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

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| Jovonne Smythe, | ) | |
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| Charging Party | ) | |
| | ) | Case Nos. S-CA-13-002 |
| and | ) | S-CA-13-022 |
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| State of Illinois, Department of Central Management Services, | ) | |
| | ) | |
| | ) | |
| Respondent | ) | |

## ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On July 5, 2012, and August 28, 2012, Jovonne Smythe (Charging Party or Smythe) filed charges with the Illinois Labor Relations Board's State Panel (Board) alleging that the State of Illinois, Department of Central Management Services (Respondent) engaged in unfair labor practices within the meaning of Section 10(a)(3), (2), and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2010), as amended. The charges were investigated in accordance with Section 11 of the Act and on November 15, 2012, the Board's Executive Director issued a Complaint for Hearing. On or about February 8, 2013, the Respondent filed a Motion to Defer to the collective bargaining agreement's grievance and arbitration process. On or about February 18, 2013, the Charging Party filed its Objection to Respondent's Motion to Defer to Arbitration and Charging Party's Motion for Continuance.

## 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 under the jurisdiction of the Board pursuant to Section 5 of the Act.
3. At all times material, Smythe held the payroll title of Office Specialist in the Case Assignment Placement Unit (CAPU) for the Department of Children and Family Services (DCFS).

4. At all times material, Smythe was a public employee within the meaning of Section 3(n) of the Act.
5. At all times material, American Federation of State, County, and Municipal Employees (AFSCME) has been a labor organization within the meaning of Section 3(i) of the Act.
6. Smythe served as union steward of AFSCME Local No. 2081.
7. On October 26, 2011, Smythe, in her capacity as a union steward, filed AFSCME grievance number 531030.
8. On November 2, 2011, Smythe, in her capacity as union steward, filed AFSCME grievance number 531031.
9. On February 9, 2012, Smythe, in her capacity as union steward, filed AFSCME grievance number 531035.
10. Respondent began investigatory interviews of Smythe on June 15, 2012.
11. On July 5, 2012, Smythe filed an unfair labor practice charge in Case No. S-CA-13-002.
12. On or about August 9, 2012, Respondent placed Smythe on paid administrative leave.
13. On or about August 25, 2012, Respondent discharged Smythe effective September 4, 2012.

## II. INVESTIGATORY FACTS

In her Complaint, Smythe alleges that the Respondent placed her on paid administrative leave, initiated disciplinary proceedings against her, and ultimately discharged her because she filed three grievances in her capacity as Union steward, between October 2011 and February 2012, and because she filed an unfair labor practice charge with the Board on July 5, 2012. Smythe grieved her termination under the collective bargaining agreement on August 24, 2012. Respondent asserts that it took such action because Smythe allegedly assaulted a coworker.

## III. ISSUES AND CONTENTIONS

The issue is whether the Board should defer this matter to the grievance arbitration process.

The Respondent argues that the Board should defer because Smythe grieved her termination, the grievance "advances the same claim as the unfair labor practice charge," and it is highly likely that the dispute will reach a satisfactory conclusion through arbitration, scheduled for April 23, 2013, or through settlement.

Smythe argues that the Board should not defer this case to arbitration because the issues in the complaint do not mirror those in the grievance and because arbitration will therefore not resolve the issues in the complaint. First, Smythe contends that the issues in the grievance do not mirror those presented in the complaint because the complaint alleges a violation of the Act while the grievance alleges a violation of the contract. As such, Smythe states that the arbitrator cannot resolve the instant dispute because he has no jurisdiction to determine whether Respondent violated the Act. Further, Smythe states that arbitration will not resolve the dispute because it does not address a different grievance that Smythe filed for coworkers in her capacity as union steward and which Smythe asserts prompted Respondent's adverse action against her.[1]

Smythe also seeks a continuance, noting that the relief sought in both actions is similar and that "arbitration may provide a catalyst to settle remaining issues."

## IV. DISCUSSION AND ANALYSIS

The Board should defer this case to the grievance arbitration process because there is a reasonable chance that arbitration will resolve the instant dispute.

Under Section 11(i) of the Act, the Board has discretionary authority to defer unfair labor practice charges to the parties' grievance arbitration procedure if an unfair labor practice involves the interpretation or application of a collective bargaining agreement. In City of Mt. Vernon, 4 PERI ¶ 2006 (IL SLRB 1988), the Board adopted a policy of deferring charges involving the application or interpretation of collective bargaining agreements. In that case, the

[1] In determining deferral of retaliation cases, the Board compares the adverse action alleged in the complaint to the contractual violation alleged in the grievance which affects the same individual. As such, the status of grievances filed by the Charging Party on behalf of others and concerning conduct not referenced in the complaint is immaterial to the deferral analysis and is not addressed below.

