STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Policemen's Benevolent and Protective Association,	)	
	)	
Charging Party	)	
	)	
and	)	**Case No. S-CA-12-087**
	)	
City of Waukegan,	)	
	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On December 12, 2011 and March 13, 2012, the Policemen's Benevolent and Protective Association (PBPA, Charging Party or Union) filed an unfair labor practice charge and amended charge, respectively, in the above-captioned case with the State Panel of the Illinois Labor Relations Board (Board) pursuant to Section 11 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules) alleging that the City of Waukegan (Respondent or Employer) had violated Section 10(a)(4) and (1) of the Act by reneging on a Settlement Agreement regarding productivity standards which the parties had reached on July 25, 2011 in another unfair labor practice case, and then by failing to comply with that Settlement Agreement, and by failing to comply with a second Settlement Agreement resolving grievances concerning minimum shift staffing which the parties had entered into on November 22, 2011. The charges were investigated in accordance with Section 11 of the Act, and on May 29, 2012 the Executive Director of the Illinois Labor Relations Board issued a Complaint for Hearing.

A hearing was held on October 11 and 12, 2012 and November 26 and 28, 2012 in Chicago, Illinois, at which time all parties appeared and were given a full opportunity to

participate, present evidence, examine witnesses, argue orally and file written briefs. After full consideration of the parties' stipulations, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

1. 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 State Panel of the Board pursuant to Section 5(a-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 the Respondent's employees in the position of Police Officer.

As a preliminary matter, I denied the Respondent's Motion to Consolidate the instant case with the unfair labor practice charge (ULP) and amended charge which the Respondent had filed in Case No. S-CB-12-037 on June 22, 2012 and September 12, 2012, respectively, against the Charging Party. In the event that the Executive Director issues a complaint in Case No. S-CB-12-037, the Respondent wanted that case consolidated with the instant one, citing 80 Ill. Admin. Code §1200.105, "Consolidation of Proceedings."[1]

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[1] Pursuant to Section 1200.105, the Board shall consolidate two or more representation or unfair labor practice cases when the following three conditions are met:

a) [t]he cases involve common issues of law or fact or grow out of the same transaction or occurrence;
b) [c]onsolidation would not prejudice the rights of the parties; and
c) [c]onsolidation would result in the efficient and expeditious resolution of cases.

While the charges which the Respondent filed in June and September 2012 in Case No. S-CB-12-037 involved the same July 25, 2011 and November 22, 2011 Settlement Agreements at issue in the instant case, and thus met the first condition needed for consolidation, the two remaining factors set forth in Board Rule §1200.105 are not satisfied. Specifically, consolidating this case with S-CB-12-037 in the event a complaint is issued in the latter, would prejudice the Charging Party's rights and would not result in the efficient and expeditious resolution of the two cases.

Although I first contacted the parties in July 2012 to schedule S-CA-12-087 for hearing, the Respondent only mentioned the possibility of consolidating the two cases once the parties had already convened for hearing in S-CA-12-087. I denied the Motion to Consolidate because, at the late date it was made, the Charging Party had already prepared its case and consolidation would no longer give rise to substantial savings.[2]

II. ISSUES AND CONTENTIONS

At issue in this case is whether the Respondent violated Sections 10(a)(4) and (1) of the Act by reneging on a Settlement Agreement reached on July 25, 2011 concerning productivity standards at issue in another unfair labor practice case, and then by failing to comply with that Settlement Agreement, and by failing to comply with a second Settlement Agreement resolving

[2] Subsequently, the Respondent made a Motion to Amend its Answer filed on June 14, 2012. In Paragraph 12 of the Answer, the Respondent's Motion admitted the corresponding paragraph of the Complaint which alleged the parties reached a settlement agreement on July 25, 2011 in another Board case in which the Charging Party accused the Respondent of violating the Act by unilaterally implementing productivity standards. Minutes earlier, the Respondent had stipulated to Paragraph 12 of its Answer, and the parties' presented their respective opening statements. When I asked the Respondent about the apparent contradiction between, on the one hand, its Answer admitting that a settlement agreement was reached on July 25, 2011 with, on the other hand, its opening statement denying that the parties entered into a settlement agreement that day, the Respondent made a Motion to Amend its Answer. The Respondent gave no reason for its Motion. I denied the Motion to Amend the Answer because of two factors: 1) the Respondent offered no basis for its desire to change its Answer; and 2) the substantial prejudice which would have resulted to the Charging Party. See State Farm Fire & Casualty, Co. v. M. Walter Roofing Co., 271 Ill. App. 3d 42, 49 648 N. E. 2d 254 (1st Dist. 1995); Trans World Airlines, Inc. v. Martin Automatic, Inc., 215 Ill. App. 3d 622, 628, 575 N. E. 2d 592 (2d Dist.1991).

grievances regarding minimum shift staffing which the parties had entered into on November 22, 2011. Additionally, the Charging Party's Motion for Sanctions against the Respondent must be resolved.

The Charging Party maintains that the Respondent reneged on the July 25, 2011 Settlement Agreement and has failed to comply with its terms. The Charging Party also argues that the Respondent has failed to comply with the November 22, 2011 Settlement Agreement concerning minimum staffing requirements. According to the Charging Party, the November 22, 2011 Settlement Agreement requires the Respondent to count toward the contractual minimum shift staffing of 10 on day shift and 14 on nights only those positions "working the road" and available to respond to calls. In addition, the Charging Party seeks sanction against the Respondent for claims it made at the hearing and in its post-hearing brief.

The Respondent argues that there was no Settlement Agreement on July 25, 2011, only a tentative agreement conditioned on the document being reduced to typewritten form and signed by authorized individuals. In addition, the Respondent contends that it has not implemented any productivity standards, only goals or initiatives. As for the November 22, 2011 Settlement Agreement, the Respondent maintains that it has complied with it by not counting towards minimum staffing the officer assigned to the desk each shift. Further, the Respondent asserts that the Charging Party's Motion for Sanctions is actually a rebuttal brief addressing the underlying merits of the case.

III. FINDINGS OF FACT

The head of Respondent's Police Department is Chief of Police, Daniel Greathouse. The two Deputy Chiefs in the Department are Mark McCormick and Wayne Walles. Below them in the hierarchy are several commanders. The Commander of the Patrol Division is Robert

Kerkorian.[3] He, in turn, is the direct superior of four lieutenants who are known as platoon leaders. The next level in the Patrol Division consists of approximately ten sergeants who are the direct supervisors of the patrol officers. These patrol officers, approximately 70 in number, are the frontline officers whose duties include handling calls, as well as enforcing the criminal and traffic laws. They work one of four shifts—D1, D2, N1 or N2—for 12 hours.

A. Parties' July 25, 2011 Settlement Agreement Regarding Productivity Standards

On July 25, 2011 the parties entered into a Settlement Agreement resolving unfair labor practice Case No S-CA-09-141. In that Board case, the Executive Director issued a complaint for hearing in which the Charging Party alleged that the Respondent violated its duty to bargain within the meaning of Section 10(a)(4) and(1) of the Act by unilaterally implementing minimum production standards for bargaining unit employees as well as engaging in other conduct.[4]

The Board's mediator, Dick Stanton, met with both the Charging Party and the Respondent on July 25 to try to settle Case No. S-CA-09-141 prior to hearing. Stanton had previously instructed the parties to appear at this mediation session with individuals having the authority to enter into a settlement agreement. In addition to Mediator Stanton, the session consisted of Attorney Margaret Angelucci, then President of the PBPA Rolando Villafuerte and its Vice-President Mike Reed, all on behalf of the Charging Party, and Attorney David Lefkow and Chief of Police Daniel Greathouse represented the Respondent.[5] The settlement agreement which the parties reached at that meeting contained the four following provisions:

> 1. The City agrees that no minimum productivity standards are currently in place or imposed upon the Union's bargaining unit members. The City further agrees they will not unilaterally implement any minimum productivity standards

[3] In addition to the Patrol Division, the Police Department includes the Traffic Division, the Criminal Investigations Division, as well as other divisions such as those for neighborhood-oriented policing and the gang and narcotics unit.

[4] The parties to Case No. S-CA-09-141 are the same parties as in the present case.

[5] Attorney Lefkow represented the Respondent in the ULP case being mediated, Case No. S-CA-09-141, and Chief Greathouse's duties regularly included collective bargaining matters.

nor will minimum productivity standards be the subject of mid-term negotiations during the life of the current collective bargaining agreement except by the parties' mutual agreement.

2. Furthermore, the City agrees to remove any all discipline including counseling, verbal, written, suspensions and/or terminations imposed on the bargaining unit members as a result of the productivity standards which are the subject of this charge, including but not limited to: Rolando Villafuerte, Lainie Schmidt Newman, Anthony Paulsen, Donnie Paulsen, Brian Bradfield, Loyda Santiago, Brian Falatico, Frankie Cancino, Kelly Gordon, Marvin Hodo, Eric Kaehle. The Union and/or the impacted individuals will submit a written request to Chief to remove said discipline. The Chief will submit a written request, with a copy to the Union, to all City departments, units, divisions ordering the removal of the discipline which is the subject of this Settlement Agreement. The City agrees that after the removal of said discipline, the alleged failure of any bargaining unit member to meet any minimum productivity standard will not serve as a basis for progressive discipline.

