STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Professional Fire Fighters of Elmhurst, Local 3541, IAFF, Charging Party, and City of Elmhurst, Respondent.	)	Case No. S-CA-21-014

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On June 2, 2021, Executive Director Kimberly Stevens dismissed a portion of a charge filed by Charging Party Professional Fire Fighters of Elmhurst, Local 3541, International Association of Fire Fighters, (Union) on August 7, 2020, alleging Respondent City of Elmhurst (City or Employer) engaged in unfair labor practices within the meaning of Section 10(a)(1), (2), and (4) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315. The charge alleged Respondent violated the Act when it implemented unilateral changes to return to work requirements and procedure for light duty assignments, fitness for duty, worker's compensation leave, and personnel investigation procedures and surveillance, during the pendency of interest arbitration proceedings. The charge also alleged the unilateral changes were made in retaliation for employees engaging in protected activity.

The Executive Director determined the charge raises questions of fact and law regarding whether Respondent made implied threats of discipline in violation of Section 10(a)(1) of the Act and whether Respondent violated Sections 10(a)(2) and (1) of the Act by discouraging employees from engaging in activities for mutual aid and protection, and thus issued a complaint for hearing on those allegations. The Executive Director, however, dismissed the remaining allegations on grounds the available evidence failed to raise issues of fact or law warranting a hearing.

The Executive Director dismissed the allegations that Respondent unilaterally implemented changes to unit members' terms and conditions of employment, including during the pendency of interest arbitration proceedings, and repudiated the parties' collective bargaining agreement. She found that the alleged changes were not substantial enough to constitute repudiation of the parties' collective bargaining agreement or to trigger the Employer's statutory bargaining obligations. The Executive Director noted that the unilateral change allegations would require the Board to interpret the parties' collective bargaining agreement to resolve the charges and concluded that those allegations involve contractual issues that implicate the parties' grievance procedure, over which the Board lacks jurisdiction. Regarding the allegations that Respondent violated certain unit members' rights under HIPAA, the Workers' Compensation Act, and the Fireman's Disciplinary Act, the Executive Director observed the Board lacked jurisdiction over those statutes and thus dismissed those allegations. The retaliation and discrimination allegations were dismissed because Charging Party failed to identify the protected concerted activity engaged in by the unit members in question and because the evidence failed to point to a causal connection between the alleged protected activity and adverse employment actions.

The Union timely appealed the Executive Director's dismissal, and Respondent timely responded. After reviewing the record, the dismissal order, the Union's appeal and supporting memorandum, and Respondent's response, we reverse the partial dismissal and direct issuance of an amended complaint for hearing to include the remaining allegations as discussed below.

In its appeal and supporting memorandum, the Union challenges seven parts of the partial dismissal order: Specifically, the Union claims the Executive Director erred by failing to find the existence of issues of fact or law warranting a hearing regarding whether: (1) the alleged unilateral changes concerning fitness for duty requirements and procedures, light duty assignments, employee investigatory methods and practices; (2) the allegations that such unilateral changes were implemented during the pendency of interest arbitration proceedings; (3) some of the alleged unilateral changes constitute permissive waivers of statutory rights; (4) the City reneged on a written agreement concerning the scope of medical information that would be provided to the City regarding Burmeister; (5) the City's conduct constituted a repudiation of the terms of the parties'

collective bargaining agreement; (6) the City retaliated and/or discriminated against Burmeister, Drzewiecki, and Stoike; and (7) the City violated the Act during a conversation between Stoike, the City's Human Resource Director, and the Deputy Chief. The Union asserts the Executive Director dismissed these allegations on the merits based on incorrect standards, rather than analyzing the evidence to determine whether allegations raised questions of fact or law for hearing.

Unilateral Changes/Pendency of Interest Arbitration/Repudiation

Section 14 of the Act gives employees, who are prohibited from striking, a procedure to "engage in negotiation and mediation, and, if no compromise can be reached, to *compel* arbitration." 5 ILCS 315/14. Section 14(l) further states that "[d]uring the pendency of proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other." 5 ILCS 315/14(l). An employer violates Sections 10(a)(4) and (1) of the Act when it unilaterally changes employees' terms and conditions of employment during the pendency of interest arbitration proceedings. Vill. of North Riverside, 33 PERI ¶ 33 (IL LRB-SP 2016); *East St. Louis Fire Dept.*, 30 PERI ¶ 67 (IL LRB-SP 2013).

