STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

International Union of Operating Engineers, Local 150,	)	
Charging Party	)	
and	)	Case No. S-CA-14-150
County of Mercer and Sheriff of Mercer County,	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. BACKGROUND

On June 17, 2014, Charging Party International Union of Operating Engineers, Local 150, AFL-CIO (Charging Party or Union), filed an unfair labor practice charge alleging that the Respondent County of Mercer and Sheriff of Mercer County (collectively Respondent or County) violated the Illinois Public Labor Relations Act (Act) when it unilaterally altered the composition of an existing bargaining unit by notifying Charging Party that certain titles, including a long-term union employee's position of Animal Control Officer, would no longer be covered by the collective bargaining agreement. On October 10, 2014, the Executive Director of the Illinois Labor Relations Board (ILRB or Board) issued a complaint alleging that the Respondent violated Section 10(a)(4) and (1) of the Act. The Respondent was required to file its answer to the complaint on or before October 27, 2014. It did not do so.

On October 14, 2014, the parties participated in a telephone conference with the undersigned administrative law judge for purposes of scheduling a hearing on the pending unfair labor practice charges, ILRB Case Nos. S-CB-14-006, S-CA-14-136, and S-CA-14-150. The parties ultimately scheduled a hearing for all three pending cases for December 3, 2014, and a Scheduling Order was issued on October 17, 2014.

On November 14, 2014, the Respondent filed a Motion for Leave to File Answer, or, in the Alternative Request for Variance. The Charging Party responded to the Respondent's Motion and simultaneously moved for default judgment on November 19, 2014. On November 24,

2014, the Respondent filed its response to the Motion for Default Judgment, wherein it argues for the denial of the motion and challenges the requested relief.

II. ISSUES AND CONTENTIONS

The Respondent asserts that it inadvertently failed to file its Answer in Case No. S-CA-14-150, at least in part due to the similarity between the present case and Case No. S-CA-14-136, to which it answered on October 8, 2014. Accordingly, it seeks leave to file a late answer under Section 1220.40(b)(4) of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code Parts 1200-1240, or, in the alternative, for a variance from the filing rules, as provided under Section 1200.160, 80 Ill. Adm. Code §§1220.40(b)(4) and 1200.160.

The Charging Party argues that Respondent has not met the "extraordinary circumstances" required for leave to file a late answer. Further, a variance is inappropriate as it would injure the Charging Party and enforcing the Board's filing requirements is not "unreasonable or unnecessarily burdensome" in this case. The Charging Party also contends that Board precedent demands a default judgment.

III. DISCUSSION AND ANALYSIS OF RESPONDENT'S MOTION

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

> 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 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.

80 Ill. Adm. Code §1220.40.

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 County, 6 PERI ¶ 2036 (IL SLRB 1990); Peoria Housing Auth., 11 PERI ¶ 2033 (IL SLRB 1995); Chicago Housing Auth., 10 PERI ¶ 3010 (IL LLRB 1994); County of Jackson (Jackson County Nursing Home), 9 PERI ¶ 2025 (IL SLRB 1993); City of Springfield, Office of Public Utilities, 9 PERI ¶ 2024 (IL SLRB 1993).

Applying the Board's Rules regarding service of documents[1] and computation of deadlines,[2] the Respondent's Answer was due on or before October 27, 2014. Instead, on November 14, 2014, Respondent's counsel filed its Motion for Leave to File Answer, or, in the Alternative Request for Variance, acknowledging that it had failed to timely file an answer to the complaint.

A. Respondent's Motion for Leave to File Answer is Denied.

The Board's Rules allow very little latitude to allow a party to file an answer outside the 15 days provided by rule. "Leave 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." 80 Ill. Adm. Code §1220.40(b)(4). Counsel correctly identifies the test by which Illinois courts determine whether a person has set out "grounds traditionally relied upon for equitable relief from judgments." A party must prove (1) unfair, unjust or unconscionable circumstances; (2) existence of a meritorious defense; and (3) that the respondent was diligent in protecting its rights. Chicago v. Central Nat'l Bank, 134 Ill. App. 3d 22, 25 (1st Dist. 1985).