3. The Union acknowledges that the agreements called for in paragraphs 1 and 2 constitute full settlement of the unfair labor practice charge styled as Case No. S-CA-09-141 and that no further relief, including, but not limited to, any other relief requested in the unfair labor practice charge or the complaint issued pursuant to said charge, is required of the City in settlement of the charge.

4. The Union will withdraw, with prejudice, the unfair labor practice charge styled in Case No. S-CA-09-141 and that charge shall be considered to be forever settled, resolved, and compromised.

The Settlement Agreement described above was actually based on a typewritten draft prepared prior to the mediation session July 25, 2011, along with handwritten insertions and deletions, initialed or signed, and dated that day. Charging Party's Attorney Angelucci had drafted language based on her communications with Attorney Lefkow, representing Respondent, and she shared it with him at some point prior to the mediation. It was two pages in length and, based on Attorney's Lefkow's representation that the Mayor for the City of Waukegan would be present, included signature lines for Mayor Robert Sabonjian and Union President Rolando Villafuerte. During the mediation, representatives of both parties placed four sets of markings—two per page—noting changes to the draft language. At the mediation, Respondent's Attorney Lefkow used a speakerphone to call John Clifford, the Board's Administrative Law Judge (ALJ)

to whom Case No. S-CA-09-141 was assigned, and told him that the parties had reached a settlement. Later that afternoon, Attorney Lefkow sent an email to ALJ Clifford stating "John we settled it."

(1) Communications Between Attorney for Charging Party and Attorney for Respondent about the July 25, 2011 Settlement Agreement

The next day, July 26, 2011, in response to Attorney Lefkow's request near the end of the mediation, the office of Charging Party's Attorney Angelucci sent him a completely typed version of the Settlement Agreement the parties had reached a day earlier. Attorney Lefkow had asked that the handwritten additions and strikeouts which the parties had approved at mediation be typed for ease of reading.

On August 2, 2011, Attorney Angelucci sent a follow-up email to Attorney Lefkow asking if he had obtained a signature from Mayor Sabonjian yet. After she again inquired about its status, on August 8, 2011 Lefkow responded "OK soon" in an email.

Subsequently, on August 19, 2011, Charging Party's Attorney Angelucci sent an email to ALJ Clifford, copying Attorney Lefkow, correcting an email which the ALJ had previously sent to the parties. Specifically, Attorney Angelucci informed ALJ Clifford that the phrase "proposed settlement" which the ALJ had used to describe the product of the July 25, 2011 mediation session was inaccurate because the parties had "actually reached an agreement fully executed by the Chief of Police, union officers and counsel for the Employer." Attorney Lefkow did not respond to Attorney Angelucci's email of August 19.

On September 13, 2011 Attorney Angelucci emailed Respondent's Attorney Lefkow prior to a conference call they had scheduled with ALJ Clifford later that week to ask if there was anything to report to the ALJ. She also expressed her belief that there was no longer a need to keep the Board involved since the parties had already reached an agreement and asked Attorney Lefkow his thoughts. The next day, he responded in an email stating "I think we need

to change the language so the mayor makes the order [to remove the discipline] but I believe all of the discipline has been extracted by the officers per the union contract."

In telephone conversations between Attorneys Angelucci and Lefkow that followed, Attorney Lefkow explained that he wanted to change the paragraph of the July 25, 2011 Settlement Agreement regarding who gave the order to remove the impacted officers' discipline. Attorney Angelluci responded that she would not change the Settlement Agreement which "had been executed by both parties." Further, she told Attorney Lefkow if he sent a letter stating the Mayor will make the order removing the discipline, Charging Party had no problem with that course of action.

On October 11, 2011 Attorney Angelluci repeated this position when she sent an email to Attorney Lefkow instructing him to send her a letter indicating he wanted the Mayor rather than the Chief [of Police] to give directions regarding the removal of discipline from the files of departments other than Police. In addition, Attorney Angelucci reiterated her statement that a completely typewritten version of the July 25, 2011 Settlement Agreement was not necessary as the parties had already signed it. Later that day, Attorney Lefkow responded in an email "will do." Having heard nothing more from him, on November 14, 2011 Attorney Angelucci sent Attorney Lefkow an email asking if his client was going to send a letter requesting that the mayor give the direction for removal of discipline.

On December 5. 2011, Charging Party's Attorney Angelucci sent the email below to Attorney Lefkow:

> [T]his matter has been fully settled since July. Since that time you requested that the Mayor rather than the Police send out notices reflected in the settlement agreement. We did not object to the Mayor rather than the police chief giving the notice and asked that you forward that request in writing. Since that time, despite repeated requests from our office and the mediator, you have failed to do so. If this does not remain an issue, I would like to advise the labor board and the mediator so the matter can be put to bed. Please advise me as soon as possible.

The next day Respondent's Attorney Lefkow sent an email to Attorney Angelucci stating "the City does not intend to settle the ULP matter." His email also pointed out that the change in union leadership "might provide a new perspective on an old and relatively minor issue, or at least let's hope!"

(2) Measures of Officers' Activity Once the Parties Entered into the July 25, 2011 Settlement Agreement

As of August 1, 2011, the Respondent had in place a measure of work performed called "three movers"—movers being citations for moving violations of the Illinois Vehicle Code.[6] Pursuant to this marker, police officers were required to write at least three tickets for moving violations during each shift. The shift supervisor verbally shared this directive with the officers at the beginning of each shift, a period referred to as line-up. Because these supervisors were instructed by their superiors not to overtly tell the officers on their respective shifts the number required, they would use such terms as "triangle" and "trifecta" to convey this mandate of three movers. Respondent did not issue a written document notifying its police officers that they had to write three moving violations per shift. Sergeants would tell officers that they needed to write three movers or would be put on a traffic detail. In addition, Sergeants would convey to the officers that failure to write the requisite number of movers during a shift may result in a ride-along.

Some officers had a ride-along as a consequence of not meeting this performance measurement which required an officer to write a minimum of three moving violations per shift. Officer Chris Rohloff, Charging Party's president and previous vice-president, is one such officer who had a ride-along in December 2011 shortly after not writing three movers on a shift.

[6] Prior to this Settlement Agreement of July 25, 2011, the Respondent required its patrol officers to write at least one citation for a traffic violation—also known as a "mover"—per shift. Subsequently, the officers had to write four movers, four parking tickets ("parkers") and one on view arrest per shift. An on view arrest occurs when an officer makes an arrest of an individual he happens upon committing a crime, rather than in response to a dispatched call.

Before the ride-along took place with Sgt. Kreppein, the latter counseled Officer Rohloff, informing him a ride-along would occur later that shift. At this time, Officer Rohloff asked Sgt. Kreppein the reason for the counseling. Sgt. Kreppein responded, "You know why." When Officer Rohloff asked him what he meant and repeated his question, Sgt. Kreppein did not respond. During this meeting in the office, Sgt. Kreppein made no mention of training or retraining. Initially, when Sgt. Kreppein directed him to come into the office, Officer Rohloff asked for union representation. Sgt. Kreppein denied this request, telling Officer Rohloff that he did not need a union representative for this counseling.

During the ride-along which ensued, Sgt. Kreppein observed a couple of vehicle code violations which Officer Rohloff did not. Sgt. Kreppein pointed out to Officer Rohloff that he could have been disciplined for not noticing these violations. Officer Rohloff explained that he had asked for a union representative to accompany him on the ride-along because of this possibility. Again, Sgt. Kreppein did not refer to the ride-along as training for Officer Rohloff.

Subsequently, the Charging Party filed Grievance No. 11-10 pertaining to this denial of union representation at the meeting/ride-along for Officer Rohloff. The parties resolved this grievance. Chief Greathouse agreed to allow union representation on ride-alongs when requested and the officer had a reasonable belief that discipline would result. Prior to that resolution, officers' requests for union representation during a ride-along were denied.

Officer Rohloff believed that the ride-along was the result of not meeting the requirement of writing three citations for moving violations. He based this belief on observations and information which he had learned from other officers speaking to him as a union advocate. In particular, Officer Rohloff became aware that shortly after an officer fails to write three movers, the officer's supervisor conducts a ride-along with him/her.

Officer Varebrook, Charging Party's secretary since October 2011, was another bargaining unit member who had a ride-along in January 2012. On January 10, 2012, Sgt. Kreppein conducted a ride-along with Officer Varebrook pursuant to an email from Comm. Kerkorian ordering him to do so after learning of Officer Varebrook's activity on the N-2 shift the previous night. Specifically, Lt. Jim Leonard had reviewed the activity sheets of each officer on the N-2 shift on January 9, 2012, and sent an email to Comm. Kerkorian earlier on January 10, identifying two officers who had not written three moving citations—one of whom was Officer Varebrook—during the N-2 shift on January 9, 2012.[7] In an email string, Comm. Kerkorian then sent a memo dated several hours later that morning to Sgt. Kreppein and other supervisors ordering them to conduct ride-alongs with the two named officers that night, January 10, 2012, and to send him an email describing the ride-along. According to Comm. Kerkorian's email of January 10, 2012, the purpose of the ride-along was "to improve [the officers'] ability to locate traffic offenders and enforce the law. This is becoming a pattern with both of these officers, let's give them the extra training and one on one supervision to increase their effectiveness."

