STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

North Riverside Fire Fighters, Local 2714,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. S-CA-18-108
	)	
Village of North Riverside,	)	
	)	
Respondent,	)	
	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On April 26, 2019, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued a Recommended Decision and Order (RDO) concluding Respondent Village of North Riverside (Village) violated Sections 10(a)(4), (2), and (1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2016), as amended, by (1) failing to maintain the status quo with respect to employee health insurance, (2) threatening to discharge three new probationary firefighters unless Charging Party North Riverside Firefighters, Local 2714 (Union), withdrew its grievance over health insurance, and (3) carrying out its threat when it fired probationary firefighter Robert Gill.

The Respondent filed five timely exceptions and supporting brief, and the Union timely responded. Respondent's exceptions focus on the ALJ's findings and conclusions regarding the Respondent's failure to maintain the status quo and Gill's termination but make no mention of the ALJ's findings and conclusions that the Respondent violated Section 10(a)(1) of the Act when Mayor Hermanek stated that he would fire the newly hired firefighters unless the Union withdrew

its grievance. Thus, pursuant to Section 1200.135(b)(2), the Respondent has waived any such exceptions. See 80 Ill. Adm. Code 1200.35(b)(2).

After reviewing the record, the RDO, the exceptions, responses thereto, and the parties' briefs in support, we find the Respondent's exceptions to be without merit and accept the ALJ's findings, conclusions, and recommendations, contained in her RDO that Respondent violated Sections 10(a)(1), 10(a)(2), and 10(a)(4), of the Act. Accordingly, we adopt the RDO as a decision of the Board with the following comments and modifications to the remedy as discussed below:

We find that the ALJ's findings and conclusions determining the Respondent's conduct violated the Act were well-reasoned and supported by the appropriate legal authority. Nothing in the Respondent's exceptions or supporting brief compels us to find otherwise. The Respondent's exception regarding the extension of Gill's probationary period, however, provides us reasons to modify the ALJ's remedy recommendation but not in the manner intended by Respondent.

Section 11(c) of the Act gives the Board authority to order a party found to have violated the Act "to take such affirmative action, including reinstatement of public employees with or without back pay as will effectuate the policies of [the] Act." We find that extending Gill's probationary period under these circumstances inadequately remedies the unlawful conduct. The ALJ found Respondent's stated reason for discharging Gill, failure to complete his probationary period was pretext for an unlawful motive. Merely extending the probationary period will only serve to afford Respondent another opportunity to use the probationary period as an excuse to discharge Gill. Thus, we find that reinstating Gill as a permanent firefighter provides the appropriate remedy and would better effectuate the purposes of the Act.

IT IS HEREBY ORDERED that the Respondent, its officers and agents, shall:

1) Cease and desist from:
    a. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act.
    b. Making unilateral changes to employees' terms and conditions of employment during the pendency of interest arbitration proceedings.
    c. Retaliating against firefighter Robert Gill for engaging in protected concerted activity.
    d. Discriminating against firefighter Robert Gill to discourage support of the Union.
2) Take the following affirmative action necessary to effectuate the policies of the Act:
    a. Restore the status quo by offering all firefighters the PPO1 health insurance.
    b. Reinstate firefighter Robert Gill as a permanent firefighter and make him whole for any loss of earnings he may have suffered because of his termination, including back pay plus interest at seven percent per annum.
    c. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.
    d. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondent has taken to comply with this order.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

/s/ Kendra Cunningham
Kendra Cunningham, Member

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

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

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

Decision made at the State Panel's public meeting in Chicago and Springfield, Illinois (via videoconference) on September 10, 2019, written decision approved at the State Panel's public meeting in Chicago and Springfield, Illinois (via videoconference) on October 8, 2019, and issued on October 9, 2019.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

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Village of North Riverside,	)	
	)	
Respondent.	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On March 14, 2018, the North Riverside Fire Fighters, Local 2714, (Charging Party or Union) filed a charge with the Illinois Labor Relations Board's State Panel (Board) alleging that the Village of North Riverside (Respondent or Village) engaged in unfair labor practices within the meaning of Sections 10(a)(4), (2), and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2014), as amended. The charge was investigated in accordance with Section 11 of the Act. On July 3, 2018, the Board's Executive Director issued a Complaint for Hearing.

A hearing was conducted on January 24 & 25, 2018, in Chicago, Illinois, at which time the Union presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, and to argue orally.

The parties filed timely post-hearing briefs. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find that:

1. At all times material, Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, Respondent 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, Respondent has been subject to the Act, pursuant to Section 20(b) thereof.
4. At all times material, Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.
5. At all times material, the Charging Party has been the exclusive representative of a bargaining unit (Unit) comprised of all full-time Firefighters or Lieutenants employed by Respondent, as certified by the Board on June 18, 2003, in Case No. S-RC-03-065, and thereafter amended.
6. At all times material, Charging Party and Respondent have been parties to a collective bargaining agreement (CBA) effective date commencing May 1, 2009 and expiring April 30, 2014.

II. ISSUES AND CONTENTIONS

The first issue in this case is whether the Respondent violated Sections 10(a)(4) and (1) of the Act when it allegedly changed the health insurance of newly-hired firefighters during the pendency of impasse resolution proceedings. The second issue is whether the Respondent violated Section 10(a)(1) of the Act when it allegedly threatened to retaliate against newly-hired firefighters because the Union filed a grievance on their behalf over their health insurance. The third issue is whether to amend the complaint to add the allegations that the Respondent violated Sections 10(a)(1) and (2) of the Act when it terminated probationary firefighter Robert Gill. If the complaint is amended, the remaining issue is whether the Respondent violated the Act by that newly-alleged conduct.

The Union argues that Respondent violated Sections 10(a)(4) and (1) of the Act when it unilaterally changed the health insurance options offered to new bargaining unit members. The Union contends that the Respondent thereby changed the status quo during the pendency of interest arbitration proceedings because the health insurance benefits it offered to new bargaining unit members was substantially different from the benefits offered to existing members.

The Respondent counters that it did not violate the Act by failing to provide new bargaining unit members with the same health insurance as that offered to existing members because the health insurance benefits it provided them were substantially equal, as the expired contract required. The Respondent contends that the Union failed to present evidence to the contrary.

Next, the Union argues that the Respondent violated Section 10(a)(1) of the Act by threatening to fire three newly-hired bargaining unit members if the union refused to drop the grievance it filed over their health insurance. The Respondent argues that its agents made no such threats.

Finally, the Union argues that the complaint should be amended to add the allegation that the Respondent violated Sections 10(a)(1) and (2) of the Act when the Respondent terminated the employment of probationary firefighter Robert Gill. The Union asserts that the amendment would conform the complaint to evidence presented at hearing. It also notes that the new allegations grew out of the originally charged conduct, which includes an unlawful threat, because the proposed amendment alleges that the Respondent followed through on that threat.

The Respondent asserts that allowing the amendment would be improper and prejudicial to the Respondent. It also denies that the new allegation is closely related to the original allegations. Instead, it notes that the conduct occurred almost a year after the charged allegations, concerns a different section of the Act, and requires the assertion of different defenses. In the alternative, the Respondent asserts that all evidence concerning Gill's termination meeting, including statements made after it, should be stricken because the Union's attorney communicated with the mayor without the presence of Respondent's counsel.

On the merits of the proposed amendment, the Union asserts that the Respondent violated Sections 10(a)(1) and (2) of the Act by terminating Robert Gill's employment in retaliation for the Union's protected activities in filing the health insurance grievance and proceeding to hearing on this unfair labor practice charge. The Respondent counters that it terminated Gill's employment solely because he was unable to complete his probationary period.

III. FINDINGS OF FACT

Hubert Hermanek is the mayor of the Village of North Riverside (Respondent). Mayor Hermanek presides over the Village Board of Trustees, which has six members. Guy Belmonte is the Village Administrator. Susan Scarpiniti is the Respondent's Finance Director. Thomas Gaertner was the Fire Chief from December 1, 2017 to July 13, 2018, when the mayor terminated his employment. Patrick Schey was Deputy Chief from December 1, 2017 to July 13, 2018, when the mayor terminated his employment. Sometime after July 13, 2018, Scott Bowman became interim fire chief, and on September 1, 2018, John Kiser became Fire Chief. Derek Zdenovec is

a fire lieutenant and also serves as Union Secretary. Robert Jason Williams is a fire lieutenant and also serves as Union Vice President. Christopher Kribales is a firefighter and also serves as Union President.

The Union and the Respondent were parties to a collective bargaining agreement that expired on April 30, 2014. On March 14, 2014, the parties filed a request for mediation with the Federal Mediation and Conciliation Service. The parties began negotiations in June 2014. On September 17, 2014, the Union filed a formal demand for compulsory interest arbitration with the Board. The parties did not reach agreement in 2014, and on September 18, 2014, the Union filed a charge against the Respondent alleging that it had engaged in surface bargaining over a proposal to privatize its fire department.

On October 6, 2014, the Respondent sent a letter to the Union purporting to terminate the collective bargaining agreement and the employment of all firefighters, effective December 5, 2014. The Union amended its charge to allege that that this conduct also violated the Act. The Executive Director issued a complaint, and the matter proceeded to hearing before an ALJ who found in favor of the Union on all issues.

On August 10, 2016, the Board, upheld the ALJ's determination that the Respondent violated the Act by announcing that it was terminating the collective bargaining agreement and the employment of all firefighters.[1] Village of North Riverside, 33 PERI ¶ 33 (IL LRB-SP 2016). The appellate court subsequently affirmed the Board's decision, and the Respondent filed a petition for leave to appeal to the Illinois Supreme Court. Vill. of N. Riverside v. Illinois Labor Relations Bd., State Panel, 2017 IL App (1st) 162251, ¶ 45.

Currently, the parties are still following the terms and conditions of employment set forth in their expired agreement.

1. Respondent Introduces New Health Insurance Plans but Declines to Apply them to Union Employees

Prior to 2016, the Respondent had a single health insurance plan that it offered to all employees, entitled PPO1. Under the PPO1 plan, the deductible is $100 for an individual and

[1] The Board also modified the ALJ's determination on the surface bargaining allegation, finding that the Respondent had not engaged in such conduct. Village of North Riverside, 33 PERI ¶ 33.

$300 for a family. The out of pocket maximum for network services is $400 for an individual and $1200 for a family. The out of pocket maximum for non-network services is $2400 for individuals and $7200 for a family. Co-insurance is 90% for network services and 70% for non-network services. For hospital emergency care, the deducible is waived and then coinsurance is 100%. For network wellness services, the deductible is waived and coinsurance is 100%; for non-network wellness services, the deductible is waived and coinsurance is 70%. The cost to enrollees of prescription drugs for a 30-day retail supply is $10 generic/ $20 brand name formulary/ $35 brand name non-formulary. The cost to employees of a prescription drug benefit for mail order of a 90-day supply is zero. The prescription drug out of pocket maximum is $6750 for an individual and $13,100 for a family.