To constitute part of the status quo between the parties, a term or condition of employment must be an established practice. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31 v. Ill. Labor Relations Bd., 2017 IL App (5th) 160229 ¶ 41. The express terms of the parties' recently expired collective bargaining agreement are, in general, the primary indicator of the status quo as to matters covered by the agreement, while the parties' past practices are relevant especially as to matters not covered under the agreement. Vill. of Oak Park, 25 PERI ¶ 169 (IL LRB-SP 2009).

When an employer's conduct demonstrates a disregard for the collective bargaining process, evidences an outright refusal to abide by a contractual term, or prevents the grievance process from working, that conduct constitutes repudiation and violates Section 10(a)(4) and (1) of the Act. City of Loves Park v. Ill. Labor Relations Bd., State Panel, 343 Ill. App. 3d 389, 395 (2nd Dist. 2003); City of Collinsville, 16 PERI ¶ 2026 (ISLRB 2000), aff'd, City of Collinsville v. Ill. State Labor Relations Bd., 329 Ill. App. 3d 409 (5th Dist. 2002). Where the allegations involve an employer's refusal to abide by a term of an agreement, the

Board will find a repudiation of that agreement if the Respondent made a (1) substantial breach of the agreement (2) without rational justification or reasonable interpretation such that it demonstrates bad faith. Chi. Transit Auth., 32 PERI ¶ 161 (IL LRB-LP 2016); Cnty. of Boone and Boone Cnty. Sheriff, 31 PERI ¶ 120 (IL LRB-SP 2015); City of Chi., 30 PERI ¶ 194 (IL LRB-LP 2014).

The Union contends the Executive Director erred by dismissing the unilateral change, pendency of interest arbitration, and repudiation allegations because they implicated contract interpretation issues to resolve the unfair labor practice claims. It contends the available evidence raises issues for hearing as to whether the Employer's actions constituted mere contract interpretation issues, unilateral changes to terms and conditions of employment during pendency of interest arbitration, or repudiation of the collective bargaining agreement.

We agree. We find Charging Party has submitted sufficient evidence to at least raise issues for hearing on whether the City unilaterally changed the status quo as to the fitness for duty requirements and procedures, light duty assignments, and employee investigatory methods and practices during the pendency of interest arbitration. For example, the express terms of the parties' agreement provide that the employee holds the detailed medical records and reports of the provider's fitness for duty evaluations and thus establishes the status quo. The correspondence from the City as Exhibit B to the Union's memorandum raises questions of fact as to whether the City changed the status quo as to the nature and scope of employee medical information it could receive. That correspondence also raises questions of fact and law as to whether such conduct together with the City's conduct in threatening discipline to obtain Burmeister's release of his detailed medical records and reports constituted a repudiation of the express terms of the parties' agreement.

We also find the evidence raises issues of fact and law for hearing on the allegations concerning the violations of HIPPA, the Workers' Compensation Act, and the Fireman's Disciplinary Act. Although the Executive Director correctly noted that this Board lacks jurisdiction to enforce provisions of those statutes, it does have jurisdiction to determine if the conduct that is alleged to have run afoul of those other statues also implicates unlawful conduct under the Act.

Retaliation/Discrimination

We find the Union has submitted sufficient evidence to raise issues for hearing on the remaining retaliation and discrimination claims. The Union claims in its appeal that the protected, concerted activity in this case is the assertion of contractual rights by each unit member, e.g., Burmeister asserting the contractual right to hold his fitness for duty medical records, and Drzewiecki and Stoike asserting their contractual rights under the fitness for duty and light duty provisions. The Union also contends that these three employees engaged in protected union activity by asserting statutory rights. There is merit to this contention as the Illinois Supreme Court has found that "[a]n employee engages in protected union activity only when the employee's actions invoke a right under the law or the collective-bargaining agreement." See Speed Dist. 802 v. Warning, et al., 242 Ill.2d 92, 121 (2011) citing Nat'l. Labor Relations Bd. v. City Disposal Sys., Inc., 465 U.S. 822 (1984)).

