STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County, and Municipal Employees, Council 31,	)	
Charging Party,	)	
and	)	Case No. S-CA-19-121
County of DuPage (DuPage Care Center),	)	
Respondent.	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On October 7, 2019, Executive Director Kimberly Stevens dismissed a charge filed by Charging Party American Federation of State, County, and Municipal Employees (Union) on June 3, 2019, alleging Respondent County of DuPage (DuPage Care Center) (Employer) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2016). The charge alleges Respondent retaliated against Abderrahim Bezzaz by discharging him for serving as a Union steward and for threatening to report Nursing Supervisor Maria Bamberger to the Union regarding a dispute resulting from a voluntary overtime assignment.

The Executive Director dismissed the charge on grounds the available evidence failed to indicate Respondent discharged Bezzaz because he engaged in protected union activity. She found the Union failed to provide a nexus between Bezzaz's threat to report Bamberger to the Union and his discharge. She also found dismissal warranted because the evidence demonstrated that Bezzaz had in fact engaged in the conduct for which Respondent claimed he was discharged, and that Respondent would have discharged Bezzaz in the absence of the alleged protected activity.

Moreover, the Executive Director observed that Charging Party did not allege an independent Section 10(a)(1) claim. Nevertheless, she determined that the evidence failed to indicate a violation under either Section 10(a)(1) or 10(a)(2).

The Union timely appealed and Respondent timely responded to the appeal. After a review of the record, dismissal, appeal, and response to the appeal, we reverse the dismissal and direct the Executive Director to issue a Complaint for Hearing as further discussed below:

In its appeal, the Union asserts the Executive Director erred by improperly weighing evidence, making credibility findings, resolving issues of fact, and discounting evidence supporting allegations Respondent discharged Bezzaz for his protected union activity in violation of Section 10(a)(2). It claims the Executive Director wrongly determined that Respondent had legitimate business reasons for discharging Bezzaz and that Respondent would have discharged Bezzaz in the absence of protected union activity, rather than focusing on whether the charge raised issues of fact or law on the elements of a prima facie case under Section 10(a)(2). The Union contends that it had indeed presented such evidence during the investigation.

Respondent timely filed a response to the appeal in support of the dismissal of the charge. Citing Michaels v. Ill. Labor Relations Bd., 2012 IL App (4th) 110612, ¶¶ 44-46, Respondent argues we must apply an abuse of discretion standard in reviewing the Executive Director's dismissal, and to prevail, the Union must show that "no reasonable person could possibly take the Executive Director's view." Regarding the merits of the appeal, Respondent claims the Executive Director correctly evaluated the evidence presented to determine the Respondent's stated reasons for discharging Bezzaz were justified. In support of its claims, Respondent points to the two prior incidents involving similar conduct that lead to the written warning and reprimand mentioned in the dismissal and referenced in the Union's appeal. Respondent further claims there was a

"mountain of evidence before the Executive Director" that it would have discharged Bezzaz in the absence of protected activity and that there is no evidence to raise an issue of fact or law on any of the elements of Charging Party's prima facie case.

Respondent's claim that the court's holding in Michaels requires the Board to apply an abuse of discretion when reviewing the Executive Director's dismissal order misapplies the court's holding. See Michaels, 2012 IL App (4th) 110612 at ¶¶ 44-46. Michaels articulated the standard of review a court applies in reviewing the Board's administrative decision and does not require the Board to use that standard when reviewing the Executive Director's orders or the determinations of other Board designees. See Id. at ¶¶ 44-46.

In this case, we find the Union's appeal has merit. The Union successfully identifies issues of fact and law warranting hearing on the charge's allegations that Respondent violated Section 10(a)(2) and, derivatively, Section 10(a)(1) of the Act. We further find the charge raises issues of fact and law regarding an independent violation of Section 10(a)(1).

Section 10(a)(2) of the Act provides that an employer commits an unfair labor practice when it "discriminate[s] 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 under Section 10(a)(2) of the Act, a charging party must establish that: (1) that an employee engaged in union or protected, concerted activity, (2) the employer was aware of that activity, and (3) the employer took adverse action against the employee in whole or in part because of union animus or protected activity, with the intent to discourage or encourage union support. City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill.2d 335, 345 (1989); Sarah D. Culbertson Memorial Hosp., 21 PERI ¶ 6 (IL LRB-SP 2005); Macon Cnty. Highway Dept., 4 PERI ¶ 2018 (IL SLRB 1988); Macon Cnty. Highway Dep't., 4 PERI ¶ 2018 (IL SLRB 1988). The

charging party may demonstrate the employer's animus 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.

