STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Service Employees International Union, Local 73,	)	
Charging Party	)	
	)	Case No. S-CA-12-026
and	)	
East St. Louis Housing Authority,	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S CORRECTED RECOMMENDED DECISION AND ORDER

On July 22, 2011, the Service Employees International Union, Local 73 (Union) filed an unfair labor practice charge in Case No. S-CA-12-026 with the State Panel of the Illinois Labor Relations Board (Board) alleging that the East St. Louis Housing Authority (ESLHA) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act). Subsequently, the charge was investigated in accordance with Section 11 of the Act and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On April 25, 2012, the Board's Executive Director issued a Complaint for Hearing. The case was then heard on June 28 and 29, 2012 in Springfield, Illinois by the undersigned Administrative Law Judge. Both parties appeared at the hearing and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Written briefs were timely filed on behalf of both parties. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following.[1]

I. PRELIMINARY FINDINGS

1. The parties stipulate and I find that, at all times material, the ESLHA has been a public employer within the meaning of Section 3(o) of the Act.
2. The parties stipulate and I find that, at all times material, the ESLHA has been subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) of the Act.
3. The parties stipulate and I find that, at all times material, the ESLHA has been subject to the Act pursuant to Section 20(b) thereof.
4. The parties stipulate and I find that, at all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
5. The parties stipulate and I find that, at all times material, the ESLHA employed Elizabeth Tolliver as its executive director.
6. The parties stipulate and I find that, at all times material, Tolliver was an agent of the ESLHA authorized to act on its behalf.
7. The parties stipulate and I find that, at all times material, Karen Kleinhans was an agent of the Union authorized to act on its behalf.
8. The parties stipulate and I find that, at all times material, the ESLHA has employed Alfred Harris as a maintenance mechanic.
9. The parties stipulate and I find that, at all times material, Harris was a public employee within the meaning of Section 3(n) of the Act.

[1] This Administrative Law Judge's Corrected Recommended Decision and Order for Case No. S-CA-12-026 is meant to fully replace the Administrative Law Judge's Recommended Decision and Order for Case No. S-CA-12-026 which was inadvertently and prematurely issued on December 5, 2012.

10. The parties stipulate and I find that, at all times material, Harris was a member of the Union's bargaining unit.

11. The parties stipulate and I find that, at all times material, Harris has served as steward for the Union.

12. The parties stipulate and I find that, at all times material, the Union and the ESLHA were parties to a collective bargaining agreement (CBA) for the bargaining unit with a term ending December 31, 2010.

13. The parties stipulate and I find that, since dates beginning in December of 2010, the ESLHA and the Union have been meeting to negotiate a successor CBA.

14. The parties stipulate and I find that, on or about June 13 and 22, 2011, Kleinhans e-mailed Tolliver and questioned the status of six to eight temporary employees.

15. The parties stipulate, and I find, that Tommie Hill was a bargaining unit employee of the ESLHA who last performed services for the ESLHA on or about August 24, 2010.

16. The parties stipulate and I find that Hill never belonged to the Union at any time during his employment at the ESLHA until he signed a membership card on or about July 28, 2010, but dues were never deducted from his paycheck because, at the time the card was submitted to the ESLHA, Hill was already on extended workers' compensation leave.

17. The parties stipulate and I find that, on or about June 15, 2011, the ESLHA terminated the employment of bargaining unit employee Hill.

18. The parties stipulate and I find that Douglas Flowers was a bargaining unit employee of the ESLHA who last performed services for the ESLHA on or about September 20, 2010.

19. The parties stipulate and I find that Flowers was never a dues-paying member of the Union at any time during his employment at the ESLHA and never submitted a Union checkoff authorization to the ESLHA.

20. The parties stipulate and I find that, on or about June 24, 2011, the ESLHA terminated the employment of bargaining unit employee Flowers.

21. The parties stipulate and I find that Amy Leggs-Washington was a bargaining unit employee of the ESLHA who last performed services for the ESLHA on or about November 15, 2010.

22. The parties stipulate and I find that Washington signed a Union membership card on or about September 10, 2008, however the Union has no record of whether or not this membership card was submitted to the ESLHA; neither the ESLHA nor the Union have any records of dues being deducted from her paycheck, but both the ESLHA and the Union have records that, in January and February of 2009, deductions were made from her paychecks and remitted to the Union political education fund, COPE.

23. The parties stipulate and I find that, on or about June 24, 2011, the ESLHA terminated the employment of bargaining unit employee Washington.

24. The parties stipulate and I find that Jeffrey Gilyard was a bargaining unit employee of the ESLHA who last performed services for the ESLHA on or about January 20, 2011.

25. The parties stipulate and I find that Gilyard signed a Union membership card on or about April 30, 2008 and dues were subsequently deducted from his paycheck but, on or about February 5, 2010, he notified the ESLHA that he had requested withdrawal from the Union and requested the ESLHA to stop deducting union dues from his paycheck, which request was honored.

26. The parties stipulate and I find that, on or about June 24, 2011, the ESLHA terminated the employment of bargaining unit employee Gilyard.

II. ISSUES AND CONTENTIONS

The Complaint for Hearing contends that the Employer violated Sections 10(a)(2) and (1) of the Act when it terminated the employment of four bargaining unit employees in retaliation for two of the Union's inquiries about the diminution of bargaining unit work. In sum, the Employer contends that it did not violate Sections 10(a)(2) or (1) of the Act.

