STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

American Federation of State, County, and Municipal Employees, Council 31,	)	
Charging Party,	)	
and	)	Case No. L-CA-18-022
City of Chicago (Police Department),	)	
Respondent.	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

On July 26, 2021, Administrative Law Judge (ALJ) Donald Anderson issued a Recommended Decision and Order (RDO) recommending dismissal of the complaint for hearing alleging Respondent City of Chicago (City) violated Section 10(a)(1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315/1 *et seq*. The complaint alleged the City unlawfully initiated an investigation of Derek Webb, a member of a bargaining unit represented by Charging Party American Federation of State, County, and Municipal Employees, Council 31 (AFSCME) and then President of AFSCME Local 654, in addition to other unit members for engaging in protected, concerted activity.

I. DISCUSSION

The dispute in this case arises from the arbitration of a grievance filed by Webb over the transfer of bargaining unit work. Representatives of the City learned during preparation for the arbitration hearing that AFSCME was provided with documents for use in the arbitration that were obtained through access to the Law Enforcement Agencies Data System (LEADS).

Because the City had not provided those documents to AFSCME through the arbitration process, the City allegedly informed AFSCME's counsel during the arbitration proceedings that the City would begin an investigation into how those LEADS documents came into AFSCME's possession and allegedly suggested that Webb "may be disciplined for this matter."

The ALJ determined AFSCME failed to establish that the City's investigation of Webb and other unit members regarding the unauthorized use of LEADS documents constituted a violation of Section 10(a)(1) of the Act. Because the ALJ found that AFSCME did not contend in its post-hearing brief that any unit members other than Webb were subject to unlawful conduct, the ALJ first analyzed the allegations with respect to Webb. Finding that where the complaint for hearing alleges a violation of Section 10(a)(1) because the employer took an adverse employment action against an employee for engaging in protected concerted activity, the ALJ applied the burden-shifting analysis set forth in City of Burbank v. Ill. State Labor Relations Bd., 128 Ill.2d 335, 345 (1989). Although he determined Webb engaged in protected concerted activity by filing a grievance and the City was aware of that activity, the ALJ found that AFSCME failed to establish that the City's conduct—starting an investigation related provision of the LEADS documents which could lead to discipline and making statements to that effect to AFSCME—constituted an adverse employment action and thus, failed to establish its prima facie case.

In finding that the City's actions did not constitute an adverse employment action, the ALJ relied on the Board's decision in City of Chicago (Chris Logan), 31 PERI ¶ 129 (ILRB-LP 2015), in which the Board found that the initiation of disciplinary proceedings which *could* result in discipline did not constitute an adverse employment action because there was "no actual harm to the [c]harging [p]arty's terms and conditions of employment." Id. The ALJ determined that

although credible, the testimony of AFSCME's counsel, Scott Miller, about the statements made during the arbitration proceedings related to the provision and use of information obtained from LEADS was too vague as to the actual statements made by the City to establish those statements as a threat that Webb might be disciplined. The ALJ further found that the evidence established that discipline is not an inevitable consequence of an investigation and that the representatives who made the statements in questions did not control or influence the outcome of an investigation.

Although the ALJ observed that AFSCME did not argue the City's actions violated Section 10(a)(1) as to other unit members, he nevertheless applied a similar analysis and arrived at the same conclusion as he did regarding Webb, namely that the initiation of an investigation and possible discipline did not constitute an adverse employment action.[1] He further noted that even if a prima facie case could be established, the City had a legitimate reason for conducting an investigation into the provision of LEADS documents and would have done so notwithstanding unit member participation in protected activity.

Charging Party's Exceptions

Charging Party filed two exceptions and a brief in support of its exceptions to the ALJ's findings and determinations recommending dismissal of the complaint for hearing. It takes exception to the ALJ's finding and conclusion that (1) the City took no adverse action against Webb and that (2) the City did not violate Section 10(a)(1) of the Act. In its supporting brief, AFSCME contends the ALJ erred by "narrowly inquiring only whether Respondent instituted an

[1] In his analysis of the allegations as they pertained to other unit employees, the ALJ cites to the Board's decision in County of Cook and Sheriff of Cook County, 37 PERI ¶ 56 (ILRB-LP 2020). The Board recently vacated its Decision and Order in that case upon remand from the Illinois Appellate Court, First District, pursuant to the court's grant of the parties' joint motion to voluntarily dismiss the petition for review. Accordingly, we modify the ALJ's RDO to remove the reference to that case.

adverse employment action against Webb" rather than focusing on whether the City's "disciplinary threats" had "a tendency to interfere with, restrain, or coerce Webb from engaging in protected activity. It claims that under the ALJ's "narrow" application of the City of Burbank analysis, threats of discipline could not constitute an unfair labor practice unless discipline was actually imposed. AFSCME urges the Board to analyze the instant matter under Chicago Transit Authority, 32 PERI ¶ 101 (ILRB-LP General Counsel Order, December 18, 2015) in which the employer was found to have violated Section 10(a)(1) for threatening two employees with additional discipline if they did not withdraw the grievance, they filed over their discipline for poor work performance.

Finally, AFSCME contends that even under the ALJ's analysis, the City's "threats of discipline" would still be considered an adverse employment action as the focus in analyzing independent Section 10(a)(1) should be on whether the City's conduct "interferes with, restrains or coerces" participation in concerted activity. It claims the analysis the ALJ employed incorrectly conflates independent and derivative Section 10(a)(1) violations despite the important distinction that exists.

Upon review of the RDO, the record, Charging Party's exceptions, response, and supporting briefs, we find the exceptions meritless and adopt the ALJ's findings and conclusions that the City did not violate Section 10(a)(1) of the Act. The crux of Charging Party's challenges to the ALJ's findings and conclusions is the claim that the ALJ failed to focus on whether the City's "disciplinary threats" *constituted* the unfair labor practice as in Chicago Transit Authority,

32 PERI ¶ 101 (ILRB-LP General Counsel Order, December 18, 2015),[2] and then erroneously found that the City's threats of discipline did not constitute an adverse employment action under the Section 10(a)(1) retaliation-type analysis.