Once the charging party establishes a prima facie case, the employer can avoid a violation of the Act by demonstrating that it would have taken the adverse action for a legitimate business reason, notwithstanding the employer's union animus. Id. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, for 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 provides, in relevant part, "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." 5 ILCS 315/10(a)(1) (2016). Section 6 of the Act broadly states that public employees have the right to join unions, to bargain collectively and to "engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion." 5 ILCS 315/6 (2016).

Motivation of a public employer is relevant to a Section 10(a)(1) analysis where a charging party alleges the employee at issue suffered an adverse employment action. See Pace Suburban Bus Div. v. Ill Labor Rel. Bd., State Panel, 406 Ill. App. 3d 484, 494-95 (1st Dist. 2010). In such cases, the Board applies the analytical framework used for Section 10(a)(2) claims to determine whether a public employer took adverse action against an employee for an unlawful motive. Pace Suburban Bus Div., 406 Ill. App. 3d at 495. Thus, the charging party must demonstrate that (1) the employee at issue was engaged in union or protected, concerted activity; (2) the employer knew of his conduct, and (3) the employer took the adverse action against him in whole or in part because of his protected conduct. See City of Burbank,128 Ill.2d at 345. Once the union makes its prima facie case, the employer may avoid a violation if it can demonstrate its reasons for the adverse employment action were bona fide and not pretextual. See Pace Suburban Bus Div., 406 Ill. App. 3d at 500. North Shore Sanitary Dist. v. State Labor Rel. Bd., 262 Ill. App. 3d 279 (2nd Dist. 1994).

Here, the Union submitted evidence meeting the elements of a *prima facie* case sufficient to warrant issuance of a complaint for hearing alleging violations of Section 10(a)(1) independently, and violations of Section 10(a)(2), and derivatively, Section 10(a)(1).

Protected Concerted Activity/Respondent's Knowledge

The Union has presented evidence to raise issues for hearing on the first and second parts of the *prima facie* case under both Section 10(a)(1) and 10(a)(2). The available evidence indicates legal and factual disputes regarding whether Bezzaz's threat to report to the Union the overtime incident constitutes protected concerted activity and Respondent's knowledge of such activity.

An employee engages in concerted activity when he or she acts, jointly or individually, on behalf of others or invokes a right under a collective bargaining agreement, but not when the

employee acts solely on his own behalf. See Cnty. of Cook (Mgmt. Info. Serv.), 11 PERI ¶ 3012 (IL LLRB 1995). All union activity is concerted activity, but not all protected concerted activity is union activity. City of Elmhurst, 17 PERI ¶ 2040 (IL LRB-SP 2001); Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). Concerted activity is protected if it is for the purpose of collective bargaining, for other mutual aid or protection, or if it is aimed at improving wages and terms and conditions of employment. Vill. of New Athens, 29 PERI ¶ 27 (IL LRB-SP 2012); Cnty. of Cook (Mgmt Info. Serv.), 11 PERI ¶ 3012 (IL LLRB 1995). As long as the employee's conduct is lawful and not indefensible in its context, it is generally deemed to be protected. Cnty. of Cook, 27 PERI ¶ 57 (IL LRB-LP 2011).

Here, there is evidence to indicate Bezzaz participated in protected union activity. Bezzaz serves as a steward for the Union and is a member of the Union's collective bargaining committee, which is involved in on-going negotiations with the Employer for a first-time contract. Although Respondent claims the Union never advised it that Bezzaz is one of the Union's stewards, Respondent admits that it was aware Bezzaz was on the Union's bargaining team. In addition, Bezzaz's threat to report the incident to the Union can be considered protected concerted activity because he intended to seek assistance or mutual aid and protection from the Union in his dispute with Respondent resulting from his voluntary overtime assignment. See State of Ill., Dep't of Central Mgmt. Serv. (ISP), 30 PERI ¶ 70 (IL LRB-SP 2013); City of Chi. (Mulligan), 11 PERI ¶ 3008 (IL LLRB 1995); see also City of Chi., Chi. Police Dep't (Karson), 7 PERI ¶ 3035 (IL LLRB 1991). Moreover, Respondent was aware of such activity as the Union presented evidence that Respondent initially referred to Bezzaz's "threat" to report Bamburger to the Union as one of the incidents discussed in Bezzaz's investigatory meeting.

Improper Motivation/Nexus

The Union has also put forth evidence to raise issues for hearing on the third part of the prima facie case, improper motivation or causal nexus, under both Section 10(a)(1) and 10(a)(2). Motive is a question of fact. City of Burbank, 128 Ill.2d at 345. As explained above, a charging party may establish this third part through direct or circumstantial evidence. Id. at 345-46. The Union presented evidence that one of its stewards and member of its bargaining committee was discharged five months after the Union was certified as the exclusive representative. In addition, Bezzaz's threat to report his dispute over his overtime assignment occurred only several days before Respondent discharged him. The length of time alone may not be sufficient, but the relatively short amount of time involved (5 months after the Union was certified and days after Bezzaz threat to report the overtime incident) together with Bezzaz's membership on the Union's bargaining team, that at the time was engaged in on-going negotiations with the Respondent, raises issues of fact and law on not only the causal connection between Bezzaz's protected union and concerted activity and his discharge but also on whether Respondent acted with the intent to encourage or discourage support for the Union.