The morning of January 10, 2012 Sgt. Kreppein first informed Officer Varebrook that he was going to ride-along with him. Officer Varebrook showed Sgt. Kreppein his activity sheet for the day before, and asked the latter if he was conducting the ride-along because he did not write three movers the previous day. In response, Sgt. Kreppein nodded his head affirmatively.[8] At that time, Sgt. Kreppein did not tell Officer Varebrook that he had to write three tickets for moving violations. Immediately after Officer Varebrook wrote three movers, Sgt. Kreppein

[7] Prior to this instance, Officer Varebrook last had a ride-along with a sergeant or lieutenant during the last stage of training with a Field Training Officer before his release to drive on his own.

[8] An activity sheet is a form which police officers must complete each day documenting the number, time and location of their activity including dispatched calls, traffic stops, arrests, parking tickets, and movers.

instructed the officer to take him back to the station. It was not the end of the shift for either Officer Varebrook or Sgt. Kreppein.

During the ride-along, Officer Varebrook and Sgt. Kreppein did not discuss productivity. In an email to Comm. Kerkorian on January 11, 2012, Sgt. Kreppein wrote the following about his ride-along with Officer Varebrook:

> . . . [h]e [Officer Varebrook] had already written 1 citation prior to the ride. During the time, we . . . discussed ways to improve his traffic enforcement. We stopped 2 vehicles which resulted in 2 citations.

Sgt. Kreppein sent this email in response to Comm. Kerkorian's email the prior day instructing the supervisor conducting the ride-along with each officer to send him an email detailing the ride-along.

Days after the ride-along January 10, 2012, Officer Varebrook was called into a meeting with Chief Greathouse, Deputy Chiefs Walles and McCormick, Comm. Kerkorian, Sgt. Kreppein and another sergeant concerning the ride-along. Officer Rohloff also attended as Officer Varebrook's union representative. At that meeting, Chief Greathouse told Officer Varebrook that he was deficient in traffic. Officer Varebrook asked repeatedly how he would not be deficient in traffic. No one present answered Officer Varebrook's questions. He was told only that he was deficient in traffic. Officer Varebrook was not issued any discipline at the meeting.

Officer Chris Albee, Charging Party's vice-president who previously served as its secretary, had a ride-along in December 2011 or January 2012. After Officer Albee was called into the station from the street, Lt. Joe Florip asked him, "What's taking so long to get the three?" At that point, Lt Florip conducted a ride-along with Officer Albee concentrating on traffic stops. During the ride-along, Officer Albee asked Lt. Florip if the ride-along was discipline. Officer Albee also inquired as to the reason for the ride-along. Lt. Florip ignored these questions, remained vague, and continued to focus on traffic. The ride-along was very

unusual for Officer Albee. Other than riding with a supervisor when he was hired and trained twelve years ago, Officer Albee has had no ride-alongs. He learned from other officers that they too experienced similar ride-alongs, and received counseling during those rides.

During the period of December 13, 2011 through February 11, 2012, there were approximately two dozen emails from a sergeant or lieutenant to his superiors identifying by name the officers on his shift the previous day who wrote fewer than three moving citations.[9] One of these emails was written by Lt. Jim Leonard to Comm. Kerkorian on January 10, 2012 informing him that Officer Varebrook and one additional officer, identified by name, were the officers on the N-2 shift on January 9, 2012 who wrote fewer than three movers.[10] The subject line of this email was "movers." In another example, on January 20, 2012 Sgt. Bill Walker wrote an email entitled "Productivity" to Chief Greathouse, copying Deputy Chiefs McCormick and Walles, and Comm. Kerkorian, identifying by name the single officer who did not write three moving citations on January 19, 2012.

The record also includes mobile computer terminal (MCT) messages for certain dates in December 2011 and January 2012 between some officers and sergeants or lieutenants. An MCT is a laptop computer in each squad car enabling the officers and their supervisors to communicate from car-to-car. For example, in an MCT message dated December 1, 2011, Sgt. Kelly instructed Officer Albee to "focus on traffic. Get the Chief his tangibles." In another example, on January 7, 2012, Sgt. Kelly asked Officer Albee "What are your numbers?" The MCT message showed his response: " I have two movers."

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[9] This number does not include the emails that identified the names of officers without including a description of why those officers' names were being reported.
The term "superiors" refers to Comm. Kerkorian, Deputy Chiefs McCormick and Walles, as well as Chief Greathouse. The email from the sergeant or lieutenant was sent directly to or copied to them.
[10] This email gave rise to those of Comm. Kerkorian and Sgt. Kreppein on January 10 and 11, 2012, respectively, described supra at pp. 10-11.

In addition to the requirement of three movers, in September 2012 the Respondent ordered its officers to write a minimum of five contact cards per shift. A contact cards is a documented interaction between a police officer and someone in the community. Interactions for which an officer must provide these contact cards include, for example, those which an officer makes while responding to calls, performing traffic stops, and stopping suspicious subjects walking[11]. Specifically, Sgt. Kreppein wrote an email, dated September 26, 2012, to several officers which stated the following:

> [t]he Chief's office is requiring Officers in Patrol to make a minimum of 5 contacts (put their information on 'contact cards') and turn them into your respective Sergeant at the end of your tour. . . Starting Monday 10/1, You are ordered to obtain a minimum of 5 contacts and if this is not accomplished you will explain to me why this is not done . . . If your failure in accomplishing this task persists without a good reason why, this may result in discipline.

Sgt. Kreppein's email also pointed out that "getting 5 contacts during a 12 hr shift is not an unreasonable request" since the officers have opportunities to do so each day in performing their duties, *i.e.*, responding to calls for service, making traffic stops, and stopping subjects walking.

The performance evaluations which the sergeant does for the officers he supervises contain categories which takes into account measures of productivity. The front page of the performance evaluation form used in the Patrol Division in 2011 indicates that it is one of the following: a final probationary review, a six month review, or a year-end review. Some officers are not evaluated every year. That form consists of 14 factors which, in turn, include criteria which are each rated. The supervisor designates a point total or "not applicable" for each criterion, and then enters the "Composite Evaluation Factor" based on the average of the criterion ratings. Following completion of the 14 factors, the supervisor then adds the

[11] The Respondent's mandate that officers complete a specified number of contact cards is different from the State of Illinois requirement that police officers fill out a card regarding racial profiling when they make traffic stops and do not issue tickets.

"Composite Evaluation Factor" to arrive at one of the following overall ratings for that performance evaluation: outstanding (59 points and above), exceeds expectations (46 points-58 points); meets expectations (39 points-45 points), below expectations (26 points-38 points), or unsatisfactory (25 points and below).

Two factors of the performance evaluation for the Patrol Division in 2011—Factor 5, "Enforcement of Traffic Regulations" and Factor 11 "Compliance with Assignments and Instruction"—incorporated the Respondent's measures of work performed. The third criterion listed under Factor 5 provides "Citations are issued in accordance with department and shift objectives." In one of the performance evaluations for 2011, the supervising sergeant's comments for this factor include the following statement: "[i]n the past four months, Officer [name deleted] was below the shift average for traffic stops." The supervising sergeant's comments for this factor in another officer's performance evaluation for this year provides that the officer "issued the fewest moving violations [in our group] for the past four months."

Regarding Factor 11 of the 2011 performance evaluation, the second criterion considers the extent to which an officer "meets standards by supervisor(s); deviation from instructions are explained satisfactorily." In the comment space for this factor in one performance evaluation,, the supervising sergeant wrote [i]n October 2011, Officer [name deleted] issued the fewest number of citations on the shift" and "fails to achieve standards." The comments of the supervising sergeant in another 2011 performance evaluation were similar.

In the two annual performance evaluations in the record for 2011, both officers received an overall rating of "below expectations." This overall rating is based on the composite scores—including Factors 5 and 11. The comments of the supervising sergeant in these performance evaluations noted that "the daily activity sheets prepared by Officer [name deleted for privacy] were a significant factor in this evaluation."

A performance evaluation may have multiple consequences. A poor performance has led to counseling of officers. The performance evaluation becomes part of his/her permanent record. In addition, performance evaluations are considered when an officer seeks a transfer to another division or a promotion. For example, when an officer applies for a transfer to the Gang Unit, the documents in his/her personnel file will be reviewed for prior discipline.

The Charging Party has not withdrawn the unfair labor practice charge in Case No. S-CA-09-141. The Charging Party's Attorney Angelucci explained that she had not withdrawn the charge due to two reasons: 1) her client has not indicated that the Respondent has stopped implementing productivity standards; and 2) Attorney Lefkow's unwillingness to have the typewritten version of the Settlement Agreement of July 25, 2011 signed.

