

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

International Union of Operating Engineers,)	
Local 399,)	
)	
Charging Party)	
)	Case No. S-CA-12-121
and)	
)	
Village of Stickney,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On February 23, 2012, the International Union of Operating Engineers, Local 399 (Union) filed an unfair labor practice charge with the State Panel of of the Illinois Labor Relations Board (Board), alleging that the Village of Stickney (Village) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), as amended (Act). The charge was investigated in accordance with Section 11 of the Act, and on April 26, 2012, the Board’s Executive Director issued a Complaint for Hearing. A hearing was held in Chicago, Illinois, on August 15, 2012, at which time the parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. At hearing, the Union moved to amend the Complaint. The motion was granted. Written briefs were timely filed by the parties. After full consideration of the parties’ stipulations, motions, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find that:

1. At all times material, the Village has been a public employer within the meaning of Section 3(o) of the Act.

2. At all times material, the Village 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 Village has been subject to the Act, pursuant to Section 20(b) thereof.
4. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
5. On or about December 9, 2011, the Union filed a majority interest petition in Case No. S-RC-12-049, seeking to represent all persons employed in the title of maintenance worker employed by the Village in its public works department.
6. As of January 4, 2012, and at all times thereafter, pursuant to the petition in Case No. S-RC-12-049, the Union has been the exclusive representative of all person employed full-time or regular part-time in the title or classification of maintenance worker by the Village in its public works department.
7. At all time material, the Village has employed Joe Lopez as a supervisor in its public works department.
8. At all times material, Lopez has been an agent of the Village, authorized to act on its behalf.
9. At all times material, Jeffrey Boyajian has held the title of assistant supervisor in the public works department and met the requirements to be a supervisor under the Act.
10. At all times material, Boyajian has been an agent of the Village, authorized to act on its behalf.
11. At all times material, the Village has employed Dan O'Reilly as its Village president.
12. At all times material, O'Reilly has been an agent of the Village, authorized to act on its behalf.
13. At all times material, the Village has employed Robert Wyant in the title of maintenance worker in its public works department.
14. At all times material, Wyant has been a public employee within the meaning of Section 3(n) of the Act.
15. At all times material, the Village has employed Vince Baena in the title of maintenance worker in its public works department.
16. At all times material, Baena has been a public employee within the meaning of Section 3(n) of the Act.
17. At all times material, the Village has employed Danny Cortez in the title of maintenance worker in its public works department.
18. At all times material, Cortez has been a public employee within the meaning of Section 3(n) of the Act.

II. ISSUES AND CONTENTIONS

The first issue is whether the Village violated Section 10(a)(1) of the Act when it questioned employees regarding their support for the Union and when it asked employees to sign affidavits attesting to their level of support for the Union. The Village argues that it did not violate the Act when it inquired as to the extent of the employees' support for the Union because the employees did not feel coerced.

The second issue is whether the Village violated Sections 10(a)(2) and (1) of the Act when it discharged three employees allegedly in retaliation for their union activity and to discourage employees from participating in union activity.¹ The Village contends that the decision to discharge the employees was made due to the public works department being overstaffed and was made prior to the employees' engaging in union activity.

III. FINDINGS OF FACTS

The Village is a small municipality located southwest of Chicago, Illinois, with a population of approximately 6,786. The Village is governed by the Village Board, which consists of a president and six trustees. The Village is organized into the following four departments: administration, police, fire, and public works. Prior to January 2012, the only Village employees in a bargaining unit represented by a labor organization were employees in the police department.

¹ The Amended Complaint also alleged a separate Section 10(a)(1) violation regarding Lopez and Boyajian's warnings to Village employees about organizing a union. In November 2011, Lopez notified Wyant, Baena, and Cortez that "the Village will find a way to fire you if you unionize," and alleges that in November 2011, Boyajian notified Wyant, Baena, and Cortez that "the Village will get rid of all of you if you organize." However, the Union presented no argument in its post-hearing brief regarding Lopez' warning. Further, the Union conceded that Boyajian's statements were untimely as the basis of an independent violation of Section 10(a)(1) of the Act. I need not determine whether these statements constitute a violation of the Act because the Union does not argue as such in its post-hearing brief, and consequently the Union has abandoned these allegations. See Vill. of Wilmette, 20 PERI ¶85 (IL LRB-SP 2004); Town of Cicero, 24 PERI ¶74 (IL LRB-SP ALJ 2008).

The Village Board conducts regular meetings, which are recorded, on the first and third Tuesday of every month. At these meetings, the Village Board conducts the general business of the Village, which includes voting to authorize payment of the Village's expenses and reporting from various committees and departments. Generally, Village personnel issues are not discussed at Board meetings. However, when the Board discusses the ratification of a collective bargaining agreement between the Village and the police department employees, or any other police department personnel matters, the Village conducts these discussions in closed executive session. The Village minutes record the occurrence of executive sessions, but the contents of the session are not recorded in the minutes.

The Village's fiscal year runs from May through April. In the fiscal year beginning May 2009, Dan O'Reilly was elected and took office as the Village president.² In 2011, the Village's six trustees were Cody Mares, Deborah Morelli, Fred Schimel, Jeffrey Walik, Jeffery White, and Scott Zeedyk.

The public works department is responsible for the maintenance of all Village property. In May 2009, Joe Lopez was promoted from maintenance worker to department supervisor. As the department supervisor, Lopez ensured that the public works department was running in an orderly fashion by creating the daily assignments for the maintenance workers. In 2011, the department consisted of nine full-time maintenance workers and two part-time seasonal employees. The full-time maintenance workers were Frank Acosta, Samuel Alonzo, Vince Baena, Jason Bruscato, Danny Cortez, Doug Czech, Dominick Iovino, Bob Jaros, and Bob

² O'Reilly's official title is Village president, but he is commonly referred to as mayor.

