# STATE OF ILLINOIS
# ILLINOIS LABOR RELATIONS BOARD
# STATE PANEL

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| International Association of Fire Fighters, Local 717,<br><br>Charging Party<br><br>and<br><br>Town of Cicero,<br><br>Respondent | Case No. S-CA-11-175C |

## COMPLIANCE ORDER

On March 13, 2012, Charging Party, International Association of Fire Fighters, Local 717 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, Town of Cicero, (Employer) in Case No. S-CA-11-175. Charging Party alleges Respondent has not complied with the order issued on December 15, 2011 by Administrative Law Judge ("ALJ") Eileen 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 February 10, 2011, Charging Party filed an unfair labor practice charge alleging Respondent, Town of Cicero, violated Section 10(a)(1) of the Act by interfering with, restraining or coercing public employees in the exercise of their rights guaranteed in the Act, Section 10(a)(2) and (1) of the Act by discriminating in the terms and conditions of employment to

discourage membership in or other support for any labor organization, and section 10(a)(4) and (1) by failing and refusing to bargain in good faith. On June 17, 2011, a Complaint for Hearing was issued setting the matter for hearing before Administrative Law Judge Eileen Bell. Respondent failed to file an answer to the Complaint.

On December 15, 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 Complaint waived Respondent's right to a hearing and moreover, was an admission of the material facts alleged in the Complaint. To remedy Respondent's illegal conduct, ALJ Bell ordered Respondent to take the following affirmative action to effectuate the policies of the Act.

1. To cease and desist from:
   a. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in the Act
2. Take the following affirmative action designed to effectuate the policies of the Act:
   a. Reinstate Peszynski to his former position as Administrative Assistant to the Fire Marshal; rescind the removal of Peszynski's duties concerning verification and submission to Respondent of bargaining unit employees' work hours; rescind the removal of Peszynski's arson investigation duties; make Peszynski whole for any losses he suffered as a result of the change in his position from the Fire Marshal's Administrative Assistant to a 24 hour shift lieutenant, including back-pay plus interest at a rate of seven percent per annum; and return Peszynski's Cicero Police Department Arson Unit Badge.,
   b. Provide the Charging Party with the information requested-bargaining unit employees' time sheets for a period of time including August 23 and 24, 2010, video footage, for specific dates, of the area where employees are required to sign in and out, and a copy of Gomez' job description.
   c. Investigate the complaint which Habercross made against one of Respondent's employees that Klosack and Gomez had previously declined to pursue.
   d. Return the charges in the investigations initiated on January 19, 2011 against bargaining-unit members Peszynski, Rand and Harvey to their original allegations, rather than the charges that were upgraded due to the protected activity of these bargaining unit members;
   e. Post at all places where notices to employees are ordinarily posted, copies of the notice attached hereto. Copies of this Notice shall be posted, after being duly signed by the Respondent, in conspicuous places and shall be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that these notices are not altered, defaced or covered by any other material.
   f. Notify the Board in writing, within 20 days from the date of this decision, of what steps this Respondent has taken to comply herewith.

As no party filed exceptions to the Recommended Decision and Order, on February 7, 2012, 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 non-precedential Recommended Decision and Order was final and binding on the parties.

On March 13, 2013, Charging Party filed a Petition for Enforcement of the Board's Order. The enforcement of the petition was assigned to the undersigned compliance officer. After completing the investigation, the undersigned finds that Respondent has failed to take all of the affirmative action ordered by the Board to comply with the make whole award.

## II. DISCUSSION

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).

### A.) Administrative Assistant Position and Duties

The Board directed Respondent to reinstate Lieutenant Theodore Peszynski to his former position of Administrative Assistant to the Fire Marshall. Peszynski is the only employee that has held this position. The Board also directed Respondent to restore Peszynski with the duties he performed prior to removing him of those duties. On August 11, 2013, Respondent returned Peszynski to a forty hour work week and reinstated him to his former position. Although Respondent complied with the Board's Order to reinstate Lieutenant Peszynski to his former position, Respondent has not restored all of his duties related to arson investigation.