Similarly, the Charging Party has not submitted a written request, pursuant to Paragraph 2 of the July 25, 2011 Settlement Agreement, to remove discipline resulting from the productivity standards. Nevertheless, the Respondent has removed discipline from the personnel files of the officers identified in that document maintained in both the Police Department and the Department of Human Resources.

B. Parties' November 22, 2011 Settlement Agreement Concerning Minimum Staffing Grievances

On November 22, 2011 the parties reached a Settlement Agreement resolving several grievances alleging the Respondent violated Section 12.3 of the collective bargaining agreement (Agreement) establishing minimum staffing levels for both the day and night shifts. The excerpt below from Section 12.3 of the Agreement dated April 1, 2009 sets forth the shift minimums that this provision instituted:

> Minimum staffing levels or 'shift minimums' shall be a minimum of ten (10) officers for the day shift and fourteen (14) officers for the night shift. Shifts will not go below minimum staffing levels except for funeral leave, sick leave, compensatory time or personal days. In the event, shift minimum is not reached, the City [of Waukegan] will be required to staff according to that minimum.

As this passage indicates, shift minimums require that at least ten officers be on each of the two day shifts, D-1 and D-2, and that a minimum of 14 officers be on each of the two night shifts, N-1 and N-2. Further, the provision sets forth four exceptions to these minimum staffing levels, *i.e.*, when the shift staffing can go below the contractual minimums. Specifically, each officer's absence from his/her shift due to funeral leave, sick leave, compensatory time or personal time, decreases by one the minimum staffing level required.[12] For example, if two officers from D1 are on compensatory leave, the Agreement's minimum staffing requirement for that shift is reduced from ten to eight officers.

If the Respondent's preliminary calculations indicate that these shift minimums will not be met, it may either hire-back an officer not scheduled to work the shift at issue or supplement that shift with an officer scheduled to work in another division pursuant to the Patrol Deployment Eligibility List (PDEL). When an officer is hired back, it is at the overtime rate. In the event an officer is brought in to work via PDEL, his/her rate of pay does not change.

Several grievances alleging the violation of Section 12.3's minimum staffing requirement were consolidated and scheduled for arbitration on November 22, 2011. Sean Smoot, Charging Party's Director and Chief Legal Counsel, and Rolando Villafuerte, Charging Party's president at that time, were among those present for the Charging Party. The Respondent was represented by Attorney Lefkow and Chief Greathouse on the day of the hearing. Rather than begin the arbitration hearing, the parties negotiated a settlement agreement of the grievances at issue. On November 22, 2011, they entered into the settlement agreement resolving "all pending 'minimum staffing' grievances in accord with the following:"

1. The Union by executing this agreement withdraws the pending minimum staffing grievances alleging violation of Section 12.3 of the contract.

[12] These contractual shift minimums described in Section 12.3 first went into effect in May 2010 when the Respondent began implementing 12 hour shifts.

2. The Union agrees that it will not file duplicative grievances to those being withdrawn for the duration of the agreement.
3. The Employer agrees that Patrol Officers—not including officers assigned to the front desk—shall be counted toward the minimum shift requirements.
4. The parties acknowledge that they continue to disagree of (sic) other terms regarding minimum staffing and have entered into this settlement agreement in anticipation of bargaining a successor agreement.
5. Both parties agree that the execution of this agreement and terms of settlement shall not in any way prejudice or advantage either party in contract negotiations.
6. The parties agree that the current contract may be re-opened for successor negotiations anytime after January 1, 2012 by either party's written request.

The Charging Party's president at the time, Villafuerte and the Respondent's Attorney Lefkow, respectively, signed the settlement agreement for the Union and the Employer.

The pending grievances which the November 22, 2011 settlement agreement resolved included Grievance Nos. 11-03, 11-04, 11-05, 11-06, 11-08, 11-15, and 11-16, all of which were filed in 2011. Each of the grievances alleged that on a specific shift and date the Respondent violated the minimum staffing provisions of the parties' Agreement set forth in Section 12.3, and stated the Union's position that the officer assigned to the front desk should not be counted for minimum staffing purposes.[13]

In resolving the pending grievances contesting shift staffing minimums by entering into the November 22, 2011 Agreement, the Respondent took into consideration certain changes in personnel which occurred around the time the current collective bargaining agreement went into effect. In particular, the position of Community Service Officer (CSO), a civilian position in the Patrol Division that handled most of the desk duties, was laid off.

[13] Some of these grievances presented other issues concerning minimum staffing such as the Charging Party's allegation that the Respondent erroneously counted officers assigned to fixed posts to meet the shift minimums established in the Agreement. The terms "fixed post" and "non-fixed post" are unique to the Respondent's Police Department. A patrol officer may be assigned to a fixed-post—a task or location from which he/she cannot deviate unless a superior orders him to do so. An officer assigned to a non-fixed post can leave the location of the non-fixed post to respond to a dispatched call, and returns once the call is resolved.

1. Minimum Shift Staffing Following Execution of the November 22, 2011 Settlement Agreement on Shift Minimums

The daily line-up sheets in the record showed the status and/or assignment of each officer scheduled for one of four shifts—D-1, D-2, N-1, and N-2—for a part of the time period following execution of the November 22, 2011 Settlement Agreement through the end of September 2012.[14] In calculating shift staffing after the parties entered into this Settlement Agreement, Respondent counted those officers designated as on a fixed-posts, including those assigned to bond court or weapons training at the range, and on leave pursuant to the Family and Medical Leave Act (FMLA).[15] The Charging Party maintains that officers so designated on the line-up sheets do not count toward the minimum staffing requirement. Further, the Charging Party does not count an officer designated on the line-up sheets as "assigned to traffic." Neither the Charging Party nor the Respondent counted those patrol officers designated on the line-up sheets as Duty Injury, Kelly Day, Vacation, Administrative Leave, and Holiday.[16] Both parties counted those patrol officers assigned to zones or designated as "Evidence Technician." Based on using the Respondent's method of counting, the line-up sheets in the record show that the contractual minimums of 10 and 14 for the day and night shift, respectively, were satisfied other than for the N2 shift on November 28, 2011. For that particular shift and day, the line-up sheet shows that without counting the officer assigned to the front desk, there were at most 13 officers

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[14] Sometime after the Board authorized it on September 27, 2012, the Charging Party had served a subpoena *duces tecum* on the Respondent for certain documents, including "all the line-up sheets from November 2, 2011 to present." Pursuant to the subpoena, the Charging Party did not receive the line-up sheets for either of the night shifts—N1 or N2—for the entire months of April, May, June, July and August, and many dates in September 2012.

[15] During a period of about two weeks beginning August 1, 2012, the Respondent deviated from this position. At that time, Comm. Kerkorian issued an email which provided, in part, "[f]rom this point forward, the patrol division will not employ the use of fixed posts if doing so brings the shift below required minimums."

[16] It is undisputed that in determining the staffing of a shift, the supervisory staff is not counted. Further, a Kelly Day is an unpaid day off, and it is not compensatory time.

staffing the shift. If the Charging Party's method of counting were used, those minimums established in the Agreement were not met on numerous occasions.

Following the execution of the November 22, 2011 Settlement Agreement, the Charging Party withdrew the grievances which led to that resolution. On August 27, 2012, the Charging Party filed Grievance No. 12-12 at Step Four alleging that the Employer violated the Agreement's Management Rights clause, Section 14.1 on training, as well as Section 12.3 concerning minimum staffing requirements.

This Grievance No. 12-12 summarized occurrences concerning minimum staffing levels from February 2011 through its fourth level filing, including the Settlement Agreement of November 22, 2011, and specifically maintained that the Employer was violating the third provision of November 22, 2011 Settlement Agreement providing that "Patrol Officers—not including officers assigned to the front desk—shall be counted toward the minimum shift requirements." Grievance 12-12 also contends that during this period the Employer allowed shift staffing levels to fall below contractual minimums when officers were absent due to FMLA leave, training for rifle qualifications, and/or assigned to fixed posts. Other than Grievance No. 12-12, the record does not show that the Charging Party has filed grievances contesting the application of minimum staffing requirements after November 22, 2011.

IV. DISCUSSION AND ANALYSIS

This case involves allegations that the Respondent violated its duty to bargain in good faith under the Act by breaching the July 25, 2011 Settlement Agreement concerning an unfair labor practice charge on productivity standards and the November 22, 2011 Settlement Agreement regarding grievances on minimum staffing requirements. As the Board first stated in its decision in City of Burbank, 3 PERI ¶2009 (IL SLRB 1986), *aff'd in part and rev'd in part,* City of Burbank v. Illinois Labor Relations Board., 185 Ill. App. 3d 997, 541 N.E.2d 1259 (4th

Dist. 1989), a party's commitment to live up to its agreements is the cornerstone of good faith collective bargaining and effective labor relations. American Federation of State, County and Municipal Employees, Council 31 and State of Illinois, Department of Central Management Services (Corrections), 4 PERI ¶2043 (IL SLRB 1988). Further, the Board has held it will enforce an agreement between the parties regardless of whether it concerns permissive or mandatory bargaining subjects. Illinois Fraternal Order of Police Labor Council and Village of Calumet Park, 17 PERI ¶2024 (IL LRB-SP 2001). A close analysis of the record establishes that the Respondent violated its duty to bargain by reneging and failing to comply with the July 25, 2011 Settlement Agreement regarding minimum productivity standards, and by failing to comply with its November 22, 2011 Settlement Agreement concerning minimum staffing requirements.