On the issue of causation, we find there is sufficient evidence to warrant a hearing. The Union submitted evidence that the adverse actions relating to all three individuals occurred almost immediately upon the invocation of their rights under the collective bargaining agreement and of their rights under the various statutes referenced in the charge. This together with the other claims of hostility towards the Union that are the subject of the complaint for hearing raises at least an issue of fact that would be more appropriately resolved at hearing.

Viewing the allegations and evidence as a whole leaves us with a sense the Union has raised issues meriting hearing at which the parties will have the opportunity to present testimony and other evidence and fully litigate the allegations. For the above reasons, we find Charging Party has provided sufficient support of its charge to raise issues for hearing. Accordingly, we reverse the Executive Director's partial dismissal of these allegations and direct the amendment of the complaint for hearing issued in this case to include allegations that the City committed unfair labor practices in violation of Sections 10(a)(1), 10(a)(2), and 10(a)(4) of the Act consistent with this decision and order.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ William E. Lowry
William E. Lowry, Chairman

/s/ John S. Cronin
John S. Cronin, Member

/s/ Kendra Cunningham
Kendra Cunningham, Member

/s/ Jose L. Gudino
Jose L. Gudino, Member

/s/ J. Thomas Willis
J. Thomas Willis, Member

Decision made at the State Panel's public meeting in Chicago and Springfield, Illinois, via videoconference on August 12, 2021; written decision approved at the State Panel's public meeting in Chicago and Springfield, Illinois via videoconference on September 23, 2021, and issued on September 24, 2021.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Professional Fire Fighters of Elmhurst, Local 3541, International Association of Fire Fighters, Charging Party and City of Elmhurst, Respondent	Case No. S-CA-21-014

PARTIAL DISMISSAL

On August 7, 2020, and as amended on October 29, 2020, Professional Fire Fighters of Elmhurst, Local 3541, International Association of Fire Fighters (Charging Party), filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board) in Case No. S-CA-21-014, alleging that Respondent, City of Elmhurst (Respondent) violated Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315, *as amended.* After an investigation conducted in accordance with Section 11 of the Act, I determined that a portion of the charge fails to raise an issue of law or fact sufficient to warrant a hearing. I hereby dismiss that portion of the charge for the following reasons.

I. INVESTIGATION

A. General Allegations

Respondent is a public employer within the meaning of Section 3(o) of the Act. Charging Party is a labor organization within the meaning of Section 3(i) of the Act that represents a bargaining unit (Unit) consisting of Respondent's full-time Fire Fighters and Fire Lieutenants.

Charging Party and Respondent are parties to a collective bargaining agreement (CBA) for the Unit that includes a grievance procedure culminating in final and binding arbitration. Charging Party alleges that Respondent violated Sections 10(a)(1), (2), (4) of the Act when it implemented unilateral changes to return to work requirements and procedure for light duty assignments, fitness for duty, worker's compensation leave and personnel investigation procedures and surveillance during the pendency of 14(l) proceedings. Section 14(l) provides:

> During the pendency of proceedings before the arbitration panel, existing wages, hours, and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this Act. The proceedings are deemed to be pending before the arbitration panel upon the initiation of arbitration procedures under this Act.

In addition, Charging Party also alleges that the changes were made in retaliation for employees engaging in union and protected concerted activities.

B. Firefighter Eric Burmeister ("Burmeister") – Unilateral Changes to: Fitness for Duty; Confidentiality of Medical Records; Complaint on Hostile Work Environment; Harassment & Increased Scrutiny

On June 27, 2020,[1] Respondent held a training exercise for firefighters that involved a ladder climb while wearing a truck belt.[2] When Burmeister was preparing for the climb, he was unable to clasp the truck belt due to size and therefore was unable to complete that portion of the training exercise. Later in the day he was able to put the belt on and fasten it. When he told personnel that he was ready to complete the exercise, he was told it was not necessary. Soon after, Burmeister requested a reasonable accommodation for a larger truck belt, which the City provided.

On July 9, Respondent placed Burmeister on paid administrative leave pending a fitness for duty test. Respondent scheduled Burmeister for the fitness for duty test for July 15.