Wyant. The part-time seasonal employees were Jason Dunow and Mitch.³ The seasonal employees were not eligible for benefits.⁴

In 2011, the maintenance workers' duties included yard waste, garbage recycling, tree trimming, street sweeping, fixing potholes, sign maintenance, sidewalk repair and maintenance, maintenance of Village buildings, tree binding, setup and cleanup for Village events, street tarring, grass cutting, taking water samples, reading water meters, painting, disposing of dead animals, attending to water main breaks, snow plowing, and various other activities. All full-time maintenance workers were required to obtain State of Illinois Class C water licenses within two years of hire. They were also required to work part-time in the Village fire department.

In February 2011, Iovino was suspended for improperly maintaining a Village vehicle. Sometime after, Baena, Boyajian, Iovino, Lopez, and Wyant discussed Iovino's suspension in the department break room during lunchtime. Wyant stated that in his opinion if the employees were represented by a union then the union would have prevented the Village from suspending Iovino. Baena stated that when he worked for a company with a union that represented the employees, there were steps management had to follow before issuing a suspension. After lunch, Boyajian told Baena and Wyant, "Be careful with that union word. They don't like that around here. If you guys ever do decide to go union or go that route, they will find a way to get rid of you."

During the tenure of Baena's employment in the department, Baena had discussed unionizing department employees with Boyajian and Lopez at least half a dozen times, including approximately three times in 2011.

³ The record did not indicate Mitch's last name.

⁴ The record did not indicate what, if any, benefits full-time maintenance workers receive.

On July 19, 2011, the Village Board passed the Village's annual budget for fiscal year ending April 30, 2012. The budget allocated an increase for maintenance workers' salaries by \$20,000 for the entire department. The budget also allocated funds for the fire department to schedule an additional firefighter on each shift. This addition to the fire department would have cost the Village at least \$127,000 per year.

In August 2011, several of the maintenance workers met with Trustee White to discuss that the employees believed the work assignments were being poorly distributed by the Village. After the meeting, White informed O'Reilly and several other trustees that the maintenance workers were complaining that they were overworked. As a result of this conversation, several times a week White, O'Reilly, and Trustee Walik watched the maintenance workers conduct their duties. O'Reilly referred to this as a time study. O'Reilly and the trustees observed that in their opinion, the maintenance workers appeared to be unproductive and wasteful of the Village's resources. O'Reilly determined that the department's core functions were garbage pickup, recycling pickup, yard work on foreclosed and Village owned property, street sweeping, and water meter reading. At O'Reilly's request, in September 2011, Lopez and Boyajian informed O'Reilly of the number of days and hours a week the department's core functions were performed.

Around September 2011, Baena asked Lopez why a previous attempt to organize a union at the department had been unsuccessful. Lopez informed Baena that the department employees had previously approached the Village Board with their demands and the Board gave them what they wanted so that the employees would not continue to pursue union representation. Since O'Reilly was not a member of the Board at the time of the previous organizing efforts, Baena asked Lopez, what would happen if the maintenance workers decided to organize now. Lopez

stated, "The guys up there just want to run this like a tight business, and no business wants a union in there."

In October 2011, O'Reilly, Lopez, and Boyajian attended a meeting in which O'Reilly informed Lopez and Boyajian that based upon the information they provided and based upon his own observations, he had determined that the department was scheduling 55 days per week, with each of the department's eleven employees scheduled five days a week, but the department was only spending 35 days on core functions. Lopez did not understand how O'Reilly had arrived at this conclusion. Lopez told O'Reilly that his calculations were not correct, and O'Reilly stated that he would look into Lopez's contentions.

After the meeting, O'Reilly created an Excel spreadsheet detailing his reasoning by creating a schedule for the department. The spreadsheet consists of three different tables. The first table reflected the department's performance of its core functions with eleven employees, the second table reflected the department's performance of its core functions with eight employees, and the third table reflected the department's performance of its core functions with seven employees. The first table was a representation of the time study the trustees had conducted and showed that with eleven employees working five days a week, the department scheduled 55 work days a week, but core functions were only being performed during 30 of those days, with the remaining 25 days consisting of other functions or "unworked man hours." The table showed that the two of the employees were not performing any of the core duties, and was consistent with the fact that as supervisors, Lopez and Boyajian did not regularly perform maintenance duties. Boyajian and Lopez spent most of their time in the department's office and Lopez only performed maintenance duties to fill in for employees who were on vacation. The second and third tables were projections based on a smaller staff. The second table showed that

with eight employees working five days a week, the department would schedule 40 work days a week, but core functions would only be performed 28 of those days, with the remaining 12 days devoted to non-core functions. The third table showed that with seven employees working five days a week, the department would schedule 35 work days a week, but core functions would only be performed 30 of those days, with the remaining 5 days devoted to non-core functions.

Shortly after Thanksgiving 2011, O'Reilly informed the Village's attorney Stanley Kuser that he had made the decision to lay off employees. O'Reilly requested Kuser's legal advice as to whether it was a better decision to lay off the employees immediately or wait until after the holidays. Based upon this discussion, O'Reilly decided to lay off the maintenance employees at the end of the year. O'Reilly chose to keep the layoffs from Lopez and Boyajian because he was concerned that if Lopez and Boyajian knew of the impending layoffs, this information could be passed on to the maintenance workers and could result in fake injuries. According to O'Reilly, previously, a temporary employee "allegedly got injured" the last week of his employment, and O'Reilly was concerned that the same type of incident would occur if an employee knew ahead of time that he or she was being laid off.

After O'Reilly decided that he would lay off employees, he determined that the department's vacation policy would need to change. He informed Lopez that the department could no longer have more than one person on vacation at a time. He did not inform Lopez that this was because there would be fewer employees to fill in for any employee on vacation.

