STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Tyron McCullough,	)	
	)	
Charging Party	)	
	)	Case Nos. S-CA-12-197
and	)	S-CA-12-201
	)	S-CA-12-211
Harvey Park District,	)	
	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On June 18, 2012, Tyron McCullough (Charging Party) filed a charge with the State Panel of the Illinois Labor Relations Board (Board), in Case No. S-CA-12-197, pursuant to Section 11 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act), and the Board's Rules and Regulations, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On June 20, 2012, Charging Party filed a charge in Case No. S-CA-12-201. On June 25, 2012, Charging Party filed a charge in Case No. S-CA-12-211. On January 16, 2013, Charging Party filed amended charges. The charges were investigated in accordance with Section 11 of the Act, and on May 29, 2013, the Board's Executive Director issued a complaint for hearing. The complaint alleges that Harvey Park District (Respondent) violated Section 10(a)(3), (2), and (1) of the Act when it failed to pay Charging Party a scheduled salary increase, failed to pay Charging Party for the correct number of hours worked, suspended Charging Party without pay on June 20, 2012, suspended Charging Party for five days without pay on August 28, 2012, and suspended Charging Party without pay and pending termination on September 10, 2012.

I. BACKGROUND

According to the affidavit of service attached to the complaint for hearing, the Board mailed a copy of the complaint to Respondent's attorney by U.S. mail on May 29, 2013.[1] The complaint contained the following statement:

> **RESPONDENT IS HEREBY NOTIFIED** that pursuant to Section 1220.40(b) of the Board's Rules and Regulations, 80 Ill. Admin. Code, §§1200-1240, it must file an answer to this complaint with Michelle Owen, Illinois Labor Relations Board, 160 N. LaSalle St., Ste. S-400, Chicago, IL 60601, and serve a copy thereof upon the Charging Party within 15 days after service of the complaint upon it. Said answer shall include an express admission, denial or explanation of each and every allegation of this complaint. **Failure to specifically respond to an allegation shall be deemed an affirmative admission of the facts or conclusions alleged in the allegation. Failure to timely file an answer shall be deemed an admission of all material facts or legal conclusions alleged and a waiver of hearing. The filing of any motion or other pleading will not stay the time for filing an answer.**

Section 1200.30(c) of the Rules provides that a document is presumed served on a party three days after it is mailed. Service on Respondent was therefore presumed effective on Monday, June 8, 2013.[2] Under Section 1220.40(b) of the Rules, Respondent was required to submit an answer to the complaint within 15 days of service. Thus, a timely answer should have been postmarked by Tuesday, June 18, 2013. Respondent did not file an answer by that date.[3]

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[1] At all times material, Attorney Shavonna Hunter of The Stuttley Group has been the attorney of record for Respondent.

[2] Under City of St. Charles, the addressee may rebut the presumption of service with sufficient evidence that actual delivery occurred at a later date. City of St. Charles v. Ill. Labor Relations Bd., 395 Ill. App. 3d 507 (2nd Dist. 2009). Respondent has not offered any evidence to rebut the presumption of service on June 8, 2013.

[3] On Monday, June 17, 2013, Respondent's counsel contacted Board Agent Michael Provines, who was assigned to investigate the unfair labor practice charges in this case, to request an extension of time to file an answer. Board Agent Provines informed counsel that once a complaint for hearing has issued, the administrative law judge assigned to the case should be contacted for any requests. He also noted that requests must be in writing. On Tuesday, June 18, 2013, Respondent's attorney contacted the undersigned requesting an extension of time to file an answer. The undersigned informed counsel that any requests needed to be in writing and that she could seek leave to file a late answer as provided by the Rules and/or seek a variance from the Rules.

On June 19, 2013, Respondent requested leave to file a late answer, and requested that the Board grant a variance from the 15-day filing requirement in Section 1220.40(b). Respondent's counsel maintains that she "was out of the country and did not receive the complaint until June 17, 2013, and as a result will not be able to answer within 15 days." She contends that she "has been diligently working to notify all parties" and is "requesting an extension of time in good faith." On June 19, 2013, Charging Party filed a response objecting to the requests. Charging Party contends that he has been suspended for over nine months, causing him hardship, pain, and suffering. To date, Respondent has not tendered an answer for filing.