[1] Unless otherwise noted, all dates listed are for the calendar year 2020.
[2] A truck belt is a safety accessory that firefighters wear to assist escape during fire service.

Respondent indicated that Burmeister must complete a fitness for duty test due to his failure to climb the ladder during the June 27 training exercise and a failure to complete a consumption drill on April 7.[3] The July 9, letter was the first time Burmeister was told there was an issue regarding the consumption drill. Burmeister spoke with Human Resources Director Emily Wagner (Wagner) about the what was involved in the examination process, and she informed him that Respondent would need detailed reports about his physical condition. Burmeister and Charging Party objected to Respondent receiving personal health information.[4] When Charging Party inquired with the City's attorney about what information the health care provider would make available to the City, the attorney responded that it was only seeking the same type of report and information as agreed to by the parties in Section 15.2 of the CBA.

When Burmeister was medically evaluated on July 15, he presented the health care provider with a letter limiting the information that he would allow to be released to Respondent. In early August, to determine whether Burmeister could perform the essential duties of the job, Respondent ordered Burmeister undergo a functional capacity evaluation (FCE) from a third party provider.[5] Burmeister also presented this provider with a letter invoking his privacy protections afforded to him by the Health Insurance Portability and Accountability Act (HIPAA). In the letter, Burmeister authorized the provider only to release a form to Respondent that would indicate his fitness for duty and not the detailed report of his FCE. On August 4, Respondent required Burmeister to sign a full release of his medical information and threatened him with discipline if he refused to comply. On August 6, under threat of discipline, Burmeister notified the provider

[3] A consumption drill requires breathing compressed air from a tank.
[4] Charging Party contends that in the past there was an issue with Fire Department officials sharing the personal health information of employees. Charging Party contends that it limited the information the City could receive, by contract to whether the employee was fit for duty or not fit for duty.
[5] A functional capacity evaluation evaluates an individual's capacity to perform work activities related to the demands of the job.

that he withdrew his letter of non-consent to provide Respondent with a detailed report to the City.

On August 17, Respondent notified Burmeister's attorney and Charging Party that Burmeister could return to work in a medium capacity job. Respondent allowed Burmeister to return to work on August 26, after he had signed a letter regarding the reason for his weight gain and his ability to work. Charging Party, which was included as a party to the agreement on Burmeister's return to work, refused to sign the letter.

Charging Party alleges that Respondent's actions violated Article XV, Sections 15.2[6] and 15.12[7] of the CBA.[8] Charging Party maintains that Respondent violated federal and State statutes concerning confidentiality of medical records. Specifically, Charging Party alleges that Respondent made a unilateral change to the CBA's standards or procedures for access to employees' personal health insurance records when it required Burmeister to waive rights afforded to him by HIPAA.

Due to concerns about Respondent's conduct toward him, Burmeister filed a complaint with Human Resources alleging that employees on the Red Shift were being subjected to a hostile work environment. Shortly after filing the complaint, Burmeister received a negative annual evaluation which rated him: "Does Not Fully Meet Standards." Burmeister disagreed with the evaluation and asserted in a rebuttal that he believed Respondent gave him the negative evaluation

[6] Section 15.2 of the CBA provides in relevant part: "The City will receive a fitness for duty report from the licensed medical professional(s) administering the tests. The provider administering the tests will hold all detailed medical records and reports of employees with the employee receiving a copy of the complete examination report."

[7] Section 15.12 concerns compliance with specific statutes. It provides: "The City agrees to comply with the applicable Illinois statutes concerning on-the-job injuries, worker's compensation, pensions, and access to personnel records as they relate to bargaining unit employees, but said statutes shall not be incorporated herein by reference and the interpretation and application of said statutes shall not be subject to the provisions of Article V (Grievance Procedure). During the term of this Agreement as specified in Article XIX, the City will not (1) adopt any ordinances or other municipal legislation which would modify or alter the benefits which employees covered by this Agreement are eligible to receive under the state's worker's compensation statute, or (2) adopt any residency requirements that are applicable to employees covered by this Agreement."

[8] Neither Burmeister nor Charging Party filed a grievance regarding these matters.

in retaliation for the hostile work environment complaint he filed with Human Resources.