On or before December 8, 2011, Wyant contacted John O'Connor, an organizer from the Union. O'Connor and Wyant discussed the possibility of organizing the maintenance workers and scheduled a meeting for December 8 at a restaurant in a nearby town. Wyant informed the other maintenance workers of the meeting. At the meeting Baena, Cortez, Wyant, and three

other maintenance workers signed union authorization cards. On December 9, 2011, O'Connor filed a representation petition with the Board pursuant to the Board's majority interest procedures.

On December 13, 2011, a Board agent issued a letter to the Village informing it that the Union had filed a representation petition seeking to represent a bargaining unit described as "all full time and regular part time Public Works employees." The petition identified that nine employees were to be included in the proposed bargaining unit. The letter was addressed to O'Reilly and stated that the Board required the Village to immediately submit an alphabetized list of names, job classifications, and signature exemplars for the employees in the petitioned-for unit. The letter also stated that "in the event that you believe that the [Union] obtained its showing of majority support through the use of fraud or coercion, you must provide clear and convincing evidence of that fraud or coercion at the time you file your response to the petition."

On Friday, December 16, 2011, upon receiving the Board's letter, O'Reilly telephoned Lopez. At the time O'Reilly called him, Lopez was with several maintenance workers at a post-Christmas party celebration. O'Reilly asked Lopez what if anything he knew about the Board letter. Lopez told O'Reilly that the letter was probably a solicitation inquiring about the department's interest in being represented by the Union because such solicitations were not uncommon. O'Reilly then asked Lopez about a previous solicitation that occurred before Lopez became a supervisor. Lopez told O'Reilly that there had been an election and the department employees voted against union representation. After Lopez ended the call with O'Reilly, Lopez briefly told Boyajian and Alonzo of the topic of the call. With Alonzo present, Lopez and Boyajian then discussed the phone call in more depth and speculated that the letter O'Reilly received was nothing more than a solicitation. Boyajian then asked Alonzo, "Well, let me ask

you this: Have you guys met with anybody from the union about anything?” Lopez also asked Alonzo whether there was any reason to believe that the letter was anything more than a solicitation. Alonzo denied having any knowledge of the contents of the letter.

On Monday, December 19, 2011, O’Reilly summoned Lopez and Boyajian into his office and showed them the letter from the Board. O’Reilly told Lopez and Boyajian that upon further review of the letter he realized that the maintenance workers had organized and an election would not be required to certify the Union as the maintenance workers’ collective bargaining representative. Lopez was surprised by this news, stating “Holy shit.” He characterized this development as “the best kept secret” in department history.

Later that day, Lopez and Boyajian again met with O’Reilly in his office, this time Kuser also attended the meeting. Lopez and Boyajian told O’Reilly that they did not believe that enough maintenance workers would want a union. Kuser then created three affidavits to present to the employees to attest to their level of union support. The first affidavit stated:

I DID SIGN A CARD IN SUPPORT OF THE OPERATING ENGINEERS, LOCAL 399, AFL-CIO TO BECOME THE EXCLUSIVE BARGAINING REPRESENTATIVE FOR THE EMPLOYEES OF THE PUBLIC WORKS DEPARTMENT OF THE VILLAGE OF STICKNEY, BUT I UNDERSTOOD THAT THE CARD WAS TO HAVE AN ELECTION TO DETERMINE THAT FACT, NOT THAT IT WOULD BE AUTOMATIC IF THEY OBTAINED ENOUGH CARDS. I WANT AN ELECTION.

The second affidavit stated:

I DID SIGN A CARD IN SUPPORT OF THE OPERATING ENGINEERS, LOCAL 399, AFL-CIO TO BECOME THE EXCLUSIVE BARGAINING REPRESENTATIVE FOR THE EMPLOYEES OF THE PUBLIC WORKS DEPARTMENT OF THE VILLAGE OF STICKNEY, BUT I SIGNED THAT CARD BECAUSE I FELT PRESSURED AND COERCED TO DO SO BY THE UNION REPRESENTATIVE AND MY COWORKERS WHO FAVORED A UNION. I DO NOT WANT A UNION.

The third affidavit stated:

I DID NOT SIGN A CARD IN SUPPORT OF THE OPERATING ENGINEERS, LOCAL 399, AFL-CIO TO BECOME THE EXCLUSIVE BARGAINING

REPRESENTATIVE FOR THE EMPLOYEES OF THE PUBLIC WORKS
DEPARTMENT AND I OPPOSE THAT EFFORT.

Kusper advised O'Reilly that O'Reilly should not be present when the maintenance workers were presented with the affidavits in order to prevent the employees from believing that O'Reilly was threatening them. Instead, Kusper recommended that Boyajian present the affidavits to the employees because Boyajian had a close relationship with them, and that Lopez should wait outside the room.

At the end of the work day, the maintenance workers were notified on their work-issued cell phones to go to the Village Hall. Wyant was not present because he was on vacation. When the maintenance workers arrived they initially met with Lopez as a group in a conference room. Lopez told them that the Village had been notified that the maintenance workers had spoken with the Union and that they had signed cards authorizing the Union to become their certified bargaining representative. He told the employees that they would each be taken individually into a room to sign signature verifications. He then instructed them to place their work cell phones and pagers on a table. After they put their phones on the table, Lopez looked into the hallway corridor, closed the door to the room, and said something to the effect of, "I hope you know what you're doing because the mayor is pissed," and "I don't know who did what. I don't know who you talked to. I just hope you guys really, really thought this through, and whatever happens I love you guys."⁵

The employees then individually went into a room where Village Treasurer Kurt Kasnicka and Boyajian were sitting at a table. Each employee sat at the table with Kasnicka and Boyajian. Boyajian stated to each employee that he had some paperwork he wanted the

⁵ While the exact language Lopez used is unclear, I credit the two Union witnesses who testified that Lopez told them that O'Reilly was "pissed" because this is consistent with Lopez testimony that O'Reilly appeared "a little upset."

employee to read over, and that if any of the paperwork pertained to the employee, he should sign it. Kasnicka stated that he was only there as a notary. He also informed the employees that they were not required to sign anything. Boyajian then handed each employee the three affidavits.

