STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Illinois Fraternal Order of Police Labor Council,	)	
Charging Party	)	
and	)	Case No. S-CA-18-158
City of Oak Brook Terrace,	)	
Respondent	)	

ORDER

On June 20, 2019, Administrative Law Judge Sharon Purcell, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its September 10, 2019 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 10th day of September 2019.

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/s/ Helen J. Kim
Helen J. Kim
General Counsel

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Charging Party,	)	Case No. S-CA-18-158
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Administrative Law Judge's Recommended Decision and Order

On June 15, 2018, the Illinois Fraternal Order of Police Labor Council (Charging Party or Union) filed a charge with the Illinois Labor Relations Board's State Panel (Board) alleging that the City of Oak Brook Terrace (Respondent or City) engaged in unfair labor practices within the meaning of Section 10(a)(2) and (1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315, *as amended*. The charges were investigated in accordance with Section 11 of the Act and on April 25, 2019, the Board's Executive Director issued a Complaint for Hearing. On May 8, 2019, Respondent filed a motion for deferral to arbitration under the grievance and arbitration process provided in the parties' collective bargaining agreement (CBA). On May 16, 2019, Charging Party filed its response in opposition to the motion to defer.

I. The Complaint and Answer

As alleged in the complaint and in the City's response, the Union is the exclusive representative of employees of the City's Police Department (Department) in the titles of Patrol Officer and Sergeant. The Union and the City are parties to a CBA with a term of May 1, 2017, through April 30, 2020, governing the bargaining unit. Victoria Johnson has been employed by the City as a Patrol Officer and Michael Hylton has been employed by the City as a Sergeant in

the Department. Hylton also is the union steward. Police Chief Casey Calvello has been employed by the City and authorized to act on its behalf.

On approximately May 3, 2018, Calvello issued Johnson two one-day suspensions. The Union filed a grievance over each suspension. The complaint alleges that on approximately May 8, 2018, Hylton presented the grievances to Calvello who told him that if the Union pursued the grievances, Johnson could receive additional discipline. Denying the allegation, the City states that Calvello advised Hylton that if their discussion in a meeting over the grievances revealed additional misconduct by Johnson, she could receive additional discipline, as had occurred in the past. The complaint alleges that the City presented Johnson with a take it or leave it offer to reduce one of the one-day suspensions to a written reprimand while retaining the other. The City answers that at the meeting Hylton sought to reduce each suspension to a counseling and training, and Calvello responded with an offer to reduce Johnson's discipline to one counseling and a one-day suspension. It asserts that Hylton rejected the offer and proposed another discipline reduction, which Calvello rejected. The complaint alleges that Hylton stated that the Union would proceed with the grievances, and Calvello stated that the investigation also would proceed. The City answers that Calvello told Hylton and Johnson that if they did not settle the grievances, he would prepare to defend them.

In early June 2018, the City issued a five-day suspension to Johnson. The complaint alleges that the City, by its actions, discriminated or retaliated against Johnson to discourage membership in or support for the Union in violation of Section 10(a)(2) and (1) of the Act. The City asserts that it suspended Johnson for five days based on statements she made in the meeting regarding the misclassification of a criminal offense that were inconsistent with her prior statements on that matter.

II. Issues and Contentions

This case presents the issue of whether deferral of the unfair labor practice charge to the grievance arbitration process is appropriate where the resolution of the charge, which alleges that the employer retaliated against an employee for engaging in protected union activity by pursuing grievances, involves the interpretation or application of the CBA's language, and where Charging Party has invoked the CBA's grievance arbitration procedure.

The City argues that the Board should defer this case to arbitration under the *Dubo* standard for deferral because the Union grieved the five-day suspension, and the grievance has been advanced to arbitration to decide whether Johnson was suspended for just cause under Article X of the parties' CBA, governing employee discipline. The Union opposes deferral and urges that the City's motion be denied. The Union asserts that the City demonstrated extreme enmity toward the grievance process when it threatened to investigate Johnson's conduct regarding new matters if the Union proceeded with the grievances over her one-day suspensions, and then suspended Johnson for five days in retaliation for doing so. The Union contends that arbitration will not resolve the statutory issue alleged in the complaint, and that the arbitrator cannot provide the remedy available to the Board.