III. FINDINGS OF FACT

The Employer and the Union were parties to a CBA that went into effect on November 17, 2008 and expired on December 31, 2010. According to testimony, after this December 31, 2010 expiration date, the CBA still applied to the parties as long as they were negotiating a successor CBA. From December of 2010 until the parties reached an impasse in August of 2011, the parties met to negotiate a successor CBA. As of the date of the hearing, no new, ratified contract was in effect.[2]

In 2010, three ESLHA employees sustained work-related injuries that caused them to stop working for the Employer. The first of these work-related injuries occurred on August 24, 2010 when Hill injured a shoulder while taking down a garage door. Subsequently, on September 20, 2010, Flowers injured his back while moving a television and a sofa. Then, on November 15, 2010, Washington hurt her knee and sprained her ankle. Each of these three employees routinely informed the Employer of the status of his or her recovery.

[2] According to Kleinhans' testimony, during these negotiations, the Employer proposed a change to the existing seniority policy. This proposal was rejected by the Union's membership. (The record does not detail precisely when these events occurred.)

All three of these injured employees were members of the Union's bargaining unit. Two of these injured employees, Flowers and Hill, were assigned to Lansdowne Towers, one of the Employer's asset managed properties (AMPs), while Washington was assigned to "Sammy Gompers," a separate AMP. Prior to their respective injuries, Flowers and Washington worked as janitors and Hill worked as a maintenance mechanic.

Like Flowers, Hill, and Washington, Gilyard was a bargaining unit employee. Furthermore, before Gilyard stopped working for the Employer on January 20, 2011, Gilyard, like Hill, worked as a maintenance mechanic and, like Flowers and Hill, was assigned to the Lansdowne Towers AMP. However, although he required surgery for his left foot following an injury, Gilyard, unlike the three other employees at issue in this case, did not suffer a work-related injury.

On January 20, 2011, Gilyard submitted a sick leave request to Amanda Stokes, the property manager of the Lansdowne Towers AMP. Subsequently, Stokes denied Gilyard's January 20, 2011 sick leave request. After speaking with Stokes, Gilyard spoke with Tolliver, the Employer's executive director, who told Gilyard that, if he wanted to take this time off, he had to send her a letter requesting Family Medical Leave Act (FMLA) leave.[3] After Gilyard sent Tolliver an e-mail requesting this type of leave on January 24, 2011, Tolliver approved his request, granting Gilyard FMLA leave that spanned from January 25, 2011 to April 18, 2011.

On or about April 20, 2011, Tolliver phoned Gilyard (a pastor) in order to ask him to provide an invocation for the groundbreaking ceremony for a new development project. Soon after, Gilyard provided this invocation as requested. While Gilyard did see John Prather (an administrative planning officer for the Employer), Tolliver, and Rhonda Lockett (of the

[3] Gilyard had surgery on his foot on January 21, 2011 and, subsequently, regularly updated the Employer on the status of his recovery.

Employer's human resources department) at the event, Gilyard did not discuss his injury or his employment status with anyone at that time.

After she became aware of the shortage of employees working at the Lansdowne Towers AMP, Tolliver, during an April 25, 2011 management staff meeting, instructed Prather to check with the Employer's attorneys and determine how long ESLHA employees could remain off work without being terminated. Prather was also instructed to determine how long Hill had been off work. According to her testimony, Tolliver gave these instructions because she wanted to be able to hire a full-time maintenance mechanic for the Lansdowne Towers AMP and was not sure if the Employer could hire someone while another employee was off work. Furthermore, according to Tolliver's testimony, when she gave this instruction, she was not exactly sure how long any employees had been off work and was not familiar with what the CBA said about this topic. However, Tolliver also testified that, at that time, Hill's employment status was fresh in her mind and she thought that Hill had been off work the longest amount of time. Tolliver was also aware that Hill had been assigned to an area that needed employees.

After receiving Tolliver's instruction, Prather checked with one of the Employer's attorneys who later apprised Prather of Article VI of the CBA which, in relevant part, states that "[a]ll rights of seniority shall be lost and employment terminated if the employee... [h]as been on layoff, or personal leave of absence or sick leave, or absent for a period of more than six (6) months." According to Prather, this section of the CBA means that the Employer can terminate an employee after he or she is off work for a period of more than six months.

Once Prather informed Tolliver of this contract language, Tolliver determined to move forward with the necessary terminations. Accordingly, on June 7 or 8, 2011, Prather prepared a draft termination letter for Hill, who, by that time, was known to have been out for more than six months. This draft termination letter indicated that Hill's termination would be effective June 6, 2011. When Prather drafted this document, he did not know exactly how long any other employees had been off work and, by that time, Prather had not attempted to determine when any employees were going to return to work.

Subsequently, on June 7 or 8, 2011, Prather provided the draft termination letter for Hill to Lockett and directed Lockett to determine which employees had been off work for an extended period and how long those employees had been off work. At that time, Prather also showed Lockett the relevant contract language. Later, in a June 9, 2011 e-mail sent to Prather, Lockett identified Flowers, Gilyard, and Washington as employees that should also be terminated.[4] This e-mail also suggested to Prather that he should review the termination effective date used in the letter for Hill.

On June 13, 2011, Kleinhans, a business agent and senior field organizer employed by the Union, sent an e-mail to Prather and Tolliver.[5] In this e-mail, Kleinhans inquired about the status of six to eight individuals who had been working for the Employer as temporary employees for over six months. According to her testimony, Kleinhans sent this e-mail because, in her view, the Employer's human resource policy and the CBA state that ESLHA employees can only hold temporary positions for six months.[6]

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[4] In order to conduct the research necessary for Prather's assignment, Lockett relied on the Employer's computer system and pay registers. Lockett testified that, when conducting this research, she was only looking for those employees who were off work "for a long time" because of work-related injuries. However, as noted, the record does not indicate that Gilyard suffered a work-related injury.

[5] On June 13, 2011, Prather went on vacation.