All of the maintenance workers refused to sign the affidavits. Each of the maintenance workers did sign a check-in sheet. The employees were told that the reason the Village needed the employees to sign the check-in sheet was so the Village could verify their signatures. Every maintenance worker had previously signed paperwork for the Village including insurance forms and W-2s.

In December 2011, at the direction of O'Reilly, Lopez informed the maintenance workers that they were no longer allowed to park between the public works building and the fire station. Also in December 2011, Baena completed his 17-week Class C water certification course.

On December 27, 2011, O'Reilly and Lopez convened in O'Reilly's office where he showed Lopez the Excel spreadsheet he had created based upon the time study. O'Reilly informed Lopez that he had concluded that the department could conduct the same core duties with as little as seven people. Lopez disagreed with O'Reilly's assessment. O'Reilly then told Lopez that O'Reilly was laying off employees in the department and Lopez had the option to either lay off three or four employees. Lopez decided to lay off three employees. O'Reilly then chose Baena, Cortez, and Wyant as the three employees to lay off because they had the least amount of seniority in the department.

Later that day, Baena, Cortez, and Wyant met with Lopez. Lopez informed them that "the Village was deciding to go in a different direction" and handed each of them an envelope with a termination letter dated the same date. Each letter stated that the Village was terminating

the employee's employment effective December 31, 2011, "due to necessary cutbacks in order to save costs." Each termination letter stated that the employee was entitled to a due process hearing with O'Reilly on December 30, 2011. Lopez told Baena, Cortez, and Wyant that they would be paid until the end of the month, but that they did not have to return to work. The last day Baena, Cortez and Wyant worked in the department was December 27, 2011, but each was paid for work through December 31, 2011.

On December 30, 2011, Baena, Cortez, and Wyant each individually met with O'Reilly in O'Reilly's office. In all three meetings, O'Reilly stated that the termination decision was not a result of any work the employees had done or any of their work habits, but was because the Village had decided to cut back. O'Reilly also explained that a time study was conducted because he was looking into the department's request for an additional employee.⁶ O'Reilly told them that during this time study research, he realized that the department was actually overstaffed and that he could actually cut four people. O'Reilly informed each employee that when he informed Lopez of this conclusion Lopez had stated that the department could not perform its duties with four less employees, and they would go ahead and try three for now. According to O'Reilly's calculations, there was still sufficient time for the department to conduct any "non-core" work it was required to complete. O'Reilly also stated that if at any time this was wrong or if he had made a mistake he would hire back any laid off employees in order of seniority and that filling any needed seasonal positions would also occur in order of seniority.

In the meeting between Baena and O'Reilly, O'Reilly stated that he had conducted the study. O'Reilly told Baena that he conducted research into the department's activities because he was looking into the department's requests for an additional employee. Baena asked O'Reilly

⁶ There is testimony that prior to the time study, Lopez had asked for an additional employee in the department. It is unclear whether in the December 30, 2011, meeting, O'Reilly was referring to Lopez's request or to White's report that employees were overworked.

how the Village could be losing three people when it was hiring an extra man for a shift at the fire station. O'Reilly stated that the fire department operates under a different budget and that he could do what he wanted with the budgets.

In the meeting between Cortez and O'Reilly, O'Reilly stated that Lopez and Boyajian conducted research in September, and by November he had already made his decision to reduce the staff in the department. O'Reilly stated that there was no more need for part-time employees. When Cortez asked whether the Village was retaining Dunow, a part-time seasonal employee, O'Reilly stated, "He's just a part-timer. He'll be gone in a few months."

In the meeting between Wyant and O'Reilly, O'Reilly stated that the supervisors "headed up" a time study, and that this study showed that department could complete the exact same functions with three or four fewer employees. O'Reilly did not respond to Wyant's inquiry about retaining Dunow, who had been employed at the Village for less time than Baena, Cortez, and Wyant. Wyant asked O'Reilly why the Village had paid to send him to the water certification class when it was planning on terminating him. O'Reilly responded that he was unaware that Wyant was taking this course, nor was he aware that the Village paid for the course.

On January 4, 2012, the Board certified the Union as the maintenance workers bargaining representative.

In April 2012, the Village recalled Wyant because a maintenance worker had vacated his employment position in the department. In May 2012, the Village offered Baena and Cortez employment as seasonal employees in the department because two current employees were leaving. In May 2012, Lopez stepped down from his supervisor position and became a maintenance worker.

IV. DISCUSSION AND ANALYSIS

The Village violated Section 10(a)(1) of the Act when it questioned the employees regarding their support for the Union and when it asked employees to sign affidavits attesting to their level of support for the Union. The Village did not violate Section 10(a)(2) and (1) of the Act when it terminated Baena, Cortez, and Wyant's employment because the Union has not met its prima facie case to show that the Village acted with union animus.

A. Evidence Submitted by the Village

The Union argues that the Village's position should not be believed because the Village has not provided evidence corroborating the Village's version of events, nor has the Village provided any "probative documentation" to support O'Reilly's testimony. The Union argues that O'Reilly's testimony should not be credited because it lacks corroboration from witnesses who were aware of the decision to terminate the employees prior to the termination date, and that the Village's single piece of documentary evidence does not establish that O'Reilly's decision to terminate the employees was made prior to the employees' organization efforts.

1. O'Reilly's Testimony

O'Reilly's testimony and the Village's documentary evidence sufficiently establish that the termination decision was reached in November 2011. Despite the Union's argument, no adverse inference can be drawn from the Village's decision not to provide witnesses to corroborate O'Reilly's un rebutted testimony. O'Reilly testified that he conducted a time study with Trustee Walik and Trustee White, and that based upon this study, in November 2011, he decided to terminate at least three public works employees. O'Reilly then discussed the implementation of this decision with the Village's attorney and based on this conversation, O'Reilly decided to wait to implement his decision until after Christmas. The fact that Walik,

White, and Kusper did not testify does not require an inference that if they were called to testify their testimony would have been contradictory to O'Reilly's testimony.