The Board directed Respondent to reinstate Peszynski's arson investigation duties and to return to him his Cicero Police Department arson unit badge. Arson investigators are peace officers and have the same authority to act as a police officer. As a consequence of holding an arson unit badge, arson investigators are permitted to carry a gun. At the time of the transfer, Pesyznski carried an arson unit badge and he carried a gun. As of the date of this decision, Respondent has not returned Peszynski's arson unit badge or allowed him to carry a firearm. Consequently, I find that the Town has failed to reinstate all of Peszynski's duties as an arson investigator and failed to return his arson unit badge or permit him to carry a firearm.

Respondent asserts the reason it has not returned Peszynski's arson unit badge or allowed him to carry a firearm is that the right to carry a firearm is ordinance driven, and the Town would have to pass an ordinance specifically naming Peszynski and decreeing that he could carry a firearm in his capacity as an arson investigator.

It is believed Peszynski has completed all the required coursework, documentation and testing and has met the statutory requirements for certification as an arson investigator. However, if his certifications have expired since the unlawful reassignment, then Respondent is directed to take the necessary steps for Peszynski to regain his certification. In addition, Respondent is hereby ordered to return Peszynski's arson unit badge and to enact an ordinance allowing him to carry a firearm.

**B.) Time Sheets and Video Footage**

The Board directed Respondent to provide Charging Party with bargaining unit employees' time sheets for the dates from August 23 and 24, 2010, and video footage from the camera that videotaped employees' sign-in and sign-out area. In addition, the Board directed Respondent to provide the job description for employee Christopher Gomez. During the investigation Charging Party informed the compliance officer that it no longer seeks the

timesheets, video footage or job description. Therefore, I find that no further action is needed to comply with this aspect of the Board's Order.

**C.) Internal Town Investigation**

The Board directed Respondent to investigate the complaint which Habercross made against one of Respondent's employees that the Employer had previously declined to pursue. In addition, the Board ordered Respondent to return the charges in the investigations initiated January 19, 2011, against bargaining unit members Peszynski, Rand and Harvey to their original allegations. Respondent's investigations of both of these matters have been closed and consequently, Charging Party is no longer pursuing any further action regarding those issues. No further action is necessary regarding this portion of the charge.

**D.) Notice Posting**

Notices have been properly posted for the requisite time period and therefore Respondent has complied with the Board's Order on the posting of Notices.

**E.) Back-Pay**

An issue in this case is whether and how much back-pay Respondent owes Peszynski as a result of its illegal actions. The purpose of a back-pay order is to restore the discriminatee to the status he or she would otherwise occupy but for respondent's discrimination. 3 NLRB Casehandling Manual ¶ 10530.1 (1993); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). [FN7] However, "a back-pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900 (1984)(emphasis in the original). To make Pesynski "whole," Respondent must pay him what he would have earned absent Respondent's illegal conduct. Phelps Dodge Corp. v NLRB, 313 U.S. 177 (1941); Mastro Plastics Corp., 136 NLRB 1342 (1962), enf'd, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966); F.W. Woolworth Co., 90 NLRB 289 (1950).

On September 10, 2011, Respondent demoted Peszynski and reassigned him from an 8-hour work day, forty hour work schedule to a 24/48 work schedule (24 hours on and 48 hours off, 49.8 hour work week). As a consequence of the demotion/transfer to the 24/48 shift, for the entire time that Peszynski worked the 24/48 work schedule, his pay was reduced by 4% from that which he would have earned if he had remained on the forty hour a week, 8-hour day work schedule. The principle on which back-pay is based is that a discriminateee is owed what he or she would have earned but for the unlawful action. 3 NLRB Casehandling Manual Section 10536.1. In the instant case, to make Peszynski whole, he is owed the difference in what he earned on the 24/48 shift and what he would have earned if he had still been employed on a 40 hour work week.