[6] In general, the Employer's human resource policy serves as a guide for ESLHA employees. As indicated by its own language, the human resource policy applies to all employees and employment practices of the ESLHA "except where negotiated contract language takes precedence." Put differently, if an aspect of the human resource policy is in disagreement with a CBA, the CBA governs. In relevant part, the human resource policy states that temporary employees "shall work for no longer than six months and shall receive written confirmation stating that their employment is temporary and in no case for more than six months." However, the section of the CBA which addresses casual and temporary employees states, in relevant part, that "[c]asual employees will normally be employed for a definite time period, normally not to exceed six (6) months, or to perform work for a particular project or projects." In addition, the CBA states,

On June 14, 2011, after receiving a June 6, 2011 letter from a workers' compensation claim representative indicating that Hill's "TDD benefits" had been terminated as of June 1, 2011, Hill spoke with Lockett by telephone and indicated that he had to return to work. In response, Lockett informed Hill that, before he could return to work, he needed to be released from a remaining doctor-imposed work restriction.[7]

At some point around this time, Lockett misplaced Prather's original draft termination letter for Hill. Tolliver then told Lockett to "redo" the draft termination letter. On or about June 15, 2011, Lockett redrafted and mailed Hill's termination letter to Hill. Hill's termination letter stated that his termination was in accordance with the CBA. A copy of the relevant contract language was attached.[8]

On June 16, 2011, Hill went to the relevant doctor's office to have his remaining restriction removed. While Hill was at this doctor's office, Hill's wife contacted him by telephone and informed him that he had received a termination letter in the mail. Subsequently, Hill once again called Lockett, who, according to Hill's testimony, then informed him of the section of the CBA that addressed his situation; told Hill that the Union, not the Employer, had terminated his employment; and instructed Hill to talk to the Union. According to Lockett's testimony, she did not tell Hill that the Union had terminated him, but did mention that he should read the termination letter and its attachments.[9]

> Temporary employees may be employees on a temporary, part-time or full-time, "on call," or "seasonal" basis, or to assist or temporarily replace absent, regular full-time employees on an "as needed" basis, or otherwise to facilitate efficient performance of work requirements of the Housing Authority. Such employees are not to displace permanent regular, full-time bargaining unit employees.

[7] To clarify, when Lockett and Hill had this telephone conversation, Lockett allegedly knew that Hill was going to be terminated but did not inform Hill of his pending termination at that time. According to her testimony, at that time, Lockett did not feel she had the authority to provide this information to Hill.

[8] Lockett's testimony explains that Hill's termination letter was not sent until June 15, 2011 (instead of June 9, 2011) because she had misplaced the letter and determined to wait to be instructed to redo the letter.

[9] On June 20, 2011, Prather returned to work from the vacation which began on June 13, 2011.

On June 22, 2011, Kleinhans sent Prather and Tolliver a follow-up e-mail stating that she had not received a response to her initial June 13, 2011 e-mail inquiry. Two days later, on June 24, 2011, the Employer's human resources department mailed Flowers, Gilyard, and Washington formal termination letters prepared by Prather. Flowers' and Washington's letters stated that each employee had been absent for a period of more than six months in violation of the CBA. Each of these termination letters included a copy of the relevant section of the CBA. While Gilyard's termination letter did not overtly mention that he had been absent for more than six months in violation of the CBA, it did include a copy of the same portion of the CBA that was included with Flowers' and Washington's termination letters.[10]

Gilyard's physician released Gilyard from his work restrictions on July 5, 2011. When Gilyard later personally presented Marie Sanders of the Employer's human resources department with documentation of this release, Lockett presented Gilyard with a copy of his termination letter. According to Gilyard's testimony, at that time, Lockett told him that the Union, rather than the Employer, was responsible for his termination and that he should check with his Union representatives.

Later, while Flowers was riding in a car with Gilyard, Gilyard told Flowers that he (Gilyard) had been terminated. Next, while still riding with Gilyard, Flowers received a telephone call from Hill. After Hill told Flowers that he had also been terminated, Flowers called Sanders, who then confirmed that Flowers had also been fired.

Later that same day, Flowers spoke with Lockett in person. According to Flowers' testimony, at that time, Lockett explained to Flowers that his termination letter had been returned to her office; acknowledged that he had been off work for longer than six months; suggested to

[10] Kleinhans filed grievances for each of the four terminations at issue. Each of these terminations was ultimately upheld by the Employer. The Union did not submit these grievances to arbitration.

Flowers that the Union, not the Employer, had terminated him; made Flowers a copy of his termination letter and the relevant section of the CBA; and indicated to Flowers that he should talk to the Union. However, during the hearing, Lockett denied telling Flowers that the Union had terminated him.

On July 13, 2011, Kleinhans sent a letter to Tolliver. In this letter, Kleinhans requested the names of all current temporary employees, the date these employees started working as temporary employees, and the position title of each of these employees. Subsequently, on July 22, 2011, Prather provided the Employer's response. On July 22, 2011, the Union filed the instant unfair labor practice charge. Later, after bargaining with the Union to impasse, the Employer implemented its "last, best, and final offer" on August 22, 2011.

IV. DISCUSSION AND ANALYSIS

As noted above, the Complaint for Hearing centrally alleges that the Employer violated Sections 10(a)(2) and (1) of the Act when it terminated the employment of four bargaining unit employees in retaliation for two of the Union's inquiries about the diminution of bargaining unit work. To begin, Section 10(a)(1) provides, in relevant part, 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 the Act or to dominate or interfere with the formation, existence, or administration of any labor organization. Thus, in order to establish a violation of Section 10(a)(1), a charging party must generally prove, by a preponderance of the evidence, that the respondent attempted to or effectively did interfere with, restrain, or coerce its employees in such protected activity. Chicago Park District (Rundle), 8 PERI ¶3017 (IL LLRB 1992).