III. Discussion and Analysis

Deferral of this case to the grievance arbitration process is appropriate. Section 11(i) of the Act, 5 ILCS 315/11(i), gives the Board discretionary authority to defer unfair labor practice charges to the parties' grievance arbitration procedure if an unfair labor practice involves the interpretation or application of a collective bargaining agreement. The interpretation and application of collective bargaining agreements is a function particularly within the special expertise of arbitrators. *City of Mt. Vernon*, 4 PERI ¶ 2006 (IL SLRB 1988). In *City of Mt. Vernon*,

the Board adopted the deferral polices enunciated by the National Labor Relations Board decades earlier in *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), and *Collyer Insulated Wire*, 192 NLRB 837 (1971). *Spielberg* concerns deferral to an existing arbitration award. *Dubo* applies in cases where the union has voluntarily initiated a grievance. And *Collyer* applies where the union has not initiated a grievance. *City of Mt. Vernon*, 4 PERI ¶ 2006.

Dubo deferral arises when, as here, the Union has filed a grievance and a party asks the Board to hold the unfair labor practice proceeding in abeyance until the grievance arbitration process is complete. The Board may defer processing of the unfair labor practice charge if (1) the parties have already voluntarily submitted their dispute to their agreed-upon grievance arbitration procedure; (2) that procedure culminates in final and binding arbitration; and (3) there exists a reasonable chance that the arbitration process will resolve the dispute. *State of Ill., Dep't of Cent. Mgmt. Serv. (Dep't of Human Serv.)*, 19 PERI ¶ 114 (IL LRB-SP 2003); *Pace Nw. Div.*, 10 PERI ¶ 2023 (IL SLRB 1994); *City of Mt. Vernon*, 4 PERI ¶ 2006.

Here, the parties' collective bargaining agreement contains a grievance procedure that culminates in final and binding arbitration. The Union voluntarily initiated that grievance and arbitration process. And in June 2018, the Union referred the grievance over the five-day suspension to arbitration (as it also did with respect to the grievances over the one-day suspensions), although the City indicates that the parties have not yet agreed on an arbitration hearing date. Accordingly, the only remaining issue is whether there is a reasonable chance that the arbitration process will resolve the parties' dispute. In this case, there is a reasonable chance that it will do so.

The Union asserts that contract interpretation is not at the heart of this dispute, but rather whether Respondent engaged in conduct constituting coercion, intimidation, and retaliation in violation of the Act. Therefore, according to the Union, there is no reasonable chance that arbitration will resolve the issues alleged in the complaint. It asserts that deferral is not appropriate because there is evidence of Respondent hostility toward the employees' rights to participate in protected activity. In support of its position, the Union relies on NLRB decisions and policy explaining that under the *Collyer* standard deferral is inappropriate where the employer has shown such hostility, including where it has interfered with the grievance-arbitration process.

The Union's argument misses the mark. Board deferral under the *Dubo* doctrine is at issue here, not deferral under the *Collyer* doctrine, and the elements for determining the appropriateness of *Dubo* deferral are different than those that must be met under *Collyer*. *Collyer* deferral may be invoked when the Union has not yet filed a grievance and: 1) a question of contract interpretation is at the center of the dispute; 2) the dispute arises within an established collective bargaining relationship where there is no evidence of enmity by the respondent towards the employees' exercise of protected rights; and 3) the respondent has credibly asserted its willingness to arbitrate the dispute. *City of Elgin*, 30 PERI ¶ 8 (IL LRB-SP 2013). As noted above, *Dubo* deferral is appropriate when 1) the parties have already voluntarily submitted their dispute to their agreed-upon grievance arbitration procedure, (2) that procedure culminates in final and binding arbitration, and (3) there exists a reasonable chance that the arbitration process will resolve the dispute. The Union has filed a grievance over the issuance of the five-day suspension, as well as grievances over the one-day suspensions, alleging that Johnson was disciplined without just cause. Thus, *Collyer* is not the relevant standard here. And even if deferral would not be appropriate under *Collyer*, it may be appropriate under *Dubo*.