**F.) Reduction in Pay**

On August 12, 2013, Respondent reinstated Peszynski to his former position as the Administrative Assistant to the Fire Marshal (8-hour day, 40 hour work schedule) and returned him to the hourly salary level consistent with wages paid to forty hour employees with similar seniority. Respondent does not dispute that if not for the transfer, Peszynsk would have earned 4% more in wages than what he earned working on the 24/48 hour shift.[1] The difference in salary that Peszynski received and what he earned is set forth below and in the attachment, Appendix A. During the time period that Peszynski was employed on the 24/48 work schedule, Peszynski received two wage increases effective January 1, 2012, and January 1, 2013.

**a. Time Period - September 11, 2011 through December 31, 2011**

On September 11, 2011, when Peszynski was transferred, he was earning $3,722.84 every two weeks. The transfer resulted in a reduction in his biweekly salary to $3, 579.65. He remained at this salary until January 1, 2012, when a new wage increase became effective.

[1] According to Respondent, 8-hour 40 hour week employees receive 4% more in pay than employees who work a 24/48 shift to compensate for less overtime opportunities that are available to employees working a 40 hour work week.

Respondent owes Peszynski the difference between $3,722.84 and $3,579.65, or $143.19 in additional compensation every two weeks for the 16 weeks he was on this pay scale until December 31, 2011. Respondent owes Peszynski $1,145.52 for the 16 weeks (8 pay periods x $143.19 = $1,145.52).

**b. Time Period - January 1, 2012 to December 31, 2012**

Peszynski's biweekly salary for the 24/48 hour schedule increased to $3,651.24 on January 1, 2012. Had Pesznski been working a 40 hour schedule his salary would have been $3,797.30 every two weeks. Respondent owes Peszynski the difference in these wages, or $140.06 every two weeks for the 2012 work year, or $3,641.56 ($140.06 x 26 weeks = $3,641.56) to make him whole for the unlawful transfer.

**c. Time Period - January 1, 2013 to August 8, 2013**

On January 1, 2013, Peszynski's biweekly salary for the 24/48 hour schedule increased to $3,733.40. Had Pesznski been working a 40 hour schedule he would have earned $3,882.74 every two weeks until he was returned to the 40 hour work schedule on August 8, 2013. Respondent owes Peszynski the difference in these wages, or $149.34 every two weeks. One half of $149.34 equals $74.67. For the 33 weeks through August 8, 2013, Respondent owes Pesynski $2,464.11 ($74.67 x 33 weeks = $2,464,11).

**G.) Overtime**

Respondent argues that the amount of overtime that Peszynski earned during the 23-month reassignment should be used to offset the amount of back-pay owed to him. In cases such as this, as in Peszynski's case, it is not appropriate to offset gross back-pay where a discriminatee worked more hours and earned overtime while on the reassignment. 3 NLRB Casehandling Manual Section 10554.3 (citing United Aircraft Corp., 204 NLRB 1068, 1073-1074) (1973); and EDP Med. Computer Sys., 293 NLRB 857, 858 (1989)); Illinois Fraternal Order of Police Labor Council and Sheriff of Jackson County, 17 PERI ¶2009, S-CA-96-052C (Il SLRB 2000). In a

case involving substantially similar facts as present here, Jackson County, supra, the Board found that interim earnings based upon the same number of hours as would have been available with the original employer should be used to offset earnings. Accordingly, the amount of overtime that Peszynski worked while on the 24/48 hour schedule shall not be used to offset the back-pay owed to him. Respondent's request to deduct overtime from the back-pay award is denied.

**H.) Lengthened Work Week**

Another compliance issue concerns whether Respondent owes Peszynski back-pay for the additional hours above 40 hours that he worked when he was on the 24/48 work schedule. Section 16.1 of the collective bargaining agreement (CBA) provides that the average number of hours for a 24/48 work schedule is 49.8 hours per week. When Peszynski was demoted from his administrative position to the firefighter position on the 24/48 work schedule, the average number of hours he worked a week increased from 40 hours to 49.8 hours a week (an increase of 9.8 hours a week). In essence, Peszynski worked 9.8 hours more a week on his new work schedule than he would have worked had he not been unlawfully transferred. Succinctly stated, the transfer resulted in Peszynski working more hours for less pay with a correspondingly loss of off duty time. If the back-pay established herein seems to make Peszynski more than whole, it is as a result of the longer hours required by Respondent's unlawful action. Peszynski is entitled to back-pay for the extra hours that he worked which was a direct result of Respondent's unlawful transfer.