Usually, whether an employer has violated Section 10(a)(1) does not depend on the employer's motive. Rather, the test is whether the employer's conduct, viewed objectively from the standpoint of a reasonable employee, had a tendency to interfere with, restrain, or coerce the employee in the exercise of a right guaranteed by the Act. See Chicago Transit Authority, 18 PERI ¶3021 (IL LRB-LP 2002); Chicago Park District, 7 PERI ¶3021 (IL LLRB 1991). However, this objective test cannot be utilized where, as here, it must be determined whether the respondent's actions were in fact improperly motivated. Consequently, in this instance, the analysis of this Section 10(a)(1) violation must follow the criteria arising under Section 10(a)(2) of the Act. See Chicago Park District (Jones), 9 PERI ¶3016 (IL LLRB 1993); Chicago Park District (Rundle), 8 PERI ¶3017; Chicago Park District, 7 PERI ¶3021; Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990).

Section 10(a)(2) of the Act provides, in part, that it shall be an unfair labor practice for an employer or its agents to "discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization." In City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 538 N.E.2d 1146 (1989), the Illinois Supreme Court set forth the standard that must be applied in cases alleging a violation of Section 10(a)(2) of the Act. See City of Kewanee, 23 PERI ¶110 (IL LRB-SP 2007). Under that standard, in order to establish a prima facie case of employer discrimination based on an employee's protected activities, a charging party must prove by a preponderance of the evidence: (1) that the employee engaged in union or protected, concerted activity; (2) that the employer had knowledge of such activity; and (3) that the employee's protected conduct was a motivating factor in the adverse employment action. City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149; City of Chicago, 11 PERI ¶3008 (IL LLRB

1995). The failure to prove such a causal connection precludes a finding of a violation. See Chicago Park District (Jones), 9 PERI ¶3016; Chicago Park District, 7 PERI ¶3021.

Strictly speaking, because the Employer's adverse employment actions clearly did not specifically target or adversely affect the employment of the particular individual who actually engaged in the allegedly protected activity (and was not employed by the ESLHA), it could be argued these actions do not squarely align with the traditional wording of the City of Burbank standard. However, concerning the first prong of the City of Burbank standard, I find that the activity at issue – Kleinhans' June 13 and 22, 2011 e-mail inquiries – is nonetheless protected by the Act to the extent that such activity is reasonably covered by the actual language of Sections 10(a)(2) and (1) of the Act and to the extent that Kleinhans was clearly functioning as a surrogate for the employees of the affected bargaining unit when she engaged in this activity. Activities on behalf of a union and its membership are by their very nature concerted. See County of Cook, 21 PERI ¶53 (IL LRB-LP 2005); County of Cook (Cook County Hospital), 10 PERI ¶3039 (IL LLRB 1994); Chicago Park District, 9 PERI ¶3016 (IL LLRB 1993). In addition, I note that the Employer does not specifically dispute that Kleinhans' June 13 and 22, 2011 e-mails sufficiently constituted union or protected, concerted activity.

Concerning the second City of Burbank prong, I note that the record clearly indicates that the Employer, via Prather and Tolliver (its two prime decision-makers in this instance), received and knew of Kleinhans' e-mails. Thus, it appears that the Union has satisfied the first two prongs of the City of Burbank standard. Accordingly, this analysis must centrally determine whether Kleinhans' protected activity improperly motivated the Employer, in whole or in part, to terminate the employment of Flowers, Gilyard, Hill, or Washington.[11] In other words, the essential question in this case is one of causation.

Before continuing with this analysis, it must be observed that the Union's post-hearing brief argues that, in addition to Kleinhans' two e-mail inquiries, the terminations at issue were implemented in retaliation for "the Union's stance on the seniority issue in bargaining." However, significantly, the Complaint for Hearing, which the Union did not formally seek to have amended, does not allege that the Employer's actions were taken in retaliation for a particular bargaining position. Because the Complaint for Hearing only formally alleges that the terminations were effected in retaliation for Kleinhans' two e-mail inquiries and I decline to amend the Complaint for Hearing sua sponte, the Employer must be shown to have been motivated by that particular activity in order find a violation of either Section 10(a)(1) or (2) of the Act. See City of Clinton, Dr. John Warner Hospital, 3 PERI ¶2062 (IL SLRB 1987); Village of Glenwood, 13 PERI ¶2023 (IL SLRB G.C. 1997). Accordingly, this analysis will largely attempt to determine whether or not the Employer specifically terminated the four employees at issue in retaliation for Kleinhans' two e-mail inquiries.

The determination of whether there is a causal link is a fact-based inquiry. City of Aurora, 24 PERI ¶118 (IL LRB-SP 2008). For this type of case, a charging party may establish the requisite unlawful intent from direct evidence such as statements or threats. Alternatively, as an employer is unlikely to acknowledge an improper motivation in its decision to terminate its employees, a charging party may rely on circumstantial evidence such as the timing of the employer's action in relation to the protected activity; expressed hostility toward protected

[11] Generally, in order to establish the third element of the prima facie case, there must be evidence that the adverse action was based, in whole or in part, on anti-union animus, or that that union activity was a substantial or motivating factor. City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149; Chicago Park District (Grant Park Music Festival), 26 PERI ¶76 (IL LRB-LP G.C. 2010).

activities; disparate treatment of the alleged discriminatee in comparison to other employees; or shifting, pretextual, or inconsistent explanations for the adverse action. See City of Burbank, 128 Ill. 2d at 345, 538 N.E.2d at 1149; Sheriff of Jackson County, 14 PERI ¶2009 (IL SLRB 1998); County of Williamson and Sheriff of Williamson County, 14 PERI ¶2016 (IL SLRB 1998); Village of Glenwood, 3 PERI ¶2056 (IL SLRB 1987).[12]

In its post-hearing brief, the Union initially asserts that improper motivation can be inferred from the proximity in time between the Union's protected activities and the terminations, the efforts made by the Employer and its agents to make terminated employees believe the Union was responsible for their terminations, and the fact that the Employer only investigated bargaining unit employees for potential termination. In sum, I find that the record does not in this way convincingly indicate by a preponderance of the evidence that the Employer took the complained-of actions in retaliation for Kleinhans' e-mail inquiries.