The Charging Party's contentions are procedurally and substantively defective. Procedurally, the Charging Party fails to take issue with the ALJ's findings that the statements made by the City during the sidebar did not threaten Webb with discipline, a finding which formed the basis for his conclusion that Charging Party failed to establish a prima facie case for a Section 10(a)(1) violation. In failing to take such exception to the findings which formed the basis for the ALJ's conclusion, we deem the Charging Party's exceptions waived because they do not comply with Section 1200.135(b)(2) of the Board's rules. State of Illinois, Department of Central Management Services, 26 PERI ¶ 39 (IL LRB-SP 2010) (failure to take exception to the underlying elements of a rule or finding constitutes a waiver of the exception to that rule or finding). See also, City of Chicago, 38 PERI ¶ 20 (ILRB-LP 2021).

Even if we were to consider Charging Party's exceptions, we find that on these facts and the evidence adduced at hearing, the ALJ's findings and conclusions are appropriate. The ALJ found that the statements made by the City's representatives during the arbitration sidebar were *not* threats of discipline. (RDO, p. 19). Rather, the ALJ found Miller's testimony "that there was a 'suggestion' that Webb might be disciplined pursuant to the investigation" too vague to find the City was threatening Webb with discipline. Id. In addition to failing to challenge the ALJ's finding that the City's statements were not threats of discipline, Charging Party does not identify

[2] We note that the ALJ RDO in Chicago Transit Authority, 32 PERI ¶ 101 (ILRB-LP General Counsel Order, December 18, 2015) is a non-precedential recommended decision and order and thus merely persuasive authority. Although we could follow the analysis in that case, for reasons discussed in the body of this Decision and Order, we decline to do so in this particular instance as we need not address Charging Party's contention.

or point to any record evidence or legal authority undermining the ALJ's findings and conclusions on this issue for us to consider. Rather, Charging Party merely asserts that the City threatened Webb with discipline and then proceeds to challenge the ALJ's analysis of that "threat" as not constituting an adverse employment action or an independent unfair labor practice. The ALJ, however, did not focus on the "threat" either as an independent violation or as a derivative of another violation because he found that the evidence did not support a determination that the City's statements constituted a "threat" of discipline.[3]

We find the remainder of the City's contentions also unavailing for they are based on the assumption that the City threatened Webb with discipline. We find Charging Party's contention that the ALJ somehow applied an improper Section 10(a)(1) standard in recommending dismissal of the Corrected Complaint for Hearing (Complaint) without merit. The Complaint alleges the City violated Section 10(a)(1) of the Act when it "began an investigation of Webb and other Unit members for the purpose of initiating discipline against Unit members for engaging in protected activity by accessing and providing documents for use during arbitration." (Complaint, ¶¶ 15, 16). The Complaint did not allege that the City violated Section 10(a)(1) by threatening discipline. And Charging Party did not move to amend the complaint to include such allegations. Although the ALJ could have amended the Complaint *sua sponte*, Charging Party does not take issue with the failure to do so. Moreover, Charging Party, in its post-hearing brief, applied the same analysis used by the ALJ in his RDO—an analysis that Charging Party now claims is improper.

[3] Our findings on this issue should not be construed to mean that a threat of discipline could never constitute an adverse employment action. Rather, our findings here are based on the ALJ's assessment that the record evidence does not support a finding that the City's statements during the arbitration sidebar constituted a threat of discipline.

City's Cross-Exceptions and Charging Party's Cross-Responses

The City cross-excepts to (1) the ALJ's finding that Webb engaged in filing a grievance more than two years before the alleged retaliatory conduct and (2) the ALJ's finding of fact attributing actions to Sergeant Theresa Hickey. Regarding the first cross-exception, the City takes issue with the ALJ's finding that the alleged threats of discipline were made because of Webb's grievance filing and his status as president of the local. It claims that the Complaint alleged the protected activity to be the access and provision of documents for use during the arbitration and not the filing of the grievance. The City asserts that it was not given the opportunity to present evidence at the hearing or advance arguments regarding whether the filing of the grievance or Webb's status as president of the local constituted protected activity.

We find the City's cross-exceptions unpersuasive. Although the portions of the Complaint cited by the City support its contentions, other portions of the Complaint, as the City concedes, allege the filing of the grievance constituted protected activity. It may have been more precise to have specified the protected activity as the alleged provision of the disputed documents for use at the arbitration of the grievance, but such precision was not required in this case. The provision of the documents at arbitration can be considered in support of the grievance since arbitration is part and parcel of the grievance process, and thus, it was not unreasonable or error for the ALJ to view the filing of the grievance as the protected activity at issue. Moreover, in this case, whether the protected activity was the filing of the grievance or the more specific activity of providing documents for use at the arbitration would be significant in analyzing causation due to the lengthy time between them. But the ALJ did not reach the causation issue because he found as discussed above, the City's actions did not constitute an adverse employment action.

The City also appears to contend the ALJ erred by referencing Webb's status as president of the local. This contention is also without merit. The ALJ may have referenced Webb's status in conjunction with the protected activity, but his status did not play a factor in the ALJ's Section 10(a)(1) analysis and thus, did not affect the outcome of the case.

Regarding the City's second cross-exception, AFSCME agrees with the City's assertion that the ALJ erroneously attributed the actions concerning the communication and review of who accessed the documents in question to Sgt. Theresa Hickey rather than Kevin O'Bryan. (RDO, p. 10). As such, we modify those findings consistent with the City's Cross-Exception and AFSCME's Cross-Response.

For the above reasons, we accept the ALJ's findings and recommendations dismissing the Complaint and adopt the RDO as a decision of the Board subject to the modifications discussed above and in footnote one.

BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Charles E. Anderson
Charles E. Anderson, Member

/s/ Angela C. Thomas
Angela C. Thomas, Member

Decision made at the Local Panel's public meeting in Chicago, Illinois, on September 8, 2022; written decision approved at the Local Panel's public meeting in Chicago, Illinois, on September 8, 2022, and issued on September 23, 2022.