The Board has held that deferral is appropriate where unfair labor practice charges turn importantly on questions of contract interpretation even though the charges may include allegations that the respondent was motivated by discriminatory or other unlawful animus. *See Vill. of Oak Park*, 30 PERI ¶ 51 (IL LRB-SP 2013) (deferring unfair labor practice charges alleging independent violations of Section 10(a)(1) or 10(a)(2) of the Act); *City of Waukegan*, 29 PERI ¶ 128 (IL LRB-SP 2013) (deferring unfair labor practice charge alleging employee was suspended in retaliation for union activity); *PACE Nw. Div.*, 10 PERI ¶ 2023 (extending holding in C*ity of Mt. Vernon* to independent violations of Section 10(a)(1) and (2) of the Act); *City of Chi*., 10 PERI ¶ 3001 (IL LLRB 1993) (deferring to arbitration unfair labor practice charge of salary reduction in retaliation for past grievance filing where salary reduction grievance already pending). With respect to cases involving alleged independent violations of Section 10(a)(1) or 10(a)(2) of the Act, the Board has stated that "neither the policy of the Act, nor the collective bargaining process itself, is well served by allowing parties to circumvent their agreed upon dispute resolution procedure and utilize the Board's processes prior to the culmination of their agreed upon procedure." *Pace Nw. Div.*, 10 PERI ¶ 2023.

In *Pace Nw. Div.*, the Board deferred to arbitration an unfair labor practice charge that alleged an employee was discharged in violation of the Act. In doing so, the Board explained that in determining whether the employee was discharged for just cause under the terms of the parties' collective bargaining agreement, there was a reasonable chance that the arbitrator would resolve questions of credibility and of fact relating to the reasons for the discharge, which might have a bearing on the resolution of the unfair labor practice charge and whether the employee's discharge violated the Act. The Board further stated that, to avoid a conflict in the credibility and factual

determinations of the arbitrator with those of the Board in any unfair labor practice hearing, deferral was warranted.

Here, the City has not objected to arbitrating the grievance. And it is reasonably certain that the arbitrator will determine whether the discipline at issue was for just cause under the terms of the parties' CBA. In an unfair labor practice proceeding concerning allegations of retaliation against an employee for protected activity, the Board determines whether the employer had a legitimate reason for its adverse action against its employee and would have taken that action notwithstanding the charging party's protected activity. *City of Burbank v. Ill State Labor Relations Bd.*, 128 Ill. 2d 335, 345 (1989). In an arbitration proceeding addressing an employer's alleged discipline of an employee without just cause under the CBA, the arbitrator considers the employer's reason for its action against the employee to determine whether it had sufficient justification for taking such action. Therefore, it is likely that the arbitration decision will resolve questions of fact that bear on the resolution of the pending unfair labor practice charge. *Pace Nw. Div.*, 10 PERI ¶ 2023; *City of Chi.*, 3 PERI ¶ 3007 (IL LLRB 1986). Finally, the Union's argument that the arbitrator will not address the statutory rights at issue is not persuasive. In deferring a complaint to arbitration, the Board retains jurisdiction over the matter until the grievance arbitration process is complete. *Vill. of Midlothian Police Dep't*, 34 PERI ¶ 134 (IL LRB-SP 2018). Accordingly, a party may request that the Board review the arbitration award to determine whether it addresses the issues in the complaint to ensure the protection of statutory rights. *Id*. This charge meets the *Dubo* standard and may appropriately be deferred to the CBA's grievance arbitration procedure.

IV. Conclusions of Law

It is appropriate to defer this charge to the CBA's grievance arbitration procedure.

V. Recommended Order

This unfair labor practice charge is deferred to arbitration. The complaint in case no. S-CA-18-158 will be held in abeyance until the parties have completed the grievance arbitration process. Within 30 days after the termination of that process, a party may notify the Board of the termination and request that the Board review the award to determine whether there are any substantial issues left unresolved by the arbitration or to proceed with the charge on the basis that the award is contrary to the policies underlying the Act. A party's request should include a copy of the award along with a detailed statement of the facts and circumstances bearing on the party's request for review of the award. If no party makes such request within the time specified, the Board may dismiss this charge upon a party's request or on its own motion. It is also ordered that the parties inform the Board of any significant delay in the grievance arbitration process or of any resolution of the matter prior to issuance of an award.

VI. Exceptions

Pursuant to Section 1200.135 of the Board's Rules, 80 Ill. Admin. Code § 1200.135, the parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email

address for electronic filings at ILRB.Filing@Illinois.gov. All filings 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 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 20th day of June 2019

STATE OF ILLINOIS
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STATE PANEL

/s/ Sharon Purcell
Sharon Purcell
Administrative Law Judge