STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Bonnie K. Miller-Herron,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. S-CA-19-065
	)	
State of Illinois, Department of Central Management Services (Financial and Professional Regulations),	)	
	)	
Respondent.	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On May 13, 2019, Executive Director Kimberly Stevens dismissed a charge filed on December 19, 2018, by Charging Party Bonnie K. Miller-Herron. Charging Party alleges Respondent State of Illinois, Department of Central Management Services (Financial and Professional Regulation) engaged in unfair labor practices within the meaning of Sections 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2016), as amended, when it denied her request for a flexible schedule.

The Executive Director dismissed the allegations because she found the available evidence failed to indicate that Respondent took action against Charging Party because she participated in protected concerted activity. Although during the investigation Charging Party claimed she was being singled out by Kerri Doll, her supervisor's supervisor, because Charging Party is African-American, the Executive Director found Charging Party failed to provide any evidence indicating the Employer took any adverse action against her due to any activity protected by the Act and found the charge could not be processed further.

Charging Party timely appealed; the Union did not file a response. In her appeal, Charging Party challenges the Executive Director's dismissal of the allegations by now alleging that Respondent retaliated against her for filing a grievance over the denial of her request for a flexible schedule when Doll singled her out for harassment, scrutinizing her work and denying her training opportunities.

After a review of the record, the dismissal, and appeal, we affirm the dismissal for Charging Party's appeal lacks merit. Charging Party for the first time on appeal alleges that Respondent took action against her because she filed a *grievance* over the denial of her request for a flexible schedule rather than alleging the Respondent retaliated against her by denying her request as alleged in the charge. Generally, we will not consider evidence or allegations on appeal that a charging party could have presented during the initial investigation of the charge but did not do so. Am. Fed'n of State, Cnty. and Mun. Empl., Council 31 (Russel), 18 PERI ¶ 2036 (IL LRB-SP 2002). We have, however, considered evidence on appeal where an individual charging party appears *pro se* and the Board determines the investigation was insufficiently designed to elicit information from a *pro se* party relevant to the allegations. See Am. Fed'n of State, Cnty. and Mun. Empl., Council 31 (Russel), 18 PERI ¶ 2036 (Board agent made no personal contact with the *pro se* charging party to afford an opportunity to obtain sufficient facts to assess viability of unfair labor practice charge).

Here, although Charging Party appeared *pro se* during the investigation, we find the investigation sufficient and thus decline to consider the new allegation. In Am. Fed'n of State, Cnty. and Mun. Empl., Council 31 (Russel), we found the investigation flawed for there was no indication in the record of contact with the *pro se* charging party to show the investigation was designed to obtain information that would elicit information substantiating a charge from an

unsophisticated *pro se* litigant. See Am. Fed'n of State, Cnty. and Mun. Empl., Council 31 (Russel), 18 PERI ¶ 2036.

In contrast, the investigatory record in this case reveals the Board agent appropriately guided Charging Party by asking questions tailored to elicit relevant elements needed to substantiate intentional misconduct. The Board agent advised Charging Party of the need for evidence indicating Charging Party participated in concerted activity such as filing a grievance and that Respondent took action against her because of that activity. Despite this specific guidance, Charging Party responded with only a brief mention of the grievance she filed over the denial of her request for a flexible schedule but failed to allege that Respondent's alleged adverse actions were taken because of the grievance. Charging Party now in response to the dismissal order, alleges it was the filing of the grievance that precipitated Respondent's alleged adverse actions against her even though she had ample opportunity to make this allegation in response to the Board agent's request.

Even if we were to consider Charging Party's new allegation on appeal, the outcome would remain unchanged.

To establish a *prima facie* case for retaliation under Section 10(a)(1), a charging party must show that: (1) she engaged in protected activity; (2) the employer was aware of that activity; and (3) the employer took adverse action against her for engaging in that activity, *i.e.,* that her "protected conduct was a substantial or motivating factor in the adverse action." See Pace Suburban Bus Div. of Reg'l Transp. Auth. v. ILRB, 406 Ill. App. 3d 484, 494-95 (1st Dist. 2010) (quoting City of Burbank v. ISLRB, 128 Ill.2d 335, 345 (1989)). Here, the appeal, even with the new allegation, fails to point to any evidence establishing a *prima facie* case.