Broadly speaking, an improper motivation may be inferred from the proximity in time between the union or protected, concerted activity and a discharge. Town of Decatur, 4 PERI ¶2003 (IL SLRB 1987). Here, in order to demonstrate a suspicious correlation, it could be observed, for example, that Hill's June 15, 2011 termination letter was issued shortly after Kleinhans' initial June 13, 2011 e-mail inquiry. Similarly, it could be also observed that the June 24, 2011 termination letters of Flowers, Gilyard, and Washington were issued shortly after Kleinhans' June 22, 2011 follow-up e-mail. Under different circumstances, such short intervals of time between the protected activity and the adverse employment actions could reasonably support an inference of an improper motive. See Clerk of the Circuit Court of Winnebago

[12] As addressed below, if by these various means a charging party establishes a prima facie case, the burden shifts to the respondent, who may demonstrate that, even absent that prohibited motivation, it would have taken the same action against the charging party for legitimate business reasons. City of Burbank, 128 Ill. 2d at 346, 538 N.E.2d at 1150; see PACE Northwest Division, 25 PERI ¶188 (IL LRB-SP 2009).

County, 17 PERI ¶2038 (IL LRB-SP 2001); City of Chicago, Department of Streets and Sanitation, 6 PERI ¶3020 (IL LLRB 1990). Nevertheless, in this instance, these particular observations, though valid to a degree, overlook significant factual circumstances that appear to predate the issuance of Kleinhans' e-mails.

As stated above, on April 25, 2011, Tolliver instructed Prather to determine how long ESLHA employees could remain off work without being terminated. After Prather informed Tolliver of the relevant CBA language, Tolliver then determined to move forward with the necessary terminations. In accordance with this determination, Prather prepared a draft of Hill's termination letter on June 7 or 8, 2011 and, on June 9, 2011, Lockett's e-mail indicated to Prather that Flowers, Gilyard, Hill, and Washington should be terminated. Significantly, all of these crucial events occurred before Kleinhans sent the first e-mail on June 13, 2011. Put differently, by the time the Employer had received Kleinhans' first e-mail, its prime decision-makers had apparently already effectively determined to proceed with the necessary terminations.

Intuitively, an employer generally cannot be found to have retaliated against a union for activity which had not yet occurred. See Village of McCook, 25 PERI ¶75 (IL LRB-SP 2009); State of Illinois, Department of Central Management Services (Department of Corrections), 18 PERI ¶2059 (IL LRB-SP 2002); City of Decatur, 14 PERI ¶2004 (IL SLRB 1997); County of Williamson, 14 PERI ¶2011 (IL SLRB 1996); Macon County Board and Macon County Highway Department, 4 PERI ¶2018 (IL SLRB 1988); City of Elgin, 21 PERI ¶203 (IL LRB-SP G.C. 2005); Wheeling Park District, 18 PERI ¶2031 (IL LRB-SP G.C. 2002). Accordingly, I largely do not view the timing of the four terminations as inherently suspicious or indicative of an improper motivation. To the contrary, I find that the chronology of the events in question appreciably undercuts the central charge presented by the Complaint for Hearing.

Certainly, Flowers, Hill, and Washington were not terminated as soon as they violated the CBA's six-month rule and Gilyard was not terminated as soon as he exhausted his FMLA leave. Yet, testimony consistently explains that the Employer's prime decision-makers were not particularly familiar with the CBA's six-month rule until it was brought to their attention by one of the Employer's attorneys at some point after April 25, 2011.[13] Furthermore, it appears that Tolliver and Prather were largely unaware of the particulars of the employment statuses of Flowers, Gilyard, and Washington until they had reviewed the results of Lockett's investigation at some point around June 9, 2011. After this review, all four employees were issued termination letters within the month.[14]

Other factual circumstances further suggest that the timing of the four terminations is not suspicious or indicative of improper motivation. For example, it should also be noted that it is apparently not unusual for the Employer to receive information requests from the Union. Indeed, according to Tolliver's uncontradicted testimony, it is relatively common. Similarly, Prather's related testimony suggests that, sometimes, he may receive information requests from the Union a couple times a week. In addition, one should recall that, before Kleinhans sent the initial June 13, 2011 e-mail inquiring about individuals working as temporary employees for over six months, the Union had already filed three grievances related to the same issue. Notably, the earliest of the three grievances was apparently filed (and familiar to Prather and Tolliver) at some point before February 25, 2009, years before the occurrence of the protected activity and

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[13] This circumstance might also explain why the CBA's six-month rule may not have been strictly enforced in the past. Additionally, it must be remembered that, during this period of time, the Employer's decision-makers were faced with an apparently unique circumstance – namely, a sorely understaffed AMP – and a corresponding need for enforcement of the CBA.

[14] The Employer's delay might also be explained by testimony which suggests that, during the relevant period, Prather was on vacation and Prather's original draft termination letter for Hill was misplaced.

terminations at issue. As characterized by Kleinhans' testimony, "this had been an ongoing issue." See Asarco, Inc. v. National Labor Relations Board, 86 F.3d 1401, 1409 (5th Cir. 1996) (no inference of anti-union animus when the union member at issue, at the time of his discharge, was "doing exactly what he had done all along").

For the foregoing reasons, I do not find that the timing of events evidences an improper motivation. However, as noted above, the Union also asserts, inter alia, that an improper motivation can be inferred from the Employer's alleged efforts to blame the Union for the terminations. According to the Union, these efforts specifically included the language used in the termination letters and conversations with three of the four terminated employees. In sum, I find that the evidence does not support such an inference.