A. Respondent's Breach of the July 25, 2011 Settlement Agreement Concerning Productivity Standards

1. Respondent's Reneging on the July 25, 2011 Settlement Agreement

A review of the evidence demonstrates that the Respondent violated its duty to bargain in good faith when it reneged on and failed to comply with the terms of the July 25, 2011 Settlement Agreement resolving the unfair labor practice charge in Case No. S-CA-09-141 regarding productivity standards. The Respondent's reneging on the Settlement Agreement is revealed over a period of several months. First, the Respondent failed and refused to sign a typed version of the Settlement Agreement that was sent on July 26, 2011, the day after the parties entered into an agreement at the mediation session. For the next several weeks, Attorney Angelucci's efforts to obtain the Respondent's signatures on the document were rebuffed. The unrebutted testimony of Charging Party's Attorney Angelucci revealed that the Charging Party had agreed to type a clean copy of the July 25, 2011 Settlement Agreement merely for ease of reading; a deal had already been reached.

The Respondent's actions in mid-September 2011 continue to show its attempts to evade legal obligations under the Settlement Agreement of the previous July. In particular, at that point the Respondent took the position that the text of the July 25, 2011 Settlement Agreement had to be changed so that the Mayor, rather than the Chief of Police, directed departments to remove discipline.[17] The pretextual nature of this request is apparent by the Respondent's refusal to provide a letter to the Charging Party stating that it needed to make this modification. Although Charging Party's Attorney Angelucci would not rewrite the Settlement Agreement which the parties had already entered into on July 25, 2011, in October she asked the Respondent to send her a letter stating that it desired to have the Mayor give this order to remove discipline. The Respondent's position that it wanted to make this modification is further undermined by testimony of its own witnesses at the hearing that the officers' files in its Division of Human Resources have already been purged of discipline without the "requisite" change to the text of the July 25, 2011 Settlement Agreement.

The Respondent's reneging on the Settlement Agreement of July 25, 2011 became unequivocal when Respondent's Attorney Lefkow sent the December 6, 2011 email stating "the City does not intend to settle the ULP matter."[18] Up until Attorney Lefkow sent that email on behalf of the Respondent, he had given email responses to the Charging Party implying that the Respondent intended to honor the agreement it had made on July 25, 2011. For example, in August 2011 Attorney Lefkow responded in an email to Attorney Angelucci's inquiry as to the

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[17] Respondent's claim in its post-hearing brief that the Mayor had also requested to delete names of police officers from the July 25, 2011 Settlement Agreement because of his concerns about their privacy is inaccurate. That particular request was first articulated by Tina Smigielski, the Respondent's Director of Finance and Administration in March 2012. During the hearing, the Respondent did not introduce any evidence that shows the Mayor made a request to modify the July 25, 2011 Settlement Agreement in this way, and that his request was then conveyed to the Charging Party.

[18] The Respondent's contention in its post-hearing brief at p. 4 that "[o]n or December 6, 2011, the City requested that the parties reopen discussions concerning utilization of productivity standards" is inaccurate based on the record.

whereabouts of the signed clean copy with the words "OK soon." Attorney Lefkow continued to give this same impression in October 2011 when he responded "will do" in another email to Charging Party's Attorney Angelucci regarding the Settlement Agreement of July 25, 2011. This refusal to sign the clean copy over several months and the Respondent's explicit statement in December 2011 that it did not intend to settle the matter constituted a violation of the Respondent's statutory duty to bargain in good faith, and thus Sections 10(a)(4) and (1). City of Burbank, 185 Ill. App. 3d at 1005; State of Illinois Dep't of Cent. Mgmt. Servs. (Corr.), 4 PERI ¶2043.

Contrary to the Respondent's assertion, the parties' Settlement Agreement of July 25, 2011 was binding. The law of the State of Illinois, as well as that of the Board, establishes that a party may be bound by a settlement agreement even if it is not executed as long as there is an offer, acceptance, and a meeting of the minds. Cook County Recorder of Deeds, 28 PERI ¶14 (IL LRB-LP 2011)(citing Quinlan v. Stouffe, 355 Ill. App. 3d 830, 837-38, 823 N. E. 2d 597 (4th Dist. 2005). Accordingly, it is not necessary for me to conclude whether the Settlement Agreement of July 25, 2011 was executed.

In the instant case, the evidence irrefutably shows that on July 25, 2011 there was a meeting of the minds between the Charging Party and the Respondent regarding the terms set forth in their Settlement Agreement of that date. The evidence that establishes this meeting of the minds includes the following: 1) the Respondent's admission in its Answer that the parties reached a settlement agreement on July 25, 2011; 2) the initials of Respondent's representatives—Chief Greathouse and Attorney Lefkow—indicating their assent to handwritten changes on the July 25, 2011 Settlement Agreement; 3) Attorney Lefkow's verbal statement from the mediation to ALJ Clifford, assigned to Case No. S-CA-09-141, that the parties had reached an agreement, as well as his email to ALJ Clifford later that day providing the same; and

4) the Respondent's admission in it post-hearing brief that a meeting of the minds existed between the parties at the July 25, 2011 mediation session.[19]

Subsequent conduct of the Respondent again demonstrates this meeting of the minds on July 25, 2011. Specifically, on August 19, 2011 Charging Party's Attorney Angelucci sent an email to ALJ Clifford, copying Attorney Lefkow, correcting the ALJ's prior reference to the settlement as "proposed." In that email, she advised ALJ Clifford that the parties' July 25, 2011 Settlement Agreement was not "proposed" but rather a fully-executed agreement. Although Respondent's Attorney Lefkow was copied on the Charging Party's email to ALJ Clifford, he did not respond to Attorney Angelucci's statement that the parties had reached agreement on July 25, 2011 over the terms of settlement. The Respondent's silence is an admission of the truth of Attorney Angelucci's statement. Dill v. Widman, 413 Ill. 448, 454, 109 N. E. 2d 765 (1952).

In reaching this conclusion that there was a meeting of the minds on July 25, 2011 over the terms resolving Case No. S-CA-09-141, I also find that the Respondent's representatives at the July 25, 2011 mediation session had at least apparent authority to reach an agreement. City of Burbank v. Illinois State labor Relations Board, 185 Ill. App. 3d 997, 1003, 541 N. E. 2d 1259 (1st Dist. 1989); State of Illinois, Dep't of Cent. Mgmt. Servs., 6 PERI ¶2038 (IL SLRB 1990). This authority is evidenced by the appearance of Attorney Lefkow and Chief Greathouse, at the mediation session on July 25, 2011 as the Respondent's representatives in response to the mediator's instructions that the parties send individuals to the mediation session with authority to enter into a settlement agreement. Additionally, the respective positions of these representatives establishes their authority: Attorney Lefkow was the attorney of record in the underlying dispute, Case No. S-CA-09-141, and Chief Greathouse, the head of the Police Department, normally addressed collective bargaining issues in that department. Further, the Respondent has

[19] See Respondent's Post-Hearing Brief at p. 13.

pointed to no evidence which shows a lack of authority. As the Respondent presented neither Attorney Lefkow nor Chief Greathouse as witnesses at the hearing in the instant matter, neither denied their authority—actual or apparent—to enter into a binding agreement at the July 25, 2011 mediation session.

At the same time, I reject the Respondent's contention that the July 25, 2011 Settlement Agreement was a "tentative agreement." There is no evidence to support the Respondent's claim that the Settlement Agreement of July 25, 2011 was conditional. Not only did both parties send representatives authorized to enter into a settlement agreement to the mediation session as the mediator instructed, at the end of the session Attorney Lefkow informed ALJ Clifford by speakerphone and email that the matter was settled. Further, during the mediation, the representatives initialed changes to the typewritten document, indicating their assent without qualification. Additionally, the Respondent's silence when the Charging Party's Attorney Angelucci explained to ALJ Clifford that the July 25, 2011 Settlement Agreement was *not* proposed, but was rather a full resolution, is an admission of the truth of her statement. See Dill v. Widman, supra.; see also discussion supra at p. 23.

2. Respondent's Failure to Comply with the July 25, 2011 Settlement Agreement

The evidence demonstrates that the Respondent has failed and refused to carry out its obligations set forth in the July 25, 2011 Settlement Agreement, and thus violating Sections 10(a)(4) and (1) of the Act. City of Burbank, 185 Ill. App. 3d at 1005. The explicit language of Paragraph 1 of that Settlement Agreement states that the Respondent "agrees that no minimum productivity standards are currently in place or imposed" upon the officers, and it "will not unilaterally implement" such standards. However, Deputy Chief Walles acknowledged that, contrary to this provision, minimum productivity standards were in place midsummer 2011. Consistent with his admission, the record reveals that, as of August 1, 2011, the Respondent had

implemented a minimum productivity standard which required an officer to write at least three moving violations per shift.