The parties' expired collective bargaining agreement addresses health insurance in a clause entitled "Hospitalization and Medical Coverage Program." The contract's recognition clause extends these provisions to probationary employees.[2] The health insurance provision provides the following in relevant part:

> The Village shall maintain in full force and effect the medical, major medical, dental, prescription and hospitalization insurance currently afforded to each firefighter and lieutenant in the bargaining unit, at the current benefit coverage and amounts subject to the provisions of this Article, in effect as of the execution of this Agreement. There shall be no reduction or modification of such coverage or benefit levels. The Village shall continue to pay all premium costs associated with providing such insurance for individuals and their dependents; however, employees shall co-pay bi-monthly health insurance premiums at the rate of forty-one dollars and sixty-seven cents ($41.67). Effective May 1, 2010, employees shall co-pay 7.5% of the premium thereof for either single or dependent coverage, whichever coverage is selected by the employee. Such employee co-payments shall increase to 8.5% effective May 1, 2011, and increase to 10% effective May 1, 2012, to be withheld semi-monthly (twice per month) from paychecks. (The 8.5% employee co-payment for the period from May 1, 2011 through April 30, 2012 shall be calculated based upon the premium as was then in effect on June 30, 2011. Thereafter, commencing May 1, 2012, the employee copayment of 10% shall be based upon the actual premium as is then in effect, for each month thereafter.) The Village may substitute, replace or supplement such insurance with preferred

[2] The recognition clause states the following in relevant part: "Probationary firefighters shall be covered by the conditions set forth in this Agreement; provided, however, that they finish a State Certified Academy and/or Local Training not to exceed a four-month period from date of hire, and that any disciplinary actions, including suspensions and discharge, shall not be subject to the grievance and arbitration procedure set forth herein."

> provider organization (PPO), and other such health care coverage, commonly known as "managed care" or to self-insure the coverage's [sic] afforded its employee[s] so long as benefits are substantially equal.

On January 25, 2016, the Respondent's finance committee met. At the meeting, Finance Director Scarpiniti recommended that the Respondent introduce a PPO2 plan and an HMO plan. She also recommended that the Respondent close participation of the existing PPO1 health care plan for all non-union employees hired after July 1, 2016. Scarpiniti asserted that the PPO1 plan was a "very rich, low deductible PPO plan" that the Respondent would not be able to abandon due to current collective bargaining restrictions. She noted that the new plans, by contrast, would have "higher in network/out of network cost structures, larger annual deductibles and out of pocket maximums, and a more competitive mail order prescription drug program." She noted that the "Village would have to negotiate acceptance of these new health care plans with [its] unions during current negotiations."

On February 15, 2016, the Respondent's Board of Trustees met. Trustee Wilt read into the record the minutes of the January 25, 2016 finance committee meeting. The Board of Trustees then voted to institute two new health insurance plans, PPO2 and HMO1. It also voted to close participation of the existing PPO1 health care plan for all non-union employees hired after July 1, 2016.

On April 18, 2016, the Board of Trustees passed an ordinance effectuating this change. The ordinance provided the following in relevant part:

> Effective July 1, 2016, the Village will make available a new PPO (PPO-2) plan and HMO plan to its employees under the following conditions. All employees hired on or after July 1, 2016 shall be eligible for participation in either the PPO-2 or the HMO plans. Effective July 1, 2016, participation in the PPO-1 plan is not available to newly hired employees who are not members of – or eligible members of – an existing collective bargaining unit whose own members continue to receive the PPO-1 plan through the terms of a collective bargaining agreement with the Village. For all persons who are active Village employees before July 1, 2016, transfer into the PPO-2 or HMO plans, upon the plans' availability is voluntary. Once an employee voluntarily transfers from the PPO-1 plan into either the PPO-2 or the HMO plan, then that employee's future return to or participation in the existing PPO-1 plan is prohibited. Employees will be eligible to move between the PPO-2 and HMO plans during the Village's annual health insurance open enrollment period.

Under the PPO2, the deductible is $600 for an individual and $1800 for a family. The out of pocket maximum for in-network services is $400 for an individual and $1200 for a family. The out of pocket maximum for both network and non-network services is $1250 for an individual and $3750 for a family. Co-insurance is 80% for network services and 60% for non-network services. For hospital emergency care, the deducible is waived but employees must pay a $50 co-pay before insurance covers the rest. For network wellness services, the deductible is waived and coinsurance is 100%; for non-network wellness services, the deductible is waived and coinsurance is 60%. No referral is required to see a specialist. The cost to enrollees of prescription drugs for a 30-day retail supply is $10 generic/ $30 brand name formulary/ $50 brand name non-formulary. The cost to employees of a prescription drug benefit for mail order of a 90-day supply is $20 for generic, $60 for brand name formulary, and $100 for brand name non-formulary. The prescription drug out of pocket maximum is $5900 for an individual and $10,550 for a family.

Under the HMO, there is no coverage for non-network services. There is no deductible. Co-insurance is inapplicable, but there are co-pays for doctor's visits and hospital emergency care. A referral is required to see a specialist. The out of pocket maximum is $1500 for an individual and $3000 for a family. The insurance pays for 100% of network inpatient hospital care and network wellness. The cost to enrollees of prescription drugs for a 30-day retail supply is $5 for generic, $25 for brand name formulary, and $50 for brand name non-formulary. The cost to employees of a prescription drug benefit for mail order of a 90-day supply is $10 for generic, $50 for brand name formulary, and $100 for brand name non-formulary. The prescription drug out of pocket maximum is $5650 for an individual and S11,300 for a family.

Scarpiniti testified that the HMO plan and PPO plans are completely different. Under the HMO plan, there is a network of providers that agrees to accept the insurance. The health insurance company predetermines the rates paid by enrollees. Accordingly, each enrollee pays a flat rate for each office visit. Blue Cross Blue Shield provides the network for the PPO plans and the HMO plan, but the networks are different because they do not include all the same providers. Scarpiniti did not compare the size of the PPO network to the size of the HMO network. However, she noted that the networks were each the largest of their kind in the country and, in this respect, were "extremely similar."

In May 2016, the Respondent offered the new plans to bargaining unit members and gave them a $2000 incentive to switch to the new plans. It also offered the same incentive to employees

in two other bargaining units, who were represented by the Illinois Fraternal Order of Police Labor Council (ILFOP). No union employees switched.

The Respondent subsequently negotiated successor agreements with the ILFOP which provided that "[a]s of July 1, 2016, all new hires on or after July 1, 2016 can either participate in the Village's new PPO plan ("PPO2") or the Village's new HMO plan. If an active employee elects one of these new health care plans, future participation in the PPO1 plan will be prohibited."

2. January 2018 – Respondent Hires Three Firefighters, Applies New Health Plans to Them, and the Union Files a Grievance

In early January 2018, Chief Gaertner and Mayor Hermanek had a discussion about hiring new firefighters. There were only 12 firefighters in the department at the time although there had been 16 firefighters in 2014.[3] Gaertner suggested that it would be a good idea to hire more firefighters because it enhanced safety for other firefighters, it was good for morale, and it would reduce the number of overtime shifts. He also asserted that hiring three new firefighters would be a good way to "extend an olive branch" to the union. At the that time, the Respondent was still seeking to appeal the Appellate Court's decision, supra, which held that the Respondent could not summarily terminate its contract with the firefighters and terminate their employment.[4] Although Mayor Hermanek initially did not wish to hire any new firefighters until the Respondent and the Union reached a new contract, he ultimately agreed to expand the department.

In early 2018, the Respondent hired three new probationary firefighters, Robert Gill, Christopher Johnston, and Dimitri "Jimmy" Tountas. Gill started on January 27 or 28, 2018. The Respondent offered the probationary firefighters the PPO2 and the HMO 1 health plans, but not the PPO1 plan. Two of the probationary firefighters selected the HMO plan and the third firefighter selected the PPO2 plan.

The mayor met with Chief Gaertner to discuss the Respondent's decision to offer the new firefighters the PPO2 and the HMO 1 plans. He informed Gaertner that even if the Union filed a grievance over this decision, the Respondent would not change anything about the insurance it provided to the new employees.

[3] Kribales asserted that there were only 10. However, I credit Gaertner's assertion that there were 12 because he participated in the discussion of numbers with the mayor. Moreover, as fire chief, he likely has a more reliable assessment of his department's overall numbers.

[4] The Supreme Court ultimately rejected the Respondent's petition for leave to appeal in late January 2018.

In February 2018, Kribales learned that the Respondent was not offering the probationary firefighters the same insurance benefits as those offered to the other firefighters, and he asked Village Administrator Belmonte why. Belmonte asserted that the PPO1 no longer existed. Kribales responded that the Respondent was required to negotiate such a change with the Union. Belmonte replied that the parties could simply put a provision in their contract stating that individuals hired after a particular date would receive the new insurance. Kribales stated that the Union would need to agree to that. After further discussion, Kribales proposed that the Respondent could offer probationary firefighters all three plans. Belmonte declined that offer and ended the meeting by stating that the Union would have to grieve the health insurance matter if it objected to it.

Sometime following this discussion, the Union's board decided to file a grievance over the Respondent's failure to offer probationary firefighters the same insurance offered to other bargaining unit members. Accordingly, on February 23, 2018, Kribales signed such a grievance on the union's behalf and submitted it to Chief Gaertner. That day, Chief Gaertner denied the grievance stating, "the insurance plans that are offered is the village's policy…[t]he same insurance plans are the ones that have been offered to all recent new hires throughout the Village."

On February 26, 2018, Kribales advanced the grievance to the Village Administrator. Kribales and Former Union President Rick Urbinati discussed the grievance with him on March 9, 2018. They informed Belmonte that the Respondent could not simply change the health insurance offered to unit members and that the Union would need to agree to any changes. The Union and the Respondent did not come to an agreement on health insurance at this meeting and instead committed to discuss the issue in upcoming negotiations.

Village Administrator Belmonte informed Mayor Hermanek that the Union had filed a grievance over the health insurance offered to probationary firefighters.

3. March 2018 meetings

In early March 2018, Chief Gaertner and Mayor Hermanek had a meeting in the mayor's office. They discussed the Union's health insurance grievance and other topics related to general operations at the fire department. At hearing, both Gaertner and Hermanek agreed that Hermanek was upset about the health insurance grievance, but they otherwise offered different accounts of the meeting.

Gaertner testified that the mayor said words to the following effect: "you need to do something about this…you need to have those guys pull the grievance and if they refuse, I'll begin firing people, these three guys probably within the next week." Gaertner further testified that the mayor instructed him to convey his threat word-for-word to the union. When Gaertner asked the mayor whether he was serious, the mayor responded that he was. Although the mayor denied making any such threat, I credit Gaertner's account because his demeanor was earnest, and he took action in conformity with the mayor's directive, as discussed below. Notably, Gaertner's failure to recall the mayor's precise words does not undermine his credibility where the mayor offered an even less precise description of his statements. The mayor testified that he "probably" said that had he "known [the probationary firefighters] were going to do this, [he] wouldn't have hired them." However, the mayor's uncertainty about the words he spoke undermines the credibility of his denial that he spoke the threat.

On March 7, 2018, Gaertner called Kribales and Zdenovec into his office. All three witnesses confirmed that the meeting occurred. In addition, all witnesses confirmed that Gaertner conveyed the mayor's sentiments during the meeting. Gaertner testified that he told Kribales and Zdenovec that the mayor was upset about the health insurance grievance and that if they did not withdraw it, the mayor would "go after" the new hires.[5] He then relayed the mayor's threat verbatim. Zdenovec confirmed that Gaertner informed them that the mayor had said, "'if the Union d[oes] not withdraw the grievance, there w[ill] be pink slips in the probationary firefighters' mailboxes within a week." Zdenovec and Kribales asked whether the mayor was serious and whether this information was meant to be shared. Gaertner replied that the mayor was serious and that Zdenovec and Kribales were meant to hear it. Gaertner then added that he was confident that the mayor would start firing probationary firefighters if the Union did not withdraw the health insurance grievance.

The discrepancies in the witnesses' testimonies about the March 7 meeting and their failure to recall certain details are insufficient to impugn their credibility because they concerned minor issues and do not indicate mendacity.[6] Indeed, an identical and comprehensive description of the

[5] Zdenovec similarly testified that Gaertner initially indicated that "things would be better" for the Union if it withdrew the health insurance grievance.