Three of the four termination letters provided in this instance observed that each of the terminated employees had been absent for over six months in violation of the Union contract and that, accordingly, the employees' rights of seniority would be lost and their employment terminated. As suggested above, unlike the other three, Gilyard's termination letter did not explicitly state that his actions violated the contract. However, copies of the section of contract that addressed seniority were provided along with all four termination letters. To be clear, I readily find that, on the surface, nothing in any of these letters truly blames the Union for any of the four terminations. Nevertheless, the Union argues that, by deviating from its past practice and referencing the contract in this way, the Employer was purposefully blaming the Union for its actions.[15] Moreover, the Union would draw an inference of anti-union animus from this alleged deviation.

[15] During the hearing, Harris testified that, prior to the four termination letters provided in June of 2011, he had never seen the Employer include copies of the relevant contract language with its termination letters.

Granted, in some cases, an employer's deviation from past practice could suggest an improper motivation. See Macon County Board and Macon County Highway Department, 4 PERI ¶2018; Birch Run Welding & Fabricating, Inc. v. National Labor Relations Board, 761 F.2d 1175, 1181 (6th Cir. 1985). Yet, one must also note that, where an employer fails to inform an employee of the reason for the adverse personnel action at the time it occurs, the Board may infer a discriminatory motive. See Clerk of the Circuit Court of Winnebago County, 17 PERI ¶2038; North Maine Fire Protection District, 16 PERI ¶2037 (IL SLRB 2000); County of White/Sheriff of White County, 8 PERI ¶2011 (IL SLRB 1992); County of Monroe, 14 PERI ¶2021 (IL SLRB G.C. 1998). Along similar lines, Kleinhans' testimony asserts that it would be "ideal" or preferred if, when an employee has violated a specific rule or provision of a CBA, the Employer called that rule or provision to the employee's attention. For the most part, this is precisely what these termination letters have done. Accordingly, to some degree, it seems counterintuitive to penalize the Employer for its chosen route in this instance, especially when the burdened Union has failed to demonstrate that the Employer has been faced with a comparable shortage of working bargaining unit employees in the past and responded differently in such an instance. Moreover, to the extent that Prather testified without contradiction that he may very well have cited specific contractual provisions in other termination letters he has drafted, it is not entirely clear whether the Employer has suspiciously deviated from an established practice.[16] Under these circumstances, I do not find the language of the four termination letters to be indicative of an improper motive.[17]

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[16] It also follows that termination letters for ESLHA employees who were not represented by a union or were not terminated for violations of a contract would not cite contract provisions.

[17] The Union's post-hearing brief also notes that, as Gilyard's termination was supposedly unrelated to Article VI of the CBA, there is no valid reason for its inclusion with his termination letter. However, as it is clear that Gilyard was also absent for an extended period of time and was terminated at the same time as Flowers and Washington, I do not find the inclusion to be inherently suspicious.

As suggested above, the Union also argues that an improper motivation can be inferred from specific conversations with Flowers, Gilyard, and Hill in which the Employer, via Lockett, allegedly made efforts to blame the Union for the terminations.[18] Indeed, in some instances, hostile or anti-union statements can be used to infer an improper motivation. See City of Mattoon, 10 PERI ¶2036 (IL SLRB 1994) (statement "you have your union buddies to thank for this" and comments blaming union for layoff characterized as evidence that anti-union animus caused layoff); 8 PERI ¶2025 (1992); County of White/Sheriff of White County, 8 PERI ¶2011; Town of Decatur, 4 PERI ¶2003. However, an improper purpose is not lightly to be inferred. See National Labor Relations Board v. Stor-Rite Metal Products, Inc., 856 F.2d 957, 965 (7th Cir. 1988); Asarco, Inc., 86 F.3d at 1408; Florida Steel Corporation v. National Labor Relations Board, 587 F.2d 724, 742 (5th Cir. 1979). For a number of reasons, I find that the evidence presented in this instance does not persuasively support such a finding.

Initially, I note that, because it does not appear that Lockett, Flowers, Gilyard, or Hill were aware of any of Kleinhans' e-mail inquiries when Lockett allegedly blamed the Union for the terminations, I find it somewhat difficult to characterize anything Lockett may have said to them as substantial evidence of a retaliatory intent. I also see no compelling reason to credit the testimony of Lockett, Flowers, and Gilyard over Lockett's consistent denials. Furthermore, to the extent that the record in this case does somehow demonstrate that Lockett did blame the Union for the terminations, I would nevertheless find the evidence largely insufficient to link her statements with the terminations.

To explain, the Board has held that, to establish unlawful discrimination under Section 10(a)(2) of the Act, it is insufficient to merely demonstrate that some supervisory or managerial personnel were hostile to the union or made anti-union statements. There must be persuasive

[18] To be clear, during the hearing, Lockett consistently denied making statements to this effect.

evidence linking the anti-union animus to an employer agent with the authority and responsibility to effectively recommend or carry out the adverse action. See State of Illinois Department of Central Management Services (Department of Public Health), 10 PERI ¶2034 (IL SLRB 1994); Village of Lyons, 5 PERI ¶2007 (IL SLRB 1989); Macon County Board and Macon County Highway Department, 4 PERI ¶2018; County of Menard, 3 PERI ¶2043 (IL SLRB 1987); Village of Skokie and Skokie Board of Fire and Police Commissioners, 13 PERI ¶2011 (IL SLRB G.C. 1997); cf. North Maine Fire Protection District, 16 PERI ¶2037 (decision-makers' promotional decisions wholly and directly attributable to unsupported, animus-tainted recommendations); Pleasantview Fire Protection District, 18 PERI ¶2054 (IL LRB-SP G.C. 2002) (decision-makers' elimination of rank directly attributable to anti-union recommendation). While the record shows that Lockett was instructed to determine which employees had been off work for an extended period and how long those employees had been off work, the record does not indicate that Lockett was involved with the Employer's initial decision to investigate its chronically absent employees. Moreover, the record contains no compelling evidence which demonstrates that Lockett had any meaningful role in or responsibility for determining whether termination was appropriate or necessary. Instead, the record largely suggests that Lockett merely provided objective data to those who decided what to do with that information. Thus, I find that Lockett's alleged statements, whether uttered or not, would not sufficiently demonstrate the requisite causal connection.