The Board ordered Respondent to restore Peszynski to the status he would otherwise occupy but for the unlawful demotion/transfer. Stated differently, if not for the unfair labor practice, Peszynski would have worked 40 hours a week, but for the reassignment, he worked an additional 9.8 hours a week resulting in a 49.8 hour workweek while on the 24/48 schedule. Charging Party argues that Peszynski should be compensated for the additional hours he worked

during the time he was employed on the 24/48 hour work schedule at the hourly pay-rate that he would have earned as if he had been employed on a 40 hour work schedule.

Because Respondent employed Peszynski on a forty hour work schedule prior to its unlawful action, the value of his time to the Employer is the hourly wage rate for a forty hour workweek. Charging Party argues that Respondent has not paid Peszynski for the 9.8 additional hours he was required to work over the 40 hour work week. Accordingly, in order to make him whole Charging Party argues that Respondent must compensate the 9.8 additional hours that Peszynski worked at the 40 hour hourly wage rate. While I concur that Peszynski is owed back-pay for the additional 9.8 hours he worked, and that indeed should be paid at a forty hour hourly rate, Respondent has already paid Pesynski for the 9.8 hours at the hourly 24/48 firefighter rate. Because he has been paid for this time, albeit at the lower fire fighter wage rate, Respondent owes Peszynski the difference between what he had been paid for those hours and the value of his time at the 40 hour hourly wage rate. See Board precedent utilizing the calculation procedure used herein for lengthened work day set forth in the City of Evanston (Peter Hanchar), 9 PERI ¶2001 (ISLRB SP, 1992).

**a. Calculations to Make Whole for the Lengthened Work Week**

Respondent owes Peszynski for the additional 9.8 hours he worked extra each week for the 16 weeks from September 11, 2011 to December 31, 2011. He was paid $35.85, hourly wage for the 24/48 work schedule, but should have been paid $46.54, hourly wage for 40 hours. Respondent owes Peszynski for the difference in the 24/48 hourly wage and the hourly rate for the 40 hour work week for the 9.8 additional hours that he worked over a forty hour work week. This calculates to $1,676.19 owed Peszynski.[2]

[2] The $10.69 is the difference between the hourly wages for the two work plans. The 24/48 hourly wage rate is subtracted from the forty hour wage rate ($46.54 - $35.85) multiplied by 9.8 additional hours worked each week multiplied by 16 weeks he was earning at this wage rate.

Respondent owes Peszynski for the additional 9.8 hours he worked extra each week for the 52 weeks from January 1, 2012 to December 31, 2012. He was paid $36.57, the hourly wage for the 24/48 work schedule, but should have been paid $47.47, hourly wage for 40 hours. This calculates to $5,554.64 owed Peszynski.[3]

Respondent owes Peszynski for the additional 9.8 hours he worked extra each week for the 33 weeks from January 1, 2013 to August 11, 2013. He was paid $37.39, hourly wage for the 24/48 work schedule, but should have been paid $48.53, hourly wage for 40 hours. This calculates to $3,602.68 owed Peszynski.[4]

**I. <u>Back-pay</u>**

In accordance with the foregoing, the Respondent, Town of Cicero, shall make Peszynski whole in the amount of back-pay from the date of his transfer to the date he was returned to the 40 hour work schedule, August 8, 2013. The total back-pay owed Peszynski is $18,240.70. This amount is established by adding the differences in the total of the monies owed because of the transfer to the 24/48 shift; $1,145.52 + $3,797.56 + $ 2,464.11 = $7,407.19; to the amounts owed due to the lengthened work week: $1,676.19 + $5,554.64 + $3,602.68 = $10,833.51. The amount of $7,407.10 difference owed added to the $10,833.51, monies owed due to lengthened work week is $18,240.70, the total back-pay amount Respondent owes Peszynski, absent the amount of interest owed.

