00 of the $4,200.26 owed, Respondent shorted the amount of back pay owed McCullough leaving a balance due of $186.26. Until the full amount is paid, interest accrues until such time that the total back pay is restored. Assuming Respondent pays the remaining balance by June 28, 2013 630 days (October 7, 2011 to June 28, 2013) would have elapsed since the partial payment was made. Respondent is hereby ordered to pay $203.46 ($181.26 balance on 10/7/2011 + $22.20 interest (630 days X daily interest factor of .0001944 X $181.26 = $22.20)). The exact dollar amount for interest is subject to change based upon when the back pay is paid in full. Consequently, the interest will continue to run on the total back pay until such date is confirmed. The amount of interest will be higher if the date of payout of the interest is later than June 28, 2013, or lower, if the actual payout of interest is before June 28, 2013. Respondent is hereby ordered to pay McCullough the $203.46 on or by June 28, 2013.[2]

III. EXPUNGE PERSONNEL FILES

Although Respondent has indicated it has removed all documents and references to termination from McCullough's personnel file, Respondent has not reviewed the file to determine whether the Employer has done so. Following McCullough's return to work on May 31, 2011 Respondent again suspended and/or terminated McCullough and he has been prohibited from the work site. In June of 2012 McCullough filed unfair labor practice charges alleging Respondent took adverse actions against him as alleged in Case Nos. S-CA-12-197, S-CA-12-

[2] As set forth in the Act at Section 11(c), Respondent is directed to pay interest at 7% on back pay. The Board's interest formula for calculating 7% is based upon the long standing formula the Board has used in all its compliance cases.

201, and S-CA-12-211. A complaint has issued in those three cases and they have been consolidated for hearing before an Administrative Law Judge. Because Respondent is currently prohibited from the work site due to a more recent suspension/termination, Respondent is hereby directed to make McCullough's personnel file available to him for his review at a time and place convenient to each of the parties. Respondent is directed to inform the undersigned of the date and the location that McCullough and Respondent have agreed upon to review the file. If McCullough finds objectionable material in the files, he is to make known the documents found to be objectionable to Respondent and request the material be removed. If Respondent disagrees and or refuses to remove the documents then copies of the documents shall be provided to the compliance officer for a determination as to whether they shall be expunged. If Charging Party does not seek to review his personnel file he is directed to inform Respondent and the compliance officer. Moreover, Charging Party is directed to contact the compliance officer within seven days of reviewing his personnel file, if he chooses to review the file, and inform the compliance officer of his review. If Charging Party reviews his personnel file and does not contact the compliance officer within seven days of review of the file, I will accept a motion from Respondent that Charging Party has abandoned his right of review regarding the personnel file.

IV. NOTICE POSTING

In order to resolve the dispute regarding the Notice posting, I hereby direct Respondent to post the attached Notice. The Notice is to be posted in the work area where McCullough worked, such as next to a time clock or on a bulletin board where notices are normally posted. Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by other material. A responsible official of the Harvey Park District must sign and date the Notice(s) before posting them. Respondent is directed to provide to McCullough and the compliance officer a report that includes: a certificate of posting that indicates the date and all

locations that the notices were posted; a photograph of the Notice postings while displayed at their posted locations; and a photocopy of the signed and dated Notice postings. In addition to the initial report, at the end of the posting period Respondent is directed to report to McCullough and the undersigned that the Notices were maintained, and continuously and conspicuously posted for a period of 60 consecutive days.

V. ORDER

IT IS HEREBY ORDERED that Respondent, within 7 days after service of this Order, shall comply with the above findings and take the actions noted herein to make Charging Party whole for Respondent's unlawful actions. This Order of the Compliance Officer is an intermediate Order that will become final unless the parties file an appeal with the Illinois Labor Relations Board, within seven (7) business days after service of this Order. Any such appeal must be in writing, and directed to Jerald Post, the Board's General Counsel, at the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Appeals will not be accepted in the Board's Springfield office. In addition, any such appeal must contain detailed reasons in support thereof, and the party filing the appeal must provide a copy of its appeal to all other persons or organizations involved in this case at the same time the appeal is served on the Board. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that a copy of the appeal has been provided to each of them. An appeal filed without such a statement and verification will not be considered. If no appeals to this Order are filed, the Order of the Compliance Officer shall become final.

Issued in Springfield, Illinois, this 7th day of June, 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Michael L. Provines
Compliance Officer

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Tyron McCullough, Charging Party and Harvey Park District, Respondent	Case No. S-CA-11-127-C

DATE OF
MAILING: **June 7, 2013**

AFFIDAVIT OF SERVICE

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

Tyron McCullough
10214 S. LaSalle Street
Chicago, Illinois 60628

Dionne Cooper
Harvey Park District
15335 Broadway Avenue
Harvey, Illinois 60426

Lori Novak

Lori Novak

SUBSCRIBED and **SWORN**
to before me, **June 7, 2013**

OFFICIAL SEAL
NICOLE A. HILDEBRAND
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 3-30-2014

NOTARY PUBLIC