II. DISCUSSION AND ANALYSIS

Respondent has failed to show that extraordinary circumstances exist to allow for the late filing of an answer pursuant to Section 1220.40(b)(4), and Respondent's request for a variance pursuant to Section 1200.160 is denied.[4]

Section 1220.40(b) of the Board's Rules provides that:

> Whenever the Executive Director issues a complaint for hearing, the respondent shall file an answer within 15 days after service of the complaint and deliver a copy to the charging party by ordinary mail to the address set forth in the complaint. Answers shall be filed with the Board with attention to the designated Administrative Law Judge.
>
> 1) The answer shall include a specific admission, denial or explanation of each allegation or issue of the complaint or, if the respondent is without knowledge thereof, it shall so state and such statement shall operate as a denial. Admissions

[4] Respondent did not request an extension of time pursuant to Section 1200.30(d) of the Rules. Rather, Respondent requested a "variance to rule 1200.30." Nonetheless, a request pursuant to Section 1200.30(d) would fail. Respondent's request did not comply with the requirements of Section 1200.30(d), which state in part that "the requesting party must specify alternative dates for scheduling the hearing or conference or for the due date of any documents" and "the position of all parties concerning both the postponement or extension requested and the proposed alternative dates must be ascertained in advance by the requesting party and set forth in the request." Respondent did not specify alternative dates for the answer's due date nor did it set forth Charging Party's position concerning the extension and proposed alternative dates. Thus, a request for an extension of time pursuant to Section 1200.30(d) would fail.

> or denials may be made to all or part of an allegation but shall fairly meet the circumstances of the allegation.
>
> 2) The answer shall also include a specific, detailed statement of any affirmative defenses.
>
> 3) Parties who fail to file timely answers shall be deemed to have admitted the material facts and legal conclusions alleged in the complaint. The failure to answer any allegation shall be deemed an admission of that allegation. Failure to file an answer shall be cause for the termination of the proceeding and the entry of an order of default. Filing of a motion will not stay the time for filing an answer.

This rule has been strictly construed by the Board and courts, which have consistently held that a respondent's failure to timely file an answer to a complaint results in admissions of all allegations in the complaint and an entry of default judgment. Wood Dale Fire Prot. Dist. v. Ill. Labor Relations Bd., 395 Ill. App. 3d 523 (2nd Dist. 2009), aff'g Wood Dale Fire Prot. Dist., 25 PERI ¶136 (IL LRB-SP 2008); Metz v. Ill. State Labor Relations Bd., 231 Ill. App. 3d 1079 (5th Dist. 1992), aff'g Circuit Clerk of St. Clair Cnty., 6 PERI ¶2036 (IL SLRB 1990); Peoria Hous. Auth., 11 PERI ¶2033 (IL SLRB 1995); Chicago Hous. Auth., 10 PERI ¶3010 (IL LLRB 1994); Cnty. of Jackson (Jackson Cnty. Nursing Home), 9 PERI ¶2025 (IL SLRB 1993); City of Springfield, Office of Pub. Utils., 9 PERI ¶2024 (IL SLRB 1993).

A. Leave to File a Late Answer

Section 1220.40(b)(4) of the Rules provides that "[l]eave to file a late answer shall only be granted by the Administrative Law Judge if the late filing is due to extraordinary circumstances, which will include among other things: fraud, act or concealment of the opposing party, or other grounds traditionally relied upon for equitable relief from judgments."

Respondent argues that it could not file a timely answer because its legal counsel was out of the country. Respondent contends that counsel "has been diligently working to notify all parties" and is "requesting an extension of time in good faith." Respondent does not allege

fraud, concealment, or other grounds traditionally relied upon for equitable relief from judgments. Rather, Respondent asserts that extraordinary circumstances exist because Respondent's counsel was out of the country and therefore missed the filing deadline. However, the failure of a party's legal representative to meet a deadline due to simple inattention does not constitute an extraordinary circumstance under Section 1220.40(b)(4). First Transit/River Valley Metro, 26 PERI ¶38 (IL LRB-SP 2010), aff'd by unpub. order, 27 PERI ¶61 (3rd Dist. 2011); City of Markham, 27 PERI ¶7 (IL LRB-SP 2011). Except in narrowly defined circumstances, negligence by a party's attorney does not shield it from the consequence of that negligence. Amalgamated Transit Union, Local 241, 29 PERI ¶78 (LRB-SP 2012) (citing Wood Dale, 25 PERI ¶136, and Bd. of Educ. Thornton Twp. High Sch. Dist. No. 205 v. Ill. Educ. Labor Relations Bd., 235 Ill. App. 3d 724, 730-31 (4th Dist. 1992)). There is nothing in Respondent's motion that indicates that Respondent could not have filed a timely answer or excuses its failure to file a timely answer. Respondent has not show any mitigating circumstances establishing that the late filing was due to extraordinary circumstances. Respondent's failure to file a timely answer was based on simple inattentiveness, not extraordinary circumstances. Therefore, Respondent's request for leave to file a late answer is denied.