This Decision and Order is a final order of the Illinois Labor Relations Board. Aggrieved parties may seek judicial review of this Decision and Order in accordance with the provisions of Section 11(e) of the Act and the Administrative Review Law. Petitions for review of this Decision and Order must be filed within 35 days from the date the Decision and Order is served upon the party affected by the decision. 5 ILCS 315/11(e).

ILLINOIS LABOR RELATIONS BOARD
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American Federation of State, County and Municipal Employees, Council 31,	)	
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and	)	
City of Chicago (Department of Police),	)	
Respondent.	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 4, 2017, the American Federation of State, County and Municipal Employees, Council 3 1 (the "Charging Party", or "AFSCME" or "the Union") filed a charge in Case No. L-CA-18-022 with the Local Panel of the Illinois Labor Relations Board (the "Board") alleging that the City of Chicago ("the Respondent" or "the City") by and through its Department of Police ("the CPD" or "the Department") engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2014), as amended ("the Act") by beginning an investigation of Derek Webb ("Webb"), then President of AFSCME Local 654, and other members of City of Chicago Unit #3 with the intention of disciplining them for providing documents to AFSCME's attorney for the attorney's use in preparing for grievance arbitration. On October 5, 2018, the Board's Executive Director issued a Corrected Complaint for Hearing, alleging that the Respondent violated Section 10(a)(1) of the Act by beginning an investigation of Webb and other Unit members for the purpose of initiating discipline against Unit members for having engaged in protected activity.

On October 25, 2018, the Respondent filed its Answer to the Corrected Complaint for Hearing, denying all material allegations and asserting affirmative defenses. For its first

affirmative defense, the Respondent asserts that Webb and other Unit members intentionally acquired, entered, accessed, and/or disseminated, for non-police purposes and without first seeking authorization from the Department, confidential LEADS (Law Enforcement Data Systems) and NCIC (National Crime Information Center) records maintained by the Department. When the City became aware of this activity, the Respondent asserts, it had a duty to report the conduct to the City's Bureau of Internal Affairs, as it had done on previous occasions when misuse of Department records was suspected.

For its second affirmative defense, the Respondent asserts that the City's determination to conduct an investigation into the conduct allegedly engaged in by Webb and other Unit members was in accord with applicable work rules and within its managerial authority to commence investigations into suspected misconduct or violations of its work rules and policies, as authorized under Section 2.1 of the collective bargaining agreement between the City and the Union.

Following the filing of the Respondent's Answer and Affirmative Defenses, and following several delays occasioned by Webb's leave of absence for medical reasons and the fact that the City had not completed its investigation, an Order Scheduling Hearing was issued on August 28, 2020 and a hearing was scheduled for November 17, 18, and 19, 2020. Thereafter, both parties filed motions in limine seeking to exclude certain testimony and other evidence at the hearing, and a ruling was issued on the motions. The ruling granted the Charging Party's motion to bar Respondent from compelling the testimony of Derek Webb and also granted the Respondent's motion to bar the presentation of evidence concerning the actual conduct to date of the Respondent's then-incomplete investigation.

A hearing was then held pursuant to the Scheduling Order on November 17 and 18, 2020. Both parties appeared at the hearing, with the Charging Party appearing by Robert A. Seltzer of Cornfield & Feldman LLP, and the Respondent appearing by City of Chicago Assistant Corporation Counsel Nicole Dax. The parties were given a full opportunity to participate, adduce relevant evidence, and examine witnesses. Written briefs were filed by both parties. Accordingly, based on the testimony, evidence and arguments submitted by the parties before, during, and after the hearing, and upon the entire record of this case, I recommend the following:

I. PRELIMINARY FINDINGS

The following facts are uncontested:

1. The City of Chicago is a public employer within the meaning of Section 3(o) of the Illinois Public Relations Act. The City operates the Chicago Police Department.

2. The City is a unit of local government subject to the jurisdiction of the Board's Local Panel pursuant to Section 5(b) of the Act.

3. The American Federation of State, County and Municipal Employees, Council 31 is a labor organization within the meaning of Section 3(i) of the Act.

4. At all relevant times, the City and the Union have been parties to a collective bargaining agreement, dated July 1, 2017 – June 30, 2022, which contains a grievance procedure culminating in binding arbitration.

II. ISSUES AND CONTENTIONS

The Union contends that the City violated Section 10(a)(1) of the Act when it began an investigation of Local President Derek Webb and threatened to discipline him because of his having engaged in union or protected concerted activities. Although the Corrected Complaint alleges, in paragraph 15, that "Respondent began an investigation of Webb and other Unit members for the purpose of initiating discipline against Unit members for engaging in protected activity by accessing and providing documents to Charging Party for use during arbitration," the Union does not contend that the City's investigation of Union members other than Webb constituted a violation of the Act.

The Respondent denies that it violated the Act in any way. It asserts that it began an investigation of Unit members after they allegedly supplied confidential documents to Union attorney Scott Miller in connection with the Union's preparation for a grievance arbitration proceeding. It contends that the Union failed to establish that bargaining unit members engaged in protected activity and that, even if the Union did make out a prima facie case, the City nonetheless demonstrated that it had a bona fide, non-pretextual, legitimate business reason for initiating the investigation.

III. FINDINGS OF FACT

A. Background Facts

The City and AFSCME Council 31, for and on behalf of its Local 654, are parties to a collective bargaining agreement ("CBA") covering civilian employees in the Chicago Police Department's Field Services Section, or Unit 166, including employees holding the titles of

Criminal History Analyst and Warrant Extradition Aide. Webb served as President of Local 654 from January, 2012 to November, 2017.

The Field Services Section has a number of responsibilities within the CPD, including providing assistance to police officers by retrieving records, including checking for warrants and processing arrests. Unit 166 is also responsible for updating "rap sheets", or criminal history records of individuals in the CPD's computer data base, including recorded arrests of such individuals.