[6] For example, Kribales recalled that Gaertner used the word "believe" rather than the word "confident," but the meaning of these words conveys substantially the same sentiment. In addition, Gaertner was uncertain of whether Schey was also present at the March 7 meeting, but he was honest about his inability

meeting from all witnesses, down to its minutia, would be unusual where the meeting occurred nearly a year prior to hearing. Likewise, the mayor's subsequent termination of Chief Gaertner in July 2018 does not undermine Gaertner's credibility where he agreed to testify in support of the Union before the mayor terminated his employment.

After the meeting, Chief Gaertner and Kribales took actions consistent with their description of events. Gaertner informed the mayor that he had conveyed the mayor's message to the Union. The mayor asked whether they had received the message. Chief Gaertner testified that they had. I do not credit the mayor's assertion that this interaction never occurred because the mayor did not offer credible testimony regarding the related threat or his earlier instructions to Gaertner. In addition, Gaertner confirmed to Belmonte that the mayor had made the threat in question, after Belmonte inquired about the matter. Significantly, Gaertner's testimony on this issue is unrebutted. Finally, Kribales conveyed Gaertner's statements to the probationary firefighters in mid-March and told them that their jobs had been threatened.

4. March 13, 2018 Bargaining Sessions

On March 13, 2018, the Union submitted a bargaining proposal to the Respondent for a successor contract covering the period of May 1, 2014 to April 30, 2018, which included proposed provisions on health insurance and wages. The Respondent responded with a counterproposal on health insurance and wages. In relevant part, it proposed that "all new hires will not be allowed to enroll in the current PPO plan referred to as PPO1 plan offered by the Village. Any employee hired on or after July 1, 2016 will be offered participation in the Village's new PPO2 plan or HMO plan." The witnesses disagree on whether or to what extent the parties discussed these proposals. However, all witnesses agree that the Union did not accept the Respondent's counterproposal. The parties did not resolve the health insurance grievance in those negotiations.

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to recall this fact and was similarly honest about the more salient facts of the meeting of which he was certain. Kribales and Zdenovec could not recall whether the Chief had told them about the timing of his meeting with the mayor and its location, or what he had said about such matters, and Zdenovec mistakenly remembered that the Chief told them that Schey was present, but these matters are ancillary to the core subject of the meeting.

5. 2018 Interest Arbitration, Staffing Changes, and Gill's Injury

The parties were scheduled to attend an arbitration meeting in June 2018. The mayor expected Chief Gaertner to attend. However, Chief Gaertner could not attend because his mother was sick and hospitalized in Florida. Then Gaertner himself became hospitalized for an illness. Schey informed the mayor that the Chief could not attend because of these issues. The mayor replied, "the Chief just doesn't want to be here for this, and he will regret his decision not to be here, the same as the Union will regret the decision to pursue this insurance issue." The mayor denied that he had any conversations with anyone about the insurance grievance after he spoke to Chief Gaertner about it in March 2018. However, I credit Schey's assertion that this conversation occurred as he described it because his memory of this exchange appeared sharp and he offered considerable detail about the conversation. Notably, the mayor's subsequent termination of Schey does not undermine Schey's credibility where he agreed to testify in support of the Union before the mayor terminated his employment.

On June 19, 2018, Gill suffered an injury on the patio adjacent to the workout room when a barbell fell on his back. He fractured his L1 vertebrae and spent some time in the intensive care unit. The mayor visited Gill in the intensive care unit shortly after his injury.

The doctors then placed Gill on 12 weeks of motion restriction where he could not bend, twist, or lift. He then performed physical therapy for 12 weeks. Finally, he performed eight weeks of "work conditioning" programs, which involved job-related activities, to building strength and endurance.

On July 13, 2018, the mayor terminated the employment of Chief Gaertner and Deputy Chief Schey.

Sometime in July 2018, the Union and the Respondent met for a negotiation session. At this meeting, the Union and the Respondent discussed Gill's status with Sue Scarpiniti and some other individuals employed by the Respondent. They discussed the possibility of transitioning Gill to the position of civilian inspector, if he could not return to full duty. The parties did not reach agreement on this matter.

On July 24, 2018, the parties met for an interest arbitration hearing before arbitrator Robert Brookins. The Employer's position in the arbitration proceeding was that it should be permitted to terminate the union contract and to terminate all bargaining unit employees.

On August 28, 2018, Gill filed an application for benefits with the Illinois Workers' Compensation Commission (WCC). The application stated that his injury was permanent. Gill classified his injury as permanent because it could potentially have lifelong, permanent implications. The following day, Gill's attorney sent a copy of the application for benefits to the Respondent.

On September 12, 2018, Gill's attorney filed an amended application for benefits with the Illinois WCC. It described the nature of the injury as "to be shown." Gill amended his WCC application because the Respondent was "uncomfortable" with the word "permanent" and his attorney therefore removed that word. That same day, Gill's attorney provided the Respondent with a copy of the amended application.

Gill kept Interim Chief Bowman apprised of his condition and recovery via email. Although Gill did not provide such updates to the new chief Kiser, Williams, who was Gill's direct supervisor, remained in contact with Gill after his injury and spoke with Chief Kiser about Gill's progress. Kiser informed Williams that he hoped that Gill would be back at work by May 2019. William responded that Gill was hoping to be cleared for work even earlier, by February 5, 2019. Gill never presented the Respondent with a functional capacity test.

6. January 10, 2019

On the morning of January 10, 2019, Chief Kiser held an officers meeting in the firehouse kitchen with the four lieutenants, Perez, Williams, Juceka, and Zdenovec. The chief had an agenda for the meeting. One of the discussion points pertained to probationary firefighters. Kiser noted that the new firefighters' probationary period was about to expire. He solicited evaluations from the lieutenants on their performance. Chief Kiser said that he did not need a letter of recommendation regarding Gill because they had not had time to evaluate his performance.

Chief Kiser mentioned the possibility of extending Gill's probationary period. Although Zdenovec and Williams asserted that the Chief would extend Gill's probation, I credit Kiser's assertion that he made no commitment to do so. Gill's testimony supports this finding because he asserted that he received a phone call from Williams that afternoon confirming that Chief Kiser made no commitment on this issue. According to Gill, Williams conveyed that the Respondent was "talking about extending" Gill's probation, but he also noted that there did not seem to be much "wiggle room" in the contract. Williams informed Gill that he would keep Gill informed

when he "learned more." Had Kiser in fact made a commitment to extend Gill's probation, as Zdenovec and Williams claimed, Williams reasonably would have conveyed that message in more certain terms.

At 1 pm that day, Chief Kiser met with the mayor for half an hour in the mayor's office to discuss the possibility of extending Gill's probationary period. Kiser had researched options and described them to the mayor. He told the mayor that the Respondent could terminate Gill's employment or could offer Gill an extension on his probationary period under state law.

According to Kiser, the mayor replied that the Respondent could not extend Gill's probationary period because the collective bargaining agreement did not permit such extension. The contract provides that "probationary periods in the Department shall be limited to a probationary period of one (1) year from the date of hire for newly hired full time sworn firefighters." Article 10, Seniority. The mayor asserted that the parties' agreement would supersede state law. At hearing, the mayor testified that he decided to terminate Gill's employment because Gill could not fulfill the terms of his probation. He further noted that the Respondent had never before extended any firefighter's probationary period.

Following that meeting, the chief approached Kribales and Lieutenant Williams at the firehouse. He informed them that they needed to attend a meeting the following day at 1:30 pm and that they should instruct Gill to attend an earlier meeting at 1:00 pm. Kribales asked whether the Respondent was going to fire Gill at that meeting. The Chief responded that he believed that the Respondent planned to fire Gill.

That evening, Union attorney Elisa Redish contacted Respondent's attorney, Cary Horvath, on behalf of the Union to discuss possibility of extending Gill's probationary period.[7]

That same evening, Gill spoke with his workers' compensation attorney and placed him in contact with Kribales. The attorney provided Kribales with a document to read at Gill's termination meeting. The document stated in relevant part, "please be advised that it is unlawful for the Village to terminate an employee for exercising his right to file an Application for Adjustment of Claim before the Illinois Workers's Compensation Commission."

[7] Redish made this representation to me in an email dated January 14, 2019, 5:36 pm.

7. January 11, 2019 – Gill's Termination

On January 11, 2019, Lieutenant Williams, Firefighter Kribales, Firefighter Gill, Mayor Hermanek, and Fire Chief Kiser attended a meeting in the mayor's office at 1 pm. Attorney Elisa Redish was present telephonically, by speakerphone, on Kribales's cell phone. The meeting lasted less than a half an hour.

The mayor's office is located in the Village Commons. There are two doors to the mayor's office. One opens into the Village's administrative offices. The other leads to a public vestibule. The Village's administrative offices include cubicles for clerical staff.[8] They also include a conference room and the office of Village Administrator Belmonte. There is an open counter, opposite the desks, that separates the inner office from the vestibule outside. Kribales, Gill, and Williams entered the mayor's office through the public-facing door. Kribales announced Redish's telephonic presence as he entered the room. Redish introduced herself.

The mayor asked Gill how he was feeling. Gill stated he was doing very well, feeling pretty good, and that he was almost as strong as he was before his injury. The mayor said that was good news, but then informed Gill that the Respondent was terminating his employment and he provided Gill with a termination letter. Kribales said that the mayor and the Respondent were making a mistake and that they would be terminating one of the finest firemen that had ever worked at the Village. The mayor asserted that he did not have anything to say. Kribales then experienced a coughing fit and had to excuse himself. He left his phone on the mayor's desk when he exited. Chief Kiser asked one of the Village staff members to get him some water. When Kiser and Williams returned, Williams distributed copies of the statement provided by Gill's workers compensation attorney and read it aloud. Kribales asked the mayor whether Gill was unable to finish his probationary period because of an on-the-job injury. The mayor refused to comment.

Kribales and Williams asked the mayor why he was terminating Gill's probation. The mayor stated that the reason was set forth in the letter. The letter stated that the Respondent was terminating Gill's employment because he was "unable to satisfactorily complete [his] twelve-month probationary period." Kribales asked the mayor whether he had prepared job evaluations for Gill or the other probationary firefighters. The mayor responded that he did not have anything to say.

[8] These include Sherri Belmonte, the payroll analyst, Pamela Foy, the water billing analysist, and Sara Danihel, the employee responsible for accounts payable.

Kribales then asserted that it was his understanding that the Respondent was going to extend Gill's probationary period. The mayor said, "I don't know what you're talking about." Chief Kiser then stated, "that's what I was looking at, and that wasn't coming from the mayor."[9] Kribales responded that the Union's lawyers had reached out to the Respondent's lawyers to attempt to negotiate an extension of Gill's probationary period but had not received a response. Kribales asked whether the Respondent would be willing to negotiate such an extension. The mayor responded that Kribales had had six months to come and negotiate that issue with him. When the meeting ended, Williams told the mayor that he thought he was making a big mistake and vouched for Gill's abilities and his character. According to the mayor, Redish concluded by stating, "that's about all we can do."[10] Kribales, Gill, and Williams left the mayor's office through the public door that opens into the vestibule. Gill walked out first, Kribales followed, and Williams left last.

As Williams left this meeting, he told the mayor, "see you on Wednesday." The mayor made a comment in response.[11] Although the witnesses disagree on what he said, the preponderance of the evidence indicates that the mayor asserted, "I hired the three guys and get this bullshit with the insurance…things have consequences." Kribales and Williams both testified that they heard the mayor make this statement. Gill confirmed that he heard the mayor use the word "consequences." Finally, Kiser told Williams that he heard the mayor use the word bullshit, although he did not hear the remainder of the mayor's statement. The mayor by contrast did not expressly deny having said the words recounted by the union witnesses. He conceded that he said "something to the effect of' 'this is the fucking thanks that I get for hiring three people,'" and noted that such a statement was "basically" all he said. Although the mayor later testified that he said nothing more, this cannot be viewed as a denial that he made the statement referenced by the Union witnesses because the statement he described was not itself verbatim or comprehensive.