B. Request for a Variance

A variance of any provision of the Rules is permitted by Section 1200.160, which states:

> The provisions of this part or 80 Ill. Adm. Code 1210, 1220 or 1230 may be waived by the Board when it finds that:
> a) The provision from which the variance is granted is not statutorily mandated;
> b) No party will be injured by the granting of the variance; and
> c) The rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome.

All three prongs must be satisfied for the variance to be entertained by the Board. However, even if all three prongs are met, granting a variance remains a matter of the Board's

discretion and not a matter of right by the party. City of Ottawa, 27 PERI ¶6 (IL LRB-SP 2011). The Appellate Court has found that strict adherence to a rule is unreasonable and unnecessarily burdensome if the respondent can show (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim in the original action; and (3) due diligence in filing the petition for relief. Cook Cnty. State's Attorney v. Ill. State Labor Relations Bd., 292 Ill. App. 3d 1, 11 (1st Dist. 1997). A party's excuses, explanations, and mitigating circumstances must also be considered in deciding whether strict adherence to the rule would be unreasonable or unnecessarily burdensome. Wood Dale, 395 Ill. App. 3d at 532-33; Amalgamated Transit Union, Local 241, 29 PERI ¶78.

Here, the first requirement of Section 1200.160 is met because the 15-day filing rule in Section 1220.40(b) is not statutorily mandated. However, the second and third requirements are not satisfied. Charging Party contends that due to the alleged unlawful actions of Respondent, he has been suspended for over nine months, causing him hardship, pain, and suffering. Since Charging Party presumably has been unemployed since his suspension nine months ago, any further delay in resolving the alleged unfair labor practices that led to Charging Party's unemployment would injure Charging Party to some degree. See First Transit/River Valley Metro, 26 PERI ¶38. Further, Charging Party has done nothing to unduly delay or interfere with the proceedings before the Board. Rather, Charging Party has attempted to reach a speedy resolution of his case by immediately objecting to Respondent's request to file a late answer. In addition, Respondent has yet to file an answer to the matter, approximately four weeks after the deadline, which is further evidence that Charging Party would be injured if the requested variance is granted. See id. Thus, Charging Party would sustain additional prejudice or injury if Respondent's request for a variance was allowed.

Failure to meet the second requirement is sufficient reason to deny the variance, but Respondent also fails to meet the third requirement: strict compliance with the time limit for filing an answer is not unreasonable or unnecessarily burdensome under the circumstances in this case. Respondent contends that it was unable to file a timely answer because Respondent's counsel was out of the country, and as a result, counsel has been diligently working to notify all parties. I find that Respondent has failed to show that it has a meritorious defense to the charges alleged in the complaint or that it exercised due diligence in presenting a meritorious defense since Respondent has not set forth any defense to the allegations. Respondent has also not shown sufficient due diligence in filing its request for relief. Although Respondent's counsel contacted the Board one day before the answer's due date, she did not file her request until one day after the answer was due. Further, Respondent's counsel has been assigned to the case since at least January 2013, the date she filed a notice of appearance. Thus, counsel was aware that the unfair labor practice charges had been filed and were being investigated. Respondent's counsel should have made arrangements for meeting any filing deadlines during her absence from the country. Further evidence of the lack of due diligence is that the answer was due approximately four weeks ago and the Board has not received an answer. This does not demonstrate a diligent effort to minimize the adverse effect of its delay. The Board's Rules note that the "filing of a motion will not stay the time for filing an answer."

