STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Association of Professional Police Officers,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. S-CA-21-023
	)	
City of Aurora,	)	
	)	
Respondent.	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On August 2, 2020, the Association of Professional Police Officers (APPO, Union, or Charging Party) filed a charge in Case No. S-CA-21-023 with the State Panel of the Illinois Labor Relations Board (Board) alleging that the City of Aurora (City, Department, or Employer) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (Act). On February 24, 2021, the Board's Executive Director issued a complaint for hearing alleging that the City violated Sections 10(a)(7), (a)(4), and (a)(1) of the Act.

The case was heard on September 24, 2021, by the undersigned. Both parties appeared at the hearing and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Post-hearing briefs were timely filed by both parties. Accordingly, after full consideration of the parties' stipulations, evidence, arguments, and upon the entire record of this case, I recommend the following.

I. Preliminary Findings

The parties stipulate and I find:[1]

[1] In their prehearing memorandum, the parties provided that the stipulated facts are included in the City's Answer to the complaint. At hearing, I asked for clarification as to the extent of the stipulations. Counsel for Charging Party stated that he reviewed the answer and stipulates to any admission by the City. I have

1. At all times material, the City has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the City has been subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) of the Act.
3. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
4. At all times material, the Union has been the exclusive representative of a bargaining unit composed of the Union's full-time sworn police officers as certified by the Board on July 13, 2015, in Case No. S-RC-15-075; the Union and the City are parties to a collective bargaining agreement (CBA) for the unit.
5. Around June 2020, certain of the City's employees, including unit members, expressed concerns about the City's promotional process.
6. On July 6, 2020, Police Chief Kirsten Ziman[2] disseminated a document that contained her thoughts about the parties' June 24, 2020, discussion and the promotional process.
7. On July 9, 2020, the City released promotional ratings.
8. On July 23, 2020, Ziman sent an email to multiple individuals, including representatives of Charging Party, indicating that Respondent would be moving forward with the current promotional process but that she was open to changes going forward; Ziman further stated that because the Union is the official bargaining representative for the unit, concerns about the matter should be "directed to that one funnel."

set forth the allegations admitted in the answer to the complaint but omitted recitation of the exhibits included in the answer. These are included in the findings of fact as necessary.

[2] As of the time of the hearing, Ziman had retired and was no longer the Police Chief.

9. Soon after July 23, 2020, Union President Lee Catavu and promotional test coordinator Lieutenant Westrom approached Ziman about instituting a promotional rating appeal panel, and she agreed with the concept.

10. On July 27, 2020, Ziman sent an email to all sworn officers stating that an agreement had been reached about creating a promotional appeal panel consisting of two officers, two sergeants, two lieutenants, one commander, and one deputy chief not involved in the promotional process; Ziman also requested that promotion appeals be filed with Westrom by August 7, 2020.

11. On July 31, 2020, Ziman sent another email to all sworn officers stating that, due to the backlash she received in response to her email regarding the promotional appeal panel, including the statement from the Aurora Sergeants Association (ASA) Board members that they had no input in the plan and would not sign a memorandum of understanding (MOU) on the subject, police management would not proceed with the proposed panel, and would proceed with appeals to be heard by the original voting body.

12. On August 5, Ziman sent an additional email to all sworn officers stating that, as she previously noted, a candidate may submit a written rebuttal of a promotional rating in order to address any alleged discrepancies or errors, and the candidate then would be reevaluated and issued either the same rating or a higher, corrected rating.

13. The issue of promotion of police officers to positions outside of the bargaining unit is a permissive subject of bargaining.[3]

[3] The City's answer to the complaint admits that the promotion of police officers to positions outside of the bargaining unit is potentially a permissive subject of bargaining. Because at hearing and on brief the parties do not contest that the subject is a permissive subject of bargaining, I have included it in the findings of stipulated fact.

II. Issues and Contentions

The Complaint for Hearing alleges that the City violated Sections 10(a)(7), (a)(4), and (a)(1) of the Act by rescinding an agreement between the parties to create a promotional appeal panel, refusing to reduce the agreement to writing and, in doing so, refusing to bargain in good faith.

The Union contends that the City violated Section 10(a)(7), (a)(4), and (a)(1) of the Act by repudiating an agreement reached on July 27, 2020, between the Union and the City's Police Department to create a promotional appeal process and by refusing to reduce the agreement to writing. The Union alleges that after promotability ratings for police officers testing for promotion in 2020 were posted, it brought issues of inequity, lack of transparency, and racial bias to the City's attention, through Ziman. It asserts that the parties engaged in robust bargaining over the subject, with Ziman recognizing the APPO as the official bargaining unit. The Union contends that the City chose to bargain with the Union over the permissive subject of the promotional process, which included its proposals and the City's counterproposals, and the bargaining resulted in an agreement with ascertainable material terms. It argues that the parties reached a meeting of the minds on the essential, enforceable terms of an agreement to create a promotion appeal process, and that the City repudiated the agreement and refused to reduce it to writing.

The City denies that it violated the Act as alleged. It asserts that the parties did not engage in collective bargaining over the promotional process, a permissive subject of bargaining. Rather, the parties were engaged in crisis management in the summer of 2020, during which the City experienced some of the same social turmoil experienced throughout the country. It contends that the City received from its African-American and Hispanic officers claims of discrimination with respect to several issues, including the promotional process. The City states that the claim of

discrimination in the promotional process was recognized as a non-contractual problem, which it attempted to resolve, but that its efforts at doing so did not constitute collective bargaining. It argues that even if the discussions that occurred between Police Chief Ziman, Lieutenant Westrom, and APPO President Catavu constituted bargaining, the Union failed to present evidence that the parties had a meeting of the minds and therefore reached agreement on a promotion appeal process. The City argues that there was no bargaining, no meeting of the minds, and therefore, no agreement which it was obligated to reduce to writing and to implement.