In or around the end of December, Respondent held a simulation exercise that involved employees maneuvering through a maze and crawling through small spaces. At one point, the space narrowed, and Burmeister was unable to fit through the space. Deputy Fire Chief Bill Anaszewicz ("Anaszewicz") had followed Burmeister through the maze. Firefighter Dan Drzewiecki ("Drzewiecki") [9] had already completed the maze. At the point where the space narrowed and Burmeister could not pass, Drzewiecki, Burmeister, and Anaszewicz discussed that, normally, an axe would be used to enlarge a passage; however, because other employees had not yet completed the course, they decided not to do so. According to Charging Party, Anaszewicz told Burmeister that the training was over and that Burmeister had done a good job. Later, the training officer who conducted the exercise told Burmeister that Anaszewicz stated that Burmeister had not completed the training and that he would have to do additional training exercises.

C. Firefighter Dan Drzewiecki – Unilateral Changes to: Worker's Compensation Act; Return to Work Assignment; Union Animus; Hostile Work Environment Investigation; Union Protected Concerted Activity

In early August, Drzewiecki was off work on a workers' compensation leave. On August 7, Respondent ordered Drzewiecki to return to full duty the next day based upon the evaluation of Respondent's doctor, who found Drzewiecki was fit to return to work. However, Drzewiecki's physician found that Drzewiecki was unable to work and would require surgery before he returned to full duty. Drzewiecki reported to work on August 8, reported his injury and went back on workers' compensation leave. On August 10, Charging Party filed a grievance claiming Respondent violated Article XV, Section 15.1 of the CBA by not correctly applying the light duty provision determining an employee's fitness for duty as well as a violation of other provisions in

[9] Drzewiecki was a former Union President and Union Secretary.

the CBA.[10] The grievance has advanced through the steps of the grievance procedure and was heard at arbitration on February 10, 2021. Additionally, Charging Party alleges that Respondent violated the Act by failing to bargain the change in the application of the return to work assignment, thereby failing to maintain the status quo during the pendency of 14(l) proceedings.

Charging Party contends that Respondent harassed Drzewiecki in part because he previously served in Union leadership in support of employee rights. Drzewiecki previously served as Union President for approximately ten (10) years and as Union Secretary for four (4) years. Moreover, Charging Party alleges that Respondent harassed and retaliated against Drzewiecki because of his involvement in the investigation of the hostile work environment complaint filed by Burmeister. During the investigation of the hostile work environment complaint, Drzewiecki requested a shift change because he believed that he was being treated unfairly by shift commanders. Respondent denied the shift change request. During a meeting with Human Resource Director Wagner, Drzewiecki challenged the integrity of the hostile work environment investigation being conducted. According to Charging Party, Wagner responded to Drzewiecki's disparagement of the investigation in a hostile manner when she leaned forward and stabbed her finger in the air at Drzewiecki as she addressed him. Charging Party alleges that Wagner's outrage is evidence of Respondent's antiunion animus.

[10] Charging Party claims that Section 15.1 of the CBA addresses a specific procedure for questions concerning employee's fitness for duty, and not as Respondent claims, that the procedure only applies when an employee is deemed unfit for duty.

D. Firefighter Bill Stoike – Changes to: Light Duty Assignment; Return to Work; Personnel Interview and Investigation; Fireman's Disciplinary Act; Surveillance & Increased Scrutiny

On October 2, Fire Fighter Bill Stoike (Stoike) was injured on duty. Respondent directed that Stoike be transported to the hospital emergency room to be evaluated. At the hospital, he was evaluated and told to remain off work. Afterwards, Stoike's physician conducted a medical evaluation and prescribed medication that effected Stoike's ability to drive. Stoike's was informed by his physician to remain off duty until October 14. On or around October 7, Respondent instructed Stoike to report on October 8 for light duty. Stoike informed Respondent that, pursuant to his physician's orders, he was supposed to be off duty until October 14. Respondent ordered Stoike to have his physician complete a light duty form and return it to the City. Stoike did not have access to the form, so Battalion Chief Millet (Millet) delivered it to Stoike at his home. Charging Party claims that, when Millet dropped off the form, Millet told him that Anaszewicz. was angry with him about the situation.