The trier of fact *may* draw an adverse inference from a party's failure to call a witness where (1) the missing witness was under the control of the party against whom the inference is drawn, (2) the witness could have been produced in the exercise of reasonable diligence, (3) the witness was not equally available to the party in whose favor the inference is drawn, (4) a reasonably prudent person would have produced the witness if the party believed the testimony would be favorable, and (5) no reasonable excuse for the failure to produce the witness is shown. Bd. of Ed., City of Peoria School Dist. No. 150 v. Ill. Ed. Labor Relations Bd., 318 Ill. App. 3d 144, 148 (4th Dist. 2000). This missing witness rule does not apply if it appears that the testimony of one not called as a witness would merely have been cumulative of facts already established. Bd. of Regents of Regency Univ. v. Ill. Ed. Labor Relations Bd., 208 Ill. App. 3d 220, 233 (4th Dist. 1991); Chuhak v. Chi. Transit Auth., 152 Ill. App. 3d 480, 489 (1st Dist. 1987).

The failure to call Walik and White does not require an adverse inference be drawn. At the time of the hearing Walik and White were Village trustees, and as such were both equally available to the Union through the subpoena process. Further, the testimony of a corroborating witness would only be necessary if O'Reilly's testimony was in doubt. Since the Union has not presented evidence contrary to O'Reilly's testimony, additional testimony by Walik or White would only serve to corroborate O'Reilly's un rebutted version of events and would be unnecessarily cumulative. See City of Peoria School Dist., 318 Ill. App. 3d at 148 (holding that the ALJ's application of the missing witness rule to draw a negative inference because the testimony was uncorroborated did not constitute reversible error because the ALJ otherwise

found that the testimony was not credible); see also Cnty. of Cook & Sheriff of Cook Cnty., 26 PERI ¶13 (IL LRB-SP 2010) (declining to make an adverse inference against the employer because corroborative testimony may have been repetitive).

The lack of testimony provided by Kusper similarly does not provide sufficient reason to draw an adverse inference against the Village. First, there is insufficient evidence to find that Kusper is within the Village's control. Kusper is not an employee of the Village, and the record is unclear as to whether he is still retained as an attorney for the Village. The third prong is not satisfied because Kusper's testimony would regard information he obtained in his capacity as the Village's attorney. Although O'Reilly testified that he went to Kusper for legal advice, sought advice from Kusper, and made a decision resulting from the advice, O'Reilly did not testify as to what advice Kusper specifically provided. As such, any legal advice O'Reilly sought in his capacity as the Village president from Kusper, in his capacity as a Village attorney, is protected by attorney-client privilege, and an adverse inference cannot be drawn from the Village's decision not to waive this privilege. See Regan v. Garfield Ridge Trust and Sav. Bank, 220 Ill. App. 3d 1078, 1090-91 (2nd Dist. 1991) (upholding the trial court's jury instruction that no adverse inference should be drawn from the party's invocation of attorney-client privilege).

2. Exhibits

With the exception of the Village's Exhibit 5(a), I credit the documentary evidence the Village provided because O'Reilly's testimony sufficiently authenticates the evidence and the Union has provided no contrary evidence. Village's Exhibit 5(a) was not sufficiently authenticated, such that it cannot be relied upon. This is not a finding that O'Reilly's testimony in any way misrepresents this document, but simply that he did not fully explain the steps reached to produce the exhibit, and as such it will not be relied upon.

The unreliability of Village's Exhibit 5(a) does not in and of itself make Village's Exhibits 1 and 5(b) also unreliable because the documents do not contain any unexplained manipulations, and the Union did not object to their authenticity. O'Reilly authenticated the excel spreadsheet by testifying that he created it and that he had not edited it since November. The Union posed no objections and unlike Village's Exhibit 5(a), Village's Exhibits 1 and 5(a) are not obviously inconsistent with the testimony of the exhibits content or creation. The Union is correct that the spreadsheet does not establish that O'Reilly made his decision in November, but the spreadsheet demonstrates the bases for his decision. The spreadsheet indicates that O'Reilly documented his opinion that the department could function effectively with less employees. His un rebutted testimony establishes that this information led to his decision to terminate several employees, and that he made this decision in November. As the Union has not rebutted O'Reilly's testimony regarding the contents of the spreadsheet, and because the Union has not provided documentation to support its position that the decision was made in December as a result of the employees' union activity, the Village's evidence is un rebutted and there is no reason to disbelieve the Village's version of events.

B. Section 10(a)(1)

The Village violated Section 10(a)(1) of the Act by questioning the employees concerning their union support and asking them to sign affidavits.

Section 10(a)(1) of the Act prohibits an employer or its agents from interfering with, restraining, or coercing employees for exercising their rights guaranteed under the Act.⁷ An

⁷ Section 10 of the Act states in relevant part:

(a) It shall be an unfair labor practice for an employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation; existence or administration of any labor organization or contribute financial or other support to it;

employer violates Section 10(a)(1) of the Act when it engages in conduct that reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights protected by the Act. Cnty. of Cook & Sheriff of Cook Cnty., 28 PERI ¶155 (IL LRB-LP 2012).

An employer's interrogation of employees violates Section 10(a)(1) of the Act when under the totality of the circumstances the questioning would reasonably tend to interfere with, restrain, or coerce the employees' rights under the Act. Cnty. of Union, 20 PERI ¶9 (IL LRB-SP 2003). When reviewing the totality of circumstances, the relevant factors to consider include (1) the background, (2) the nature of the information requested, (3) the identity of the questioner, and (4) the place and the method of the interrogation. Hardin Cnty. Ed. Assoc. v. Ill. Ed. Labor Rel. Bd., 174 Ill. App. 3d 168, 189 (4th Dist. 1988); Cnty. of Union, 20 PERI ¶9.