1. LEADS

Authorized employees in Unit 166 have access to the Law Enforcement Agencies Data System ("LEADS"). LEADS is the law enforcement data base containing information maintained by the State of Illinois and used by Illinois police agencies, including the CPD. LEADS contains information concerning persons who are wanted by law enforcement agencies, as well as other information used by law enforcement agencies such as vehicles and guns that are reported stolen and information relating to runaway children or missing persons. It is used by the CPD as a means of communicating with other law enforcement agencies and as a source of non-public information relating to the policing function that is broader in scope than the information available to a single agency. National crime information also is available to authorized Unit 166 employees by means of their access, via LEADS, to the National Crime Information Center ("NCIC").

In order to upload information into and acquire information from LEADS, the CPD uses an internal computer system known as "Hot Desk." Documents printed from Hot Desk contain LEADS data, including LEADS numbers that are unique identifiers generated by LEADS.

Documents obtained by use of Hot Desk are subject to the same prohibitions concerning access and dissemination for non-law enforcement purposes as LEADS documents generally.

CPD's authorization to use LEADS is governed by means of an agreement with the Illinois State Police that contains restrictions on dissemination. Thus, the LEADS Agreement states, in pertinent part, that "[i]t is strictly forbidden to disseminate any information obtained through LEADS to any individual organization that is not legally authorized to have access to that information." This admonition also is contained at Section 1240.80(d) of Title 20 of the Illinois Administrative Code, which pertains to "Corrections, Criminal Justice, and Law Enforcement."

To aid in the enforcement of this administrative rule and contractual requirement, participating agencies are required to "[e]stablish local policies and procedures for safeguarding information and equipment, and impose disciplinary action against any individual found to be violating LEADS policies and procedures." In addition to cautioning participating agencies that "unauthorized request or receipt of LEADS material could result in criminal proceedings," the LEADS agreement provides that the Illinois State Police may "unilaterally suspend [the agency's] access to LEADS when any term of [the] Agreement is violated or, in the opinion of [the Illinois State Police] appear to be violated." The record is clear that the loss of access to LEADS would compromise the CPD severely in the exercise of its policing function.

In compliance with the LEADS Agreement, CPD General Order 09-01-01 provides, in pertinent part, that "[t]he contents of any record, file or report will not be exhibited or divulged to any non-Departmental person or entity except in the performance of official duties and in accordance with Department policy, and applicable federal, state and local laws." General Order

09-01-01 also provides that "alleged violations of [the General Order] shall be investigated by means of the Complaint Register (CR) process and subject to disciplinary action."

2. Investigations of Alleged Misconduct

When it is alleged that a CPD employee has engaged in misconduct, including but not limited to, LEADS violations, the resulting investigation is usually handled by the Department's Bureau of Internal Affairs ("BIA").[1] The BIA is divided into sections, including General, Special, and Confidential Investigations sections, as well as an Advocate Section. The General and Special Investigations sections are located at the Department's facility at 35th and Michigan in Chicago.

Investigations are conducted in accordance with Special Order S08-01-01, entitled Conduct of Complaint Investigations, which contains a number of procedural requirements and legal protections for the subjects of allegations of misconduct. Investigators in the BIA are conducted by sergeants, who in turn supervise detectives who are assigned in the event that the investigations should lead to allegations of criminal misconduct.

Special Order S08-01-01 provides that the investigator assigned to conduct the investigation will "[i]nterview the accused member and other members who may have knowledge of the alleged misconduct." The Special Order also provides that "[e]very effort will be made to ensure that the investigation is conducted in an impartial manner."

Upon completion of the fact-gathering portion of an investigation, including facts gathered from witness interviews, the BIA investigator will classify the allegation as "unfounded", "exonerated", "not sustained", or "sustained". An allegation is classified as

[1] Investigations of complaints against police officers, including officer-involved shootings and alleged Fourth Amendment violations, are handled in accordance with a City of Chicago ordinance by the Civilian Office of Professional Responsibility ("COPA").

"sustained" only when supported by substantial evidence. Respondent's witness Lieutenant Joseph Bird ("Lt. Bird") estimated that approximately 20 to 30 percent of complaints result in sustained allegations. If the investigator finds that the complaint is sustained, he or she will make a disciplinary recommendation.

Once the BIA investigator completes the investigation, the investigation and disciplinary recommendations, if any, are reviewed by the investigator's supervisor. Once that review has occurred, the investigation is sent through Command Channel Review ("CCR"), during which the investigation and recommendations are reviewed by superiors in the accused employee's chain of command, each of which has the opportunity to concur or not concur with the recommendations. Following the CCR review, the Chief of the BIA reviews the investigation and recommendations and makes a determination as to the discipline to be imposed, if any. The outcome of the investigation also may be reviewed by the Department's Superintendent of Police.

Prior to the employee's being notified of the outcome, the investigation is reviewed by the Advocate Section of the BIA to make sure that the investigation was thorough, that the outcome is supported by the evidence, and that the disciplinary recommendations are fair and consistent with other cases. When this stage of the investigation is complete, the employee is notified by the BIA of the outcome of the investigation, and the employee has the option of accepting or rejecting the disciplinary determination. If the employee rejects the penalty, he or she has the right to file a grievance in accordance with the terms of the applicable collective bargaining agreement.

At the hearing, the Respondent produced a listing of discipline imposed for sustained complaints involving alleged misuse of Department records. The list was current as of

November 6, 2020, and included cases with occurrences dating back as far as August of 2012. The period between the incident date and the closed date was typically lengthy, often encompassing two years or more. Of 16 reported cases, 11 resulted in suspensions of up to 5 days, three resulted in reprimands, and two were recorded as "violation noted."