Stoike did not report to light duty on October 8. On that date Stoike observed Anaszewicz drive slowly pass his home in a fire department vehicle and then park across the street with a clear view of his home. Stoike phoned Millet and asked him if he knew why Anaszewicz was observing his house. Millet informed Stoike that he did not know and asked Stoike if he was going to return the light duty form. Stoike replied that he was uncomfortable with Anaszewicz' anger and did not want to come to the station when Anaszewicz was in such an agitated state of mind. Stoike requested that Millet have Human Resource Director Wagner call him so that he could discuss the situation. Wagner called Stoike later that day. During the call, Stoike asked if he was on speakerphone. Wagner indicated that she was on speakerphone and for the first time indicated that Anaszewicz was in the room with her. Stoike said he was not comfortable continuing the

conversation but then spoke about Anaszewicz' conduct which he found unsettling. According to Charging Party, Anaszewicz became angry and accused Stoike of not following the chain of command by going to Human Resources.[11]

Stoike was not cleared for a light duty assignment and eventually returned to work on October 14 in accordance with his physician's orders. Charging Party filed a grievance claiming Respondent violated the CBA by changing its light duty policies regarding return to work. The issue is currently pending at arbitration. Charging Party also filed the unfair labor practice in the instant case alleging a violation of Respondent's duty to bargain the change in the policy and procedures for an employee's return from a work related medical leave and the policy and procedures for submission of the light duty form. Charging Party also grieved the issue and filed the instant unfair labor practice charge alleging that Respondent surveilled Stoike when he was off duty when Anaszewicz parked his vehicle to observe Stoike at his residence. Charging Party also alleges that Respondent violated Stoike's confidentiality because of Anaszewicz' unannounced presence during the telephone call received from Human Resources. Charging Party alleges that the actions undertaken by Respondent to surveil his home and the incident that occurred during the telephone call violated Stoike's rights afforded to him under the Fireman's Disciplinary Act, 50 ILCS 745/3.2.[12] In or around November, Stoike received a negative review on his annual evaluation.

[11] Charging Party asserts that, when Drzewiecki was Union President, an issue arose regarding employees taking personnel issues to Human Resources. The Fire Chief insisted that all personnel matters go through the chain of command. Charging Party insisted that personnel matters be addressed by going directly to Human Resources. According to Charging Party, the parties eventually agreed that employees could go directly to Human Resources with personnel matters.

[12] § 3.2 states: "No fireman shall be subjected to questioning in relation to an allegation of misconduct without first being informed in writing of the allegations and whether the allegations, if proven, involve minor infractions or may result in removal, discharge, or suspension from duty in excess of 24 duty hours. If an administrative proceeding is instituted, the fireman shall be informed beforehand of the names of all complainants and all information necessary to reasonably apprise the fireman of the nature of the charges and the preparation of a defense."

II. DISCUSSION AND ANALYSIS

As a preliminary matter, I find that the charge raises a question of law and fact regarding whether Respondent made implied threats of reprisals in violation of Sections 10(a)(1) of the Act. In addition, I find that the charge raises a question of law and fact regarding whether Respondent violated Section 10(a)(2) and (1) of the Act by discouraging employees from engaging in activities for mutual aid and protection. Accordingly, I shall issue a complaint on those aspects of the charge.

A. Unilateral Changes

An employer violates Section 10(a)(4) of the Act when it refuses to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit. Charging Party alleges that the Respondent made unilateral changes to mandatory subjects of bargaining. Many of the changes Charging Party alleges that were made occurred prior to October 5 during the pendency of interest arbitration proceedings. Charging Party alleges that these changes violate Sections 10(a)(4) and 14(l) of the Act. For the changes that Charging Party alleges were implemented after October 5, Charging Party alleges violations of Section 10(a)(4) of the Act.[13]

Specifically, Charging Party alleges that Respondent implemented new or changed standards and procedures concerning: fitness for duty examinations (Burmeister and Stoike); determinations of light duty assignments (Burmeister, Drzewiecki and Stoike); employee investigation methods by engaging in surveillance of employees (Stoike); and employee investigative practices by not announcing the presence of another individual that was on a speakerphone (Stoike). Charging Party further alleges that Respondent changed and/or imposed permissive waivers of bargaining unit employees' statutory rights regarding privacy concerns

[13] The Parties reached a tentative agreement on or about September 17 and ratified the successor agreement October 5.

afforded under HIPAA (Burmeister); workers compensation leave (Drzewiecki and Stoike); and due process rights afforded under the Fireman's Disciplinary Act (Stoike).