[9] Mayor Hermanek more specifically testified that Kiser stated, "that was a discussion with me...and the mayor knows nothing of it."

[10] Chief Kiser recalled her saying, "we'll do what we have to do."

[11] The preponderance of the evidence demonstrates that the mayor made his comment as the union attendees were leaving this first meeting because Gill, Kribales, and the mayor all agree on that time frame. Only Williams believed that the mayor issued his comment after the second meeting, but his testimony is outweighed by the congruent testimony of three other witnesses.

The minor flaws in memory of the Union's witnesses do not warrant a credibility determination in favor of the Respondent for the following reasons: Kribales's inability to recall which door he used to leave the office is matched by the mayor's own failure to remember what he did after the meeting, ("I think I left") and his inability to recall other details such as which firefighter read him the prepared statement. Gill's failure to recount the entirety of the mayor's statement is not in fact a failure of memory and is instead is consistent with his assertion that he was the farthest from the mayor when the mayor spoke. Williams's failure to accurately recall that the mayor made his statement after the first meeting rather than after the second does not undermine the reliability of his memory regarding the substance of the statement, under the particular circumstances presented here. The most salient aspect of Williams's interaction with the mayor was their verbal exchange. By contrast, the timing of the statement could easily be confused where Williams attended two meetings in the same building within 10 minutes of each other.[12]

Moreover, the testimonies offered by Kribales and Gill sufficiently support this credibility determination, even apart from Williams's description. Both Kribales and Gill testified accurately and to the best of their recollection. Gill did not attempt to testify about the entirety of the mayor's statement, which he admitted he had not heard. Kribales was honest about the ancillary details he could not recall. Both had an honest, forthright demeanor when offering testimony on this issue. By contrast, the mayor's description of his statement evidences a hesitance to tell the entirety of what transpired. The statement he provided was, by his own account, not perfectly accurate. It was merely "something to the effect of" what he actually said, and only "basically" covered the contents of his statement after the meeting. The mayor's failure to offer a more precise account of his statement is particularly telling where the interaction occurred a mere two weeks prior to hearing and where he himself was the speaker.

About five to ten minutes after this meeting, Gill, Kribales, Williams, Scarpiniti, and Village Administrator Belmonte attended a second meeting to discuss Gill's post-employment

[12] Administrative Assistant Foy's failure to corroborate the Union's account of the mayor's statement is irrelevant where she could not hear anything the mayor said. Notably, her testimony is consistent with the testimony of Kribales, Gill, and Williams that the mayor did not use a loud tone overall. Kribales characterized the mayor's tone as stern but not loud. Similarly, Gill asserted the mayor's voice was initially quiet but then escalated. Williams asserted that the mayor used a whisper but noted that it was loud for a whisper. He also recalled a comment from Chief Kiser remarking that only the mayor's use of the word bullshit was "kind of loud," and this testimony was left unrebutted by the Respondent.

benefits and the administrative aspects of Gill's termination. Kribales, Gill, and Williams entered the meeting room through the public door of the administrative offices, not through the mayor's office. The meeting lasted approximately 15 minutes. The demeanor of the Union members at this meeting was cordial and pleasant. They did not mention the pending unfair labor practice charge, the health insurance grievance, or the mayor's recent comments.

The mayor did not consult Williams about Gill's recovery before terminating his employment. Chief Kiser did not reach out to Gill's worker's compensation attorney before the Respondent terminated Gill's employment.

The Respondent did not terminate the other two probationary firefighters.

IV. DISCUSSION AND ANALYSIS

1. Alleged Unilateral Change to Health Insurance in Violation of Sections 10(a)(4) and (1)

The Respondent violated Sections 10(a)(4) and (1) of the Act by failing to maintain the status quo of employees' health insurance during the pendency of interest arbitration proceedings.

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

There is no dispute that interest arbitration proceedings commenced for the parties in March 2014, when they filed a request for mediation. Vill. of N. Riverside v. Illinois Labor Relations Bd., State Panel, 2017 IL App (1st) 162251, ¶ 38; East St. Louis Fire Department, 30 PERI ¶ 67. The parties likewise do not dispute that health insurance is a mandatory subject of bargaining. Accordingly, the sole question presented here is whether the Respondent changed the status quo of employees' health insurance.

To constitute part of the status quo between the parties, a term or condition of employment must be an established practice. Am. Fed'n of State, County, & Mun. Employees, Council 31 v. Illinois Labor Relations Bd., 2017 IL App (5th) 160229, ¶ 41. The test for determining whether a practice is sufficiently established to constitute the status quo requires a determination of four factors, (1) the parties' past history, (2) their past bargaining practices, (3) the terms of the existing collective bargaining agreement, and (4) the reasonable expectations of the employees. Am. Fed'n of State, County, & Mun. Employees, Council 31, 2017 IL App (5th) 160229, ¶ 41. This test applies whether the analysis considers the status quo during the term of a collective bargaining agreement or during the hiatus between CBAs, at issue here. Id. at¶ 49. The Board has also noted that the express terms of the parties' recently expired collective bargaining agreement are, in general, the primary indicator of the status quo as to matters covered by the agreement, while the parties' past practices are relevant especially as to matters not covered under the agreement. Vill. of Oak Park, 25 PERI ¶ 169 (IL LRB-SP 2009).

Here, the Respondent changed the status quo when it offered new firefighters the PPO2 and the HMO plans, instead of the PPO1 plan that the Respondent provides to the rest of the bargaining unit. This conclusion finds support in the terms of the parties' expired CBA, the parties' history, and the reasonable expectations of employees.

First, the Respondent's change is not in accord with the terms of the parties' now-expired collective bargaining agreement. In relevant part, the collective bargaining agreement provides that the Respondent may change its PPO carrier, self-insure, or provide managed care, "as long as benefits are substantially equal." Here, however, the benefits of the PPO2 and the HMO are not substantially equal to the benefits of the PPO1 plan. In fact, neither plan is comparable to the PPO1, as discussed below.

The PPO2 significantly increases employees' up-front costs, as compared to the PPO1, by offering considerably less favorable deductibles, co-insurance, out-of-pocket maximums for in-network coverage, and prescription drug benefits. The deductible is six times higher, $600 for individuals and $1800 for families, as opposed to $100 for individuals and $300 for families under the PPO1. The co-insurance under the PPO2, which is the percentage of costs that the insurance pays after the deductible, is considerably smaller for a nearly all network and non-network services than under the PPO1. For example, under the PPO2, the insurance pays only 80% for network physician and other covered services and 60% for such non-network services, while under the

PPO1 the insurance pays 90% and 70%, respectively, for those same services. Although some payment percentages remain the same, such as 100% payment for hospital emergency care, the PPO2 adds a $50 copay. Furthermore, while in-network wellness coverage remains the same, the percentage paid by insurance for non-network services is reduced from 70% to 60%. The out-of-pocket maximums for individual in-network coverage are four times higher, $1250 for individuals and $3750 for families, as opposed to $400 for individuals and $1200 for families under the PPO1. In addition, the cost of 30-day supplies of prescription drugs under the PPO2 increased for brand name formulary and non-formulary drugs by $10 and $15, respectively. The cost of a 90-day supply increased from zero overall to $20 for generic, $60 for brand name formulary, and $100 for brand name non-formulary. These are not merely "superficial dissimilarities," as the Respondent contends. Rather, they are considerable changes to a wide swath of core benefits.

The HMO plan likewise fails to satisfy the Respondent's obligation to provide benefits that are substantially equal to the existing PPO1 plan. Unlike the PPO1 plan, the HMO plan does not include any out-of-network benefits, and it requires enrollees to obtain a referral for specialists even when the doctor is within network. In addition, the HMO plan more than triples individuals' out-of-pocket maximums for in-network services, and more than doubles family out-of-pocket maximums for those services, raising them from $400 to $1500 for individuals, and from $1200 to $3000 for families. Finance Director Scarpiniti confirmed that the HMO plan was completely different to any PPO plan, and she likewise conceded that the HMO did not include the all the same health service providers as the PPO1. The record does not permit a precise comparison of the size of the HMO network to the size of the PPO1 network.[13] However, the elimination of out-of-network coverage, the requirement of a referral to see a specialist, and the more than two-fold increase in out of pocket maximums sufficiently demonstrate that the HMO is not substantially equal to the PPO1.

Contrary to the Respondent's contention, the limited advantages of the new plans do not counterbalance the significant adverse changes discussed above or otherwise render their overall benefits substantially equal to the benefits of the existing PPO1 plan. For example, the PPO2 significantly increases employees' ***up-front*** costs through higher deductibles, higher prescription drug prices, and reduced co-insurance, which impact employees immediately upon obtaining

[13] Scarpiniti did not compare the size of the two networks to each other. She simply noted that the networks were each the largest of their kind in the country and, in that respect, were extremely similar.

services. By contrast, the potential savings represented by reduced out-of-pocket maximums for non-network services and prescription drugs may never be realized, particularly when the significantly higher upfront costs may deter employees from using health care. Similarly, the HMO's elimination of deductibles and co-insurance does not counterbalance the removal of non-network coverage and limitations on employee choice of specialist. In fact, every bargaining unit member rejected a $2000 incentive to switch from the PPO1 to the new plans, demonstrating that the value of the PPO1 benefits is significantly greater than the value of the benefits provided under either new plan.

The Respondent argues that some of the HMO's benefits are in fact more favorable than the PPO's benefits, but this is immaterial to the extent that the Respondent relies upon it to show that the HMO plan is largely better than PPO1 plan. "The fact that a unilateral change is economically beneficial to employees does not excuse the violation" or negate the existence of the change. City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1987); Viejas Band of Kumeyaay Indians, 366 NLRB No. 113 (2018) (quoted text). Accordingly, the zero deductible under the HMO plan, if viewed as net benefit, would still demonstrate that the HMO plan is not substantially equal to the PPO1 plan.

Next, the parties' history supports the finding that the Respondent changed the status quo when it introduced the new plans to newly-hired firefighters and failed to offer them the PPO1 plan. In February 2016, Scarpiniti implicitly acknowledged that the benefits of the new plans were not substantially equal to the benefits of the PPO1 because she warned the Respondent's finance committee that the Respondent would have to negotiate acceptance of the new plans with its unions. Indeed, she noted that the existing PPO1 plan was a "very rich, low deductible PPO plan," whereas the new plans would have "higher in network/out of network cost structures." In April 2016, the Respondent acted in accordance with its agent's interpretation of the applicable collective bargaining agreements by exempting union employees from the new health insurance ordinance that implemented the new plans. Finally, in May 2016, when the Respondent sought to introduce the new plans to unionized employees, it again acknowledged that there was a significant disparity between the benefits of the old plan and the new ones by offering employees a $2000 inducement to abandon the PPO1. Had the Respondent believed that the new plans provided benefits that were substantially equal to the benefits of the PPO1, the rationale for taking the above-

referenced actions would have been absent because the Respondent could have simply implemented them for all employees.

Finally, the Respondent's conduct, discussed above, fostered employees' reasonable expectations that the PPO2 and HMO plans were not substantially equal to the PPO1 plan and that the Respondent therefore would not unilaterally substitute them for the PPO1. Here, Scarpiniti stated that the Respondent would need to obtain its unions' agreement to the new plans, the Respondent then exempted Union employees from participating in them, and it later used financial inducements to encourage employees to accept those plans. In turn, employees reasonably expected the Respondent to bargain over the introduction of the new plans, rather than imposing them under purported authority that it previously and repeatedly claimed it did not possess.

There is no merit to the Respondent's claim that the Union was required to prove that any particular employee was individually affected by the introduction of the PPO2 and HMO plans. The Board rejected a similar contention in Kankakee. City of Kankakee (Kankakee Metropolitan Wastewater Utility ("Kankakee"), 9 PERI ¶ 2034 (IL SLRB 1993). There, as here, the respondent asserted that its change to insurance benefits was not significant. It had newly established a lifetime benefit cap and maximum cap for organ transplants but argued that it was unlikely that any employee would ever be affected by those limits and reasoned that its change was therefore de minimis. The Board responded that the "critical inquiry" was "not the likelihood of any actual effect on its employees but rather whether there ha[d] been a significant or material effect on the level of benefits *available* to those employees. Kankakee, 9 PERI ¶ 2034.

Like the charging party in Kankakee, the Union here has demonstrated through a concrete comparison of the respective plans that the benefits available to employees under the HMO and the PPO2 plans are not substantially equal to the benefits available to them under the PPO1 plan. Accordingly, the Union is not required to provide additional evidence as to how the plans bear on the medical/financial circumstances of any particular employee, nor is it required to prove that a substantial portion of the unit has been affected by the change. Kankakee, 9 PERI ¶ 2034; see also Cnty. of Cook (Cook Cnty. Forest Preserve Dist.), 4 PERI ¶3012 (IL LLRB 1988) (where new qualification exam itself constituted a change to employees' conditions of employment, union did not need to additionally show that any employee had failed it); Columbia College Chicago, 360 NLRB No. 122, slip op. at 2 (2014) (unilateral change was material and substantial even though it affected only a few employees).

The Respondent's reliance on a grievance arbitration award in support of an alternative approach is misplaced. In that case, involving the City of Markham, the arbitrator required the union to provide evidence that the employer's change to insurance had an economic consequence on the bargaining unit as a whole. And absent such evidence, the arbitrator declined to find that the employer breached its contractual obligation to maintain "substantially equal" benefits. However, that award is not binding on the Board and, in fact, directly conflicts with the Board's approach, discussed above. In addition, the award does not bind the parties to this case because it resolves a dispute that arose between different parties. Finally, even if it were appropriate to consider the award, the Respondent's interpretation of its own agreement is a distinguishing factor that weighs against adopting the arbitrator's approach here.

In sum, the Respondent changed the status quo during the pendency of interest arbitration proceedings when it failed to offer probationary firefighters the PPO1 insurance.

2. Section 10(a)(1) – Mayor's Threat to Terminate Probationary Employees

The Respondent violated Section 10(a)(1) of the Act when the mayor threatened to terminate the employment of probationary employees if the Union did not withdraw its health insurance grievance.

A respondent violates Section 10(a)(1) of the Act when it engages in conduct which reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights protected by the Act. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012); City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); Clerk of the Circuit Court of Cook Cnty., 7 PERI ¶ 2019 (IL SLRB 1991); Ill., Dep't. of Cent. Mgmt. Servs. (Dept. of Conservation), 2 PERI ¶ 2032 (IL SLRB 1986); City of Chi., 3 PERI ¶ 3011 (IL LLRB 1987). A violation of Section 10(a)(1) does not depend on the employer's motive. City of Mattoon, 11 PERI ¶ 2016; Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007). Instead, 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. Clerk of the Circuit Court, 7 PERI ¶ 2019.

There is no requirement of proof that the employees were actually coerced or that the employer intended to coerce the employees. Vill. of Calumet Park, 23 PERI ¶ 108. Employer statements to employees which contain threats of reprisal or force or promise of benefit violate

Section 10(a)(1). Vill. of Calumet Park, 23 PERI ¶ 108; Vill. of Calumet Park, 22 PERI ¶ 23 (IL SLRB 2005) (addressing implied threat); City of Highland Park, 18 PERI ¶ 2012 (IL SLRB 2002); City of Chi. (Chi. Police Dep't), 3 PERI ¶ 3028 (IL LLRB 1987); City of Freeport, 3 PERI ¶ 2046 (IL SLRB 1987). The Board has held that a threat violates Section 10(a)(1) if a reasonable employee would anticipate adverse consequences if he continued participating in protected concerted activities, regardless of whether any specific employee actually reached that conclusion. Clerk of the Court of Cook County, 7 PERI ¶ 2019.

Here, the Respondent's conduct in this case evidences a quintessentially unlawful threat against employees for engaging in protected, concerted activity. Employees engaged in protected, concerted activity when the Union filed a grievance on their behalf alleging that the Respondent failed to provide probationary firefighters with the same health insurance as non-probationary firefighters. Pace Suburban Bus Div. of Reg'l Transp. Auth., 406 Ill. App. 3d 484, 495-96. The mayor, upset by this grievance, threatened to fire the probationary firefighters if the Union did not withdraw its health insurance grievance within a week, and he directed Fire Chief Gaertner to convey the threat to the Union, so that they would "get the message." Fire Chief Gaertner in turn repeated the mayor's threat to Union President Kribales and Union Vice President Williams, explained that the mayor asked him to convey this message to them, and told them that the mayor was serious.

Moreover, this threat would lead reasonable employees to anticipate adverse consequences if they continued participating in protected concerted activities. The mayor made clear, through his conduit, Chief Gaertner, that if the Union continued to participate in the protected activity of pursuing the health insurance grievance, the Union's members could anticipate adverse consequences because the mayor would fire the probationary firefighters.[14] Vill. of Calumet Park, 22 PERI ¶ 23; City of Highland Park, 18 PERI ¶ 2012.

It is immaterial that the Union did not withdraw its grievance following the mayor's threat. A Respondent's threat of reprisal for engaging in protected activity is unlawful irrespective of

[14] It is immaterial that the mayor did not aim his threat of termination at firefighter Kribales, the individual who filed the grievance at the Union Board's direction. The key inquiry is whether the Respondent issued a threat because of that protected activity, in an effort to restrain that activity, and whether an employee would reasonably anticipate any adverse consequence as a result of the threat. Brad Snodgrass, Inc., 338 NLRB 917, 924 (2003) (respondent's threat to nonemployee business agent was unlawful where respondent asserted that bargaining unit members would lose their jobs because of his grievance filing).

whether the threat successfully coerces employees to abandon their protected activity. Vill. of Calumet Park, 23 PERI ¶ 108 (threatening statement related to employee's grievance filing violated the Act even though it did not prevent employee from filing grievances).

Finally, it is likewise immaterial that the mayor did not follow through with his threat a week later when the Union still had not withdrawn its grievance. A respondent's threat of reprisal against employees for engaging in protected activity is unlawful irrespective of whether the respondent follows through with the threatened action. City of Chi. (Chi. Police Dep't), 3 PERI ¶ 3028 (employer's threat that it would change employee's work schedule if he filed a grievance violated the Act even though Respondent did not carry out threatened conduct).

In sum, the Respondent violated Section 10(a)(1) the Act when the mayor, through Chief Gaertner, threatened to fire the three new probationary firefighters if the Union did not withdraw its grievance over their health insurance.

3. Motion to Amend

The Union's motion to amend the complaint is granted. Accordingly, the Complaint is amended to include the allegations that the Respondent violated Sections 10(a)(1) and 10(a)(2) of the Act by terminating probationary firefighter Gill's employment in retaliation for the Union's grievance over health insurance and the Union's decision to move forward with the hearing in this case.[15]

The Act gives administrative law judges broad discretion to amend complaints. Section 11(a) provides, in relevant part: "Any such complaint may be amended by the member or hearing officer conducting the hearing for the Board in his discretion at any time prior to the issuance of an order based thereon." 5 ILCS 315/11(a). The Board's case law is more specific, allowing for the amendment of complaints in two distinct instances: (1) where, after the conclusion of the hearing, the amendment would conform the pleadings to the evidence and would not unfairly prejudice any party; and (2) to add allegations not listed in the underlying charge, so long as the added allegations are closely related to the original allegations in the charge, or grew out of the same subject matter during the pendency of the case. Forest Preserve. Dist. of Cook Cnty. v. ILRB, 369 Ill. App. 3d 733, 746 (1st Dist. 2006); Chicago Park Dist., 15 PERI ¶ 3017 (IL LLRB 1999);

[15] Contrary to the Respondent's contention, these allegations do fall squarely under Sections 10(a)(2) and 10(a)(1) of the Act. See discussion infra.

City of Chicago (Police Dep't), 14 PERI ¶ 3010 (IL LLRB 1998); Cnty. of Cook and Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB 1990); Cnty. of Cook, 5 PERI ¶ 3002 (IL LLRB 1988). The Board may properly decide allegations which have been litigated by the parties, even if those allegations were never specifically pleaded, as long as the respondent has had notice and an adequate opportunity to prepare and present a defense. County of Cook, 5 PERI ¶ 3002.[16]

Here it is appropriate to amend the complaint to conform to evidence presented at hearing which indicates that the Respondent terminated Gill's employment at least in part because of the Union's health insurance grievance and its decision to move forward with this case, pertaining to the same subject matter. The Union presented direct evidence of the mayor's animus towards the Union's efforts to reverse the Respondent's unilateral change to health insurance. Specifically, the mayor threatened to fire probationary employees if the Union did not withdraw its health insurance grievance challenging that change. In addition, the mayor linked Gill's termination with the Union's efforts to counter the Respondent's changes to health insurance by making the following statement after the termination meeting: "I hired the three guys and get this bullshit with the insurance…things have consequences."

Second, the amendment would not unfairly prejudice the Respondent because it had adequate notice of the proposed amendment and an adequate opportunity to prepare and present a defense. The Union moved to amend the complaint on January 11, 2019, five days before the scheduled hearing date (January 16, 2019), the Respondent requested and received a continuance, and the matter therefore did not proceed to hearing for another thirteen days (January 24 & 25, 2019). In the interim, the Respondent amended its witness list and prehearing memorandum to reflect the new evidence it intended to adduce regarding Gill's termination. At hearing, the Respondent cross-examined the Union's witnesses on their accounts of the termination meeting and the statements the mayor allegedly made afterwards. The Respondent also called its own witnesses to address this issue, including one witness who did not appear on the Respondent's initial witness list. Finally, the Respondent presented evidence and arguments on its affirmative defense, that it terminated Gill's employment for an overridingly legitimate business reason. Compare Chicago Park District, 15 PERI ¶ 3017 (amendment appropriate where employer had notice of union's motion to amend and an opportunity to prepare a defense) and County of Cook

[16] Any such amendments must be timely filed. Vill. of Wilmette, 20 PERI 85 (IL LRB-SP 2004).

and Sheriff of Cook County, 6 PERI 3019 (IL LLRB 1990) (amendment to add certain allegations was improper where union did not formally move to add them to complaint, respondents were not aware that those issues would be made part of complaint, and respondents did not present evidence on these allegation or argue them in their brief).

There is no merit to the Respondent's claim that it had insufficient time to prepare and present a defense against the Union's proposed amendment. The Respondent's own actions both before and during hearing weigh heavily against such a finding. Prior to hearing, the Respondent volunteered to make itself available for hearing as early as the week following its request for new hearing dates. I informed the parties that while I was not available on both of the dates initially proposed by the Union, I would change my own schedule to accommodate the parties if the Respondent was also available. The Respondent asserted it was available and made no claim that the arguably short length of the continuance was insufficient to allow it to prepare a defense. Then at hearing, the Respondent declined to call three of the witnesses it listed on its pre-hearing memo, though it had added two of them for the express purpose of defending against the Union's amendment.

In addition, the amendment to add the Section 10(a)(1) allegation is separately permissible on the grounds that it grew out of the original allegations and is closely related to them. Whether a new allegation is closely related to allegations in the original complaint depends on whether the new allegation is of the same class as the original allegations and whether the respondent would raise the same or similar defenses to both the new and original allegations, such that it preserved similar evidence and prepared a similar case in defense against both the new and original allegations. County of Cook and Sheriff of Cook County, 6 PERI 3019. This standard is met.

Here, the original charge alleges that the Respondent violated Section 10(a)(1) of the Act when it threatened to terminate probationary firefighters if the Union did not withdraw its health insurance grievance. The amendment similarly alleges a violation of the same class, Section 10(a)(1). Moreover, the Union provided some evidence that the Respondent's decision to terminate firefighter Gill represents the Respondent's follow-through on the threat it made months earlier. Accordingly, the new allegation, if proved, would closely relate to allegations in the original complaint. Chicago Transit Auth., 14 PERI ¶ 3002 (IL LLRB 1997) (complaint alleged unilateral change, ALJ properly amended complaint to include allegation that respondent promoted employee out of the bargaining unit to retaliate against her for filing a grievance over

the alleged change); cf. Vill. of Oak Lawn, 26 PERI ¶ 118 (IL LRB-SP 2010) (amendment would have prejudiced respondent where parties proceeded on a stipulated record and respondent would have had no opportunity to raise defenses or add evidence).

Contrary to the Respondent's contention, the new allegations remain closely related to the charged conduct even though the events underlying them are separated in time by nearly 10 months. Close proximity is not required in this case where the Union has provided some other evidence of a link between the two events, discussed above. This approach is consistent with the Board's case law which holds that close proximity between protected activity and an adverse employment action is not required to prove the underlying violation. Village of New Athens, 29 PERI ¶ 27 (IL LRB-SP 2012). The same analysis reasonably applies to determining whether two allegations are closely related for purposes of a granting an amendment.

Moreover, there is sufficient overlap in the Respondent's defenses to the new and the original allegations to permit the amendment under the circumstances presented here. First, the Respondent's defense to both new and old allegations includes the claim that the mayor never made the underlying threat to terminate the probationary firefighters. Moreover, the Respondent received a continuance so that it could present a more fulsome defense of the mayor's motive, including the stated reason for Gill's termination, which was not at issue in defending against the alleged threat. Nat'l Licorice Co. v. N.L.R.B., 309 U.S. 350, 369 (1940) (National Labor Relations Board had "authority to deal with those [actions] which followed as a consequence of those already taken"); cf. NLRB v. Complas Industries, Inc., 714 F.2d 729, 734 (7th Cir. 1983).

Contrary to the Respondent's contention, the Union attorney's allegedly improper, *ex parte* communication with the mayor does not justify denial of the Union's motion to amend because there is insufficient evidence that the Union attorney engaged in any misconduct. Rule 4.2 of the Illinois Rules of Professional Conduct provides the following: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." IL R S CT RPC Rule 4.2. The Respondent alleges that the Union attorney violated Rule 4.2 of the Illinois Rules of Professional Conduct by communicating with the mayor at Gill's termination meeting without the presence of the Respondent's attorneys. However, the Respondent's arguments lack merit.

Here, Mayor Hermanek was an individual represented by counsel, as of January 11, 2019, on the matter of Gill's termination. In cases involving corporate parties, such as the Village of North Riverside, individuals will be deemed represented in a particular matter, if they are part of the corporation's "control group." Champaign County Clerk of the Circuit Court, 8 PERI ¶ 2025 (IL SLRB 1992) (citing Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc., 128 Ill. App. 3d 763, 770-1 (2nd Dist. 1984) (interpreting predecessor version of the rule, Rule 7–104(a)(1) (107 Ill.2d R. 7–104(a)(1))). A corporation's control group includes "top management" who have authority to make a final decision. Consolidated Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 120 (1982). It also includes those "whose advisory role to top management in a particular area is such that a decision would not normally be made without [their] advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority." Consolidated Coal Co., 89 Ill. 2d at 120. Notably, a member of the control group falls within the ambit of the rule even absent active litigation, where litigation is simply under consideration, provided that the "persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute."[17] People v. White, 209 Ill. App. 3d 844, 875 (5th Dist. 1991) (stating *in dicta* that the predecessor to Rule 4.2, DR 7-104(a)(1), "provides protection" before the filing of criminal charges); Kole v. Loyola Univ. of Chicago, 95 C 1223, 1997 WL 47454 (N.D. Ill. 1997) (apply principle to civil case); ABA, Formal Op. 95–396 (1995) (quoted text).

Applying these principles, there is little question that the mayor is part of the Respondent's control group for purposes of this case because he has final authority over the termination of probationary firefighters, at issue here. In addition, the Union attorney knew as of January 11, 2019 that the mayor was represented by counsel on the subject of Gill's termination because she contacted Respondent's attorney Cary Horvath a day earlier to resolve potential litigation of the matter. Indeed, a few hours after the Fire Chief announced Gill's impending termination to the Union on January 10, 2019, the Union attorney spoke on the phone with Respondent's counsel about extending Gill's probationary period.

Nevertheless, any communication by the Union attorney to Mayor Hermanek at the January 11, 2019 meeting was de minimis and did not violate Rule 4.2. Where the attorney's

[17] This may be found here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_95_396.authcheckdam.pdf

communication with a represented individual on the subject of the representation is de minimis and there is no showing that the communication resulted in prejudice, the appellate court has found no violation of rule 4.2. Pettey v. First Nat. Bank of Geneva, 225 Ill. App. 3d 539, 546. This is consistent with the purposes of the rule, to foster public confidence in the legal profession, and to protect individuals from "being tricked by a lawyer's artfully contrived questions into giving his case away." People v. Santiago, 384 Ill. App. 3d 784, 788 (1st Dist. 2008), aff'd, 236 Ill. 2d 417 (2010) (identifying two key purposes of Rule 4.2).

Here, the Union attorney's conduct at the January 11, 2019 meeting is best characterized as that of observer. The sole communications she made were to introduce herself and to indicate her departure from the meeting at its conclusion ("that's about all we can do"). She did not ask questions, she did not direct any statements to the mayor other than those described above, and there is insufficient evidence that she remained on the phone after making her final statement. Indeed, the totality of her communications could not have lasted more than 30 seconds. Mahan v. Louisville & Nashville R. Co., 203 Ill. App. 3d 748, 754 (5th Dist. 1990).[18]

Nor is there any evidence that the Union attorney impermissibly directed Union President Kribales and Vice President Williams to communicate with the mayor on her behalf. The comments to Rule 4.2 provide that "[a] lawyer may not make a communication prohibited by this Rule through the acts of another." IL R S CT RPC Rule 4.2, cmt. 4. In this case, however, there is no indication from the record that the Union attorney gave Kribales and Williams such instructions at any time. Indeed, Kribales's phone sat on the mayor's desk throughout the meeting, even when Kribales momentarily left the room.[19]

Most importantly, the evidence provided at hearing was not tainted by the Union attorney's communications. Indeed, the witnesses provided largely consistent descriptions of the January 11, 2019 meeting. The key disputed statement offered by the mayor occurred after the meeting concluded, as union participants were walking out the door and the fire chief had started a phone call. The attorney's telephonic presence, which had reasonably concluded by then, did not trick

[18] Although, Illinois federal courts have applied rule 4.2 more strictly, finding that any such communication is forbidden, these cases are only persuasive, whereas the appellate court cases above are binding and precedential. Weibrecht v. S. Ill. Transfer, Inc.,241 F.3d 875, 883 (7th Cir.2001); Parker v. Pepsi-Cola General Bottlers, Inc., 249 F. Supp. 2d 1006, 1010 (N.D. Ill. 2003).

[19] Prior to hearing, the mayor submitted an affidavit asserting that he believed Kribales had taken the phone with him. However, Respondent's counsel did not ask him about this matter at hearing, and Kribales emphatically asserted that he left his phone on the mayor's desk.

the mayor into "giving [the] case away." Rather, the mayor's statement was provoked by Williams, who made implicit reference to the parties' upcoming hearing in this case, as he was leaving the mayor's office. White, 209 Ill. App. 3d at 875 (prosecutor's knowledge of investigative procedure was not sufficient to render the investigator the prosecutor's alter ego for purposes of no-contact rule where it did not subject defendant to prosecutor's superior legal skill and acumen); Santiago, 384 Ill. App. 3d at 788 (quoted text).

Accordingly, the Complaint is appropriately amended to add the new allegations that the Respondent violated Sections 10(a)(2) and (1) of the Act when it terminated the employment of probationary employee firefighter Gill.

4. Gill's Termination, Section 10(a)(2) and Section 10(a)(1) Allegations

The Respondent violated Section 10(a)(2) and Section 10(a)(1) of the Act when it terminated probationary firefighter Gill's employment.

Section 10(a)(2) of the Act makes it an unfair labor practice for an employer "to discriminate in regard to hire or tenure of employment…in order to encourage or discourage membership in or other support for any labor organization." 5 ILCS 315/10(a)(2).

To establish a prima facie case that the employer violated Section 10(a)(2) of the Act, the charging party must prove by a preponderance of the evidence that: (1) the employee engaged in union and/or protected concerted activity, (2) the employer was aware of that activity, and (3) the employer took adverse action against the employee as result of his involvement in that activity to encourage or discourage union membership or support. City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989); City of Elmhurst, 17 PERI ¶ 2040 (IL LRB-SP 2001); Illinois State Toll Highway Authority, 25 PERI ¶ 4 (IL LRB-SP 2009); Vill. of Schiller Park, 13 PERI ¶ 2047 (IL SLRB 1997); Macon Cnty. Highway Dept., 4 PERI ¶ 2018 (IL SLRB 1988); Gale and Chicago Housing Authority, 1 PERI ¶ 3010.

The charging party may demonstrate the requisite causal connection through circumstantial or direct evidence including expressions of hostility toward union activity, together with knowledge of the employee's union activities; timing; disparate treatment or targeting of union supporters; inconsistencies in the reasons offered by the employer for the adverse action; and shifting explanations for the adverse action. City of Burbank, 128 Ill. 2d at 345; Gale and Chicago Housing Authority, 1 PERI ¶ 3010.

Once the charging party establishes a prima facie case, the employer can avoid a finding that it violated the Act by demonstrating that it would have taken the adverse action for a legitimate business reason, notwithstanding the employer's union animus. City of Burbank, 128 Ill. 2d at 345. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. Id. If the proffered reasons are merely litigation figments or were not in fact relied upon, then the employer's reasons are pretextual and the inquiry ends. Id. However, when legitimate reasons for the adverse employment action are advanced and are found to be relied upon at least in part, then the case may be characterized as a "dual motive" case, and the employer must establish, by a preponderance of the evidence, that it would have taken the action notwithstanding the employee's union activity. Id.

Section 10(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in [the] Act." 5 ILCS 315/10(a)(1). Where a charging party alleges that the employer violated Section 10(a)(1) of the Act by taking an alleged adverse employment action against an employee because of, and in retaliation for, the exercise of protected rights, the analysis tracks the one used in cases arising under Section 10(a)(2) of the Act, set forth above. Vill. of Oak Park, 18 PERI ¶ 2019 (IL SLRB 2002); Vill. of Schiller Park, 13 PERI ¶ 2047. Accordingly, in such cases, the charging party must prove, by a preponderance of the evidence, that the employee engaged in protected activity, the Respondent knew of that activity, and the Respondent took adverse action against the employee as a result of his involvement in that activity. Vill. of Schiller Park, 13 PERI ¶ 2047 (citing Gale and Chicago Housing Authority, 1 PERI ¶ 3010 (IL LLRB 1985)). Under this framework, as under a Section 10(a)(2) analysis, the employer can avoid a finding that it violated the Act by demonstrating that it would have taken the adverse action for a legitimate business reason, notwithstanding the protected activity. Pace Suburban Bus Div. of Reg'l Transp. Auth., 406 Ill. App. 3d at 500.

In this case, the Union satisfied its prima facie burden under both sections of the Act, but the Respondent has not met its burden on the affirmative defense. The Union's prima facie case under Section 10(a)(1) of the Act is addressed first, below.

a. The Union's Prima Facie Case under Section 10(a)(1) of the Act

Gill engaged in union/and or protected, concerted activity when the Union, on Gill's behalf, filed a grievance challenging the Respondent's failure to provide probationary firefighters with the PPO1 health insurance provided to non-probationary firefighters. Indeed, it is well established that grievance filing is protected concerted activity and that it may also constitute protected union activity. Cnty. of Cook, 27 PERI ¶ 57 (IL LRB-SP 2013) rev'd on other grounds, 29 PERI ¶ 44 (1st Dist. 2012); State of Illinois (Department of Human Services), 20 PERI ¶ 73 (IL SLRB 2004); Chicago Transit Auth., 14 PERI ¶ 3002 n. 11 (noting that employee's grievance activity was not only protected concerted activity but also union activity where union representatives settled the grievance).

Gill similarly engaged in union and/or protected, concerted activity when the Union, on Gill's behalf, pursued this unfair labor practice complaint to hearing, challenging the lawfulness of the Respondent's change to health insurance and the mayor's threat, discussed above. Chicago Board of Education, 18 PERI ¶ 1045 (ILELRB 2002) (expression of intent to file charge with the Board constituted protected concerted activity).

Notably, there is no merit to the Respondent's assertion that the Union's claim of retaliation, based on its activities before the Board, must be analyzed under Section 10(a)(3) of the Act rather than under Sections 10(a)(1) or 10(a)(2), discussed infra. The Union expressly referenced its activities before the Board as the basis for its claims under these sections of the Act. Moreover, the harms that the Union seeks to redress—broad interference with protected activity and discouragement of union support—are more appropriately considered under Sections 10(a)(1) and 10(a)(2) of the Act, which squarely prohibit such conduct. Section 10(a)(3) of the Act, by contrast, is narrower.[20] Even if an analysis of the Respondent's conduct could proceed under Section 10(a)(3) of the Act, as the Employer contends, an analysis under Sections 10(a)(1) and 10(a)(2) of the Act is nevertheless appropriate. Cf. Cook County (Circuit Court, Chief Judge), 5 PERI ¶ 2024 (IL SLRB 1989) (declining to address Section 10(a)(1) allegation where it was deemed derivative of the Section 10(a)(4) allegation and was not pleaded independently).

[20] Section 10(a)(3) of the Act protects employees from discrimination for cooperating with the Board by signing or filing an affidavit, petition or charge, or providing any information or testimony under the Act. 5 ILCS 315/10(a)(3).

Contrary to the Respondent's anticipated contention, the protected activity described above is sufficient to satisfy the first element of the Union's prima facie case, irrespective of whether Gill himself authorized it or was even aware of it. Brad Snodgrass, Inc, 338 NLRB 917, 924-5 & 927 (2003).

Next, it is clear that Mayor Hermanek knew of the Union's grievance and the Union's decision to proceed to hearing on the unfair labor practice charge prior to January 10, 2019, the date on which he first expressed his decision to terminate Gill's employment. An employer's knowledge of protected activity may be inferred from direct or circumstantial evidence. Rockford Twp. Hwy. Dep't v. State Labor Rel. Bd., 153 Ill. App. 3d 863, 88-1 (2d Dist. 1987). Here, there is direct evidence that the mayor knew of the grievance as early as March 2018 because he complained about it to the chief at that time. In addition, there is strong circumstantial evidence that the mayor likewise knew that the Union was proceeding to hearing on a complaint in this case, previously scheduled for Wednesday, January 16, 2019. The Respondent's prehearing memo, dated January 9, 2019, indicates that the mayor had been preparing for hearing as of that date because the Respondent described the mayor's anticipated testimony. In addition, the mayor's own testimony reveals knowledge of a contentious event, scheduled for Wednesday, January 16, 2019, because the mayor admitted that the trigger for his expletive after the termination meeting was Williams's statement, "see you on Wednesday."

Next, the Respondent took adverse action against Gill by terminating his employment on January 11, 2019. Ill. Dep't of Cent Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶2022 n. 3 (IL SLRB 1995) (noting that discharge is one example of an adverse employment action).

Furthermore, the evidence demonstrates that the Respondent terminated Gill's employment because of the Union's grievance over health insurance and its decision to pursue a hearing before the Board in this case. The Union presented direct evidence of Mayor Hermanek's animus towards the Union's decision to file the health insurance grievance and his animus, more broadly, towards any Union attempts to remedy the Respondent's decision regarding the health insurance provided to new employees. First, and most notably, the mayor threatened to fire the probationary firefighters if the Union did not withdraw that grievance. Second, the mayor felt so strongly about the matter that he ordered Fire Chief Gaertner to convey that threat to the Union, and asked Gaertner afterwards whether the Union had gotten the message. Third, the mayor told then-Deputy Chief Schey in June 2018 that the Union would "regret the decision to pursue this insurance issue,"

a statement that demonstrates both hostility toward the protected activity, taken on Gill's behalf, and an intent to retaliate because of it. County of Bureau and Bureau County Sheriff, 29 PERI ¶ 163 (IL LRB-SP 2013) (employer's threat, that it would bring charges against charging party if she did not withdraw her grievance, was evidence of animus towards her protected activity). Finally, the mayor himself implied there was a link between Gill's termination and the Union's protected activity by telling the union members, as they walked out of the meeting, "I hire these three guys and get this bullshit with the insurance…things have consequences." Although the mayor did not expressly mention the Union's pending hearing or its earlier grievance at this time, it is clear from the statement's context and the mayor's earlier comments that the phrase "bullshit with the insurance" referred to both activities. The mayor had repeatedly expressed disapproval over the Union's health insurance grievance, and he knew the parties were scheduled for hearing on health insurance matters intimately related to the grievance. While Williams's implied reference to the upcoming hearing ("see you on Wednesday") may have triggered the mayor's outburst, the breadth of the mayor's statement demonstrates a global animus towards all the Union's health insurance-related efforts.

The Respondent's prior unfair labor practice in Case No. S-CA-15-032 further supports the finding that the Respondent fired Gill because the Union engaged in protected concerted activities on his behalf. A respondent's prior unfair labor practices can be used to show unlawful motive and/or union animus. Peoria School District 150, 24 PERI ¶ 105 (IELRB 2007) (citing NLRB case law). Such a finding is warranted in this case, where the protected activity in the prior case and the Respondent's response to it are strikingly similar to those presented here. In both cases, the Union rejected the Respondent's attempts to change employees' terms and conditions of employment, and the Respondent responded by terminating unit employees. In the first case, the Union initiated compulsory interest arbitration because its members would not accept the Respondent's final offer on a contract, and in response, the Respondent issued notices of termination to all bargaining unit members because of that refusal. Village of North Riverside, 33 PERI 33 aff'd by Vill. of N. Riverside v. Illinois Labor Relations Bd., State Panel, 2017 IL App (1st) 162251, ¶ 47. Likewise, in this case, the Union rejected the Respondent's attempt to unilaterally change employees' health insurance, initially through a grievance and then through the Board's procedures. The Respondent then terminated one of the beneficiaries of the Union's protected activities after having threatened all the beneficiaries with termination if the Union did

not withdraw the grievance. Notably, Mayor Hermanek was a key participant in both actions, which likewise weighs in favor of finding that the actions in this case are a continuation of the Respondent's animus towards employees' protected activities. Opelika Welding, 305 NLRB 561, 566 (1991) (finding prior unfair labor practice indicative of respondent's continuing animus where the protected activity at issue in the prior and the current case was the same).

Contrary to the Respondent's anticipated contention, the admittedly long gap between the Respondent's initial termination of unit employees (December 2014) and the termination in this case (January 2019), does not foreclose an inference of continuing animus here. The Respondent persisted in unlawful conduct during the interim when Former Fire Chief Basek threatened the then-union president with discipline for filing a grievance. Village of North Riverside, 34 PERI ¶ 48 (IL LRB-SP ALJ 2017). Moreover, there was never any period of reconciliation. The mayor asserts that he hired the three new firefighters and a new fire chief, to extend the olive branch to the Union. However, during that time, the parties had reached no contract and the mayor was still pursuing appeals of the first unfair labor practice case, in which the Respondent sought to terminate all unit members. Moreover, within two months of the Illinois Supreme Court's denial of the Respondent's petition for leave to appeal that case, the mayor threatened probationary employees with termination in response to the Union's grievance. Tennessee Packers, Inc., 158 NLRB 1192, 1201 and n. 9 (1966) (considering multiple unfair labor practices over six years), enforcement granted in relevant part, N. L. R. B. v. Tennessee Packers, Inc., Frosty Morn Div., 390 F.2d 782 (6th Cir. 1968).

Furthermore, there is also suspicious timing between Gill's termination and the Union's hearing in this case because the mayor terminated Gill's employment a mere five days before the initially-scheduled hearing dates. This timing is rendered even more suspect where Gill's inability to complete his probationary period within one year had been apparent for months, as he had been off work since June 2018. Even if there is some ambiguity about whether the mayor knew that Gill had been absent that entire time, the mayor undoubtedly knew the nature of Gill's condition because he had visited Gill in the hospital shortly after his injury. He therefore also knew that Gill's return to work would be delayed, and that Gill would not be able to complete a full twelve months of work within the agreed-upon deadline. Yet, the Respondent has not explained why it

waited until five days before the hearing to terminate Gill's employment.[21] S. Freedman & Sons, Inc., 364 NLRB No. 82, slip op. 3 (2016) (timing of discharge was suspicious where it occurred five days before the hearing on unfair labor practice).

Finally, the above-referenced evidence is sufficient to satisfy the Union's prima facie burden, even absent evidence of disparate treatment, targeting of union supporters, shifting explanations, or close timing between Gill's termination and the Union's grievance. An announced intent to retaliate against certain employees because of their protected activity is especially persuasive evidence that a subsequent discharge was unlawfully motivated where one of the individuals discharged was the subject of the threat. Town of Decatur, 4 PERI ¶ 2003 (IL SLRB 1987) (applying similar analysis to discharge of leading union supporter). Moreover, in this case, the evidence of unlawful motive also includes the mayor's statement following Gill's termination, the close proximity of Gill's termination to another instance of protected activity, and the Respondent's prior, similar unfair labor practices.

b. The Union's Prima Facie Case under Section 10(a)(2) of the Act

The Union likewise met its prima facie burden to show that the Respondent terminated Gill's employment because of the Union's activities undertaken on Gill's behalf, to discourage support for the Union.

As noted above, the Gill engaged in union and/or protected concerted activity when the Union, on his behalf, filed a grievance over the new firefighters' health insurance and proceeded to hearing before the Board in this case. In addition, the mayor knew of this protected activity and took adverse action against Gill by terminating his employment because of animus towards those activities.