Under the totality of the circumstances, the Village's questions regarding each employee's level of union support and asking the employees to sign affidavits tends to restrain, coerce, or interfere with the employees' rights under the Act. The Village specifically asked every employee to attest whether he was involved in the organizing effort. Hardin Cnty. Ed. Assoc., 174 Ill. App. 3d at 189, citing Club Monte Carlo Corp., 280 NLRB 257 (1986) (finding employer's interrogation of employees was an unlawful attempt to determine the identity of the employee who instigated the protected activity).

In this case, the questioner was the employees' direct supervisor and an agent of the Village. Boyajian was specifically chosen to represent the Village because of his close relationship to the employees, and although the Village contends that the employees did not feel coerced, the subjective feelings of the employees are irrelevant. An alleged violation of Section

provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

10(a)(1) is analyzed from the objective viewpoint of an employee, because the Act is “concerned with the effect of an employer's actions on the free exercise of employee rights regardless of the employer's purpose.” City of Mattoon, 11 PERI ¶2016 (IL SLRB 1995). There is no requirement that the Village intended to coerce the employees, nor is there a requirement that the employees were actually coerced by the Village’s actions. Vill. of Ford Heights, 26 PERI ¶2017 (IL LRB-SP 2010); Vill. of Elk Grove, 10 PERI ¶2001 (IL SLRB 1993).

The circumstances surrounding the meeting also support a finding that the Village violated Section 10(a)(1) of the Act. Lopez’s comments that “the mayor is pissed,” and “I don’t know who did what. I don’t know who you talked to. I just hope you guys really, really thought this through, and whatever happens I love you guys,” implies that O’Reilly was upset because the employees contacted the Union and indicated that there may be adverse consequences for the employees.

Further, the place and the method of the interrogations tended to interfere with the employees’ rights under the Act because they served as an attempt to violate the employees’ right to privacy in their personal sentiments regarding union representation, which would chill the employees’ exercise of their right to full freedom of association, self-organization, and union representation. Cnty. of Du Page v. Ill. Labor Rel. Bd. State Panel, 231 Ill. 2d 593, 610 (2008), citing Pac. Molasses Co. v. Nat’l Labor Rel. Bd., 577 F. 2d 1172, 1182 (5th Cir. 1978). In sum, the Employer violated Section 10(a)(1) of the Act when it questioned employees regarding their support for the Union and asked the employees to sign affidavits attesting to this.

C. Section 10(a)(2) and (1)

The Village did not violate Section 10(a)(2) and (1) of the Act when it terminated Baena, Cortez, and Wyant because the Union has not met its burden to show that the Village acted out of union animus.

Section 10(a)(2) of the Act states that it “shall be an unfair labor practice for an employer or its agents to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization.” To establish a prima facie case of discrimination under Section 10(a)(2) of the Act, the charging party must prove by a preponderance of the evidence, that (1) the employee was engaged in protected union activity, (2) the employer was aware of the employee’s protected union activity, (3) the employer took adverse action against the employee, and (4) the employer’s action was motivated by the employer’s animus toward the employee’s protected union activity. Cook Cnty. v. Ill. Labor Rel. Bd., 2012 IL App (1st) 111514 ¶25, citing City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 346 (1989). To satisfy the fourth element, a party must establish a causal link between the employee’s union activity and the employer’s adverse action, such that the protected union activity was a substantial or motivating factor in the employer’s adverse action against the employee. Pace Suburban Bus Div. of Reg’l Transp. Auth. v. Ill. Labor Rel. Bd., 406 Ill. App. 3d 484, 495, citing Speed Dist. 802, 392 Ill. App. 3d 628, 636 (1st Dist. 2009). Absent this causal link the prima facie case is not satisfied.

Once a charging party establishes a prima facie case, the burden shifts to the employer to demonstrate that it would have taken the same action for legitimate business reasons even without the discriminatory motive. City of Burbank, 128 Ill. 2d at 346. However, simply proffering a legitimate business reason for the adverse action does not satisfy this burden. Id.

The fact finder must determine whether the proffered reason is bona-fide or pretextual. Id. If the employer did not actually rely on the proffered reason, then the reason is pretextual and the inquiry is complete. Id. Conversely, if the employer advances a legitimate reason and is found to have relied upon that reason, then the inquiry continues and is characterized as dual motive. Id. at 347. The employer then must demonstrate by a preponderance of the evidence that it would have taken the same adverse action notwithstanding the employee's union activity. Id. There is no dispute that Baena, Cortez and Wynant engaged in protected union activity by signing authorization cards, nor is there any dispute that their terminations were adverse employment actions. The parties only dispute whether the second and fourth prongs are satisfied.

1. Knowledge

The Union has not satisfied the second prong of its prima facie case because it has failed to show that the Village had knowledge of the employees' union activity at the time it decided to terminate the employees. The Village decided to terminate the employees in November, but the employees did not organize until December. As such, the Village could not have had knowledge of an event that had not yet occurred. In the alternative, if this prong is analyzed from the time the adverse action actually occurred, rather than when the Village decided to take the adverse action, this prong is still unsatisfied. At the time the Employer terminated Baena, Cortez, and Wyant, the Village was only aware that a majority of the employees had signed the majority interest petition, and there is no evidence that the Village had knowledge that Baena, Cortez, and Wyant were included in that majority.