In addition to the back-pay award of $18,240.70, Respondent owes Peszynski $2,049.34 in interest if paid by April 15, 2014. The total back-pay with interest that Respondent owes Pesynski is $20,290.04. Until the full amount is paid, interest accrues until such time that the

[3] The $10.90 (difference in hourly wage owed $47.47 - $36.57) multiplied by 9.8 additional hours worked each week multiplied by 52 weeks.

[4] The $11.14 (difference in hourly wage owed $48.53 - $37.39) multiplied by 9.8 additional hours worked each week multiplied by 33 weeks.

total back-pay is restored. The exact dollar amount of interest is subject to change based upon when the back-pay is paid. The amount of interest will be higher if the date of payout of the interest is later than April 15, 2014, or lower, if the actual payout of interest is before April 15, 2014.

## II. 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 S. 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 1st day of April, 2013.**

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

**Michael L. Provines**
**Compliance Officer**

Appendix A

**September 11, 2011 through December 31, 2011 (16 weeks)**[5]

| | | | |
|---|---|---|---|
| A. A. to Fire Marshall (40 hr. work week) | base pay – | $3,722.84 biweekly | /$46.54 per hour |
| Fire fighter (24/48 shift – 49.8 hours a week) | base pay – | $3,579.65 biweekly | /$35.85 per hour |
| Difference | | $143.19 | /$10.69 per hour |

$3,722.84 - $3,579.65 = $143.19 difference in biweekly salary owed every two weeks.
$143.19 x 8 pay periods = $1,145.52 total difference in what he was paid and what he would have earned for the 16 weeks (8 pay periods) if not transferred.

$46.54 - $35.85 = $10.69 per hour difference in the 40 hour wage rate and 24/48 hour wage rate.
$10.69 per hour difference x 16 weeks x 9.8 hours additional worked each week = $1,676.19 total of additional compensation owed for longer work week.

$1,145.52 + $1,676.19 = **$2821.71 total owed**

**January 1, 2012 to December 31, 2012 (52 weeks)**

| | | | |
|---|---|---|---|
| A. A. to Fire Marshall (40 hr. work week) | base pay – | $3,797.30 biweekly | /$47.47 per hour |
| Fire fighter (24/48 shift – 49.8 hours a week) | base pay – | $3,651.24 biweekly | /$36.57 per hour |
| Difference | | $146.06 | /$10.90 per hour |

$3,797.30 - $3,651.24 = $146.06 = $146.06 difference in bi weekly salry owed every two weeks.
$146.06 x 26 pay periods = $3,797.56 total difference in what was paid and what would have been earned for the 52 weeks (26 pay periods) if not transferred.

47.47 – 36.57 = $10.90 per hour difference in the 40 hour wage rate and 24/48 hour wage rate.
$10.90 per hour difference x 52 weeks x 9.8 hours additional worked each week =
$5,554.64 total of additional compensation owed for longer work week.

$3,797.56 + $5,554.64 = **$9,352.20 total owed**

**January 1, 2013 through August 8, 2013 (33 weeks)**

| | | | |
|---|---|---|---|
| A. A. to Fire Marshall (40 hr. work week) | base pay – | $3,882.74 biweekly | /$48.53 per hour |
| Fire fighter (24/48 shift – 49.8 hours a week) | base pay – | $3,733.40 biweekly | /$37.39 per hour |
| Difference | | $149.34 | /$11.14 per hour |

$3,882.74 - $3,733.40 = $149.34 difference in biweekly salary owed every two weeks.
$149.34/2 x 33 weeks = $2,464.11 total difference in what was paid and what would have been earned for the time period if not transferred.

48.53 – 37.39 = $11.14 per hour difference in the 40 hour wage rate and 24/48 hour wage rate.
$11.14 per hour difference x 33 weeks x 9.8 hours additional worked each week = $3,602.68 total of additional compensation owed for longer work week.
$2,464.11 + $3,602.68 = **$6,066.79**

Total dollars owed Peszynski for the 23 months that he was transferred to the 24/48 work schedule.

**$2,821.71 + $9,352.20 + $6,066.79 = $18,240.70**

[5] Employees are paid every two weeks.