Board listed the primary deferral doctrines employed by the National Labor Relations Board (NLRB). Each of these policies is known by the lead case in the area, namely, Spielberg Manufacturing Co., 112 NLRB 1080 (1955); Dubo Manufacturing Corp., 142 NLRB 431 (1963); and Collyer Insulated Wire, 192 NLRB 837 (1971). Spielberg concerns deferral to an existing arbitration award. Dubo applies in cases where the union has voluntarily initiated a grievance. Collyer concerns cases in which the union has not initiated a contract grievance. The instant matter is analogous to a Dubo deferral case.

Deferral to pending arbitration, or "Dubo deferral," arises when the parties have initiated the arbitration process and a party requests that the Board hold the unfair labor practice proceeding in abeyance until the arbitration award issues. In such instances, the Board will defer the processing of an unfair labor practice charge if (1) the parties have already voluntarily submitted their dispute to their agreed-upon grievance arbitration procedure, (2) that procedure culminates in final and binding arbitration, and (3) there exists a reasonable chance that the arbitration process will resolve the dispute. State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Human Serv.), 19 PERI ¶ 114; PACE Northwest Division, 10 PERI ¶ 2023 (IL SLRB 1994); City of Mt. Vernon, 4 PERI ¶ 2006 (1988); Dubo Manufacturing Corp., 142 NLRB 431. The Board has held that even in cases involving alleged independent violations of Section 10(a)(1) or 10(a)(2) of the Act "that neither the policy of the Act, nor the collective bargaining process itself, is well served by allowing parties to circumvent their agreed upon dispute resolution procedure and utilize the Board's processes prior to the culmination of their agreed upon procedure." Pace Northwest Division, 10 PERI ¶ 2023 (IL SLRB 1994).

It is clear that the current collective bargaining agreement contains a grievance procedure that culminates in arbitration and that Smythe voluntarily commenced the grievance and arbitration process. Accordingly, the only remaining issue is whether there is a reasonable chance that the arbitration process will resolve the dispute. In this case, there is a reasonable chance that it will.

There is a reasonable chance that the arbitration process will resolve the dispute here because the arbitrator will make determinations that bear on the resolution of the associated pending unfair labor practice complaint. PACE Northwest Division, 10 PERI ¶ 2023; City of Chicago, 3 PERI ¶ 3007 (IL LLRB 1986); See also State of Ill., Dep't of Cent. Mgmt Serv., 29 PERI ¶ 39 (IL LRB-SP ALJ 2012). In an unfair labor practice proceeding which addresses

retaliation against an employee for protected activity, an ALJ must determine whether the respondent-employer had a legitimate reason for its adverse action against the charging party and whether the respondent-employer would have taken that action notwithstanding the charging party's protected activity.[2] City of Burbank v. ISLRB, 128 Ill. 2d 335, 345, 538 N.E.2d 1146, 1149 (1989). In an arbitration proceeding which addresses an employer's alleged violation of the contract's just cause provision, the arbitrator must consider the employer's reason for terminating a grievant's employment to determine whether the employer had sufficient justification for its action in light of the circumstances.

Here, the complaint alleges that the Respondent retaliated against Smythe by initiating disciplinary proceedings which culminated in her termination and the grievance alleges that Respondent terminated Smythe without just cause. Thus, the disposition of this grievance will likely resolve most, if not all, of the issues in the complaint because the arbitrator's decision, which examines the employer's basis for the termination, bears on the Board's determination of whether the respondent-employer discharged Smythe for legitimate and genuine reasons.[3]

Therefore, it is appropriate to defer these charges to the Agreement's grievance arbitration procedure.

## V. CONCLUSIONS OF LAW

It is appropriate to defer these charges to the Agreement's grievance arbitration procedure.

## VI. RECOMMENDED ORDER

These charges will be deferred until the parties have completed the process in the Agreement's grievance procedure and in accordance with the text of this order. Within 15 days after the termination of the grievance procedure, the Charging Party may request that the Board reopen the case to address any substantial issues left unresolved by the arbitration or to proceed

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[2] The ALJ reaches this issue only if the charging party has made out its prima facie case.

[3] As noted above, contrary to Smythe's contention, the arbitration is likely to resolve the issues in the complaint, even though the arbitrator cannot address statutory issues. Notably, the Board would never exercise its power to defer if it found deferral inappropriate merely because the complaint alleges violations of statute which the arbitrator cannot address because every unfair labor charge alleges a statutory violation and every statutory violation is outside an arbitrator's jurisdiction.

with the charge on the basis that the award is contrary to the policies underlying the Act. If Charging Party fails to make such a request within the time specified, the Board may dismiss this charge upon request of Respondent or on its own motion.

## 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 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 27th day of February, 2013**

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

/S/ *Anna Hamburg-Gal*

**Anna Hamburg-Gal**
**Administrative Law Judge**