Here, Respondent's counsel explained that it "inadvertently did not file its Answer" in this case. Counsel pointed to the similarity between Cases S-CA-14-150 and S-CA-14-136 (to which Respondent filed a timely Answer) and the Amended Scheduling Order issued on October 17, 2014, which it contends led it to believe that an Answer had been filed in the present case when

[1] A document is presumed served three days after it was mailed. 80 Ill. Adm. Code §1200.30(c).
[2] *See* 80 Ill. Adm. Code §1200.30; Int'l Brotherhood of Teamsters, Local 700 (Ziccarelli), 30 PERI ¶ 122 (IL LRB-SP 2013); *see also* 5 ILCS 70/1.11 (2012).

it had not. Instead, the Respondent attached a proposed answer to its motion, which was filed 17 days after the answer was due.

In Amalgamated Transit Union, Local 241 (Spratt), 29 PERI ¶ 78 (IL LRB-LP 2012), the Board affirmed the denial of a union's request for leave to file a late answer. Though the union was placed under trusteeship the day before the union's answer was due, the Board found that in-house counsel's failure to file an answer "appear[ed] to have been negligent, and the well-established rule is that, except in narrowly defined circumstances, negligence by a party's attorney does not shield it from the consequences of that negligence." Id. *citing* Wood Dale Prof. Firefighters Assn. Local 3594, 25 PERI ¶ 136 (ILRB-SP 2008), *aff'd*, Wood Dale Fire Protection Dist. v. Ill. Labor Relations Bd., 395 Ill. App. 3d 523, 25 PERI ¶ 149 (2d Dist. 2009) (default where counsel misfiled and thus inadvertently failed to answer); Bd. of Educ. Thornton Twp. H.S. Dist. No. 205 v. Ill. Educ. Labor Relations Bd., 235 Ill. App. 3d 724, 730-31 (4th Dist. 1992) (inadvertence due to attorney stress; collecting NLRB cases regarding attorney inadvertence). In Spratt, the Board concluded that the motion for leave was appropriately denied, "because a party's attorney's negligence is not a 'ground[] traditionally relied upon for equitable relief from judgments' as required by Section 1220.40(b)(4) of the Board' s Rules." Id.

This case calls for the same conclusion. Nothing in the facts as submitted by Respondent rises to the level of an extraordinary circumstance which could predicate granting the Respondent's Motion for Leave to File a Late Answer. Therefore, the Motion is DENIED.

B. Respondent's Alternative Request for Variance is Denied.

Even where a motion for leave to file a late answer is denied, a party can seek a variance from the Board's filing requirements. The Board's Rules provides that provision of the Board's Rules "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." 80 Ill. Adm. Code §1200.160.

The Respondent correctly points out that the Board's filing rules are not statutorily mandated. However, the remaining two elements are contested. The Respondent contends that no party would be injured by waiving the filing deadlines and allowing a late answer because a consolidated hearing is already scheduled, there is no Order to Show Cause or Motion for

Default Judgment filed,[3] and it would allow the issue to be decided substantively rather than procedurally. The Charging Party contends that it would be injured in that it would have to very quickly prepare to litigate newly raised issues (specifically, the Respondent's affirmative defense that Animal Control Officer Christina Brewer is a managerial and/or supervisory employee) and would be compelled to call counsel for the County as a witness, which would likely necessitate obtaining co-counsel to handle the case[4] with very little notice or opportunity to prepare. Moreover, the Charging Party indicates that Brewer has been denied the benefits of the collective bargaining agreement for almost one year, and "she is entitled to have her dispute resolved as expeditiously as possible."