The existence of this productivity standard is evidenced by several factors: 1) the substance of what was conveyed to the officers at roll call; 2) emails from the officers' supervisors to their superiors reporting the identity of those officers who did not write three movers, and, in turn, the superior's order to conduct a ride-along; 3) a ride-along resulting from an officer not writing three moving violations; 4) MCT messages consistent with their existence; and 5) performance evaluations which consider this activity in the officers' ratings. Although the Respondent has not issued a document setting forth the directive that each officer is to write a minimum of three moving violations per shift, these elements, in conjunction, show the existence of a productivity standard in contravention of the July 25, 2011 Settlement Agreement.

In reaching this conclusion, it is not necessary for me to determine an issue between the parties: whether a ride-along is counseling. The Respondent's breach of the July 25, 2011 Settlement Agreement, by itself, is a violation of the Act, regardless of any impact on terms and conditions of employment which that breach may have. See Village of Calumet Park, 17 PERI ¶2024 (Board concluded that ALJ erroneously stated if parties' agreement concerned permissive bargaining subject, there could be no violation of the Act).

The evidence shows that this productivity standard requiring an officer to write three moving violations per shift has an effect on the officer's terms and conditions of employment. In particular, the extent to which an officer meets this productivity standard is considered in an officer's performance evaluation. As a result of a poor rating, the officer may be counseled, the first step in progressive discipline as documented in the July 25, 2011 Settlement Agreement. The performance evaluation then becomes part of the officer's permanent record. Further, an officer's performance evaluation is considered in the event he seeks a transfer or a promotion.

The record establishes the implementation of another minimum productivity standard in September 2012 when Sgt. Kreppein sent an email to several officers providing that as of October 1, each was required "to obtain a minimum of five contacts" per shift, and failure to do so might result in discipline. The Respondent thus breached the July 25, 2011 Settlement Agreement, and continued this breach each instance it issued discipline to officers for not meeting this minimum productivity standard. Consequently, the Respondent again violated its duty to bargain in good faith within the meaning of the Act. City of Burbank, 185 Ill. App. 3d at 1005.

I reject the Respondent's contention that these measures of an officer's productivity—three movers and five contacts—are not productivity standards but rather goals or initiatives. Regardless of the terms that Respondent uses to describe these productivity standards, they each require an officer to produce a certain number of measurables per shift. As such, they are productivity standards. While Comm. Kerkorian maintains that they are initiatives, "not the *traditional* productivity standards" that the Respondent had in the past, his testimony fails to constitute a denial that productivity standards were in existence after the parties entered into the July 25, 2011 Settlement Agreement. Further, Comm. Kerkorian's testimony distinguishing the current "initiatives" from prior productivity standards, merely demonstrates that productivity standards in the past encompassed several types of activity whereas more recently the standards referred to a single type of activity.[20] These "goals" or "initiatives" are productivity standards nonetheless.

[20] For example, the record establishes that in the period prior to the July 25, 2011 Settlement Agreement, the Respondent had a productivity standard requiring the officers to have four movers, four parkers and one on view arrest, *i.e.*, several types of activity. After that Settlement Agreement was reached, the Respondent had in place what it calls "an initiative" requiring the officer to write three movers, *i.e.*, a single type of activity.

The duties of a police officer are not a defense to the Respondent's breach of the July 25, 2011 Settlement Agreement. While there is no dispute that an officer's duties include enforcing laws, investigating traffic accidents, and performing those duties assigned by a superior officer, such duties are different from productivity standards which mandate that an officer produce a specified number of tickets for moving violations or contact cards per shift. After entering into the July 25, 2011 Settlement Agreement prohibiting the implementation of productivity standards, the Respondent could no longer require a police officer to write three moving violations or have five contacts per shift.

Further, the Respondent's argument that the Charging Party has breached the July 25, 2011 Settlement Agreement by failing to withdraw the charge in Case No. S-CA-09-141 and/or failing to write a letter requesting removal of discipline is unpersuasive. Once the Charging Party observed the Respondent exhibiting behavior which might indicate it was having second thoughts about having entered into that agreement, it was not obligated to withdraw the charge. See Norris Concrete Materials, Inc., 282 NLRB 289, 292 n. 15 (1986) (NLRB noted that a charging party in such case agrees to withdraw charges because it assumes that it can rely on a respondent's good-faith intent to comply with the terms on which those charges are settled); see also How to Take a Case Before the NLRB, 618 (Frederic Fisher, *et al.* eds., 8th ed. 2008). In this case at bar, the Respondent was revealing its attempt to back out of an agreement already made as soon as July 26, 2011—the very next day—when it failed to sign the clean copy which the Charging Party provided on that date.

Moreover, if the Charging Party had withdrawn the charge, it risked a Board decision that such withdrawal precluded a finding that the Respondent violated Sections 10(a)(4) and (1) of the Act by reneging on and failing to comply with the July 25, 2011 Settlement Agreement. See City of Harvey, 13 PERI ¶2031 (IL SLRB 1997) (Bd. concluded that charging party's

withdrawal of charge precluded a finding that respondent's repudiation of memorandum of agreement violated its duty to bargain in good faith).

B. Respondent's Breach of the November 22, 2011 Settlement Agreement on Minimum Staffing

The evidence establishes that the Respondent violated its duty to bargain in good faith when it failed to comply with its November 22, 2011 Settlement Agreement resolving on minimum staffing grievances. See City of Harvey, 13 PERI ¶2031 (when parties to a collective bargaining relationship negotiate and execute a grievance settlement agreement, *the terms of which are clear and undisputed*, the parties are required, by principles of good faith and fair dealing, to abide by its terms) (Emphasis added). Specifically, the record shows that the Respondent breached this Settlement Agreement in its staffing of the N2 shift on November 28, 2011. Because that was a night shift, a minimum staffing of 14 officers was required. None of the four contractual exceptions applied to reduce the minimum required. Without counting the officer assigned to the front desk, at most the staffing for that shift was 13.[21] Thus, the Respondent would have had to count the officer assigned to the desk in order to meet minimum staffing requirements of 14 on a night shift. However, by doing so, the Respondent violated Paragraph 3 of the November 22, 2011 Settlement Agreement which provides that "the Employer agrees that Patrol Officers—not including officers assigned to the front desk—shall be counted toward the minimum shift requirements."

In reaching the conclusion that the Respondent breached its Settlement Agreement on November 28, 2011, I decline to adopt the Charging Party's expansive reading of the November 28, 2011 Settlement Agreement. Specifically, I emphasize that Paragraph 4 of that Settlement Agreement provides "the parties acknowledge *that they continue to disagree of (sic) other terms*

[21] That number—13—even includes counting the officer designated on the line-up sheet as "assigned to traffic."

regarding minimum staffing and have entered into this settlement agreement in anticipation of bargaining a successor agreement." (Emphasis added). Based on the record before me, in entering the November 22, 2011 Settlement Agreement, the parties only resolved the issue concerning whether to count an officer assigned to the front desk for minimum staffing requirements. The record shows that many differences remain concerning which officers to count: officers on fixed posts, including bond court and weapons training at the range, as well as officers on FMLA leave, and those assigned to traffic. With regard to these issues about the application of the minimum staffing requirements of Section 12.3, the parties acknowledge they disagree and will try to resolve their differences in contract negotiations. Thus, the terms of the parties' November 22, 2011 Settlement Agreement are not "clear and undisputed" concerning certain assignments/statuses beyond officers assigned to the front desk. This forum—the Illinois Labor Relations Board—is not appropriate to determine the parties' intent in agreeing to the minimum staffing provisions of Section 12.3.

Although the record shows that the Respondent breached the November 22, 2011 Settlement Agreement on a single occasion, under the circumstances of this case, I find that single breach constitutes an unfair labor practice—a violation of the Respondent's duty to bargain in good faith. In particular, the unique facts demonstrate that the Respondent failed to comply with a subpoena *duces tecum* and gave no explanation for its failure to do so when the Charging Party pointed out that failure twice during the hearing. If the Respondent had complied with the subpoena *duces tecum* by providing the Charging Party with the line-up sheets for the several missing months in 2012, Charging Party may have shown that the November 22, 2011 Settlement Agreement was breached on additional dates. Accordingly, Board precedent which hold that a lone breach of an agreement fails to constitute a violation of the statutory duty to bargain in good faith do not apply to the instant situation. See e.g., Illinois Nurses Association

and County of Cook, 21 PERI ¶53 (IL LRB-LP 2005) (a single alleged occurrence of a breach of duty to discuss grievances does not rise to level of refusal to negotiate in good faith); Village of Creve Coeur, 3 PERI ¶2063 (IL SLRB 1987) (a single refusal to arbitrate a grievance is not a refusal to bargain in violation of the Act).