B. Events Leading to the Unfair Labor Practice Charge

On May 2, 2015, Local 654 President Derek Webb filed grievance number 1-15-57-914 against the City asserting that the City's Police Department violated the CBA by assigning or allowing Criminal History Analysts to perform work that should have been performed, allegedly according to the CBA, by employees in the title of Warrant Extradition Aide. Failing resolution in the grievance procedure, the grievance was submitted to arbitration before Arbitrator Daniel Nielsen and a hearing date was set for June 2, 2017. The Union was represented by Attorney Scott Miller ("Miller") and the City was represented by Assistant Corporation Counsel Richard "Joe" Cook ("Cook"), with Chicago Police Department Assistant Director of Labor Relations Kevin O'Bryan ("O'Bryan") serving as the representative of the Department.

On May 22, 2017, Arbitrator Nielsen, at Miller's request, sent a subpoena to the City seeking the production of certain documents, including Hot Desk reports, for a Criminal History Analyst named Aaron Pulling. In response, Cook sent partially redacted documents to Miller. The Union did not contest the sufficiency of the response to the subpoena.

On June 1, 2017, the day before the scheduled arbitration hearing, Miller sent Cook an e-mail message attaching PDF files containing approximately 200 pages of documents that Miller said he may introduce at the hearing. Cook forwarded the message, with attached PDF files, to O'Bryan, who in turn forwarded the message to CPD Lieutenant Janice Roche ("Lt. Roche"), asking what the PDF documents were. Lt. Roche told O'Bryan that some of the documents were

sensitive documents to be used for law enforcement purposes only. Lt. Roche then told O'Bryan that a Complaint Register ("CR") had to be initiated because, under CPD General Order G09-01-01, the information contained in the documents should not have been disseminated outside the CPD. Accordingly, Lt. Roche told O'Bryan to prepare an initiation report and to review the documents to determine whether they contained any information that would allow identification of the person(s) who produced them. The review in fact was performed by Sergeant Theresa Hickey ("Sgt. Hickey"), a supervisor within the CPD Field Services Division.

On review, it was determined that the PDF files contained 14 handwritten notification documents, 21 Hot Desk documents, and one computer record containing a LEADS document. Pursuant to Lt. Roche's direction, Sgt. Hickey then prepared for Lt. Roche's signature a memorandum dated June 1, 2017, to Wynter Jackson, Director of the City's Management and Labor Affairs Section. The memorandum was identified as Complaint Log Initiation #1085425, or "CR", and it listed four employees who were identified from the documents sent by Miller to Cook. These four employees were Samuel Ware Jr. ("Ware"), Aaron Pulling ("Pulling"), Karen Brown ("Brown"), and Jo Ann Jordan ("Jordan"). Local Union President Derek Webb was not among those identified.

Identifying Ware, Pulling, Brown, and Jordan as the "accused", the CR states that "[i]t is alleged that the above employees while working in Unit 166 violated their individual LEADS agreements with the Illinois State Police, as well as violating Chicago Police Department policy in regards to the dissemination of LEADS and NCIC information." The CR went on to state:

> On today's date Kevin O'Bryan was given close to 200 pages of documents that were associated with the above employees' PCO login. The documents were sent by an attorney for the AFSCME union in regards to an active grievance. These documents have no redaction. These documents were not requested by Kevin O'Bryan. These documents were clearly gotten from LEADS and NCIC. The documents were disseminated in violation of Chicago Police Department policy as well as in violation of

> the signed agreements with the Illinois State Police. Access to information is restricted to official police business. Access of information for personal or other reasons is strictly prohibited. Records, files or reports may be printed from computerized information systems and/or duplicated by Department personnel for Department use only with limited exceptions. This instance is not one of those exceptions.

Prior to the start of the scheduled arbitration hearing on June 2, 2017, Cook talked to Miller and told him that he was not supposed to be in possession of the documents that he had sent to Cook the day before, that some of them were LEADS documents and that they should not be used in the hearing. Miller testified that "[t]here was the statement that the City Police Department would have to investigate the matter, having possession of the documents, and there was also the suggestion that the local president [Webb] may be disciplined for this matter." Miller then was asked by Union counsel whether Cook stated why he believed that Webb might be subject to discipline. Miller responded that Cook said: "Because the Union was in possession of these documents. The police department did not provide them to me." When Miller was asked if he told Cook who provided him with the documents, he replied: "No. The local."

During a prehearing conference with Arbitrator Nielsen, the City objected to the introduction of the disputed documents, and the Arbitrator asked the attorneys to step into the hall for a sidebar conference. According to O'Bryan, those present during the sidebar were the Arbitrator, Miller, Cook, and O'Bryan. After a discussion concerning the documents, leading ultimately to a decision that redacted versions of some of the documents would be admitted, Arbitrator Nielsen turned his attention to Cook and O'Bryan, saying (according to O'Bryan), "[I]f there's going to be an investigation into union members, you know that they could file an unfair labor practice?" In response, O'Bryan testified that he gave a twofold response:

> [O]ne, the ball is already in the air. You know, we have an obligation to open the CR within an hour. And two, we didn't have a choice when an allegation of misconduct comes up. I'm sorry, when potential misconduct comes up, it is the responsibility of a supervisor to initiate the CR.

Attorney Miller testified that this sidebar conference was not the only conversation in which the documents, the prospect of an investigation and possible discipline were discussed. Miller testified that "there were many conversations. There were conversations in the general room. There were conversations when we were broken out by the arbitrator in our respective breakout rooms." When asked how many times Cook said that Webb might be disciplined, Miller responded: "It came up several times."

Attorney O'Bryan testified that he did not believe that there were any sidebar conversations that he did not attend, and that, to the best of his recollection, there was only one sidebar conversation, involving Scott Miller, Joe Cook, the Arbitrator, and himself. When asked if anyone from the City said that Webb or any other bargaining unit member would be disciplined for providing the documents in question to Miller, O'Bryan testified:

> No, absolutely not. As pertains to Mr. Webb, you'll see on the Initiation Report his name is nowhere on it. You know, as I was going through the documents, there was no evidence that Mr. Webb had anything to do with those documents. You know, his PCO number was not on any of them, which is why he was not listed as an accused.
>
> In terms of would be disciplined, no, we investigate, and if we determine whether or not a rule has been broken, then misconduct is possible. I'm sorry, discipline is possible.