Certainly, the Charging Party would be inconvenienced by having to amend its strategy at this late date, but given the numerous extensions between the parties, it is not clear that this inconvenience would be sufficiently injurious to warrant denying a variance. Further, Brewer is certainly entitled to as prompt a resolution as possible, but having the issue go to hearing approximately two weeks after the request for variance is a *de minimus* injury at best.

Regardless of the effect of the second element, Respondent's request for a variance must be denied, because it has not proven that that the Board's deadlines would be "unreasonable or unnecessarily burdensome." Pointing to language in Cook County State's Atty. v. Ill. State Labor Relations Bd., 292 Ill. App. 3d 1, 7 (1st Dist. 1997) ("Cook County"),[5] the Respondent contends that a variance is appropriate because it (1) has a meritorious defense – that Brewer is a managerial or supervisory employee and thus not covered by the Act; (2) timely filed its position statement with the Board agent handling the investigation; and (3) was diligent in filing the Motion for Leave to File Answer or, in the Alternative Request for a Variance. Expounding on its defense, the Respondent argues that not allowing it to file its Answer and entering a default judgment would,

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[3] The Petitioner's Motion for Default Judgment was filed after Respondent's motion.

[4] In Case No. S-CB-14-006, the parties had dueling subpoenas of counsel and accompanying motions to quash. The undersigned ordered that if the parties were unable to stipulate to the subjects to which counsel was expected to testify, they would be required to testify. Through discussion with the parties, the undersigned administrative law judge made clear that either both subpoenas would stand or neither would.

[5] The Illinois Appellate Court pointed out in Wood Dale Fire Protection Dist., 395 Ill. App. 3d at 533, that the Cook County court did not specifically adopt the three-prong test. The Wood Dale court noted that it is in fact a higher standard than that proposed by some.

> not resolve the issue as to whether Animal control Officer Chris Brewer is included in the bargaining unit, because evidence would then not be heard to allow the Administrative Law Judge to determine whether Animal Control Officer Chris Brewer has duties and responsibilities that cause her to be a managerial employee and/or a supervisor, and therefore excluded from the bargaining unit, or had duties and responsibilities that cause her to be an administrative or clerical employee, and therefore included in the bargaining unit.

The Charging Party contends that the Respondent has not established a meritorious defense. The Union asserts that the question before the Board in *this* case is whether the County failed to bargain in good faith prior to removing Brewer from coverage of the collective bargaining agreement, not whether a specific employee should continue to be included in the bargaining unit.

I agree with the Charging Party that the Respondent has failed to put forward a meritorious defense to the present action. In sum, Respondent does not present any defense whatsoever for its failure to bargain with the Union over its "interpretation" of the certified bargaining unit to now exclude Brewer. Instead, Respondent attempts to support its excluding Brewer by arguing that Brewer is now a supervisory or managerial employee, both of which are specifically excluded from the Board-certified unit. The bargaining unit certified by the Board in 1994 and is described as follows:

> Included, all full and regular part-time administrative and clerical employees in the offices of the County Clerk and Recorder, County Assessor, County Treasurer, Animal Control, County Sheriff, County Board and Probation and Court Services.
>
> Excluded, all employees that are supervisory, confidential, managerial or short-term within the meaning of the Act.

The Respondent does not dispute that the position of Animal Control Officer has been covered by the Board's 1994 certification, has previously been covered by the collective bargaining agreement, and that at least one of the two Animal Control Officers is appropriately included in the bargaining unit. Instead, Respondent contends that over time, Brewer's duties (and not those of the other Animal Control Officer) have changed such that she is now a managerial and/or supervisory employee; thus, her position is, and should be, excluded from the certified bargaining unit.

While it is true that supervisory and managerial employees have been excluded from the bargaining unit since its initial certification, one party cannot unilaterally determine that a

specific position is no longer a public employee/no longer covered by the Board certification and is therefore not covered by an applicable collective bargaining agreement. *See* Chief Judge of the 13th Judicial Circuit, 15 PERI ¶ 2006 (IL SLRB 1999); County of LaSalle and Sheriff of LaSalle County, 23 PERI ¶ 15 (IL LRB-SP G.C. 2007). Certainly, the parties could bargain and agree to exclude a certain position based on the existing language that supervisory and/or managerial employees are excluded. However, if the parties could not come to an agreement, the position could only be excluded as supervisory or managerial by the Board through its unit clarification procedure. *See* Office of the Illinois Comptroller, 30 PERI ¶ 282 (IL LRB-SP 2014), *appeal pending* No. 4-14-0352 (Ill. App. Ct., 4th Dist.) (amendment to the Act was not self-effectuating, and unit clarification was required before the employer could exclude positions from the bargaining unit and coverage under the associated collective bargaining agreement). Of course, a change in duties is one of the three bases for a unit clarification specifically identified in the Board's Rules,[6] 80 Ill. Adm. Code §1210.70(a)(1), and is cited by the Respondent in ILRB Case No. S-UC-15-063, filed on November 28, 2014, in which the County seeks, through the unit clarification process, to exclude Brewer as supervisory and managerial.

Because the Respondent has failed to put forth a meritorious defense, granting a variance would be inappropriate in this case. Furthermore, the Board has noted that the "denial of a variance has frequently been affirmed on judicial review in instances of attorney negligence or of miscommunication between the client and its counsel." Spratt, 29 PERI ¶ 78 (internal citations omitted). Accordingly, the Respondent's request for a variance to waive the Board's filing deadlines is DENIED.

V. DISCUSSION AND ANALYSIS OF MOTION FOR DEFAULT

The Board's Rules further set out: "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." 80 Ill. Adm. Code §1220.40(b)(3).

Because I find that a variance is not appropriate in this case, the Employer's failure to answer results in an admission of the statements of fact and conclusions of law outlined in the

[6] "An exclusive representative or an employer may file a unit clarification petition to clarify or amend an existing bargaining unit when substantial changes occur in the duties and functions of an existing title raising an issue as to the title's unit placement." 80 Ill. Adm. Code §1210.70(a)(1).

complaint. In its Motion, the Charging Party requests a default judgment based on the admissions of the allegations in the Complaint. As set forth below, Charging Party's Motion for Default is GRANTED.

A. Respondent's Admissions

By failing to timely file an Answer, pursuant to Section 1220.40(b)(3) of the Board's Rules, the Respondent is deemed to have made the following admissions:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Respondent has been subject to the jurisdiction of the State Panel of the Board, pursuant to Section 5(a-5) of the Act.
3. At all times material, Respondent has been subject to the Act, pursuant to Section 20(b) thereof.
4. At all times material, Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.
5. At all times material, the Charging Party is the exclusive representative of multiple bargaining units (Units) consisting of employees in the Respondent's Highway Department, Courthouse Division and the Sheriff's Department.
6. At all times material, the Charging Party and the Respondent have been parties to collective bargaining agreements (CBAs) setting forth the terms and conditions of employment for employees in the Units, with terms of December 1, 2009, through November 30, 2013.
7. In or around March of 2014, the parties commenced negotiations for successor CBAs for the Units.
8. On or about July 25, 1994, the Board certified the following unit: All full and regular part-time administrative and clerical employees in the offices of the County Clerk, and Recorder, County Assessor, County Treasurer, Animal Control, County Sherriff, County Board and Probation and Court Services.
9. By letter dated December 18, 2013, Respondent notified Charging Party that certain titles, including the Animal Control Officer, would no longer be covered under a labor agreement.

10. By letter dated January 31, 2014, Respondent clarified which titles would no longer be covered under a labor agreement, and one of those titles included the Animal Control Officer.

11. On or about June 6, 2014, Respondent filed a request for mediation, submitting a recognition clause that did not include the Animal Control Officer.

12. By its acts and conduct as described in paragraphs 9, 10 and 11, Respondent unilaterally changed the scope of a bargaining unit by removing the title of Animal Control Officer.

13. By its acts and conduct as described in paragraph 12, the Respondent has violated Sections 10(a)(4) and (1) of the Act.

B. Appropriate Remedy

In its Motion for Default, the Charging Party seeks the following damages: "(1) restore the composition of the bargaining unit to status quo ante; (2) provide make-whole relief to all affected bargaining unit members, including Christina Brewer; (3) post the requisite notice; and (4) any other relief the ALJ deems appropriate to remedy the violation of the Act." The Respondent argues that the appropriate remedy would be to "require Respondent to bargain with Local 150 as to whether the parties interpret the positon at issue, Animal Control Officer Christina Brewer, as being included or excluded from the certified bargaining unit as set forth in the Certification."

Respondent's proposed relief is insufficient to remedy its violations of the Act. Respondent correctly acknowledges that it could have reached out to the Charging Party prior to treating Brewer as if her position was no longer included in the bargaining unit. However, at the point where the unfair labor practice was committed – namely, when on December 18, 2013, Respondent notified Charging Party that certain titles, including the Animal Control Officer, would no longer be covered under a labor agreement – the County could no longer comply with the law merely by bargaining with the Charging Party. Further, the Charging Party indicates that Brewer has been deprived of the rights of the collective bargaining agreement since the Respondent's unfair labor practice was committed. Accordingly, I find the Respondent's argument regarding remedy to be unpersuasive and inadequate for the purpose of this case.

VI. CONCLUSIONS OF LAW

Respondent has violated Sections 10(a)(4) and (1) of the Act when it unilaterally changed the scope of a bargaining unit by removing the title of Animal Control Officer from the unit's coverage under a collective bargaining agreement without bargaining with the Charging Party as exclusive representative of the certified bargaining unit.

VII. RECOMMENDED ORDER

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

1. Cease and desist from:
   a. Unilaterally excluding positions from the certified bargaining unit;
   b. Failing and refusing to bargain in good faith with the International Union of Operating Engineers, Local 150 as to proposed changes to the bargaining unit; and
   c. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act.
2. Take the following affirmative actions to effectuate the purposes of the Act:
   a. Restore the composition of the bargaining unit to status quo ante;
   b. Make whole any affected bargaining unit members, including Animal Control Officer Christina Brewer;
   c. Post at all places where notices to employees are ordinarily posted, copies of the notice attached hereto and marked "Addendum." Copies of this Notice shall be posted, after being duly signed by the Respondent, in conspicuous places and shall be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that these notices are not altered, defaced, or covered by any other material; and
   d. Notify the Board in writing, within 20 days from the date of this decision, of what steps the Respondent has taken to comply herewith.

VIII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, the parties may file exceptions no later than 30 days after service of this recommendation. Parties may file responses to any exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within 15 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, if at all, with the General Counsel of the Illinois Labor Relation Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. 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. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Springfield, Illinois, this 11th day of December, 2014.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ Sarah R. Kerley

Sarah Kerley
Administrative Law Judge

NOTICE TO EMPLOYEES

FROM THE
ILLINOIS LABOR RELATIONS BOARD

S-CA-14-150
Addendum

The Illinois Labor Relations Board, State Panel is charged with protecting rights established under the Illinois Public Labor Relations Act, 5 ILCS 315 (2012). In the course of fulfilling this duty, the parties stipulated to the record in this case. Upon that record, the Board found that the County of Mercer has violated Section 10(a)(4) and (1) of the Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- 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 and protection
- To refrain from these activities

The Act further imposes upon a public employer and the exclusive representative of a bargaining unit the duty to bargain collectively.

Accordingly, we assure you that:

WE WILL cease and desist from:

a. Unilaterally excluding positions from the certified bargaining unit;
b. Failing and refusing to bargain in good faith with the International Union of Operating Engineers, Local 150 as to proposed changes to the bargaining unit; and
c. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act.

WE WILL, restore the composition of the bargaining unit to status quo ante and make whole any affected bargaining unit members, including Animal Control Officer Christina Brewer.

DATE _____ _____

County of Mercer