Respondent has not shown that the rule requiring timely filing of an answer is, in this case, unreasonable or unnecessarily burdensome. Without any sufficient mitigating circumstances excusing Respondent's untimely answer, a variance is not warranted.[5] The

[5] Even if the Board were to find that all three conditions were met under Section 1200.160, I would not, based upon the alleged facts, exercise such discretion to grant a variance and leave to file a late answer. The need to consistently apply long-standing rules outweighs any unreasonableness of application or unnecessary burden in this case.

complaint fully informed Respondent of the required filing period for an answer and the consequences for not complying. As noted previously, the Board has consistently held that an entry of default judgment is appropriate in such circumstances. Thus, I find that Respondent has admitted the material facts and legal conclusions alleged in the complaint, and waived its right to a hearing in this matter.

III. RESPONDENT'S ADMISSIONS

By failing to file an answer, Respondent has admitted the following material facts and legal allegations as stated in the complaint:

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

2. At all times material, 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, Respondent has been subject to the Act, pursuant to Section 20(b) of the Act.

4. On or about November 28, 2011, Teamsters, Local 700 (Union) filed a majority interest petition to represent all employees employed full-time or part-time by the Harvey Park District as maintenance employees (Unit) in Case. No. S-RC-12-041.

5. On or about January 30, 2012, the Board certified the Union as the exclusive representative of the Unit referenced in paragraph 4.

6. At all times material, Respondent employed Brian Ingram in the rank or title of Director.

7. At all times material, Ingram was an agent of Respondent, authorized to act on its behalf.

8. At all times material, Eric Patterson has served on Harvey Park District's Board of Commissioners.

9. At all times material, Patterson was an agent of Respondent, authorized to act on its behalf.

10. At all times material, Charging Party, Tyron McCullough, was a public employee within the meaning of Section 3(n) of the Act.

11. At all times material, Respondent has employed Charging Party in the working title of maintenance field technician or superintendent of maintenance.

12. At all times material, Charging Party has been a member of the Unit.

13. On or about December 22, 2010, Charging Party filed an unfair labor practice charge with the Board in Case No. S-CA-11-127.

14. At all times material, Charging Party was an active and visible supporter and organizer for Teamsters, Local 700 in the representation of the Unit referenced in paragraph 4.

15. At all times material, Charging Party was President of the Unit referenced in paragraph 4.

16. On or about June 1, 2012, Respondent promoted Charging Party to superintendent of maintenance.

17. On or about June 15, 2012, Respondent failed to pay Charging Party the scheduled salary increase effective with the June 1, 2012 promotion referenced in paragraph 16.

18. On or about June 15, 2012, Respondent failed to pay Charging Party the correct number of hours he worked for the period from May 31, 2012 through June 13, 2012.

19. On or about June 18, 2012, Charging Party filed an unfair labor practice charge in Case No. S-CA-12-197.

20. On or about June 20, 2012, Respondent suspended Charging Party without pay for divulging information discussed in Respondent's Executive Board Session.

21. On or about June 20, 2012, Respondent suspended Charging Party without pay for dispensing Harvey Park District gasoline into a personal vehicle.

22. On or about June 20, 2012, Charging Party filed an unfair labor practice charge in Case No. S-CA-12-201.

23. On or about June 25, 2012, Charging Party filed an unfair labor practice charge in Case No. S-CA-12-211.

24. On or about August 28, 2012, Respondent suspended Charging Party for five days without pay for violations of Respondent's employee policy manual.

25. On or about September 3, 2012, Charging Party returned to work from the five day suspension referenced in paragraph 24.

26. On or about September 3, 2012, after Charging Party returned to the worksite from the suspension referenced in paragraph 24, Patterson instructed a Harvey Park District employee to "tell Ty to leave or I will call the police on him."

27. On or about September 10, 2012, Respondent suspended Charging Party, without pay and pending termination, for returning to work while still on suspension from the discipline referenced in paragraph 24.

28. On or about September 10, 2012, Respondent suspended Charging Party, without pay and pending termination, for refusing to relinquish keys to District vehicles when ordered to do so on September 3, 2012.

29. Charging Party's actions, referenced in paragraphs 13, 14, 15, 19, 22, and 23 are protected, concerted actions within the meaning of the Act.

30. Respondent took the actions described in paragraphs 17, 18, 20, 21, 24, 26, 27, and 28 because Charging Party has filed a petition, charge or provided information or testimony under the Act as referenced in paragraphs 4, 13, 19, 22, and 23.

31. By its acts and conduct referenced in paragraph 30, Respondent has disciplined, suspended, terminated or taken adverse action against a public employee in violation of Section 10(a)(3) of the Act.

32. Respondent took the actions described in paragraphs 17, 18, 20, 21, 24, 26, 27, and 28 in order to discourage unit employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or support by members of Charging Party's bargaining Unit.

33. By its acts and conduct as described in paragraph 32, Respondent has discriminated against public employees in order to discourage membership in or support for a labor organization in violation of Section 10(a)(2) of the Act.

34. Respondent took the actions described in paragraphs 17, 18, 20, 21, 24, 26, 27, and 28 in retaliation for Charging Party's actions referenced in paragraph 29.

35. By its acts and conduct as described in paragraph 34, Respondent has interfered with, restrained or coerced public employees in the exercise of rights guaranteed in the Act, in violation of Section 10(a)(1) of the Act.

IV. CONCLUSIONS OF LAW

Respondent violated Section 10(a)(3), (2), and (1) of the Act when it failed to pay Charging Party a scheduled salary increase, failed to pay him for the correct number of hours worked, and suspended Charging Party.

V. RECOMMENDED ORDER

IT IS HEREBY ORDERED that Respondent, Harvey Park District, its officers and agents shall:

1. Cease and desist from:

(a) retaliating against Tyron McCullough, or any of its employees, for engaging in union or protected, concerted activity;

(b) discriminating against Tyron McCullough, or any of its employees, for signing or filing an affidavit, petition, or charge or providing any information or testimony under the Act;

(c) in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Tyron McCullough whole for all losses incurred as a result of (1) the failure to pay McCullough the scheduled salary increase effective with his June 1, 2012 promotion, (2) the failure to pay McCullough the correct number of hours he worked for the period from May 31, 2012 through June 13, 2012, (3) the suspension without pay that McCullough received on June 20, 2012, (4) the suspension for five days without pay that McCullough received on August 28, 2012, and (5) the suspension without pay and pending termination that McCullough received on September 10, 2012.

(b) Effective immediately, rescind the disciplinary action taken against McCullough on June 20, 2012, August 28, 2012, and September 10, 2012, without prejudice to his seniority or other rights and privileges.

(c) Remove from all files and records, including Tyron McCullough's personnel file, any and all documents and references to the disciplinary action taken against him on June 20, 2012, August 28, 2012, and September 10, 2012, and notify him in writing both that this has been done and that evidence of his unlawful discipline will not be used as a basis for future personnel actions against him.

(d) 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 relief due under the terms of this decision.

(e) Post at all places where notices to employees are normally posted, copies of the notice attached hereto and marked "Addendum." Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

(f) Notify the Board in writing, within 20 days from the date of this Decision and Order, of the steps Respondent has taken to comply herewith.

VI. 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 at 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 22nd day of July, 2013.

Michelle N. Owen
Administrative Law Judge
Illinois Labor Relations Board

NOTICE TO EMPLOYEES

FROM THE
ILLINOIS LABOR RELATIONS BOARD

The Illinois Labor Relations Board has found that the Harvey Park District 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 retaliate against Tyron McCullough, or any of our other employees, for engaging in union or protected, concerted activity.

WE WILL NOT discriminate against Tyron McCullough, or any of our other employees, for signing or filing and affidavit, petition, or charge or providing any information or testimony under the Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights guaranteed them under the Act.

WE WILL rescind the disciplinary action taken against Tyron McCullough on June 20, 2012, August 28, 2012, and September 10, 2012, on May 18, 2012 and May 19, 2012, immediately and without prejudice to his seniority or other rights and privileges.

WE WILL make Tyron McCullough whole for all losses incurred as a result of (1) the failure to pay McCullough the scheduled salary increase effective with his June 1, 2012 promotion, (2) the failure to pay McCullough the correct number of hours he worked for the period from May 31, 2012 through June 13, 2012, (3) the suspension without pay that McCullough received on June 20, 2012, (4) the suspension for five days without pay that McCullough received on August 28, 2012, and (5) the suspension without pay and pending termination that McCullough received on September 10, 2012.

WE WILL expunge from all files and records, including Tyron McCullough's personnel file, any and all documents and references to the disciplinary actions taken against him on June 20, 2012, August, 28, 2012, and September 10, 2012, and notify him in writing both that this has been done and that evidence of his unlawful discipline will not be used as a basis for future personnel actions against him.

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	Harvey Park District (Employer)

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