When asked by Union counsel if he was saying that Derek Webb's name was not mentioned at all in any of the conversations, O'Bryan testified:

> To the best of my recollection, sir, it definitely could have come up as someone who if misconduct was proved, could face discipline, along with anybody else that was being investigated. But the idea that we went in there and said "We're going to investigate and discipline Derek Webb" is incorrect. We were not investigating Derek Webb. His name is not on the CR initiation, and we don't presuppose the results of our investigations.

Union counsel then asked: "If Mr. Webb is not being investigated, would he still be subject to interrogation?" O'Bryan responded: "He could be called in as a witness."

With Arbitrator Nielsen's assistance, the City and the Union were able to settle the grievance, resulting in the entry of a Consent Award. Accordingly, there was no hearing and no documents were entered into evidence. The Arbitrator signed the Consent Award on March 23, 2018. Miller was not asked to return the disputed documents at or after the date of the hearing, nor was he asked to delete them from his computer.

On September 5, 2017, Miller sent a "cease and desist" letter to the City's Management and Labor Affairs Director Wynter Jackson ("Jackson") stating in pertinent part that:

> It's come to my attention that the Chicago Police Department (Employer) is investigating AFSCME 654 Local President Derek Webb and two (2) – three (3) additional bargaining unit members with the intent of disciplining them as a result of the information the Local provided to me in preparation for the grievance arbitration [before Arbitrator Nielsen]…. The Employer's attorneys suggested at the hearing that the Employer may discipline Mr. Webb because of the Union's possession of this information.

On September 20, 2017, Jackson responded to Miller's letter. After acknowledging receipt of Miller's letter, Jackson stated, in pertinent part, that: "To be clear: the Department has rules against the unauthorized use of its computerized [documents]. The Department's clear and longstanding policy is to investigate any potential breaches of that rule. The Department will not cease and desist its investigation into this matter." The charge of unfair labor practices followed on October 4, 2017. The investigation referred to in Jackson's letter, however, had not been completed as of the date of the hearing in this case.

C. Ruling on Motions in Limine

As noted in the introduction to this Recommended Decision and Order ("RDO"), both parties filed motions in limine in advance of the hearing. The Union sought an order prohibiting the City from subpoenaing Webb to testify or provide documents or from calling Webb to testify at the hearing. The City sought an order excluding as irrelevant evidence relating to the conduct

of the investigation to date or to what may transpire in the future during the course of the investigation.

I issued a Ruling on the Motions on October 13, 2020, before the dates of the hearing. In that Ruling, I said that "[e]ach party here seeks a ruling that will restrict the other party's case but allow free rein to the moving party to present its case." In making my ruling, I said that "I am not inclined to gerrymander the presentation of evidence either way." Accordingly, I granted both motions. As a result, Webb did not testify nor was he required to produce documents, and while the City produced evidence as to the conduct of investigations generally, no evidence was produced as to the status of the investigation at issue as of the dates of the hearing.

As I noted in my Ruling on the Motions, "[t]he problem that the parties and I face is that this is really just a partial case. It involves alleged threats of discipline made in connection with an investigation that has not yet been concluded." Therefore, I stated, "at this stage of what may become an evolutionary process, I cannot presume that the investigation will be concluded or that discipline will ensue."

IV. DISCUSSION AND ANALYSIS

The Employer did not violate Section 10(a)(1) of the Act by commencing an investigation concerning alleged improper dissemination of confidential documents, including LEADS documents.

This case, as limited in scope by the Ruling on the Motions in Limine, involves 1) alleged threats of discipline allegedly made in retaliation for or because of Derek Webb's having filed a grievance or because of his status as President of the local Union; and/or 2) alleged threats of discipline allegedly made in response to actions taken by Union members in the course of

providing information to the Union's attorney in connection with the attorney's preparation for a grievance arbitration hearing.

A. Applicable Legal Standards

The Corrected Complaint in this case alleges that the Respondent violated Section 10(a)(1) of the Act by commencing an investigation of Webb and other Unit members for the purpose of initiating discipline against them for engaging in protected activity. While Section 10(a)(1) typically does not require proof of an illegal motive on the part of the employer, when an employee asserts that he or she suffered an adverse action because of having engaged in protected activity, "[the employee] necessarily contends that the employer's motives for [the adverse action] were improper." *Pace Suburban Bus Division of the Regional Transportation Authority v. Illinois Labor Relations Board, State Panel, et al.*, 406 Ill.App.3d 484, 494 (1st Dist. 2010) (*"Pace"*).

Where, as here, the charging party alleges that the employer violated Section 10(a)(1) by taking an alleged adverse employment action against him because of, and in retaliation for, the exercise of protected rights, the analysis must track the one used in cases arising under Section 10(a)(2) of the Act *Pace; Village of Oak Park,* 18 PERI ¶ 2019 (IL SLRB 2002); *Village of Schiller Park*, 13 PERI ¶ 2047 (IL SLRB 1997). In such a case, the charging party;s prima facie case consists of proof, by a preponderance of the evidence, that (1) he engaged in protected activity, that (2) the employer was aware of the activity, and that (3) the employer took adverse action against him for engaging in that activity. *City of Burbank v. Illinois State Labor Relations Board,* 128 Ill.2d 335, 345 (1989) ("*City of Burbank"*): *Sheriff of Jackson County v. Illinois State Labor Relations Board*, 302 Ill. App. 3d 411, 415 (5th Dist., 1999). Both parties adopt this analysis in their post-hearing briefs as the proper one to be used based upon the allegations in the Corrected Complaint and the facts of this case.

Once the charging party has met the three-step prima facie case obligation set forth above, the employer may avoid a finding of a statutory violation by showing that it had a legitimate business reason for the adverse action against the employee. *City of Burbank,* at 346. In addition, as the Court said in *City of Burbank,* the legitimate business reason advanced by the employer must be shown to be bona fide and not pretextual. *Id.* Finally, if the employer advances a bona fide, non-pretextual reason for the adverse action and is determined to have relied on that reason, then the case is characterized as a dual motive case, and the employer must show by a preponderance of the evidence that it would have taken the same action notwithstanding the employee's union or protected, concerted activity. *City of Burbank,* at 347; *Pace,* at 500.