Evidence of animus must be specifically linked to those individuals whose decisions are alleged as being discriminatory. Otherwise, the evidence is not material to establishing the causal connection. See City of Springfield and Director of Public Safety for the City of Springfield, 6 PERI ¶2004 (IL SLRB 1989). Put differently, when assessing allegations that conduct directed against employees has been improperly motivated, the crucial inquiry must be directed to the state of mind of the officials who made the decision at issue. See The New Otani Hotel & Garden, 325 NLRB 928, 930 (1998); Advanced Installations, Inc., 257 NLRB 845, 854 (1981). Here, the Employer's decision to effectuate the four terminations at issue was most clearly made by Tolliver. The record also suggests that, ultimately, Tolliver is the only person with the authority to terminate ESLHA employees. Yet, the record provides no comparable evidence which addresses Tolliver's state of mind. The instant record lacks, for example, any revealing evidence which suggests that Tolliver has voiced animosity or showed hostility toward the Union or collective bargaining. This is also true for Prather.

The Union separately argues that "[a]n inference of animus can be drawn from the evidence that the Employer only targeted Union employees who were out for lengthy periods of time." However, I find that this argument mischaracterizes the record. As an initial matter, this argument overlooks the fairly probative fact that, to the extent that the employees at issue were targeted at all, they were targeted before the protected activity occurred. Second, the record does not clearly indicate whether Lockett was specifically instructed to investigate bargaining unit employees. Further, I suspect that, if the Employer was truly concerned with filling these effectively vacant positions, it follows, to some extent, that it would only seek to discover the statuses of employees assigned to those positions, all of which were apparently bargaining unit positions. (Put differently, it appears that Tolliver was "just trying to get all of the work done.") It also plausibly follows that, once the Employer's decision-makers were familiar with the relevant provision of the CBA, they would apply that provision to all of the bargaining unit employees it covered.[19] Once again, notably, it has not been demonstrated that the Employer,

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[19] Moreover, it generally follows that, in such a case, the Employer's actions would not necessarily be guided by a comparable six-month rule for absent non-bargaining unit employees.

faced with a similar shortage of non-bargaining unit employees at a worksite, has or would have responded differently.

In its post-hearing brief, the Union separately argues that the Employer's asserted legitimate reason for terminating the four employees is pretextual.[20] More narrowly, the Union argues that evidence of pretext can be found in the fact that the terminations of the alleged discriminatees were unprecedented, that none of the alleged discriminatees were given any notice of their pending terminations, and that the Employer has provided shifting explanations for its terminations. As with the above contentions, I also find this argument unpersuasive.

Intuitively, a violation of the Act is not established simply because a union employee is the first to have been negatively affected by an existing policy. See Asarco, Inc., 86 F.3d at 1410. Moreover, to the extent that one could observe the allegedly unprecedented nature of the terminations, logically, one must also once again observe the apparently unprecedented nature of the circumstance presented in this instance. See Clerk of the Circuit Court of Champaign County, 8 PERI ¶2025 (IL SLRB 1992). Put differently, one might reasonably conclude that no comparable set of terminations has occurred because, prior to this instance, the Employer had not had to address a comparable shortage of working full-time employees.[21] Likewise, one might reasonably presume that the Employer has never been similarly motivated to closely monitor the amount of time its bargaining unit employees have been off work or to aggressively search for legal methods to address a comparable shortage of bargaining unit employees at a worksite. In addition, to the extent it appears that Tolliver and Prather were unfamiliar with the relevant

[20] In this context, analytically, pretext means that the employer's proffered reasons for the terminations were a sham, a "mere litigation figment," or not relied upon by the employer, the true reasons being retaliation for protected activity. However, if a termination is for a legitimate cause, it cannot truly be pretextual. See Sheriff of Jackson County, 14 PERI ¶2009; City of Pekin, 9 PERI ¶2037 (IL SLRB 1993).

[21] During the hearing, Hill and Flowers could not recall another time when there were three people off at the Lansdowne Towers AMP at the same time for an extended period of time.

provision of the CBA prior to 2011, it makes sense that those two would have been unlikely to similarly enforce such a provision prior to that date.[22]

The Union's post-hearing brief attempts to demonstrate an inconsistent application of the six-month rule by suggesting that Cordell Rush, a former maintenance mechanic and bargaining unit employee, "had, within the past decade, been allowed to return to work after missing between ten months and a year of work." For a number of reasons, I do not find this specific example to be particularly compelling. For one, I generally find the evidence presented regarding this particular example to be too imprecise or vague to be considered significant evidence of improper motive. Moreover, the testimony which provided Rush's fairly remote employment history was not bolstered by a strong supporting foundation establishing a clear basis for admissibility. See City of Clinton, Dr. John Warner Hospital, 3 PERI ¶2062; County of Peoria, 3 PERI ¶2028 (IL SLRB 1987). Additionally, to the extent that the record does not describe the circumstances of Rush's work site or the corresponding employment status of Rush's coworkers during his absence, I find that a proper comparison cannot be conducted. Further, it appears that a "Mr. Wilkins," not Tolliver, was the executive director of the ESLHA when Rush was off work. Thus, I also find that Rush's circumstances might fairly be distinguished from those of the instant case to some degree. See Village of Oak Park, 28 PERI