While the evidence demonstrates the Respondent's breach of the November 22, 2011 Settlement Agreement, it does not support the Respondent's argument that the Charging Party violated the November 22, 2011 Settlement Agreement by filing "duplicative grievances to those being withdrawn." First, the instant hearing did not incorporate the Respondent's claims against the Charging Party. Specifically, at the beginning of the hearing, I denied the Respondent's Motion to consolidate the instant case with the Respondent's charge in Case No. S-CB-12-137 which is still under investigation. Second, the Charging Party's witness, Officer Rohloff, rebutted the claim of Respondent's witness, Director Smigielski that in February 2012 the Union filed a grievance challenging application of Section 12.3 regarding shift minimums. Although the Respondent then had an opportunity to establish the existence of the alleged grievance by introducing a copy into evidence, it did not do so.

Additionally, the Respondent's contention that the Charging Party's filing of Grievance No. 12-12 in August 2012 violates the same provision of the November 22, 2011 Settlement Agreement is without merit. Contrary to the Respondent's contention, Grievance No. 12-12 was different from the grievances previously contesting minimum staffing in two critical ways. First, Grievance No. 12-12 set forth a summary of incidents regarding minimum staffing levels dating back to February 2011, continuing through the parties entering the November 22, 2011 Settlement Agreement, the Charging Party's allegation of how the Respondent breached that agreement, and then up to its filing in August 2012. Second, Grievance No. 12-12 also alleged a

violation of the Management Rights clause of the collective bargaining agreement, not only Section 12.3 regarding minimum staffing requirements.

C. Sanctions

The Charging Party's Motion for Sanctions is granted. Section 11(c) of the Act provides that the Board has discretion to include an appropriate sanction if a party has made allegations or denials without reasonable cause and found to be untrue, or has engaged in frivolous litigation for the purposes of delay or needless increase in the cost of litigation.[22]

The test for whether a party has made factual assertions which are untrue and made without reasonable cause is an objective one of reasonableness under the circumstances. See e.g., Chicago Transit Authority. 16 PERI ¶3021 (IL LLRB 2000); Cnty of Rock Island, 14 PERI ¶2029 (IL SLRB 1998), aff'd, 315 Ill. App. 3d 459, 734 N. E. 2d 33. 16 PERI ¶4008 (3d Dist. 2000). The test for determining whether a party has engaged in frivolous litigation is whether the party's defenses to the charge were made in bad faith or did not represent "debatable" positions. See e.g., Wood Dale Fire Protection District, 395 Ill. App. 3d 523, 916 N. E. 2d 1229, 25 PERI ¶149 (2d Dist. 2009); County of Cook (Office of Public Defender), 13 PERI ¶3005 (IL LLRB 1997).

The Charging Party argues that the Respondent must be sanctioned for making the following claims which constitute both allegations and denials without reasonable cause and frivolous litigation for the purpose of delay or needless increase in the cost of litigation: 1) the Respondent alleged in its brief that the July 25, 2011 Settlement Agreement was not ratified by either side, that it was a nonbinding, unexecuted settlement agreement, and that an agreement was conditioned on the document being reduced to a typewritten form and signed by authorized individuals of the respective parties; 2) the Respondent's denial of a Complaint paragraph that

[22] Section 1220.90 of the Board's Rules, based on Section 11(c) of the Act, authorizes the ALJ to award sanctions in appropriate cases.

alleged the reaching of an agreement on July 25, 2011 concerning a ULP charge in Case No. S-CA-09-141 which, in turn, alleged the unilateral implementation of productivity standards; 3) the Respondent's Answer to the Complaint denied the allegation that on December 6, 2011 the Respondent notified the Charging Party that it did not intend to settle the referenced ULP charge; 4) the Respondent's assertion that it did not unilaterally implement any productivity standards following the Settlement Agreement of July 25, 2011; 5) the Respondent's statement of issues in its brief and subsequent argument that " the Union failed to bargain in good faith and comply with the July 25 2011 Tentative Agreement," as well its request for injunctive relief, ordering the Union to withdraw the ULP charge in Case No. S-CA-09-141; 6) the Respondent's raising the issue in its brief and subsequent argument that the Union failed to bargain in good faith and comply with the November 22, 2011 Settlement Agreement, as well as the Respondent's request that the Board "order the Union to withdraw the two duplicative grievances pertaining to shift minimums"; and 7) the Respondent's assertion in its brief that "[t]he Union failed to prove the existence of shift minimum violations because it relied on inaccurate evidence," specifically line-up sheets.[23]

Regarding the Respondent's allegation that the July 25, 2011 Settlement Agreement was actually tentative, with an agreement conditioned on the document being put in typewritten form and signed by authorized parties, I find that the record supports the award of sanctions. This assertion is false and was made without reasonable cause. Several pieces of evidence establish the intentionally deceptive nature of this assertion: 1) Respondent's representatives at the July 25, 2011 mediation—Attorney Lefkow and Chief Greathouse—appeared there in response to the

[23] The five initial claims of the Respondent which the Charging Party cites in its Motion for Sanctions concern the July 25, 2011 Settlement Agreement of Case No. S-CA-09-141 alleging the unilateral implementation of productivity standards, while the remaining two claims pertain to the November 22, 2011 Settlement Agreement of grievances about minimum staffing requirements.

mediator's instructions that the parties send personnel authorized to enter into a settlement agreement; 2) the initials of the parties' representatives on the July 25, 2011 Settlement Agreement were not accompanied by any qualifying language, such as the letters "TA" indicating a tentative agreement; 3) at the end of the mediation session, Attorney Lefkow told ALJ Clifford on speaker phone that the case was settled, and later that day sent an email to the ALJ stating the same; and 4) Attorney Lefkow remained silent when Attorney Angelucci wrote in an email to ALJ Clifford that the July 25, 2011 Settlement Agreement was a full resolution of the issues. The Respondent presented no evidence to refute any of the evidence which the Charging Party introduced.

Although the Respondent's post-hearing brief provides that "evidence suggests" the conditional nature of the parties' agreement on July 25, 2011, such a statement is not accurate. The evidence which the Respondent cites to support its statement is the testimony of Director Smigelski about her understanding of what resulted from the July 25, 2011 mediation session. However, it is undisputed that she was not present at that mediation session, and did not represent the Respondent in Case No. S-CA-09-141, the subject of that mediation session.

The falsity of the Respondent's assertion is particularly evident because the Respondent's representative in the case at bar, Attorney Lefkow, is the same person who is the Respondent's attorney of record in Case No. S-CA-09-141 that was being mediated on July 25, 2011. As a result, he was aware at all times of the evidence which irrefutably shows that the July 25, 2011 Settlement Agreement was intended by the parties to be a full resolution of the underlying ULP charge.

Similarly, I find that the Respondent's denial of Paragraph 12 of the Complaint alleging that the parties reached an agreement on July 25, 2011 warrants sanctions. Not only is this denial untrue and made without cause, but Respondent also made it in bad faith. This bad faith is

evident by reviewing the events which preceded this denial. Initially on June 14, 2012 when the Respondent filed its Answer, it admitted Paragraph 12 of the Complaint. In the Respondent's Pre-Hearing memorandum filed on October 5, 2012, it identified this same paragraph as an uncontested fact. At the hearing on October 11, 2012, the Respondent stipulated that Paragraph 12 was an uncontested fact. Then when the Respondent gave its opening statement, Attorney Lefkow stated that no settlement agreement was reached on July 25, 2011. After I asked him about the apparent contradiction between this statement and the admission in Paragraph 12 of the Answer, Attorney Lefkow made a Motion to Amend the Answer to deny the corresponding allegation of the Complaint. He gave no reason for his motion. Attorney Lefkow made this Motion to Amend moments after I denied his Motion to Consolidate the instant case with the charge in Case No. S-CB-12-037 which the Respondent had filed in June 2012 and amended in September against the Charging Party.[24] In seeking consolidation, Attorney Lefkow expressly asked that the instant hearing be postponed until the Executive Director had addressed the Respondent's charge in Case No. S-CB-12-037.

Additionally, the Respondent's denial in Paragraph 13 of its Answer was untrue and made without reasonable cause. In that paragraph, the Respondent denied the allegation that on December 6, 2011 it notified the Charging Party that it did not intend to settle the ULP charge in Case No. S-CA-09-141. Contrary to this denial, the record includes an email that Attorney Lefkow sent to Charging Party's Attorney Angelucci on December 6, 2011 stating "the City does not intend to settle the ULP matter." During the hearing, the Respondent introduced no evidence to refute this document. In its post-hearing brief, the Respondent ignored this evidence and instead claimed that the City "suggested to re-open discussions about the tentative agreement," a claim the record does not support. This issue concerning the Respondent's notification to the

[24]See discussion supra at pp. 2-3.

Charging Party was litigated in the hearing, and I found that the Respondent notified the Charging Party on December 6, 2011 that it did not intend to settle the ULP charge in Case No. S-CA-09-141. Further, unlike a party's representative that may file an answer at the beginning of a proceeding when he/she may be unaware of all the critical facts, Respondent's representative who made this denial in instant case, Attorney Lefkow, was the very same person who sent the email December 6, 2011. Given these unique circumstances, the Respondent should be sanctioned due to its denial in Paragraph 13 of its Answer.