B. Analysis

The Union, in its post-hearing brief, does not contend that employees other than Derek Webb were subject to conduct violative of Section 10(a)(1). Rather, the Union contends that the unfair labor practice occurred when Webb allegedly was threatened with discipline in connection with the production of LEADS and other confidential documents to Scott Miller. Accordingly, I will first address the evidence as it applies to Webb and then to employees other than Webb.

1. Derek Webb

The City contends that the employees in question, including Webb, did not engage in protected, concerted activity. As the City notes, "[a]n employee engages in concerted activity when he or she acts, jointly or individually on behalf of others or invokes a right under a collective bargaining agreement, but not when the employee acts solely on his own behalf," quoting *County of Cook (Management Information Services),* 11 PERI ¶ 3012 (IL LRB 1995). The Union alleges, however, that Webb engaged in union and protected, concerted activity when he filed the grievance that led to the arbitration proceeding before Arbitrator Nielsen. It is well settled that filing a

grievance pursuant to a collective bargaining agreement is statutorily protected activity as defined in Section 6 of the Act. *Pace,* at 496; *County of Cook*, 27 PERI ¶ 57 (IL LRB-SP 2013); *Village of Calumet Park,* 22 PERI ¶ 23 (IL LRB-SP 2006). Accordingly, the first step of the three-step prima facie case burden, as to Derek Webb, has been met by the Union. The second step also was met, as the evidence clearly establishes the City's knowledge of Webb's status as President of the local union and of the fact that Webb signed the grievance in question.

The third step of the *City of Burbank* initial burden analysis requires a showing that the Employer took adverse action against Webb. The Union contends that the third step obligation is met by evidence that the City "commenced an investigation of Webb … even though the City had no evidence that Webb had anything to do with Miller's possession of the documents." Accordingly, the Union contends, it reasonably can be inferred that the City began the investigation of Webb "because of his status as the president of Local 254, his filing of Grievance No. 1-15-57-914 against the City, and his attendance for the Union at the arbitration hearing of that grievance on June 2, 2017."

The first question to be addressed in analyzing the evidence pertaining to the third step of the prima facie case analysis is whether the Employer, by and through its attorney and agent Joe Cook, told Miller, as attorney and agent for the Union, that Webb would be subjected to an investigation for his alleged role in the provision of confidential documents to Miller. I find that he did. As noted in the Findings of Fact, Miller initially testified that "[t]here was the statement that the City Police Department would have to investigate the matter, having possession of the documents, and there was also the suggestion that the local president [Webb] may be disciplined for this matter." Miller later amplified his testimony on cross-examination, testifying that there were many conversations about the documents. When asked how many times in those

conversations Cook said that Webb might be disciplined, Miller responded: "It came up several times." I credit Miller's testimony, without necessarily discrediting O'Bryan.

With respect to the testimony given by Miller, O'Bryan testified that, except for Miller's testimony regarding Cook's alleged statement concerning the possible discipline of Derek Webb and except for Miller's belief that Wynter Jackson was present during the conversation, "I believe Miller's testimony was accurate." In addition, when describing his working relationship with Scott Miller, O'Bryan said: "Very professional, very much the same. Scott is a dedicated attorney and a good one. He's an honest man, and we have never had an issue with each other."

The next question is whether the statements concerning the investigation and possible discipline of Derek Webb, credibly attributed to City attorney Joe Cook by Union attorney Scott Miller, constituted adverse action or an intent to take adverse action against Webb. I find that they did not.

Adverse employment actions include such actions as "discharge, discipline, assignment to more onerous duties or working conditions, layoff, reduction in pay, hours or benefits, imposition of new working conditions or denial of advancement." *Illinois Department of Management Services (Department of Employment Security),* 11 PERI ¶ 2022 (IL SLRB 1995). See also *County of DuPage and DuPage County Sheriff,* 30 PERI ¶ 115 (IL LRB-SP 2013). While "adverse financial consequence is not a requirement for a finding that an unfair labor practice occurred," *City of Chicago v. Illinois Local Labor Relations Board,* 182 Ill. App. 3d 588, 595 (1st Dist. 1988) ("*City of Chicago"*), "there must be some qualitative change in or actual harm to an employee's terms or conditions of employment." *City of Chicago (Chris Logan),* 31 PERI ¶ 129 (IL LRB-LP 2015) ("*Chris Logan"*), citing *City of Chicago* at 594-95.

In *Chris Logan,* a panel majority determined that a notice of a second pre-disciplinary meeting (the "2012 Notice") issued to the charging party did not support the Administrative Law Judge's recommendation that the respondent had committed an unfair labor practice. The Board's Local Panel noted that "[t]he alleged unfair labor practice is the issuance of the 2012 Notice, not any discipline that may have followed." Accordingly, the Local Panel found that "the issuance of the 2012 Notice is insufficient to sustain the alleged charges because the issuance of the 2012 Notice is not an adverse action under the Act." Similarly here, attorney Cook's reference to Webb as a person subject to an investigation and possible discipline because of the alleged dissemination of confidential documents, including LEADS documents, to an unauthorized person did not constitute an adverse action.

There are several reasons for this determination. First, Miller's testimony, while credible, is vague as to the actual comments made by Cook. Miller's direct testimony was that there was a "suggestion" that Webb might be disciplined pursuant to the investigation. While Cook's statements could be interpreted as a threat, it is equally reasonable to interpret the comments as a statement of a possible outcome of the investigation, as derived from City policy providing that alleged violations of General Order G09-01-01 are to be investigated and are "subject to disciplinary action."