~~However, knowledge of a specific employee's union activity is not necessarily required.~~

When an employer engages in a pattern of adverse employment actions for the purpose of

discouraging union activity or to retaliate against employees as a whole because of the union activity of some, its conduct is deemed unlawful, even in the absence of evidence that it was aware of the specific union sentiments of individual employees. North Shore Sanitary Dist., 9 PERI ¶2014 (SLRB 1993), aff'd. North Shore Sanitary Dist. v. Ill. State Labor Rel. Bd., 262 Ill. App. 3d 279, 289 (2nd Dist. 1994); Rockford Township Hwy. Dep't., 2 PERI ¶2013 (Ill. SLRB 1987), aff'd. 153 Ill. App. 3d 863, 881 (2nd Dist. 1987); M.S.F. Indus., Inc. v. NLRB, 568 F.2d 166, 176 (10th Cir. 1977). General retaliation by an employer against the work force can discourage the exercise of protected rights just as effectively as adverse action taken against only specifically identified union supporters. Birch Run Welding & Fabricating v. NLRB, 761 F. 2d 1175 (6th Cir. 1985).

In mass discharge cases, the fourth prong must first be satisfied in order to demonstrate that the employer's animus extended to the group as a whole. In order to satisfy the fourth prong, the Union must prove that the employees' signing of authorization cards was a substantial or motivating factor in O'Reilly's decision to terminate three department employees. As discussed below, the Union has failed to show that the decision to terminate the employees was related to their union activity, and as such, the second prong is not met because the fourth prong is not met.

2. Animus as a Substantial or Motivating Factor

The existence of a causal link between an employee's protected activity and the employer's adverse action is a question of fact, and as such can be established by direct evidence or inferred by circumstantial evidence including an employer's expressed hostility toward unionization; the timing of the adverse action in relation to the union activity; a pattern of disparate treatment of those engaging in union activity; shifting explanations for the adverse actions; and inconsistency in the reasons given for its action against the employee and the

employer's other actions. City of Burbank, 128 Ill. 2d at 345-346. Mere proof of union animus, independent of an examination into causation, is not sufficient to establish discrimination. City of Springfield, 6 PERI ¶2004 (IL SLRB 1989). See NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 398 (1983).

i. Expressed Hostility Toward Unionization

Through its agents, the Village has repeatedly expressed hostility towards unionization. This hostility is evidenced by statements made by Boyajian and Lopez, and by O'Reilly's reaction to the petition filed by the Union.

Boyajian specifically warned Baena and Wyant that if they organized the Village would "find a way to get rid of" them.⁸ Although the Union abandoned its argument that this statement is an independent violation of that Act, the statement is admissible as evidence of the Village's animus. See Pace Suburban Bus Div., 406 Ill. App. 3d at 465 (affirming the Board's consideration of conduct that was untimely as to independently violate the Act because the conduct was considered to determine the true character of the employer's motive). Here Boyajian is speculating at a possible outcome. At most this is Boyajian's opinion of what actions the trustees and O'Reilly will likely take if the maintenance workers seek union representation. However, since Boyajian provides no explanation as to the basis for this opinion, this statement cannot be given any weight in the determination of whether the Village, through its agent O'Reilly, terminated Baena, Cortez, or Wyant at least in part because of O'Reilly's union animus.

⁸ I do not credit Boyajian's testimony that he never made such a statement. Wyant and Baena testified that this statement was made in February 2011, while they were discussing Iovino's suspension, and credibly testified that Boyajian was in the lunchroom at the time Wyant and Baena were having this discussion. Boyajian could only testify that he vaguely remembered Iovino's suspension, and as such I do not credit his less clear recollection of the incident.

Lopez conveyed the Village's aversion to unionization when he informed Baena of the department's previous organizing attempts. This statement is evidence that the Village is averse to its employees' organizing, and would negotiate as to avoid such organization. Lopez's statement that the Village wants "to run [the department] like a tight business, and no business wants a union in there," is also evidence of the Village's union animus.⁹ While Lopez's statement is also unsupported by explanation, it is reliable because it does not involve the speculation of some future event as Boyajian's does, rather it is an opinion of how the Village chooses to operate.

Finally, O'Reilly's hostility towards the unionization of Village employees is evidenced by his immediate phone call to Lopez upon receiving the petition, and O'Reilly's negative reaction to the petition. Lopez told the employees that O'Reilly was pissed, but that statement was based upon Lopez's own observation, and Lopez's testimony downplayed O'Reilly's reaction by stating that O'Reilly was "a little upset." Whether mild or extreme, O'Reilly's negative reaction is evidence of his hostility towards the maintenance workers' organizing.

ii. Pattern of Disparate Treatment

There is no evidence of disparate treatment. While the employees that were discharged did sign authorization cards, the December 19th meeting is evidence that the Village was unaware of which specific employees signed authorization cards. Also, there is no evidence of disparate treatment of the public works employees compared to other Village employees who were not organizing.

The Union also argues that the changes in parking and vacation scheduling were made after the Union filed the petition with the Board and are evidence of the Village's animus.

⁹ As noted above, Baena's testimony of Lopez's statements referring to past events was not disputed by Lopez. Also, as an agent for the Village, Lopez's statements are an admission of the Village's desires, and the Village's post-hearing brief does not argue that these statements should not be relied upon.