The Respondent's assertion that it did not implement productivity standards after the July 25, 2011 Settlement Agreement also warrants sanctions. This assertion was false, made without reasonable cause, and gave rise to frivolous litigation. The Respondent failed to rebut the testimonial and documentary evidence which the Charging Party presented during its case-in-chief. The testimony of the Charging Party's officials established the existence of productivity standards requiring the officers to write three moving violation per shift and five contact cards per shift. In addition, the emails exchanged among supervisory staff of Respondent's Police Department establish a clandestine reporting procedure so that the Chief of Police could learn which officers were not meeting this productivity standard.

The Respondent's witnesses failed to rebut this evidence that productivity standards did exist after the parties entered the July 25, 2011 Settlement Agreement. Deputy Chief Walles admitted that Chief Greathouse reinstated the productivity standards in midsummer 2011. Commander Kerkorian's testimony distinguished the productivity standards from the "traditional" ones that it had previously, but it failed to deny their existence after July 25, 2011. Similarly, Director Smigelski testified that after the operative date, the Respondent did not have productivity standards "in the way that they were previously implemented." However, her testimony does not deny their implementation after July 25, 2011—the productivity standards

were just different than they were before. Likewise, Lt. Oliver's testimony that he has not *enforced* productivity standards since 2009 fails to deny their *implementation*. While Deputy Chief McCormick testified that there were no productivity standards currently in place, he admitted that the Chief' had implemented "initiatives" after July 25, 2011. The record overwhelmingly shows that one of these "initiatives"—actually a productivity standard—required the officers to write three movers per shift.

Sanctions are also appropriate for the Respondent's statement in its brief that the issues included whether the Union failed to bargain in good faith and comply with the July 25, 2011 Settlement Agreement, argument regarding that issue, and request for injunctive relief ordering the Union to withdraw its ULP charge in Case No. S-CA-09-141. The Respondent's statement of issues in its brief, argument and request for injunctive relief were allegations made without reasonable cause and exemplify frivolous litigation. Although the Respondent explained in its Response to the Charging Party's Motion for Sanctions that its actions were based on Board Rule 1220.50(f), that rule is inapplicable to a respondent seeking to make allegations against a charging party.[25]

Further, I had already denied the Respondent's Motion to Consolidate the instant charge with its charge in Case No. S-CB-12-037 against the Charging Party concerning the same Settlement Agreements at issue here. In an effort to postpone the hearing at bar, at the beginning of the hearing, the Respondent asked that the proceedings in this case be stayed pending investigation of its charge in Case No. S-CB-12-037, and then be consolidated if a complaint were issued in that case.

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[25] Board Rule 1220.50 (f) provides as follows:

> The Administrative Law Judge, on the judge's own motion or on the motion of a party, may amend a complaint to conform to the evidence presented in the hearing or to include uncharged allegations at any time prior to the issuance of the Judge's recommended decision and order.

Similarly, regarding the November 22, 2011 Settlement Agreement, the Respondent should be sanctioned for its statement of the issues in its brief to include whether the Charging Party had bargained in good faith and complied with that document, its argument that the Charging Party had violated the Settlement Agreement, and its request for injunctive relief against the Charging Party. They constitute allegations made without proper cause and frivolous litigation. As stated earlier, Board Rule 1220.50(f) does not enable a respondent to amend a complaint to include allegations against a charging party. I had already denied the Respondent's Motion to Consolidate the instant case with its charge against the Charging Party in S-CB-12-037.

Additionally, in the process of advancing its argument that the Charging Party violated the November 22, 2011 Settlement Agreement, the Respondent made false assertions. In particular, the Respondent alleged that the Charging Party had filed a grievance in February 2012. However, Officer Rohloff rebutted this allegation, and then the Respondent failed to produce a copy of the grievance that the Charging Party supposedly filed.

The Respondent must also be sanctioned for arguing that the Charging Party failed to prove shift minimum violations because it relied on inaccurate evidence. Specifically, the Respondent maintains that the daily line-up sheets which the Charging Party used to prove its charge do not accurately reflect the numbers of officers who actually worked on a particular shift. These assertions were false, made without reasonable cause, and made in bad faith. Prior to each shift at roll call, officers are given copies of the line-up sheets. They include the name of each officer on the shift in the left column, and then his/her status and/or assignment in the right column. If officers were added to the shift via PDEL or hire back, the names of the officers were handwritten on the daily line-up sheets. The Respondent's evidence showed that in summer 2012, the daily line-up sheets were revised so that the previous handwritten markings

indicating officers who had been hired back or PDELed were now typewritten. The Respondent introduced no evidence demonstrating that the daily line-up sheets which the Charging Party introduced lacked handwritten markings indicating any officers who had been hired back or PDELed.

V. CONCLUSIONS OF LAW

1. The Respondent violated Section 10(a)(4) and (1) of the Act by reneging on the Settlement Agreement reached on July 25, 2011 regarding productivity standards, and then failing to comply with it.

2. The Respondent violated Section 10(a)(4) and (1) of the Act by failing to comply with the Settlement Agreement entered into on November 22, 2011 concerning staffing minimums.

VI. RECOMMENDED ORDER

In light of the above findings and conclusions, I recommend the following:

1. That Respondent, City of Waukegan, having violated Section 10(a)(4) and (1) of the Act in connection with its reneging of the July 25, 2011 Settlement Agreement with the PBPA concerning productivity standards and its refusal to comply with same, be ordered to cease and desist from refusing to bargain the PBPA and from interfering with, restraining or coercing its employees in the exercise of rights guaranteed under the Act.

2. The Respondent, City of Waukegan, having violated Section 10(a)(4) and (1) of the Act in connection with its refusal to comply with the November 22, 2011 Settlement Agreement with the PBPA concerning minimum staffing, be ordered to cease and desist from refusing to bargain with the PBPA and from interfering with, restraining or coercing its employees in the exercise of rights guaranteed under the Act.

3. That Respondent, City of Waukegan, be ordered to immediately take the following steps which would effectuate the policies of the Act:

A. Abide by the terms of its July 25, 2011 and November 22, 2011 Settlement Agreements with the PBPA.

B. Rescind any productivity standards, including those requiring officers to write three movers and 5 contact cards per shift, which it implemented after July 25, 2011.

C. Remove discipline—including documentation of counseling—from Respondent's records of the officers named in Paragraph 2 of the July 25, 2011 Settlement Agreement.

D. Make officers whole for any losses suffered as a result of the Respondent's failure to comply with the July 25, 2011 and November 22, 2011 Settlement Agreements.

E. Reimburse the PBPA for its costs and reasonable attorney's fees in pursuing this matter.

F. Post, for 60 consecutive days, at all places where notices to the employees of Waukegan Police Department are regularly posted, signed copies of the attached notice.

4. That Respondent, City of Waukegan, be ordered to notify the Board, in writing, within 20 days of the Board's order, of the steps that Respondent has taken to comply herewith.

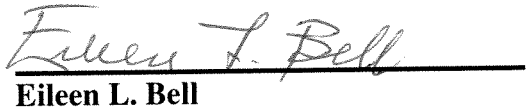
VII. EXCEPTIONS

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 General Counsel of the Illinois Labor Relations Board, 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 24th day of April 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD



Eileen L. Bell
Administrative Law Judge

NOTICE TO EMPLOYEES

FROM THE
ILLINOIS LABOR RELATIONS BOARD

The Illinois Labor Relations Board has found that the City of Waukegan has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that:

The Illinois Public Labor Relations Act gives you, as an employee, these rights:

To engage in self-organization.
To form, join, or help unions.
To bargain collectively through a representative of your own choosing.
To act together with other employees to bargain collectively or for other mutual aid or protection.
And, if you wish, not to do any of these things.

Accordingly, we assure you that:

WE WILL cease and desist from reneging on and refusing to comply with the July 25, 2011 Settlement Agreement regarding productivity standards that we reached with the PBPA..

WE WILL cease and desist from refusing to comply with the November 22, 2011 Settlement Agreement with the PBPA concerning minimum shift staffing.

WE WILL cease and desist from in any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in the Act.

WE WILL, effective immediately, abide by the terms of the July 25, 2011 and November 22, 2011 Settlement Agreements with the PBPA.

WE WILL, effective immediately, rescind any productivity standards, including those requiring officers to write three movers and five contact cards per shift, implemented after July 25, 2011.

WE WILL, effective immediately, remove from our records any discipline—including documentation of counseling—of the officers named in Paragraph 2 of the July 23, 2011 Settlement Agreement.

WE WILL make officers whole for any losses suffered as a result of our failure to comply with the July 25, 2011 and November 22, 2011 Settlement Agreements.

WE WILL reimburse the PBPA for its costs and reasonable attorney's fees in pursuing this matter.

Date of Positng:_____

City of Waukegan
(Employer)

_____
(Representative) (Title)

ILLINOIS LABOR RELATIONS BOARD

320 West Washington, Suite 500
Springfield, Illinois 62701
(217) 785-3155

160 North LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED.