STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Charles Jones,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. S-CA-15-149
	)	
State of Illinois, Illinois Department of Central Management Services (Children and Family Services.	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On June 30, 2016, Executive Director Melissa Mlynski, issued an order dismissing the above-captioned charge (Dismissal). On July 14, 2016, Charging Party, Charles Jones (Jones), filed a timely appeal of the Dismissal along with a *Request for Appointment of Counsel*.[1]

On May 27, 2015, Jones filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board) alleging that Respondent, the Illinois Department of Children and Family Services (DCFS or Employer) violated Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315/1, *as amended,* (Act). Specifically, Jones alleges that DFCS plotted with his Union, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union), to seek Jones' discharge.

Charging Party contends that the Employer historically has treated him poorly. Indeed, DCFS terminated Jones in 1997 and 2008, accusing him of falsifying his job application and criminal record, and being unfit to work in an agency responsible for the protection of children. AFSCME represented Jones successfully, resulting in his reinstatement in both instances.

Jones claims that after transferring from a suburban DCFS office to a Chicago office in

[1] Jones' *Request for Appointment of Counsel* was made jointly in the above-captioned case and in the related case, *Charles Jones and American Federation of State, County and Municipal Employees, Council* 31, Case No. S-CB-15-035.

2013, DCFS increased its efforts to terminate him again. The Employer suspended Jones on a number of occasions. In at least two instances, AFSCME was able to negotiate a reduction in his suspensions. Jones' suspension was reduced from 7 to 5 days in one instance and from 15 to 10 days in another.

On May 8, 2015, Jones and Union Steward Patrick Armstrong (Armstrong) met regarding another pre-disciplinary hearing that Jones was facing. Following that meeting, Armstrong filed an Unusual Incident Report (UIR) indicating that Jones had made threats of violence against a DCFS supervisor; Jones contends that it was Armstrong who threatened him.

As a consequence of Armstrong's UIR, DCFS placed Jones on paid administrative leave, prohibited him from coming onto DCFS properties without prior approval, and required that he notify the Employer if he were away from his home during working hours. In contravention of that directive, Jones went to DCFS Human Resources Department, after which DCFS brought charges against him for failing to abide by the directive, making threats against his supervisor and failing to timely perform his duties.

Subsequently, the Employer discharged Jones. Among other things, Jones contends that the Employer assaulted him, improperly suspended him, altered information on his computer in order to support claims that Jones did not adequately perform his job duties, refused to allow him to use benefit time, and failed to properly investigate a claim that he allegedly had threatened a supervisor. However, the Executive Director correctly observed that Jones offered no evidence to support these allegations.

Ultimately, the Executive Director correctly determined that Charging Party failed to establish a *prima facia* case that the Employer had violated Section 10(a)(1) of the Act, which proscribes an employer from interfering with, restraining or coercing public employees in the exercise of their rights under the Act. In assessing Jones' claim, the Executive Director

acknowledged that Jones had engaged in protected activity by previously filing many grievances against the Employer, and that the Employer had taken adverse action against Jones by imposing a number of suspensions against him before finally discharging him in 2015. However, the Executive Director concluded that Jones' charge did not raise a question of fact or law for hearing because he produced no evidence of a causal connection between his protected activity and the adverse actions taken against him by the Employer. Indeed, the only explanation offered by Jones was that the Employer had retaliated against him for his having filed claims under the Americans with Disabilities Act and the Illinois Human Rights Act. While these and other statutory provisions addressing discrimination in the workplace also proscribe retaliation for making such complaints, the Executive Director correctly noted that our Board does not have jurisdiction over these underlying claims of discrimination or related retaliation charges.

Jones filed a lengthy but very disjointed appeal purporting to assert legal theories such as breach of contract and constructive discharge that are wholly irrelevant to the Employer's alleged violation of the Act. Jones' appeal generally failed to address, much less successfully challenge, the Executive Director's analysis and conclusion.

Jones' Request for Appointment of Counsel:

Board Rule 1220.105[2] Appointment of Counsel provides in pertinent part as follows:

> a) A charging party may file a request for appointment of counsel simultaneously with or after filing a charge. The request shall be on a form developed by the Board. It shall be accompanied by an affidavit attesting to the charging party's *inability to pay or inability to otherwise provide for adequate representation.* (Section 5(k) of the Act) It shall also be accompanied by affidavits, documents or other evidence supporting the charge. (Emphasis in the original)
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> * * *
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> e) If the Board or its designated representative determines that the charging party is unable to pay or is otherwise unable to provide for adequate representation

[2] The appointment of counsel provision was formerly set forth in Board Rule 1220.30, which was later renumbered to Section 1220.105 at 27 Ill. Reg.7393, effective May 1, 2003.

> [pursuant to "Adjusted Income" Standards for Appointment of Counsel as set out in Section 1220.Table A], and that the charge is not clearly without merit, the charging party shall select counsel from a list of attorneys maintained by the Board.

As demonstrated by the plain language of the Rule, a charging party has no entitlement to appointment of counsel. Rather, this matter is within the discretion of the Board or its designated agent. In some instances, the Executive Director, as Board agent, may resolve a request for appointment that is made during the investigatory phase of the charge. However, in this instance, Jones first made this request after the Executive Director issued the Dismissal, at which time this matter was "pending before the Board." Accordingly, the request is properly presented to the Board for determination.[3]

As an initial matter, we note that Jones has not satisfied the basic requirements of the Rule because he has not submitted the requisite affidavit attesting to his inability to pay or otherwise provide for adequate representation. However, rather than focus on this technical, and arguably remediable, shortcoming, we address more substantive concerns.

This Board has previously declined to appoint counsel in the investigative stage of its labor practice procedures because the investigative stage does not involve legal formalities. *Carl Hamilton and American Federation of State, County and Municipal Employees, Council 31*, 28 PERI ¶ 139 (SP ILRB 2012). The Board applied that same rationale denying a request for appointment of counsel even after charging party had appealed the Executive Director's dismissal. *See Patrick Nelson and Chief Judge of the Circuit Court of Cook County*, 31 PERI ¶ 74 (SP ILRB 2014).

[3] *See Patrick Nelson and Chief Judge of the Circuit Court of Cook County*, 31 PERI ¶ 74 (SP ILRB 2014)(the Board upheld the Executive Director's dismissal of an unfair labor practice and denied charging party's request for appointment of counsel; *Laura Foster and Chicago Transit Authority*, 31 PERI ¶ 40 (LP ILRB 2012)(following charging party's appeal, the Board upheld the Executive Director's dismissal of an unfair labor practice and denied charging party's request for appointment of counsel).

We do not choose to depart from this established standard, or otherwise conclude that the context in which Jones' request for appointment of counsel is not free of technical formalities. We note, however, that in either event Jones' request for appointment of counsel would still properly be denied because his charge is clearly without merit. Although the language of the Rule is somewhat oblique, the only reasonable interpretation of the Rule, taking into consideration the language in sub-section (e), is that appointment of counsel is predicated on the Board's making two determinations: 1) that charging party satisfies the means test established by Sections 1220.105 (b) (c) and (d), and 2) "that the charge is not clearly without merit."

Even assuming that the Board determined that Jones has or can satisfy the means test, based on our careful review of the Executive Director's discussion and analysis, as well as the content of the investigatory file, we find that the charge is clearly without merit. While any *pro se* party's submissions or communications to the Board are likely to be improved to some degree if the party is represented by counsel, in this instance, the assistance of counsel could not remedy the substantive deficiencies of Jones' claims so as to affect the current determination that Jones' charge is entirely without merit.

Although not expressly stated in either the Act or the Rule, it is reasonable to infer that the articulated prerequisite pertaining to merit (or lack thereof) recognizes the financial costs associated with appointment of counsel and, empowers the Board to make a decision that implicitly includes some measure of cost/benefit analysis. If the allocation of financial resources associated with appointment of counsel were not implicitly intended to be a factor affecting the ultimate determination of whether to grant a request for appointment, the Rule need only have articulated the means test. Because the Rule also includes this reference to merit, we interpret and apply the Rule in such a way that does not ignore this language or otherwise render it superfluous. Further, we believe that the Board is entitled to be especially judicious in assessing

the question of merit as the cost of appointing counsel is high and Board resources are extremely limited, notwithstanding that in this case, the question of lack of merit is not a close question.

Accordingly, after reviewing the record and appeal, we uphold the Executive director's Dismissal for the reasons stated in that document. Further, for all of the reasons stated herein, we deny Charging Party's request for appointment of counsel in this matter.

BY THE STATE OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartnett, Chairman

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ John R. Samolis
John R. Samolis, Member

/s/ Keith A. Snyder
Keith A. Snyder, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on September 7, 2016; written decision issued in Chicago, Illinois on September 30, 2016.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Charles Jones, Charging Party and State of Illinois, Department of Central Management Services (Children and Family Services), Respondent	Case No. S-CA-15-149

DISMISSAL

On May 27, 2015, Charging Party, Charles Jones, filed a charge with the State Panel of the Illinois Labor Relations Board (Board) in the above-captioned case, alleging that Respondent, State of Illinois, Department of Central Management Services (Children and Family Services), violated Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2014), *as amended*. After an investigation conducted in accordance with Section 11 of the Act, I determined that the charge fails to raise an issue of law or fact sufficient to warrant a hearing and issue this dismissal for the reasons set forth below.

I. INVESTIGATION

Respondent is a public employer within the meaning of Section 3(o) of the Act and subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) of the Act. Jones was formerly employed by the Respondent as an Office Associate Option 2 for the Illinois Department of Children and Family Services (Employer or DCFS). Jones began his employment with DCFS on January 12, 1995. As an Office Associate Option 2, Jones was included in a bargaining unit (Unit)

represented by American Federation of State County and Municipal Employees (AFSCME or Union). The Union and Employer are parties to a collective bargaining agreement (CBA) for the Unit that provides for a grievance procedure culminating in final and binding arbitration.

Charging Party states the Employer has had a history of treating him poorly. The Employer terminated Jones' employment in 1997 and 2008 accusing him of falsifying his job application and criminal record, and being unfit to work in an agency whose mission involves the protection of children. The Union successfully represented Jones and resolved the two terminations with Charging Party's return to work.

In December 2013, Charging Party transferred from the DCFS Deerfield Office to the DCFS Chicago Office at 1911 S. Indiana. Since transferring to the Chicago office, Charging Party claims the Employer increased its efforts in seeking his termination. Charging Party asserts the Employer has:

- assaulted him;
- manipulated or removed a substantial amount of work stored on his computer which would have exonerated him from being falsely accused of failing to properly and adequately perform his job duties;
- improperly suspended him;
- refused to allow him to use sick time;
- failed to properly investigate a charge filed against him that would have proved he had not threatened management.

The available evidence indicates the Employer suspended Charging Party on a number of occasions. On one occasion, the Union was able to negotiate a reduction in the suspension from 7 days to 5 days. On another occasion, the Union was able to negotiate a reduction in the suspension from 15 days to 10 days.

On May 8, 2015, Steven Minter, a DCFS supervisor, contacted Glendora Marshall, Local AFSCME Steward, seeking to schedule a pre-disciplinary (pre-d) meeting with the Union and

Jones. On May 11, 2015, Marshall asked Union Steward Patrick Armstrong to handle the Jones pre-d matter on behalf of the Union. When Armstrong and Jones met later that day, Jones claims Armstrong threatened him, telling him to leave the building or resign or someone will take him out. During this conversation, Jones informed Armstrong that he did not want him representing him and walked away. When Armstrong returned to work after his conversation with Jones, he filed an Unusual Incident Report (UIR) reporting that Jones had made a threat of violence against Steve Minter. Armstrong wrote the following on the UIR:

> As I was talking to cj about a leave of absence, n the pending pre-d. He said that I should tell steve to resign, I said what u say, then he said don't worry about it, I WILL HAVE SOMEONE TAKE HIM OU, I said WHAT YOU SAY!!!, and cj REPEATED IT AGAIN, I said, WHAT YOU SAY. Then he said, I will have someone from eeoc escort him out of the building. Then cj accused me and steve of being friends, and walked away.

The UIR that Armstrong wrote led the Employer to discipline Jones. During the afternoon of May 11th, Minter and another employee gave Jones a memorandum placing him on paid administrative leave. Jones refused to sign for receipt when served with the memorandum. The memorandum prohibited Jones from coming onto DCFS properties without express approval. On paid administrative leave he was required to be available and accessible during normal work hours and to notify the Employer if he was away from his home during work hours.

On May 12, 2015, Jones went to the DCFS Human Resources Department to ask questions about, and to check on the authenticity of, the document that placed him on administrative leave and to obtain a copy of his last pay stub. Jones also contacted the Department of Human Rights to follow up on charges that he had filed against the Employer and also to file new charges. On May 27, 2015, the Employer held a pre-disciplinary meeting and provided a Statement of Charges against Jones. The Charges included:

- making threats of bodily harm against DCFS Supervisor Minter;
- failure to abide by leave of absence requirements set forth in the May 11th memorandum and violating the terms of his Administrative Leave and reporting to DCFS without approval on May 12th
- being away from his home during work hours without prior approval while on paid administrative leave;
- failure to follow supervisory directives;
- refusing to participate in a scheduled training;
- failing to perform duties in a timely fashion.

AFSCME representative David Dover provided representation to Jones during this pre-d meeting. On July 14, 2015, DCFS terminated Jones' employment based upon the Statement of Charges. On that same date, the Union filed a grievance at Step 3 of the grievance procedure claiming Jones was discharged in violation of the CBA's just cause provision. On August 8, 2015, the Employer denied the grievance and the Union subsequently advanced the grievance to Step 4 of the grievance procedure on September 1, 2015. AFSCME employee Ron Hudson handled the grievance at Step 4.

On March 8, 2016, the Union informed Charging Party that based upon the merits of the case it would not be pursuing the grievance further. The Union furthered informed Jones that it had persuaded the Employer to drop all reference to the discharge from his record in exchange for his voluntary resignation. Charging Party did not resign.