In order to demonstrate that Respondent made a unilateral change in violation of the Act, Charging Party must show that the change was widespread and had a generalized effect on Unit employees' terms and conditions of employment. A contractual breach which is substantial enough to indicate repudiation or renunciation of the terms of the collective bargaining agreement constitutes a refusal to bargain in good faith. NLRB v. Katz, 369 U.S. 736 (1962). In this case, it is not clear whether the alleged changes are a breach of the CBA; indeed, as indicated above, Charging Party has filed grievances regarding the alleged changes. However, the alleged changes are not so substantial that they indicate a repudiation or renunciation of the CBA, nor do they concern a term of such importance that it negates the statutory duty to bargain collectively.

To find that unlawful unilateral changes occurred here would require the Board to interpret the CBA. To that extent, the Board does not allow parties to use the Board's processes to remedy alleged contractual breaches or to obtain specific enforcement of contract terms. The Board has repeatedly dismissed unfair labor practice charges where the Board' s resolution of the unfair labor practice charge would require the Board to interpret the parties' collective bargaining agreement. Village of Oak Park, 25 PERI ¶ 169; Village of Creve Coeur, supplemental decision, 4 PERI 2002 (IL SLRB 1987). In Village of Oak Park, the Board dismissed an allegation that the respondent violated Sections 10(a)(4) and 14(1) of the Act by changing employees' longevity pay during the pendency of interest arbitration proceedings where the Board was required to interpret the parties' contract to determine whether its terms allowed the change. Therefore, the charge herein fails to raise an issue of law or fact sufficient to warrant a hearing.

Regarding Charging Party's assertions that Respondent violated Burmeister's privacy rights protected by HIPAA, Drzewiecki's and Stoike's rights under the Workers' Compensation Act and Stoike's rights protected by the Fireman's Disciplinary Act, the Board does not have jurisdiction under the circumstances presented here to enforce these rights.

B. Retaliation and Discrimination

Section 10(a)(l) of the Act provides that it shall be an unfair labor practice for an employer or its agents, to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act. In order to prove a Section 10(a)(1) violation and subsequently a Section 10(a)(2) violation, a charging party must demonstrate that (1) the employee engaged in union or other protected concerted activity; (2) the employer was aware of that activity; and (3) the employer took adverse action against this employee for engaging in that activity. Kirk and Chicago Housing Auth., 6 PERI ¶ 3013 (IL LLRB 1990); Green and Warns and City of Chicago, 3 PERI ¶ 3011 (IL LLRB 1987); Gale and Chicago Housing Auth., 1 PER ¶ 3010 (IL LLRB 1985). In order to demonstrate a Section 10(a)(2) violation, a charging party must further prove that the employer took adverse action against this employee for engaging in that activity in order to encourage or discourage union membership or support. New Lenox Fire Protection District, 24 PERI ¶ 78 (IL LRB-SP 2008) (citing City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335 (1989)).

A charging party satisfies the third element when it establishes a causal connection between the employee's protected concerted activity and the employer' s adverse action, such that the activity was a substantial or motivating factor in the employer' s adverse action against him or her. Pace Suburban Bus Div., 406 Ill. App. 3d at 495; Chicago Park District, 9 PERI ¶ 3016 (IL LLRB 1993). A casual connection may be inferred if a discriminatory motivation exists. Discriminatory

motivation may be established through direct evidence or based on circumstantial factors, including expressions of hostility towards protected activity together with knowledge of the employee's union activity; proximity in time between the employee's union activity and the employer's action; disparate treatment or a pattern of conduct which targets union supporters for adverse employment action; or shifting or inconsistent explanations regarding the adverse employment action. City of Burbank, 128 Ill. 2d at 345-346; County of Menard v. Ill. State Labor Relations Bd., 202 Ill. App.3d 878, 890-891 (4th Dist. 1990).