Although the Executive Director may not have specifically considered the filing of Charging Party's grievance as protected concerted activity, Charging Party's appeal fails to identify any evidence indicating Respondent took any adverse employment action against her because she filed the grievance. Indeed, Charging Party in her response to the Board agent's request for information, provided a copy of the resolution of the grievance she filed which was signed by the Respondent and the union, which rather than indicating the Respondent was hostile to Charging Party's grievance, suggests there was no causal connection between the grievance and Respondent's subsequent conduct. Moreover, the investigation, dismissal, and appeal, all suggest the Charging Party's claims against Respondent are based on her belief she was being singled out by Doll because of her race. As the Executive Director correctly observed in a footnote, however, the Act does not afford public employees protection against employer discrimination based on race, gender, national origin, age, religion, or disability. State of Ill., Dep't of Central Mgmt. Serv., 19 PERI ¶ 105 (IL LRB SP 2003).

Accordingly, we find Charging Party's appeal to lack merit and affirm the dismissal subject to modification regarding the elements of a retaliation claim under Section 10(a)(1) of the Act as described in the dismissal order. This modification has no bearing on the grounds for the dismissal as the appropriate analysis was applied, but the appropriate analysis should be clarified to avoid confusion. Although the analysis of Section 10(a)(1) retaliation claims closely tracks the analysis under Section 10(a)(2), the retaliation analysis under Section 10(a)(1) does not require charging parties to establish that the employer took action against the charging party to encourage or discourage union membership or support as stated in the dismissal order. See Pace Suburban Bus, 406 Ill. App. 3d at 494-95 (1st Dist. 2010). Rather, as discussed above, a charging party need only

demonstrate the employer took adverse action against her because of her participation in protected concerted activity. See id.

For the reasons set forth above, we find the Charging Party's appeal lacks merit and affirm the dismissal for the reasons stated by the Executive Director subject to the modification discussed above.

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 August 13, 2019, written decision approved at the State Panel's public meeting in Chicago and Springfield, Illinois (via videoconference) on September 10, 2019, and issued on September 12, 2019.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Bonnie K. Miller-Herron, Charging Party and State of Illinois, Department of Central Management Services (Financial and Professional Regulation), Respondent	Case No. S-CA-19-065

DISMISSAL

On December 19, 2018, Bonnie K. Miller-Herron (Charging Party) filed a charge in Case No. S-CA-19-065 with the State Panel of the Illinois Labor Relations Board (Board), in which she alleged that the Respondent, State of Illinois, Department of Central Management Services (Financial and Professional Regulation) (Respondent) engaged in unfair labor practices within the meaning of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2014), *as amended.* After an investigation conducted in accordance with Section 11 of the Act, I determined that the charge fails to raise an issue of law or fact sufficient to warrant a hearing. I hereby dismiss this charge for the following reasons.

I. INVESTIGATION

Respondent employs Charging Party in the title of Case Manager. As such, she is a member of a bargaining unit represented by the American Federation of State, County, and Municipal Employees (AFSCME), Council 31 (Union). Respondent and the Union are parties to a collective bargaining agreement (CBA) for the Unit that includes a grievance procedure culminating in final

and binding arbitration. Charging Party alleges that Respondent violated the Act when it discriminated against her due to her race by denying her request for a flexible schedule.

Charging Party was transferred into the position of Case Manager on April 16, 2018. During the interview process, Charging Party claims that her supervisor, Chicago District Manager Paul Ward (Ward), informed her that he was willing to accommodate her flexible work hours. A few days after the interview, Ward emailed Charging Party, informing her that management in Springfield indicated that, during her probationary period, her hours would be 8:00 a.m. 4:30 p.m., and, after she completed her probationary period, her hours would change to 8:00 a.m. 5:00 p.m.

On August 16, 2018, Charging Party's four-month probationary period was completed, and she was scheduled to work 8:00 a.m. 5:00 p.m. On August 16, 2018, Charging Party requested a flexible schedule with hours of 8:00 a.m. 4:30 p.m. Ward denied her request, and Charging Party believes he did so on the orders of Director Kerri Doll (Doll). On October 2, 2018, Charging Party again requested that her hours be changed to 8:00 a.m. 4:30 p.m. because she had temporary custody of her grandson and she needed to pick him up from daycare before 6:00 p.m. Charging Party's brother had previously been picking up her grandson from daycare since August 16, 2018, when her schedule changed after her probationary period, but he passed away on September 28, 2018. Ward again denied her request.

On October 23, 2018, the Union filed a grievance over the issue of Charging Party's schedule. The grievance was resolved at Step 3 of the process when the parties agreed to return Charging Party to her nine-day flex schedule that she worked before starting her position as Case Manager. Effective March 1, 2019, Charging Party began working from 7:30 a.m. to 4:30 p.m. with every other Friday off.

Charging Party alleges that Doll dislikes her and treats her differently because she is African American. Charging Party provided evidence that two other employees were allowed flexible schedules for less serious reasons, such as letting out their dogs. This information was included in the grievance. Charging Party also claims that Doll does not greet her as she does the other employees, excludes her from emails, denies her training requests, and denied her and a coworker's request that she be assigned the Information Technology (IT) supervisor position.

II. DISCUSSION AND ANALYSIS

Section 10(a)(l) of the Act provides that it shall be an unfair labor practice for an employer or its agents, to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act. To determine whether the Employer's actions in this case violate the Act, the analysis tracks that used in cases arising under Section 10(a)(2), concerning the exercise of the right to engage in union activity. Kirk and Chicago Housing Authority. 6 PERI ¶ 3013 (IL LLRB 1990). This means that the Charging Party must prove that (1) she engaged in union or other protected concerted activity; (2) the employer was aware of that activity; and (3) the employer took adverse action against her for engaging in that activity in order to encourage or discourage union membership or support. New Lenox Fire Protection District, 24 PERI ¶ 78 (IL LRB-SP 2008) (citing City of Burbank v. Illinois State Labor Relations Board. 128 Ill. 2d 335 (1989)). There must be a causal connection between the employer's adverse employment action and the protected concerted activity. See Chicago Park District, 9 PERI ¶ 3016 (IL LLRB 1993).

Discriminatory motivation may be established through direct evidence or based on circumstantial factors, including expressions of hostility towards protected activity together with knowledge of the employee's union activity; proximity in time between the employee's union activity and the employer's action; disparate treatment or a pattern of conduct which targets union

supporters for adverse employment action; or shifting or inconsistent explanations regarding the adverse employment action. City of Burbank, at 345-346; County of Menard v. Ill. State Labor Relations Bd., 202 Ill. App.3d 878, 890-891 (4th Dist. 1990).

In this case, Charging Party failed to provide evidence to suggest that Respondent retaliated against Charging Party for her participation in protected concerted activities.[1] As such, the Board is unable to process this charge any further.

III. ORDER

Accordingly, this charge is hereby dismissed. The Charging Party may appeal this dismissal to the Board any time within 10 calendar days of service of this dismissal. Such appeal must be in writing, contain the case caption and numbers and must be addressed to the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103 or filed electronically at ILRB.Filing@Illinois.gov in accordance with Section 1200.5 of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300. The appeal must contain detailed reasons in support thereof, and the Charging Party must provide it to all other persons or organizations involved in this case at the same time it is served on the Board. Please note that the Board's Rules and Regulations do not allow electronic service of the other persons or organizations involved in this case. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that the appeal has been provided to

[1] Section 10(a)(1) of the Act protects against discrimination resulting from a public employee's engagement in protected concerted activity, but it does not protect against discrimination based on an employee's race, sex, national origin, age, religion, or disability. State of Illinois, Department of Central Management Services (Department of Public Aid), 19 PERI ¶ 105 (IL LRB SP 2003); State of Illinois, Department of Central Management Services and Corrections, 8 PERI ¶ 2047 (IL SLRB 1992); City of Chicago, (Department of Police), 7 PERI ¶ 3035 (IL LLRB 1991). Such claims are more appropriately investigated by the Illinois Department of Human Rights and/or the U.S. Equal Employment Opportunity Commission (EEOC). State of Illinois, Department of Central Management Services (Department of Public Aid), 19 PERI ¶ 105 (IL LRB SP 2003). Thus, to the extent the allegation is couched in the general terms of race discrimination, the Board has no jurisdiction.

them. The appeal will not be considered without this statement. If no appeal is received within the time specified, this dismissal will be final.

Issued at Springfield, Illinois, this 13th day of May, 2019.

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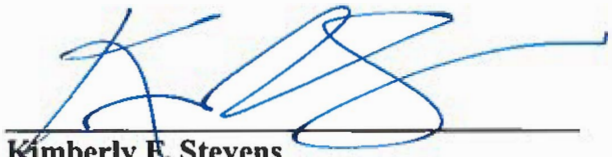

Kimberly F. Stevens
Executive Director