Second, the fact that Webb is not one of the employees listed on the CR does not mean that he was not or could not be subject to investigation. As Special Order S-08-01-01 provides, the investigator assigned to an investigation of this type is required to "[i]nterview the accused member *and other members who may have knowledge of the alleged misconduct*." As O'Bryan testified, Webb could be interviewed as a witness concerning any knowledge he may have had with respect to the alleged dissemination of confidential documents, perhaps on the basis of

information obtained from employees listed on the CR or, given Webb's position as local union president, on the basis of Miller's statement that he got the documents "from the local."

Third, it is clear from the record that Joe Cook, who made the alleged threat of investigation and discipline, was not in a position to control the investigation or its outcome. Once it was determined that confidential documents, including LEADS documents, had been disseminated to persons allegedly not authorized to have them, the investigation of the dissemination was triggered by the preparation of the CR and it became the responsibility of the BIA. There is no evidence that either Cook or O'Bryan either influenced or was in a position to influence the outcome of the investigation.

Fourth, the record establishes that the conducting of an investigation does not inevitably lead to discipline and that safeguards are employed to ensure a fair result that is consistent with other cases. As Lt. Bird estimated, only 20 to 30 percent of investigations result in sustained allegations. Moreover, if discipline does result, it is subject to challenge by means of the contractual grievance procedure.

As in *Chris Logan,* "the alleged adverse action is not the discipline itself but rather the initiation of … proceedings which *could* result in discipline." And as in *Chris Logan,* "the [alleged] adverse action in question does not satisfy the third element of the prima facie case because there was no actual harm to the Charging Party's terms and conditions of employment."

2. Other Employees Subject to Investigation

The Union appears to have abandoned, in its post-hearing brief, any claim it may have had to a violation of the Act resulting from the BIA investigation of the other employees referenced in the Corrected Complaint, which essentially are the four employees listed on the CR and any other

employees, including Webb, reasonably suspected of having been involved in the unauthorized dissemination of LEADS data by virtue of information obtained during the investigation. The record supports the Union's restriction of its case to the comments regarding the investigation and possible discipline of Derek Webb. Notwithstanding this limitation, however, the evidence relating to employees other than Derek Webb must be addressed.

The issue of the investigation of and possible discipline that could be administered to the four employees listed on the CR is different from the issues raised by the alleged threat to investigate Derek Webb. While providing documents to a union attorney for possible use in a grievance arbitration proceeding is generally considered to be protected activity, in that "[i]t is well settled that employees have the statutory right to communicate their employment-related complaints to persons and entities other than their employer…." *Village of Bensenville*, 10 PERI ¶ 2009 (IL SLRB 1993), it is also true that "[c]oncerted activity, although generally protected, may lose the protection of the Act 'when an employee ignores a work rule or when the employee's conduct is so destructive that it threatens the employer's right to maintain discipline in the workplace.'" *County of Cook and Sheriff of Cook County*, 37 PERI ¶ 2020 (IL LRB-LP 2020), citing *Village of New Athens,* 29 PERI ¶ 27 (IL LRB-SP 2012). In this case, the record establishes that there were explicit and clearly communicated policies and work rules prohibiting unauthorized dissemination of LEADS data. In addition, the record establishes that the non-enforcement of those policies could have severe adverse consequences for the achievement of the central mission of the CPD. Accordingly, if the City's investigation should establish that the policies and work rules prohibiting unauthorized dissemination of LEADS documents were violated, employees proven to have violated those policies and work rules would not be sheltered from the consequences of their actions by virtue of having engaged in otherwise protected activities.

As to the four employees listed on the CR, there was a rational basis, derived from information obtained from the documents themselves, for the City to have initiated an investigation into the unauthorized dissemination of LEADS documents. In *Better Government Association v. Zaruba,* 2014 IL App (2d) 140071, a Freedom of Information Act case in which the plaintiff BGA sought to obtain certain LEADS records, the Appellate Court quoted liberally from the Illinois Department of State Police regulations, some of which were cited above, and said that "[t]he regulations make clear that the public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS." *Id.*, at ¶ 27. With respect to the right of a police agency to investigate alleged violations of the agency's agreement with the Department of State Police and/or the regulations, the Appellate Court, quoting the trial court, said: "There is nothing to prevent the appropriate body, properly authorized to access the LEADS system, from investigating any alleged improper uses." *Id.*, at ¶ 34. The City, therefore, was justified in initiating an investigation into the alleged violations of the City's LEADS dissemination policies.

As to the employees other than Webb, I find that, the third step of the *City of Burbank* prima facie case analysis was not met because of the record evidence that the employees who produced LEADS documents to attorney Miller did so in probable violation of established work rules, with potential serious harm to the Employer. But even if it were determined that a prima facie case was established, I find that the Employer established legitimate business reasons for conducting the investigation, that these reasons were bona fide and not pretextual, and that an investigation concerning a LEADS violation would have been conducted irrespective of the employees' having engaged in union or concerted activities. *City of Burbank* at 346, 347.

3. Summary of Findings and Recommendations

In summary, I find that the Respondent did not violate the Act by virtue of comments regarding Derek Webb made by an attorney for the Respondent at a grievance arbitration proceeding, because those comments did not constitute an adverse employment action. As to the employees other than Derek Webb who are referenced in the Corrected Complaint, they lost the protection of the Act to the extent that it is determined that they disseminated LEADS documents to unauthorized persons. Moreover, even if a prima facie case had been established, I find that the Employer produced legitimate, non-pretextual business reasons for conducting an investigation concerning that dissemination, and that, because of the nature of the misconduct alleged and the safeguards employed in the investigation process, the Employer would have taken the same action whether or not the employees alleged to have been involved were engaged in union or concerted activities.

V. RECOMMENDED ORDER

Unless reversed or modified by the Board, the Corrected Complaint is dismissed.

VI. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 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 Recommended

Decision and Order. 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 N. LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated e-mail address for electronic filings, at ILRB.Filing@Illinois.gov in accordance with Section 1200.5 of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300. All filings must be 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 in Chicago, Illinois on July 26, 2021

Donald W Anderson

_____

Donald W. Anderson
Administrative Law Judge

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