Further, the Board has held that, in order to obtain the Act's protection, employee activity must be "concerted," which means undertaken jointly by two or more employees, or by one employee on behalf of others. Esco Elevators, 276 NLRB 1245, 120 LRRM 1214 (1985) *enforced,* 794 F.2d 1078, 122 LRRM 3178 (5th Cir. 1986). Concerted activity, to be protected, must also satisfy the requirement in Section 6 that it be undertaken for the purpose of collective bargaining or for "mutual aid or protection." Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 24 LRRM 2416 (4th Cir. 1949). as cited County of Cook (Cook County Hospital), 10 PERI ¶ 3029 (ILLRB 1994).

While the Board agent requested that Charging Party identify what protected concerted activities Burmeister, Drzewiecki, and Stoike participated in and demonstrate a nexus between their activities and Respondent's subsequent alleged retaliatory actions, Charging Party alleged that Respondent acted due to a antiunion animus. Charging Party alleges that Respondent held hostility toward Drzewiecki because of his past Union leadership positions and his activity as it related to the hostile work environment complaint. However, Charging Party failed to provide a nexus between Drzewiecki's service in his past Union leadership roles and the handling of the hostile work environment complaint. Charging Party references Burmeister's disagreement with

Respondent's handling of his fitness for duty and subsequent return to work and the complaint with Human Resources over the hostile work environment that he experienced as causation for the treatment he experienced by Respondent. It is unclear if Charging Party is alleging whether it was Burmeister's hostile work environment complaint is the protected activity for which Respondent is retaliating against him, but, even if this were the case, that complaint does not afford the Act's protection. Moreover, Respondent's alleged retaliatory actions happened before that complaint was filed and therefore could not be the motive and basis for Respondent's earlier conduct. Charging Party did not identify any protected concerted activity in which Stoike participated. The Act does not prohibit all types of discrimination or unfair treatment by a public employer. Absent a factually supported allegation that the Respondent was motivated to discriminate due to union or other activity protected by Section 7 of the Act, the Board is foreclosed from making a judgement of the merits or fairness of the Employer's actions. Because Charging Party fails to demonstrate a nexus between Drzewiecki's service in Union leadership and Respondent's actions, and because there is no evidence that Burmeister and Stoike participated in protected concerted activities, these allegations fail to raise an issue for hearing.

It is understandable that Stoike was disconcerted by the Deputy Chief surveilling him while he was home convalescing. Indeed, surveillance of off-duty employees with an intent to catch them in misconduct prevents employees their legitimate enjoyment of off-duty benefit time and carries an implied threat of discipline. However, the surveillance here was not a violation of the Act. Stoike was not simply off-duty using benefit time; he was injured while on duty and was recovering at home. Respondent's heightened scrutiny of Stoike was a legitimate method to determine whether Stoike was abusing medical leave and, as such, Respondent's action does not violate the Act. Moreover, the Board has no authority to determine whether Respondent's

surveillance violated the Fireman's Disciplinary Act. Furthermore, Charging Party has not presented evidence suggesting that Respondent violated the Act by not immediately announcing that the Anaszewicz was present on the speakerphone when the Human Resource Director called Stoike.

Because Charging Party fails to demonstrate that Respondent retaliated against any of the these employees in question for their participation in union or protected concerted activities and the remainder of the unilateral change allegations made in this charge are contractual issues that implicate the parties' grievance procedure, the Board does not have jurisdiction to address them as unfair labor practices. Consequently, these portions of the charge do not raise an issue of law or fact for hearing before the Board.

III. ORDER

Accordingly, this charge is hereby dismissed in part. The Charging Party may appeal this dismissal to the Board any time within 10 calendar days of service of this dismissal. Such appeal must be in writing, contain the case caption and numbers, and must be addressed to the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103 or filed electronically at ILRB.Filing@Illinois.gov in accordance with Section 1200.5 of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300. The appeal must contain detailed reasons in support thereof, and the Charging Party must provide it to all other persons or organizations involved in this case at the same time it is served on the Board. Please note that the Board's Rules and Regulations do not allow electronic service of the other persons or organizations involved in this case. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that the appeal has been provided to

them. The appeal will not be considered without this statement. If no appeal is received within the time specified, this dismissal will be final.

Issued at Springfield, Illinois, this 2nd day of June, 2021.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Kimberly F. Stevens
Executive Director