III. Findings of Fact

The City's police officers are members of a bargaining unit represented by the APPO and the police sergeants are members of a bargaining unit represented by the ASA.[4] The City is a party to a collective bargaining agreement (CBA) with each unit. The City and the APPO do not bargain the Police Department's promotional process, and their CBA does not govern that process.

Promotional exams are administered every three years. The exam for promotion to sergeant consists of four components, weighted as follows:[5]

(1) Written – 25 percent;

(2) Assessment center– 30 percent;

(3) Promotability – 35 percent;

(4) Education/Experience – 10 percent;

(5) Military Preference Points – 10 percent.

Military preference points are applied after all the exam components are complete and may result in a candidate receiving more than 100 points.

[4] The ASA also represents the lieutenants and commanders for some purposes.
[5] The exam for promotion to lieutenant includes the same components, but they are weighted differently.

The exam for promotion to sergeant and the exam for promotion to lieutenant occurred during the same time period. The promotion exams began with a sign-up period beginning October 1, 2019, through November 1, 2019. In October 2019, the officers were informed that the education/experience component would increase from five percent to ten percent of the exam's overall score. The exams began with the promotability component, which had been completed for both the patrol officer-to-sergeant exam and the sergeant-to-lieutenant exam when the written and assessment center components of the testing were postponed in March 2020, due to the Covid-19 outbreak. The exams' written portions were postponed to August 2020, and the assessment center components to late September into early October 2020.

To begin the promotability component, each test candidate submitted a self-assessment to his or her immediate supervisor, who rated the candidate's promotion qualifications. The supervisors may award the candidate 100, 85, or 70 points. Seventy points indicate the candidate is not qualified for promotion. The supervisors provided written narratives explaining the reasons for the ratings they awarded. The candidates were permitted to submit written responses to their ratings. The supervisors presented the ratings and narratives, and candidate responses, to the entire supervisory staff, which included personnel from the rank of sergeant to and including the police chief. In a meeting, the supervisory staff discussed the submissions and then cast anonymous votes on each candidate. For each candidate, the vote scores were averaged to arrive at a promotability rating of 100, 85, or 70 points.[6] The supervisors were not required to provide reasons for their votes. In a change from the pre-2020 promotion exam process, the candidates were not allowed to appeal their ratings. The supervisors reviewing and voting on officers seeking promotion to

[6] Under the previous version of the exam, the candidates received the rating that a majority of supervisors awarded, instead of the averaged rating. They received the rating and written comments, which they could appeal to the Police Chief's office.

sergeant included those in the ranks of sergeant through chief. Those reviewing and voting on sergeants seeking promotion to lieutenant included those in the ranks of lieutenant through chief.

In May 2020, Deputy Police Chief Keefe Jackson retired and Commander Keith Cross, who is African-American, was promoted to that rank. Jackson had overseen the Department's promotion process since 2011 until his retirement, and upon his promotion, Cross took on those duties. Following Cross's promotion, a lieutenant who had participated in the officers' and sergeants' promotion process, sent a text message to two sergeants, who were not his intended recipients, in which he commented that the new Deputy Police Chief is of a "convenient" race. The text message became common knowledge among the officers.

On June 21, 2020, Police Chief Ziman met with Retired Police Chief Powell, who represented the National Organization of Black Law Enforcement Officers (NOBLE). Union Ex. A. NOBLE is not a labor organization. On June 24, 2020, the Department's officers who were members of NOBLE initiated a meeting with Chief Ziman, retired Deputy Chief Jackson, and Deputy Chief Cross to make known their concerns over possible racial bias in the promotion process and other issues. At the invitation of the NOBLE officers, APPO President Lee Catavu attended the meeting. Prior to the meeting, Catavu discussed concerns about the promotional process with the APPO executive board.

At the June 24 meeting, the officers voiced their concerns that they were not fairly rated in the promotion process and because the supervisors' votes were anonymous, they could not learn the reasons for their ratings. They were concerned that racial bias negatively impacted the subjective ratings, as well as the composition of some of the Department's specialized units and the internal affairs process. Officer Edwina Pirela lead the meeting and acted as the chief spokesperson for the NOBLE members.

Ziman testified that after June 24, 2020, officers and sergeants continued to approach her and Deputy Chief Cross about their concerns. She stated that some told her "Pirela doesn't speak for me," and so she was unsure who their spokesperson was and how widespread was the feeling that the promotion process needed changes.

On July 2, 2020, Pirela emailed Ziman to ask if she could provide any feedback on the concerns that they had expressed in the June 24 meeting. That same day, Ziman responded by email to the meeting attendees stating that she was putting together a document to address their concerns and suggest "a path forward to get to where we need to go."

On July 6, 2020, Ziman sent an email to meeting attendees stating that she had worked on her responses over the weekend and the promotion ratings would be forthcoming. Union Ex. B. Ziman attached a memorandum setting forth her responses to the officers' concerns. She stated that the numbers with respect to promotions did not support the claim of bias, but she agreed there was subjectivity in the process, which should be corrected. She expressed her appreciation to those who had reached out to her for further discussion and stated that "these meaningful discussions are so beneficial." Union Ex. A. Catavu testified that after receiving the email, he spoke with NOBLE members Officer Pirela and Officer Reggie Walls who told him they wanted to see how the supervisors voted so they could identify any patterns of similarly situated minority officers receiving lower scores than their white male counterparts.

On July 9, 2020, Pirela emailed a response to Ziman. She asked Ziman to let them know if they could assist in any way in moving forward and thanked her for her time and for listening. Union Ex. B. On that same date, Ziman responded to Pirela's email with her own, to which she attached the promotion ratings for the 2017 and 2020 lieutenants' exams and sergeants' exams, which they had requested. Catavu testified that after he received the email, he spoke with Pirela,

who told him that it was insufficient for the purpose of exploring concerns over potential bias. She also told him the lists contained errors, identifying some Hispanic candidates as white.

Ziman testified that officers and sergeants continued to approach her to engage in informal conversations about the issue of possible bias in the promotion process. She stated that one of the sergeants asked her to disseminate the promotion ratings department-wide as the only way to dispel their concerns. She also said that others continued to tell her that they did not share those concerns and Pirela did not speak for them. Ziman testified that the issue had surfaced seven months after the ratings came out and she was trying to listen to everyone and get to the bottom of things.

Two weeks later, on July 23, 2020, Catavu met with Lt. Westrom, who had been promoted to Lieutenant as of July 4, 2020, and had taken on the duties of the Department's promotion test coordinator.[7] He had asked for the meeting because he thought Westrom would be the most appropriate person with whom to discuss the issue. Catavu stated that he was aware the NOBLE officers wanted to eliminate the supervisor ratings portion of the exam, but the Department's command structure was not interested in doing so. Therefore, he developed the idea of a multi-ranked and diverse appeal panel and wanted to discuss it with Westrom to get his opinion on its viability. Catavu testified that he and Westrom discussed the make-up of the panel and initially selected a Hispanic female officer and a white male officer, a female Hispanic sergeant and a white male sergeant, a Black female lieutenant and a white male lieutenant, and the Deputy Chief, who is a Black male. Catavu testified that he did not anticipate that the ASA would have to agree to the appeal process, only that individual sergeants would have to agree to participate on the panel.

Westrom testified that Catavu told him the officers had authorized him to represent them in trying to resolve their concerns. Catavu identified Wiencek's email and inaccurate supervisor

[7] The previous promotion test coordinator, Lt. Wallers, retired.

comments in the promotability component of the exam as the bases for the officers' concerns about the promotion process. Westrom agreed with the concept of creating some type of appeal process to address claims that the supervisors' promotability comments were inaccurate. He testified that he and Catavu discussed appeals that had been considered in the latest testing, one involving a sergeant and another a patrol officer, and they agreed that if the Department did not do something, the officers likely would file a civil lawsuit. He stated that they both believed that they needed to resolve the situation, and if both sides were agreeable to it, it was possible the appeal panel process could work. Westrom told Catavu that he would contact Ziman to schedule a meeting for the three of them to discuss the matter.

Also on July 23, 2020, Ziman sent an email addressed to Pirela and copied to a number of other officers, including Catavu, regarding the promotion process. Emp. Ex. 3; Union Ex. D. She wrote,

> I've been communicating with everyone separately, so I want to make sure that my response is in one place. I'm having conversations with our African American Officers, our Latin X officers, and our APPO president separately and as a result, messaging is getting crossed and convaluted [sic]. APPO is the official bargaining unit so I'm going to ask that all issues be directed to that one funnel.

Id. She noted that she understood the officers had gone to the Civil Service Commission with their claim that the promotion process was discriminatory, and she was working with the Human Relations Department and the Civil Service attorney to determine the proper venue for the officers' concerns. She stated that "[h]aving said that, I want you to all know my intent to move forward with this current process *as is*." *Id*. (Emphasis in original). She continued that she agreed that there were weaknesses in the process and that "we can fix that in the next process. Or, if it's collectively decided to adopt an entirely new process, I'm amenable to that as well! However, I am not a proponent of changing the rules in the middle of the game which is why we will be

moving forward as is." *Id*. She stated that if the APPO or individual officers chose to litigate over it, she would abide by the results. She wrote that she wanted to get it right and "would love it if those of you taking up this cause will join the Promotion Committee and help us get there." *Id.* After receiving the email, Westrom told Catavu that he still planned to ask Ziman to meet with them.

Ziman testified that she did not designate Catavu as the communication "funnel" in his official capacity as APPO President but did so because as a member of the APPO Board he had experience in gathering and disseminating information and was involved in department matters. She noted that he was the Department's LGTBQ liaison and was on the community foundation. She stated that she also wanted Catavu to act as the officers' spokesperson because he was involved in the promotion process and therefore was familiar with it. Further, Catavu had been at the June 24 meeting and so was involved with the issue from the beginning. She testified that she never considered their discussions about the promotion process to be bargaining. She stated that there was "a lot of noise," and she could not keep track of everyone's opinions, so she asked for a spokesperson.

Ziman met with Westrom and Catavu the next day, July 24, 2020. She testified that the meeting had not been scheduled in advance, but Westrom and Catavu came by and asked if they could "pop in" because they "may have an idea." Catavu testified that Ziman told them that she wanted to go forward with the process as is, and he noted to her that a sergeant already had been permitted to appeal his rating, which she indicated she did not recall. He stated that after Westrom called ASA Vice President Sergeant Whitfield and confirmed the identity of the sergeant who had been permitted to appeal, Ziman began to engage with them and they told her of their idea for an appeal panel. Westrom testified that they had a lengthy discussion on the justifications and

rationale for the issues that had surfaced and the pros and cons of the appeal panel he and Catavu had discussed the previous day. He stated that Ziman agreed that an appeal process was needed but she would need to check with City Hall to make sure it would agree to the panel concept and with the ASA, as well, to confirm it would sign a memorandum of understanding (MOU) to send the message that the process was to change. Westrom said that they ended the meeting agreeably, waiting to see what would happen.

Ziman described the meeting as "kind of a brainstorm." She agreed that there should be an appeal process and the panel they described was viable. She told them that the sergeants also were testing to promote to the next level and would be involved in the process. Ziman testified that because the ASA had skin in the game, she wanted to make sure it was on board and would sign a MOU on changing the process. She further testified that she wanted to leave no stone unturned and open the process to everyone who felt they might have been discriminated against in the ratings process.

She also needed to make sure City Hall officials would approve the concept. Ziman testified that time was of the essence as the written exam was scheduled to be administered soon. She did not want to pause the promotion process, and so was looking for a solution.

That evening, Ziman told Westrom that the City wanted to be sure that officers who would be adversely affected by the changed process would not litigate against the City, and officers who did not study for the exam would not claim that they did not have time to prepare for it. Westrom relayed that information to Catavu. He asked Catavu if he would be willing to sign something to avoid potential lawsuits against the City. Catavu responded that he could sign on behalf of the APPO only and not the ASA, but that signing such an agreement would not prevent individual

officers from filing lawsuits. He stated that he would discuss the idea of the panel with ASA President Sergeant Brian Pierce.

Catavu later phoned Westrom and told him that he spoke to Pierce and the ASA would sign on to the concept of the appeal panel. Westrom sent a message to Ziman relaying that information. Ziman testified that she took the information at face value and did not verify it with Pierce.

Catavu testified that sometime between July 24 and July 31, 2020, he and Pierce had another conversation when Pierce phoned him and told him that he had issues with the panel's composition. Pierce did not want officers and sergeants on a panel that would be considering the promotion of sergeants to lieutenants. Catavu told Pierce he should talk to Ziman about creating a separate panel for the sergeants.

Pierce testified that he did not discuss the matter again with Catavu after their July 24 phone conversation. He also testified that he never stated that he would or would not sign a MOU. He explained that he agreed to the appeal panel process because he was not aware of any sergeant who had come forward alleging bias or other problems affecting his or her rating and, therefore, he did not believe the process would affect ASA members.

One or two days after the July 24 meeting, Westrom called Catavu to suggest that the panel include a police commander and whom to include. Catavu suggested a different commander, and Westrom agreed. With the addition of a commander, the appeals panel would consist of two officers, two sergeants, two lieutenants, a commander, and the deputy chief.

On July 27, 2020, Catavu met with Chief Ziman and Deputy Chief Cross. Ziman told Catavu that she was open to an appeal process limited to claims that the ratings provided to the supervisory staff for the promotability vote had included incorrect information, but it would not be open to officers who simply wanted to appeal their scores. Catavu stated that the process also

needed to address claims of bias. They agreed that it would apply to inaccuracies and to lower scores awarded without explanation. Catavu testified that he asked if Ziman would sign an agreement, and she responded that the matter was too important to wait and immediately sent out an email explaining the process.

In her July 27, 2020 email, which she sent to all sworn members of the Department, Ziman noted the concerns over the promotional rating process that had been brought to the Command Staff's attention. She wrote, "[i]n an effort to try and rectify the situation, different options were discussed with [APPO]. An agreement was reached in which an appeal panel would be convened that consists of 2 Officers, 2 Sergeants, 2 Lieutenants, 1 commander and the Deputy Chief. The panel members will consist of a diverse representation of Sworn Officers and Supervisors who are not involved in the current promotional process." Emp. Ex. 4; Union Ex. E. (Emphasis in original). Ziman wrote that the panel would be presented with the appeal from any "Officer or Sergeant" who believed his or her rating was negatively affected by comments made during the supervisors' group discussion or whose ratings were lowered despite the absence of negative comments, and she outlined the appeal process. She stated that because the written test date of August 22, 2020 was approaching, the process should move forward as quickly as possible and provided the date by which to notify Westrom of the intention to appeal, the deadline for submitting a written appeal, and the week during which the panel would discuss the appeals and cast their votes. Finally, she wrote, "I appreciate your patience and understanding as we work through these issues," and noted that they had the opportunity to make the process better.

One or two days later, a sergeant came to Westrom's office and told him that he and several other sergeants did not agree with the appeal process and the panel's composition. Westrom phoned Pierce and asked if the ASA was still on board with the process. Pierce told Westrom that

he was hearing from many of the sergeants who were unhappy with it and that they would not agree to anything until they were presented with something in writing. He stated that he would present the plan to the ASA members for a vote before agreeing to anything. Westrom sent Ziman an email to tell her that the ASA had issues with the new process and keep her updated with respect to tension ASA was experiencing over it.

Pierce testified that he had expected to receive something from management indicating the appeal process was moving forward and that if there was something to be signed, it should come from management and not from another union. Further, when he received Ziman's July 27 email he believed it did not mention the ASA because the plan did not affect its members as he did not know of any who wanted to appeal his or her rating. He stated that he received "a lot of pushback" from the ASA members in response to the July 27 email. He explained that the sergeants were unhappy that they would be rated by patrol officers and other sergeants, and they were displeased that the ASA agreed to the process. Accordingly, the ASA board decided not to participate in it.

On July 30, 2020, Pierce sent a message to the sergeants explaining that the APPO had gone to Ziman asking for a promotion appeal process. Emp. Ex. 5. He stated that the ASA was not part of the process's creation or its implementation. He noted that some of the sergeants may have heard that the ASA had recently interceded for a sergeant by securing an appeal of his promotion rating and explained that it had done so through a grievance under the terms of their CBA. He explained that the ASA would not be involved in the new appeal process and instructed that they should address any questions they had about it to Westrom. Pierce never spoke to Ziman about the promotion process.

Westrom received Pierce's email because, being recently promoted to Lieutenant, he was still included in the sergeants' email address book. He forwarded the email to Ziman with his own

message telling her that the ASA had decided not to be involved in the process. Pierce testified that Westrom phoned him and asked if he was stating that the ASA would not participate. He stated that he told Westrom they would hear the appeal as part of the promotability process, but he would not sign an MOU, as they had not seen anything yet.

Ziman testified that she was "dumbfounded" and confused by the information in Westrom's email because Catavu had talked to the ASA board and indicated that they agreed with the process. She stated that, with the information she received from Westrom, she could not proceed with the plan. On July 31, 2020, Ziman issued another email to all sworn members of the Department explaining that she had received backlash with respect to several issues outlined in the July 27 email and could not go forward with the process she had described therein. Union Ex. F; ER Ex. 6. She identified the issues of concern as: (1) the panel was a different voting body than the original voting body; (2) the panel was to include APPO officers who would rate their supervisors and their peers; (3) who would choose the panel members and for what reasons; and (4) the ASA's statement that it did not have input into the plan and would not sign an MOU. She stated that she and the APPO President had a verbal agreement to go forward with the plan, but given the discourse over it, she could not in good conscience do so. However, the Department would provide an appeal process with all appeals heard by the original voting body. She stated that while the timeline was not ideal, she was doing her best to cure concerns of inaccurate information in the promotion process. She stated that the appeal process would go forward with the same supervisors who participated in the rating vote hearing the appeals of "Officers and Sergeants."

On August 1, 2020, Ziman emailed Pirela stating that she did not back of out of the deal, as Catavu stated, but that she was getting a lot of pushback against the promotion committee the

APPO Board had chosen. On August 5, 2020, she sent another email to all-sworn members of the Department regarding promotion exam appeals. In it, she explained that officers could contest and correct alleged discrepancies to their rating and the appeal could not result in a lower rating than they originally received. She instructed the officers that August 10, 2020, was the deadline for submitting appeals.

Also on August 5, 2020, Catavu advocated in favor of the plan before the City Council. And on August 19, 2020, Catavu sent an email to Ziman's wife, Officer Christine Tunney, and also to Ziman, Westrom, Pierce, and Cross, in which he refuted allegations that he misled Ziman with respect to the appeal panel.

The written portion of the promotion examination was administered on August 22, 2020, followed by the assessment center from September 30 through October 2, 2020. The promotion eligibility list was posted on November 5, 2020.

IV. Discussion and Analysis

As discussed below, the City did not violate the Act when it refused to reduce to writing and sign an agreement with respect to the Police Department's promotion process because the parties did not engage in collective bargaining on the subject and, even if they did, the parties did not have a meeting of the minds on its essential terms and therefore did not reach an agreement.

Under the Act, it is an unfair labor practice for an employer or its agents to do the following:

> (1) to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act . . . ;
>
> * * *
>
> (4) to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, the discussing of grievances with the exclusive representative;
>
> * * *

> (7) to refuse to reduce a collective bargaining agreement to writing or to refuse to sign such agreement;

5 ILCS 315/10(a).

Under Section 10(a)(7) of the Act it is an unfair labor practice for an employer "to refuse to reduce a collective bargaining agreement to writing or to refuse to sign such agreement." 5 ILCS 315/10(a)(7). An employer's refusal to sign a collective bargaining agreement or reduce it to writing likewise constitutes an unlawful refusal to bargain in good faith under Section 10(a)(4) and (a)(1) of the Act, 5 ILCS 315/10(a)(4), (a)(1). *Vill. of Frankfurt*, 28 PERI ¶ 144 (IL LRB-SP 2012) (*citing City of Harvey*, 18 PERI ¶ 2032 (IL LRB-SP 2002); *Chi. Transit Auth.*, 16 PERI ¶ 3021 (IL LRB-LP 2000); *Cnty. of Cook (Cermak Health Servs.)*, 10 PERI ¶ 3009 (IL LLRB 1994); *State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Corr.)*, 6 PERI ¶ 2038 (IL SLRB 1990); *Ill. Dep'ts of Corr. and Cent. Mgmt. Serv.*, 4 PERI ¶ 2043 (IL SLRB 1988); *City of Belvidere*, 4 PERI ¶ 2048 (IL SLRB 1988)).

Initially, the City argues that it cannot be found to have violated the Act because the parties' discussions over providing an appeal process to the promotion process did not constitute collective bargaining but, rather, a crisis management effort. It notes that the City and the APPO have never bargained over the promotional process, a permissive subject of bargaining. It argues that bargaining involves a structured process and identifies written proposals, counterproposals, bargaining sessions, draft documents, responsive draft documents, tentative agreements, and approvals of the agreement as the indicia of that process. The City asserts that the minority officers presented to the City non-contractual concerns of race discrimination, including in the promotional process. Trying to address those concerns, Ziman was communicating directly with the affected officers and decided that, to be effective, communication had to be funneled through a point person, and she identified the APPO and ASA Presidents as the best choices for that role. The

City contends that communicating through the APPO President did not transform the attempt to resolve this issue into collective bargaining. It asserts that Catavu and Westrom did not approach Ziman with the idea for the appeal panel as a subject for collective bargaining but as an attempt to stave off discrimination claims against the City.

The Union argues that bargaining does not require a formal process, simply the exchange of ideas aimed at reaching an agreement. Nor does it require the exchange of written proposals. It states that bargaining often is accomplished through conversations and bargaining sessions. It asserts that the parties exchanged their proposals verbally and the Act requires the City to reduce the agreement reached to writing.

Neither party cited Board or court caselaw supporting their respective positions. However, the Union's assertion that the bargaining process need not be so formal as the City urges is supported by caselaw. The Illinois appellate court has instructed, "the conduct of parties, and not merely their words, must be considered when deciding whether a document was collectively bargained." *Bd. of Educ. of Du Page Cnty. High Sch. Dist. No. 88 v. Ill. Educ. Labor Relation Bd.*, 246 Ill. App. 3d 967, 978 (1st Dist. 1993). That is to say, whether the parties engaged in collective bargaining as the Union contends, or in crisis management as the City contends, should be determined by looking at the totality of the circumstances surrounding their efforts.

In *Du Page Cnty. High Sch. Dist. No. 88*, the employer school district and the union disputed whether they had collectively bargained the substance, and not only the procedures, of the school district's teacher evaluation plan and, therefore, whether the District committed un unfair labor practice under the Illinois Educational Labor Relations Act, 115 ILCS 5/1 *et seq*., when it refused to arbitrate a grievance over the plan's application. The appellate court reversed the Illinois Educational Labor Relations Board's holding that the evaluation plan had been the

product of "'the give-and-take typical of labor negotiations in a committee setting'" and, therefore, had been collectively bargained. *Id*. (citation omitted). The court stated, "'the give and take between a committee of representatives from employers and employees which resembles that typical of labor negotiations, can, under some circumstances, constitute collective bargaining[.]'" *Id*. (quoting *Alton Cmty. Unit Sch. Dist. No. 11 v. Ill. Educ. Labor Relations Bd.*, 209 Ill. App. 3d 16, 25 (4th Dist. 1991)). But it concluded that the give and take that occurred between the employer school district and the exclusive representative did not constitute collective bargaining. *Id*. It explained that the evidence indicated that the District was adamant in its refusal to bargain over the matter while it cooperated with the union in developing the evaluation plan. The court determined there was no testimony that either the employer or the union was under the impression they were bargaining the evaluation plan. Rather, the evidence was that the parties were engaged in consensus-building rather than the give-and-take of negotiations. The court further explained that finding the parties' conduct to constitute bargaining under those circumstances would have a chilling effect on educational employers, who would be more likely to avoid all but the most limited interaction so as not to unintentionally cross the line between "cooperation" and "bargaining." *Id*.

Here, the Union asserts that it brought issues of inequity, lack of transparency, and racial bias in the promotional process to the City's attention, through Ziman. However, this representation is not accurate. The evidence shows that NOBLE's representative, City retired Police Chief Powell, met with Ziman on June 21, 2020, to present to her the racial bias concerns of the Department's African-American officers. Subsequently, the Department's African-American officers who were members of NOBLE initiated a meeting on June 24, 2020, with Ziman, Deputy Chief Cross, and retired Deputy Chief Jackson, who had overseen the

Department's promotion process for approximately nine years, to address the officers' concerns over the promotion process and other issues. The NOBLE officers invited Catavu to attend the meeting and he did so. He did not initiate or act as a catalyst in bringing about the meeting. Moreover, it was Officer Pirela and not Catavu who presented as the leader of the officers at the June 24 meeting. NOBLE and APPO share members, but they are not interchangeable, as the Union's post-hearing brief's framing of the facts and its arguments suggests.

Although Catavu testified he discussed promotion concerns with the APPO Executive Board prior to the meeting, there is no evidence he acted as a spokesperson on behalf of the bargaining unit members or the officers in general at the meeting. Rather, at the meeting and subsequently, Officer Pirela acted as chief spokesperson on the issues of concern. From June 24 through July 9, 2020, it was Pirela, not Catavu, who maintained email communication with Ziman on the issues NOBLE had brought forward. While Pirela and Catavu conferred on the issues over that time, Catavu did not approach Ziman to initiate talks with her or anyone else at the City. Indeed, during that time, Ziman, Cross, and Westrom were having conversations with individual officers and sergeants who approached them to talk about the issues, including some who were telling them that Pirela did not speak for them. Because she was confused about how widely shared the concerns voiced by NOBLE were, and was having many individual conversations about those concerns, on July 23, 2020, Ziman designated Catavu as the communication "funnel." On that same day, Catavu told Westrom that the officers had authorized him to represent them on the issue.

Catavu became the officers' spokesperson on the issue by virtue of Ziman's difficulties communicating with officers and sergeants approaching her individually with their concerns and her consequent decision to designate him as the employees' communication funnel, based on his experience as APPO President and his breadth of experience with issues within the Department

and in the community at large. Ziman also explained in her July 23, 2020 email that she did not like to change the process while it was ongoing, but she was amenable to an entirely new process if such was collectively decided to take that path. That Ziman stated that she was open to a new appeal process if they collectively decided to do so weighs against finding Ziman's or Westrom's discussions with Catavu to be bargaining for an agreement for a process that would apply to the APPO bargaining unit members only.

Although Ziman recognized Catavu as the president of the officers' bargaining unit, the evidence does not suggest that either Catavu or she considered their discussions over the issue to be bargaining over the promotion process. This is so particularly in light of the fact that, as the parties do not dispute, the promotion process is a permissive subject of bargaining over which the City and the APPO had never bargained. That Ziman considered the ASA's participation to be necessary and relied on Catavu to communicate with ASA President Pierce on the promotions issue undermines the Union's contention that the City engaged in collective bargaining over the promotion issue with the APPO. Rather, it supports the City's position that it was engaged in problem-solving, broadly trying to resolve the crucial issues the African-American and Hispanic officers had raised and do so in a manner that would be acceptable collectively to the officers and to the sergeants. Moreover, the Union's argument that the absence of the ASA's representative from the discussions over creating an appeal process is evidence that the City and the APPO were engaged in bargaining over that subject is not persuasive. On June 23, 2020, Ziman had designated Catavu as the "funnel" through whom to communicate with her on the promotion issues. The parties conduct thereafter was consistent with that action. The next day, Catavu and Westrom approached Ziman to talk about the appeal panel idea, after which Catavu volunteered to contact and speak to ASA President Pierce about it. He then reported Pierce's reaction back to Westrom.

In other words, the evidence indicates that, as Ziman had wanted, Catavu was acting as the communication funnel in a collaborative effort to address the issues NOBLE had brought forth. It does not support a finding that the parties were engaged in bargaining.

Further supporting the City's position is Catavu's statement to Westrom on June 23, 2020, that the officers had authorized him to represent them with respect to their concerns over the fairness of the promotion process. Presumably, as APPO President, Catavu already was authorized to bargain on behalf of the unit members on collective bargaining issues. The Union provides no reason he would have needed the officers' authorization if the efforts over the promotion process was an exercise in collective bargaining. His statement indicates that he recognized the discussions over resolving concerns about bias in the promotion process were outside of the collective bargaining context, or that he recognized Westrom and Ziman so considered them. And, it is reasonable to assume that his statement would have communicated to Westrom that Catavu did not, at that time, understand their discussions to constitute bargaining.

The parties' uncertainty over whether there would be a signed MOU on the matter, who would sign it, and Ziman's conduct on July 27 in sending another email to all sworn Department members instead of executing a MOU describing the appeal process further weigh against finding that the parties were engaged in collective bargaining over the promotion process. Ziman's sending of the all-sworn email – that is to say, communicating on the subject directly with all the officers and sergeants – confirms that she continued to operate under the premise that they were working to collectively reach a solution to the issues the minority officers had raised with respect to the promotion process, that both the APPO and the ASO were on board with doing so, and they were not doing so in an effort to bargain an agreement limited to the APPO bargaining unit.

Based on the record, I find that, as in *Du Page School District*, in June 2020, the parties were not engaged in bargaining but in the critical task of consensus-building to find a workable solution to the pressing concerns of racial bias within the Department, and in particular, in the administration of the promotion process. Because the parties were not engaged in collective bargaining, they did not reach a collectively bargained agreement. Therefore, the City did not commit an unfair labor practice when it failed to reduce to writing the appeal process Ziman described in her July 27, 2020 all-sworn email, or on July 31, 2020, when Ziman sent another email to all sworn members of the Department explaining that, based on opposition to that process, the Department was instead opting to permit appeals under the former process.

However, even if the discussions between Ziman, Westrom, and Catavu constituted collective bargaining rather than consensus building, the evidence indicates that the parties did not have a meeting of the minds as to the new appeal process to be instituted. As described above, the Union asserts that the parties reached agreement on July 27, 2020, and through Ziman's July 31, 2020 email, the City repudiated the agreement. The Employer disputes that they did so. For the reasons set forth below, I find the parties did not have a meeting of the minds, and therefore they did not have a bargained agreement.

To prove that a party violated the Act by refusing to sign or reduce an agreement to writing, the charging party must first demonstrate that the parties had an agreement. An agreement requires offer, acceptance, and a meeting of the minds – that is, the parties must truly assent to the same things in the same sense on all the agreement's essential terms and conditions. *City of Rockford*, 33 PERI ¶ 108 (IL LRB-SP 2017), *aff'd Int'l Assoc. of Firefighters, Local 434, AFL-CIO v. City of Rockford*, 2018 IL App (2d) 170318-U (unpublished order); *Chi. Transit Auth.*, 29 PERI ¶ 156 (IL LRB-LP 2013); *Recorder of Deeds*, 28 PERI ¶ 14 (IL LRB-LP 2011). Whether

the parties had a meeting of the minds is determined by their objective conduct rather than their subjective beliefs. *Paxton-Buckley-Loda Educ. Ass'n, IEA-NEA v. Ill. Educ. Labor Relations Bd.*, 304 Ill. App. 3d 343 (4th Dist. 1999); *Chi. Transit Auth.*, 37 PERI ¶ 32 (IL LRB-LP 2020); *Cnty. of Tazewell and Sheriff of Tazewell Cnty.*, 19 PERI ¶ 39 (IL LRB-SP 2003); *City of Chi. (Police Dep't)*, 14 PERI ¶ 3010 (IL LLRB 1998).

Where, as here, a party denies that it violated the Act because no agreement had been reached, the Board determines whether the parties had a meeting of the minds and therefore reached agreement. In so doing, the Board asks whether the parties agreed to "the same things in the same sense on all of the agreement's essential terms and conditions." *City of Rockford*, 33 PERI ¶ 108; *see Paxton-Buckley-Loda Educ. Ass'n*, 304 Ill. App. 3d at 350 ("The existence or nonexistence of an agreement is a question of fact for the [Illinois Educational Labor Relations Board]."). If so, then the parties had a meeting of the minds and reached agreement. Here, if the evidence shows that the parties had a meeting of the minds such that an agreement was reached, then the City will be found to have violated its duty to bargain under the Act. If, on the other hand, the evidence shows that there was no such meeting of the minds, and therefore they had not reached agreement, then the City will not be found to have so violated the Act.

The Union argues that Ziman and Catavu reached an agreement with ascertainable material terms that must be enforced. It asserts that in her July 27, 2020 email, Ziman admitted that the parties had reached an agreement and laid out the essential terms as to the panel's composition and the appeal process. According to the Union, Catavu, as APPO President could only agree to a process on behalf of the officers' bargaining unit and could not agree to anything on behalf of the ASA sergeants' unit and the July 27, 2020 email reflects such an agreement. It contends that Catavu and Ziman agreed to a panel concept that included two sergeants and they were not

bargaining over whether the panel would also hear appeals of the sergeants' promotion process. The City, however, asserts that Ziman agreed to a concept involving a single appeal process that would apply to the officers' promotion process and to the sergeants' promotion process and that the ASA had bought into that concept. The evidence supports the City's argument.

It is true that, as the Union points out, on July 27, 2020, Ziman sent an email stating that she and the APPO had agreed on an appeal process and set out the composition of the panel and the process's deadlines. However, the Union ignores Ziman's statement that "[t]his panel will be presented with the appeals of *any officer or Sergeant* who believes that their rating was negatively affected by the comments made during the group discussion or whose rating was lowered despite zero negative comments being made about them." Union Ex. E (emphasis added). And throughout the email, Ziman referenced convening "an appeal panel," described who would be included as "the panel members," and otherwise referred to a single panel. Notably, there is no evidence that Catavu objected to Ziman's description in her July 27 email of a panel that would hear appeals from officers and sergeants, communicated to her that it did not correspond to their agreement, or sought to clarify her description of it in any way. Together with Ziman's July 23, 2020, email in which she stated that she was amenable to a new process if such was collectively decided, it is clear that Ziman was envisioning a single panel that would hear and consider appeals arising from the officer to sergeant promotion exam and from the sergeant to lieutenant promotion exam.

The conversations taking place between July 23 and 31, 2020, support the conclusion that Ziman was agreeing to a single panel even if Catavu may have, at the same time, been pursuing it for the officers and not for the sergeants, and only expected the sergeants to participate as panel members. On July 24, 2020, after Catavu, Westrom, and Ziman discussed the idea for a new appeal panel, Westrom asked if the ASA was on board with the idea. Catavu volunteered to contact

Pierce to find out the ASA's position on the idea, and sometime later that same day Catavu phoned Westrom and told him that he had spoken with Pierce and the ASA was agreeable to it. That same day, Westrom relayed that information to Ziman. Catavu testified that he believed that the ASA did not need to agree to the panel, it was only necessary that at least two sergeants would agree to participate. But Pierce's testimony that when Catavu told him of the idea on July 24, he had no problem with it because he did not know of any sergeant who was complaining about the ratings indicates that, at that time, Pierce understood that the process would apply to the officers seeking promotion and to the sergeants seeking promotion and was not a limited panel that only would hear appeals of officers seeking promotion to sergeant.

Moreover, it is unclear whether some time after July 24, 2020, Pierce and Catavu had a second conversation in which Pierce told Catavu that he was uncomfortable with officers and sergeants participating on the appeal panel and Catavu responded that Pierce should talk to Ziman and work out a separate appeal panel for the sergeants. Catavu variously testified that such a conversation took place between July 27 and July 31, 2020, and between July 24 and 27, 2020. Pierce's testimony that he and Catavu had only one conversation and did not again speak about the matter after their July 24 phone conversation contradicts Catavu's testimony that they had such a conversation. In any event, if such a conversation took place before Ziman's July 27 email, there is no evidence Catavu mentioned Pierce's reservations about the panel to Ziman or Westrom to clarify that the panel was limited to the officers and did not include the sergeants. And whether it occurred before or after Ziman issued the July 27 email, Catavu did not testify that he made clear to Pierce that the panel was not intended to hear appeals from sergeants. Rather, he testified that he told Pierce that the ASA could pursue a separate process. Catavu's testimony, coupled with his lack of response to Ziman's description in the July 27 email of a single panel that would hear

appeals brought by officers and by sergeants weighs in favor of finding that the parties had been discussing a process that would address appeals of both officers and sergeants. Even if Catavu was proceeding on the premise that he was bargaining an agreement only for an appeal process for the officers, the evidence shows Ziman had been proceeding on the premise that they were discussing a process that would address the appeals of both officers and sergeants.

Moreover, all this activity took place because the Department's NOBLE members articulated their concerns about potential racial bias in the Department's promotion process, which were not limited to the officers' promotion process but also included the sergeants' promotion process. Ziman's conduct in sending out the email on July 24, which indicated a willingness to change the process if it was collectively decided to do so, and the email on July 27, 2020, to explain to all sworn members of the Department the response to those concerns reflect that the appeal plan was intended to reach and resolve any such allegations raised, whether by officers or by sergeants.

Even if Catavu believed the appeal concept was not contingent on it hearing appeals of both officers and sergeants, it is clear from her email that Ziman did. The evidence is that, as of July 27, 2020, Ziman was operating on the premise that the discussions between herself, Westrom, and Catavu were attempting to resolve those issues and that the participation of both officers and sergeants was assured. Because Ziman and Catavu were operating upon different premises, they did not have a meeting of the minds with respect to the appeal process. Therefore, contrary to the Union's allegation, they did not reach an agreement on that process.

Finally, the Union argues that the City repudiated the agreement and refused to reduce it to writing in retaliation for Catavu advocating for the bargaining unit members. It asserts that the City retaliated because Catavu spoke in favor of the panel at a City Council meeting on August 5, 2020; sent an email on August 19, 2020, to Tunney, Ziman, Westrom, Pierce, and Cross, refuting

allegations that he misled Ziman with respect to the appeal panel; processed grievances on behalf of bargaining unit members; and engaged in other concerted Union activity. First, as I have found, there was no agreement and therefore no repudiation of an agreement by the City. Further, the complaint does not allege that the City retaliated against Catavu and the bargaining unit. The Union has not asked to amend the complaint to so allege and it has not presented evidence or argument in support of these assertions. Based on the record, I decline to do so on my own motion.

V. Conclusions of Law

For the reasons set forth above, I find that the Charging Party failed to prove that the Employer violated Sections 10(a)(7), 10(a)(4) and, derivatively, 10(a)(1) of the Act.

VI. Recommended Order

The Complaint in this matter is dismissed.

VII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or

cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued in Chicago, Illinois on this 26th day of January 2022

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ Sharon Purcell_____

Sharon Purcell
Administrative Law Judge