II. DISCUSSION AND ANALYSIS

Although Charging Party failed to identify the Section of the Act allegedly violated by Respondent, the arguments made by Charging Party would best fit those alleging a violation of Section 10(a)(1). Section 10(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in Section 6 of the Act. Section 6(a) of the Act provides that public employees have the

right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion. Thus, the Board will find a public employer in violation of Section 10(a)(1) if the charging party engaged in protected activity, the employer knew of that activity, and the employer took adverse action against the charging party as a result of his involvement in that activity. City of Burbank v. ISLRB, 128 Ill. 2d 335, 538 N.E.2d 1146, 5 PERI ¶4013 (1989); Gale and Chicago Housing Authority, 1 PERI ¶3010 (IL LLRB 1985). There must be a causal connection between the employer's adverse employment action and the protected concerted activity. See Chicago Park District, 9 PERI ¶ 3016 (IL LLRB 1993).

Grievance filing is protected activity. Charging Party has filed a significant number of grievances in the past, or the Union filed grievances on his behalf. Clearly, Jones engaged in protected activity by such actions. Also, Respondent is aware of Jones' grievance activity as it participated in the processing of those grievances. Likewise, Respondent took adverse action against Jones, in that it levied a number of suspensions against him before it ultimately discharged him. However, what is lacking is evidence establishing a causal connection between Charging Party's protected activity and the adverse employment actions taken by the Respondent.

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

No such evidence is present in this case. In fact, Charging Party asserts the reason the Employer has taken the adverse employment actions against him was in retaliation for the charges

he filed under the Americans with the Disabilities Act (ADA) and the Human Rights Act regarding his disability.

Claims of bias based on race, color, sex, religion, national origin, age and disability and are more appropriately investigated by Illinois Department of Human Rights and/or U.S. Equal Employment Opportunity Commission (EEOC).[1] Charging Party argues that the Employer violated the Act by taking the adverse action because he filed a charge(s) that he had a disability with the Illinois Department of Human Rights Commission or the Equal Employment Opportunity Commission. Section 10(a)(1) of the Act protects against discrimination resulting from a public employee's engagement in protected concerted activity, it does not protect against discrimination based on an employee's race, sex, national origin, age, disability, or religion. State of Illinois, Department of Central Management Services (Department of Corrections, 8 PERI ¶ 2047 (IL SLRB 1992) Board affirming, in part, Executive Director's Order that the Board does not have jurisdiction in cases involving sex and age discrimination; and City of Chicago, (Department of Police), 7 PERI ¶ 3035 (IL LLRB 1991) Board affirming, in part, Executive's Director Order that the Board does not have jurisdiction in cases involving religious beliefs.[2]

Even if Charging Party's unfair labor practice charge is read generously as asserting that the Respondent also sought to discharge him for activity (like grievance filing) that is protected by the Act, the available evidence is insufficient to suggest such discriminatory animus on the part of

[1] Evidence was submitted that Charging Party requested an American with Disability (ADA) accommodation for a hearing disability in January of 2014. On March 30, 2015, Charging Party filed a complaint with the Department of Children and Family Services Affirmative Action, EEOC and ADA Officer claiming harassment and retaliation due to his disability. On April 2, 2015, Charging Party filed a retaliation claim with the Illinois Department of Human Rights. Jones has filed the following charges with the Department of Human Rights: Charge Nos. 2014CF3498, 2015CF1878, 2015CF2327, and 2015CFR3064, and a Charge with EEOC, Charge No. 21BA42024.

[2] The Board has held that such activities undertaken by individual employees on their own behalf is not protected concerted activities. Pace West Division, 13 PERI ¶ 2027 (IL SLRB 1997). Moreover, the Board has found the filing of a complaint in court or with an administrative agency to be protected, concerted activity only where the employee's charge was for the mutual aid and protection of all similarly situated employees in the work place. *See,* Chicago Park District, 7 PERI ¶ 3021 (IL LLRB 1991).

Respondent exists or that it was a motivating factor in the adverse employment actions taken by Respondent. As such, this charge does not raise a question of law or fact that warrants a hearing.

III. ORDER

Accordingly, the instant charge is hereby dismissed. Charging Party may appeal this dismissal to the Board at any time within 10 calendar days of service hereof. Any such appeal must be in writing, contain the case caption and number, and be addressed to the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Appeals will not be accepted in the Board's Springfield office. In addition, any such appeal must contain detailed reasons in support thereof, and the party filing the appeal must provide a copy of its appeal to all other persons or organizations involved in this case at the same time the appeal is served on the Board. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that a copy of the appeal has been provided to each of them. An appeal filed without such a statement and verification will not be considered. If no appeal is received within the time specified herein, this dismissal will become final.

Issued in Springfield, Illinois, this 30th day of June, 2016.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Melissa Mlynski
Executive Director