Finally, the Union demonstrated that the Respondent took such action to discourage support for the Union. The direct evidence of animus discussed above sends a message that the Union's activities on behalf of employees are not beneficial and may in fact be counterproductive. For example, the mayor's statement, that he would fire probationary employees if the Union did not withdraw its grievance, conveys that the Union's attempt to help its members causes more

[21] Even assuming that it was the respondent's practice to wait until the end of the probationary period to make a determination on whether to retain a probationary employee, the timing of Gill's termination is still suspicious because it occurred more than two weeks before his probationary period expired.

harm than good. The mayor's statement following Gill's termination sends the same message because it implicitly references the Union's protected activities on behalf of probationary employees (i.e., "this bullshit with the health insurance") and links it to Gill's termination ("actions have consequences"). Brad Snodgrass, Inc, 338 NLRB at 925 & 927 (employer's statement to employees that layoffs were due to the union's grievances satisfied union's prima facie burden under Section 8(a)(3) of the National Labor Relations Act, which is parallel to Section 10(a)(2) of the IPLRA).[22]

c. The Respondent's Business Explanation

The Respondent's business reason for terminating Gill's employment, though plausible, was in fact a pretext to discrimination because the Respondent did not rely upon it. In the alternative, even if the Respondent did rely, in part, on its proffered reason for Gill's termination, it has not met its burden to show by a preponderance of the evidence that it would have terminated Gill's employment absent the protected activities undertaken by the Union on his behalf.

The proffered basis for the Respondent's decision, Gill's inability to successfully complete his probationary period within a year, is a legitimate business reason for Gill's termination. A respondent's explanation for the adverse action is deemed legitimate provided that the respondent has not taken such action on arbitrary, implausible, or unreasonable grounds. State of Illinois, Secretary of State, 31 PERI ¶ 7 (IL LRB-SP 2014). Here, the Respondent reasonably believed that Gill would not be able to complete his probationary period within one year. He had injured himself on the job in June 2018, had not returned to work between the date of his injury and his termination in January 2019, and had never provided the Respondent with documentation indicating he was ready to return. Although Lieutenant Williams informed Chief Kiser that Gill was hoping to be cleared for work relatively soon, in early February 2019, Gill still would have been unable to complete his probationary period within the specified one-year period.

[22] Contrary to the Union's assertion, not all the mayor's statements can be used to support a finding of unlawful motive. Section 10(c) of the Act explicitly protects an employer's freedom of expression provided the expression "contains no threat of reprisal or force or promise of benefit." 5 ILCS 315/10(c); County of Woodford, 14 PERI ¶ 2017 (IL SLRB 1998); County of Cook, 7 PERI ¶ 3017 (IL LLRB 1991). Here, the mayor's reference to the Union in derogatory terms such as "leper" and "jag offs" is simply an expression of his opinion that is protected under Section 10(c) of the Act because it contains no threat or promise of a benefit.

Nevertheless, while the Respondent may have had legitimate grounds to terminate Gill's employment, it has not proven that those grounds were its controlling motive. The mere fact that justifiable grounds for an adverse action exist, does not demonstrate that those grounds motivated the respondent's decision. City of Burbank, 128 Ill. 2d at 346 ("merely proffering a legitimate business reason for the adverse employment action does not end the inquiry…if the proffered reasons…were not in fact relied upon, then the employer's reasons are pretextual and the inquiry ends"); General Warehouse Corp., 247 NLRB 1073, 1075 (1980).

Here, the considerable, direct evidence of the mayor's unlawful motive demonstrates that the controlling factor in his decision to terminate Gill's employment was a desire to interfere with employees' protected activity and to discourage support for the union. As noted above, the mayor told Kribales and Williams that Gill's termination was a consequence of the Union's insurance grievance and activity before the Board when he stated, after the termination meeting, "I hired three guys and get this bullshit with the insurance…things have consequences." It is significant that this statement followed the mayor's earlier, explicit threat to terminate all probationary firefighters if the Union did not withdraw its health insurance grievance, and his subsequent assertions to Schey that the Union would regret pursuing the "insurance issue." Brad Snodgrass, Inc, 338 NLRB at 925 & 927 (declining to apply mixed motive analysis where respondent told employees that they were being fired because of the union's grievance).

The suspicious timing of the Respondent's termination of Gill, five days before the hearing in this case, further supports that conclusion. Notably, the inference of suspicious timing is unrebutted because the Respondent did not terminate Gill's employment when its agents first learned that he would not be able to complete a full twelve months of work within one year of his hire. It likewise did not wait until the close of that period to terminate his employment and instead terminated him two weeks earlier, just days before the scheduled Board hearing. The mayor's expression of animus toward Gill's protected activity, issued within minutes of the termination meeting, renders this timing even more suspect and weighs in favor of finding that the Respondent's stated reason for the termination was pretextual. Murray Am. Energy, Inc., 366 NLRB No. 80 (2018) (employer's unrestrained animus towards protected conduct at the meeting where discipline was meted out demonstrated that reason for discipline provided in the written notice was pretextual).

Finally, the mayor's explanations for refusing to negotiate an extension to Gill's probationary period likewise demonstrate pretext. They show that the mayor did not view the contract's probationary period as immutable and that he likewise did not believe that the parties' prior agreement on that issue was a bar to extending it in Gill's case, as the Respondent now contends. To the contrary, he informed the Union that he would have negotiated an extension, had the Union simply raised its request sooner, stating that Kribales had had six months to come and negotiate that issue with him. Similarly, at hearing, the mayor implicitly justified his refusal to negotiate an extension by stating, "it was never brought up to me."[23] These statements call into question the veracity of the Respondent's claim that the mayor terminated Gill's employment because it had a strict, agreed-upon policy from which it would not have varied. Vill. of Glenwood, 3 PERI ¶ 2056 (stated budgetary reason for adverse action was pretextual where it was inconsistent with respondent's decision to grant other employees pay raises).

Contrary to the Respondent's contention, this analysis does not improperly infer unlawful motive from an employer's mere refusal to negotiate a matter that it had no obligation to bargain. Rather, it shows that the mayor's stated reason for terminating Gill's employment is not the true reason for his termination. Cf. City of Mattoon, 11 PERI ¶ 2016.

Even if the Board determines that the Respondent relied upon Gill's inability to timely complete his probationary period when it terminated his employment, the Respondent has still failed to show that it would have taken the same action regardless of Gill's protected activity. "The issue is "not simply whether the employer 'could have' [taken the adverse action], but whether it 'would have' done so, regardless of" the protected activities. Carpenter Technology Corp., 346 NLRB 766, 773 (2006). In the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent [can meet its burden on the affirmative defense] by demonstrating that it has a rule and that the rule has been applied to employees in the past." Publix Super Markets, Inc., 347 NLRB 1434, 1439 (2006). However, an employer fails to meet its burden where the evidence affirmatively shows a lack of consistency in the employer's application of its rules, and where the case for unlawful motive is substantial. Publix Super Markets, Inc., 347 NLRB at 1439.

Here, the Respondent has failed to demonstrate that it had previously terminated employees for failing to successfully complete the agreed-upon one-year probationary period. It did not

[23] Tr. P. 328.

identify any employees it terminated for that reason, nor did it even claim to have taken such action. The Respondent simply noted that it had never extended the probationary period for any employee. However, under these facts it is equally like that the Respondent never extended the probationary period because all employees had successfully completed it. Accordingly, the record does not permit a finding that the Respondent's treatment of Gill was consistent with its treatment of other, similarly situated employees.

Contrary to the Respondent's anticipated contention, it is the Respondent's burden at this stage of the analysis to demonstrate consistent treatment of employees under its rule, and not the Union's burden to show disparate treatment. Am. Red Cross Missouri-Illinois Blood Services Region, 347 NLRB 347, 350 (2006) (employer's rebuttal burden failed where it did not show a single instance in which it treated another employee the way it treated the discriminatee); see also Mays Elec. Co. Inc., 343 NLRB 121, 132 (2004) (respondent did not meet its burden where record was "entirely lacking" evidence that the respondent's treatment of discharged employees was consistent with treatment of coworkers who engaged in similar misconduct).

Under these circumstances, the Respondent's failure to terminate all three probationary employees does not demonstrate that the Respondent would have terminated Gill's employment regardless of the protected activities undertaken by the Union on Gill's behalf. A respondent cannot insulate itself from a finding that it acted from an unlawful motive where it terminated only one of the employees who engaged in protected activity. Cnty. of Jersey (Lewis and McAdams), 7 PERI ¶2023. Indeed, a "discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not take similar actions against all union adherents." Resolute Realty Mgmt., 297 NLRB 679, 689 (1990) (quoted text; employer failed to meet burden on affirmative defense); Cnty. of Jersey (Lewis and McAdams), 7 PERI ¶2023 (IL SLRB 1991) (respondent's conduct was unlawful even though it did not discharge all of the employees who signed the grievance); cf. Ottawa Township High School District 140, 30 PERI ¶ 57 (IELRB 2013) (employer satisfied its burden on the affirmative defense where it both imposed similar penalties on those who had not engaged in protected activity and did not discipline all those who had engaged in protected activity).

Thus, the Respondent violated Section 10(a)(1) and Section 10(a)(2) of the Act when it terminated Gill's employment.

V. CONCLUSIONS OF LAW

1. The Respondent violated Sections 10(a)(4) and (1) of the Act by failing to maintain the status quo of employees' health insurance during the pendency of interest arbitration proceedings.
2. The Respondent violated Section 10(a)(1) the Act when the mayor, through Chief Gaertner, threatened to fire the three new probationary firefighters if the Union did not withdraw its grievance over their health insurance.
3. The complaint is properly amended to include the allegations that the Respondent violated Sections 10(a)(1) and (2) of the Act by terminating probationary firefighter Gill's employment.
4. The Respondent violated Section 10(a)(1) of the Act when it terminated Gill's employment.
5. The Respondent violated Section 10(a)(2) of the Act when it terminated Gill's employment.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Respondent, its officers and agents, shall:

1) Cease and desist from:
    a. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act.
    b. Making unilateral changes to employees' terms and conditions of employment during the pendency of interest arbitration proceedings.
    c. Retaliating against firefighter Robert Gill for engaging in protected concerted activity.
    d. Discriminating against firefighter Robert Gill to discourage support for the Union.
2) Take the following affirmative action necessary to effectuate the policies of the Act:
    a. Restore the status quo by offering all firefighters the PPO1 health insurance, irrespective of when they were hired.
    b. Extend firefighter Robert Gill's probationary period and make him whole for any loss of earnings he may have suffered because of his termination, including back pay plus interest at seven percent per annum.

c. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

d. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondent has taken to comply with this order.

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 seven 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 Board's General Counsel, at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email address for electronic filings, at ILRB.Filing@Illinois.gov. All filing must be served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of 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 at Chicago, Illinois this 26th day of April, 2019

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/S/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge

NOTICE TO EMPLOYEES

FROM THE
ILLINOIS LABOR RELATIONS BOARD

Case No. S-CA-18-108

The Illinois Labor Relations Board, State Panel, has found that the Village of North Riverside has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from retaliating against firefighter Robert Gill for engaging in protected concerted activity.

WE WILL cease and desist from discriminating against firefighter Robert Gill to discourage support for the Union, North Riverside Fire Fighters, Local 2714.

WE WILL cease and desist from in any like or related manner interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL cease and desist from making unilateral changes to employees' terms and conditions of employment during the pendency of interest arbitration proceedings.

WE WILL restore the status quo by offering all firefighters the PPO1 health insurance, irrespective of when they were hired.

WE WILL extend firefighter Robert Gill's probationary period and make him whole for any loss of earnings he may have suffered because of his termination, including back pay plus interest at seven percent per annum.

DATE _____ _____

Village of North Riverside
(Employer)

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor
Springfield, Illinois 62702
(217) 785-3155

160 North LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400