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[22] One might also observe that, unlike the facts presented by County of Monroe, 14 PERI ¶2021, a case cited by the Union in its post-hearing brief in support of this particular argument, the instant record does not suggest that the Employer's terminations were "set against a background of threats and interrogations." Additionally, in this instance, there is certainly no evidence of a targeting of the most active Union adherents. However, to be clear, I would allow that, logically, where the central aim of an employer's action is to discourage union activity, that action can still be unlawful even though only neutral or even anti-union employees suffer in the process. See North Shore Sanitary District, 9 PERI ¶2014 (ILL SLRB 1993); Birch Run Welding & Fabricating, Inc., 761 F.2d at 1180; Merchants Truck Line, Inc. v. National Labor Relations Board, 577 F.2d 1011, 1016 (5th Cir. 1978); M.S.P. Industries, Inc. v. National Labor Relations Board, 568 F.2d 166, 175 (10th Cir. 1977); Arnoldware, Inc., 129 NLRB 228, 229 (1960).

¶111 (IL LRB-SP 2012); Clerk of the Circuit Court of Champaign County, 8 PERI ¶2025; Asarco, Inc., 86 F.3d at 1408.[23]

Concerning the next aspect of the Union's argument, I would concede that, in some instances, the failure of any supervisor or manager to warn or give notice of alleged deficiencies prior to termination has been considered a factor that could support an inference that an employer's reasoning was pretextual and that its real motivation was improper. See Sheriff of Jackson County, 14 PERI ¶2009; County of Monroe, 14 PERI ¶2021; Ballou Brick Company v. National Labor Relations Board, 789 F.2d 339, 342 (8th Cir. 1986); American Wire Products, Inc., 313 NLRB 989, 995 (1994). Yet, I find that this axiom is not easily applied to the distinguishable circumstances presented by the instant case. Importantly, this is not a traditional case of discipline being applied for allegedly improper performance or other work deficiency. As Tolliver testified, none of the employees at issue were terminated for disciplinary issues or for poor performance. Likewise, though the evidence suggests that the terminated employees were not particularly familiar with it, it could be argued that the Union and all covered bargaining unit employees were technically advised of the six-month rule at least to the extent that it was publicly disclosed by the terms of the CBA. Accordingly, I do not characterize this employer's alleged failure to warn its employees of their pending terminations as evidence of pretext.

It is fairly clear that an employer's presentation of false or shifting explanation for a termination supports a finding that the discipline was pretextual and that the protected activity was a motivating factor for that termination. County of Rock Island and Sheriff of Rock Island County, 14 PERI ¶2029 (IL SLRB 1998). However, contrary to the Union's assertion, I simply

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[23] As noted, testimony also clarifies that, prior to 2011, Prather and Tolliver were not particularly familiar with the CBA's six-month rule and thus, had they been the Employer's decision-makers at the time, might not have similarly determined to enforce it.

do not find that this employer has provided shifting explanations for the four terminations at issue. Rather, I find that the preponderance of the evidence readily demonstrates that the Employer has consistently asserted that its decision to terminate Flowers, Hill, and Washington was ultimately the result of those employees' apparent violations of the CBA's six-month rule. Additionally, the Employer has consistently asserted that its decision to terminate Gilyard was ultimately the result of Gilyard's extended absence.

In light of the foregoing, I find that the burdened Union has failed to establish, by a preponderance of the evidence, the required causal link connecting the four terminations and Kleinhans' e-mails. Because the Union has thus not sufficiently established a prima facie case of discrimination, I must necessarily hold that the Union has not proven by a preponderance of the evidence that the ESLHA unlawfully terminated the employment of Flowers, Gilyard, Hill, or Washington. Accordingly, the Complaint for Hearing should be dismissed in its entirety. However, if the Board determines that the Charging Party has demonstrated that Kleinhans' activity was protected and was a known, motivating factor in the termination of these employees, it then must be found that the Union had proven a prima facie case under Sections 10(a)(2) and (1) of the Act. City of Burbank, 128 Ill.2d at 345, 538 N.E.2d at 1149. Yet, according to the City of Burbank standard, once a charging party has established a case of termination based in part on improper motivation, the employer can nonetheless avoid a finding that it violated the Act by demonstrating that the terminated employees would have been fired for legitimate reasons notwithstanding the employer's improper motivation. Id.; see County of Menard v. Illinois State Labor Relations Board, 177 Ill. App. 3d 139, 144, 531 N.E.2d 1080, 1083 (4th Dist. 1988).

If it is found that the Union presented sufficient evidence to establish the requisite prima facie case, I would nevertheless find that substantial evidence demonstrates that the Employer would have terminated these four employees even without the occurrence of the protected activity. I would reach this conclusion, in part, because the record fairly clearly demonstrates that, prior to the receipt of Kleinhans' e-mail inquiries, the Employer's decision-makers had effectively already determined to do so. The Union has not disproven this key factual circumstance. In addition, whether or not Kleinhans ever sent her e-mail inquiries, the record suggests that the Lansdowne Towers AMP was abnormally understaffed when Tolliver reasonably initiated efforts to determine how long ESLHA employees could remain off work without being terminated. Moreover, independent of Kleinhans' activity, Flowers, Hill, and Washington had all evidently been away from work for more than six months when the Employer enforced the relevant section of the CBA. Likewise, Gilyard's FMLA leave had already been exhausted by the time Kleinhans sent her first e-mail inquiry.

V. CONCLUSIONS OF LAW

I find that the Union failed to prove, by a preponderance of the evidence, that the Employer violated either Section 10(a)(1) or Section 10(a)(2) of the Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the complaint in this case be dismissed in its entirety.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued in Chicago, Illinois, this 5th day of December, 2012.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Martin Kehoe

Martin Kehoe
Administrative Law Judge