Without additional evidence, the Union has not established that the parking change is evidence of union animus. In addition, the vacation change is a direct result of having a smaller staff.

iii. Shifting Explanations

The Village's explanation for discharging the three employees has not shifted. The Village has consistently maintained that it discharged three employees because it determined that the department was overstaffed. The Village further contends that reducing the staff would enable it to cut costs. Contrary to the Union's argument, the Village's decision not to inform the department of the pending terminations does not demonstrate shifting reasoning creating an inference of discriminatory intent. The only reason the Village offered for its decision not to inform the department of the pending terminations is because it feared that the employees might fake injuries. It is plausible that this was in fact O'Reilly's reason for not informing anyone in the department of the pending layoffs. In any event, a poor decision is not itself evidence of animus. See City of Lake Forest, 29 PERI ¶52 (IL LRB-SP 2012) (finding that an employer's decision is not pretextual simply because it is ill-informed or ill-considered); Macon Cnty. Hwy. Dep't, 4 PERI ¶2018 (IL SLRB 1988).

iv. Inconsistency

The Village's decision to eliminate staff in the department to cut costs is consistent with its other actions. The Union argues that both the addition of a firefighter to the fire department and the 2012 budget demonstrate that the Village did not need to cut costs. However, these are different departments and the record contains no evidence that they have similar functions or that the employees perform the same duties. The Village's explanation that the fire department's budget has no bearing on the public works budget is credible. The Village does not contend that it lacks funds. Rather the Village contends that it desired to reallocate existing funds because it

determined that the public works did not need the amount of staff it employed. Also, the record demonstrates that the time study conducted by O'Reilly and several Village Trustees was spurred by a meeting that occurred between department employees and Trustee White. The Village finalized its budget in July, and this meeting took place in August, and thus, the 2012 budget would not reflect the results of the time study. Also, the time study consisted of O'Reilly's and Trustee Walik's observations and information compiled from Lopez and Boyajian regarding the department's core functions. The spreadsheet O'Reilly created as a result of the time study shows that two of the eleven public works employees did not perform core functions, and that fifteen scheduled days were not spent conducting core functions. This is supported by testimony that Boyajian mostly stayed in the office, and that Lopez only worked outside the office when he was filling in for an employee who was on vacation. The fact that Boyajian and the current department supervisor now spend a majority of their time performing the core functions as well as their former supervisory duties lends support to the Village's position that it concluded that the department was overstaffed.

The Village's lack of a reason for its decision to wait to terminate the employees until after Christmas is not inconsistent with its reason to terminate the employees. O'Reilly testified that when he decided to terminate several employees, he was unsure of whether he should implement the terminations before or after the holiday, and that after a conversation with Attorney Kusper, he decided that he would terminate the employees at the end of the year.

v. Timing and Causal Link

The timing of the employees' discharges is not suspicious because while the discharges occurred only two weeks after the Village was notified that the employees sought union representation, the decision to discharge the employees was made prior to the union activity.

The relevant inquiry is whether the employer's decision was influenced by the union activity. See Vill. of Hazel Crest, 30 PERI ¶72 (IL LRB-SP 2013) (analyzing discriminatory motive from the time of the decision to take the adverse action); Wheeling Park Dist., 18 PERI ¶2031 (IL LRB-SP ALJ 2002). While the timing of the action in proximity to the union activity can support an inference of union animus, when the facts demonstrate that the motive was firmly established prior to the union activity there can be no link between these two. Nonetheless, mere proximity in time is insufficient to infer causation. Hardin Cnty. Ed. Assoc. v. Ill. Ed. Labor Rel. Bd., 174 Ill. App. 3d at 184-185; see Cook Cnty. Public Defender, 11 PERI ¶3015 (IL LLRB 1995). Here, proximity in time does not support an inference that the Village terminated the employees due to their union activity because the termination was an implementation of the Village's earlier decision. See Macon Cnty. Hwy. Dep't., 4 PERI ¶2018; Wheeling Park Dist., 18 PERI ¶2031.

Further, since the Village made the decision to lay off employees before Baena, Cortez, and Wyant engaged in union activity, there can be casual connection between the employees' union activity and the Village's adverse action. As such, the Union has not satisfied its prima facie case because it has not demonstrated by a preponderance of the evidence that there is a causal connection between the Village's decision to terminate three employees and the employees' union activity.

In the alternative, even if the Village's union animus was sufficient to satisfy the Union's prima facie case, the Village has successfully demonstrated that it would have terminated at least three maintenance workers even if the employee's had not chosen to organize, because that decision was made prior to the employees' organizing efforts. In sum, the Village did not violate Section 10(a)(2) and (1) of the Act.

V. CONCLUSIONS OF LAW

The Village violated Section 10(a)(1) of the Act when it questioned employees regarding their support for the Union and when it asked employees to sign affidavits attesting to their level of support for the Union. The Village did not violate Section 10(a)(2) and (1) of the Act when it terminated Baena, Wyant, and Cortez.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Respondent, the Village of Stickney, its officers and agents shall:

1. Cease and desist from:
 - a. Interfering with, restraining, or coercing employees in the exercise of rights guaranteed under the Act by questioning employees regarding their support for the Union and asking employees to sign affidavits attesting to their level of support for the Union.
 - b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act.
2. Take the following affirmative step which would effectuate the policies of the Act:
 - a. Post for 60 consecutive days, at all places where notices to the employees of the Village of Stickney are regularly posted, signed copies of the attached notice.
 - b. Notify the Board, in writing within 20 days of the date of the Board's Order, of the steps that the Village has taken to comply herewith.

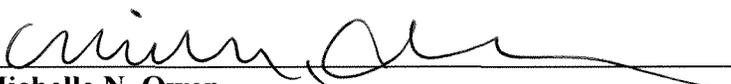
VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order in briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service

of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within seven days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, IL 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 3rd day of July, 2014.

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


Michelle N. Owen
Administrative Law Judge

NOTICE TO EMPLOYEES

FROM THE ILLINOIS LABOR RELATIONS BOARD

The Illinois Labor Relations Board has found that the Village of Stickney 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 protected, concerted activity.
- To engage in self-organization.
- To form, join, or assist 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 NOT interfere with, restrain, or coerce employees in the exercise of rights guaranteed under the Act by questioning employees regarding their support for the union or asking employees to sign affidavits attesting to their level of support for the union.

WE WILL preserve, and upon request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of relief due under the terms of this decision.

This notice shall remain posted for 60 consecutive days at all places where notices to employees are regularly posted.

Date of Posting

Village of Stickney (Employer)

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, 1st Floor
Springfield, Illinois 62702-1271
(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.**