Respondent's claim of a "mountain of evidence" indicating that it would have discharged Bezzaz in the absence of any protected activity is unfounded. Respondent does not specifically identify such evidence and a review of the investigative file fails to support Respondent's claim. Even if there was a "mountain of evidence," such evidence would only highlight the existence of an issue of fact to be resolved at hearing, specifically whether Respondent's articulated business reason was indeed legitimate and not pretextual. See Pace Suburban Bus Div., 406 Ill. App. 3d at 500. Although the Executive Director may have found Respondent articulated legitimate reasons for the discharge and those reasons may ultimately be found to be in fact legitimate and/or

persuasive on the issue of Respondent's motivation at hearing, as the Union correctly points out in its appeal, these determinations should not be dispositive of the charge at the investigation stage.

Accordingly, we find the Union has raised issues of both fact and law as to the elements of a prima facie case on the ultimate issue of whether Respondent discharged Bezzaz because of his protected union and concerted activity in violation of Section 10(a)(1) and also of 10(a)(2) and, derivatively, Section 10(a)(1) of the Act.

For the reasons set forth above, we reverse the dismissal and remand the matter to the Executive Director with direction to issue a Complaint for Hearing consistent with this Decision and Order.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

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

/s/ Kendra Cunningham
Kendra Cunningham, Member

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

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

Decision made at the State Panel's public meeting in Chicago and Springfield, Illinois on January 9, 2020 (via videoconference), written decision approved at the State Panel's public meeting in Chicago and Springfield, Illinois (via videoconference) on February 6, 2020, and issued on February 6, 2020.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County, and Municipal Employees, Council 31, Charging Party and County of DuPage (DuPage Care Center), Respondent	Case No. S-CA-19-121

DISMISSAL

On June 3, 2019, American Federation of State, County, and Municipal Employees (AFSCME), Council 31 (Charging Party) filed a charge in Case No. S-CA-19-121 with the State Panel of the Illinois Labor Relations Board (Board), alleging that the Respondent, County of DuPage (DuPage Care Center) (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 this 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 is a public employer within the meaning of Section 3(o) of the Act. Charging Party is a labor organization within the meaning of Section 3(i) of the Act and is the exclusive representative of Respondent's permanent part-time and active registry employees including those with the job title or classification of Certified Nursing Assistant (CNA). Charging Party became

the certified representative of these employees on November 27, 2018, and the parties are currently in the process of negotiating an initial collective bargaining agreement (CBA). Charging Party alleges that Respondent violated Sections 10(a)(2) and (1) of the Act when it terminated Abderrahim Bezzaz (Bezzaz) in retaliation for Bezzaz serving as a Union steward and threatening to report to Charging Party that his supervisor instructed him to report to another floor for his overtime shift.

On April 21, 2019, Bezzaz reported to the DuPage Care Center to perform an overtime shift. When he arrived, he spoke to Nursing Supervisor Josephine Rola (Rola), who instructed him to work on the 3-Center unit. When Bezzaz arrived at 3-Center unit, he was told to call the nursing office again to confirm his assignment. This time when Bezzaz called the nursing office, Nursing Supervisor Maria Bamberger (Bamberger) instructed him to report to the 2-East unit. Bezzaz responded that he had just been told by Rola to work the 3-Center unit, and Bamberger said that Respondent could send him anywhere because he was working overtime and that if he did not want to work on 2-East he should leave. Bezzaz then asked Bamberger whether he had a choice in the matter, and Bamberger replied that it was his choice whether to leave. Bezzaz told Bamberger that he was leaving, and, subsequently, he went home.

On April 23, 2019, Bezzaz attended an investigatory meeting regarding the April 21, 2019, incident. Respondent accused Bezzaz of being insubordinate, using profanity, and abandoning his shift. Bezzaz argued that Bamberger had given him a choice to leave. Respondent also alleged that Bezzaz used profanity and made threatening statements to Bamberger, including threats to report Bamberger to the Union.

On April 25, 2019, Respondent sent a letter to Bezzaz notifying him that Respondent terminated his employment effective that day. Respondent cited Bezzaz's insubordination, usage

of loud profanity in front of residents, and abandonment of his scheduled overtime shift as reasons for his termination. Bezzaz had also been previously issued a verbal and a written warning for improper communication in the workplace.

Charging Party asserts that Bezzaz's termination for his behavior on April 21, 2019, constituted excessive discipline. In addition, Charging Party believes that he was terminated in retaliation for serving as a union steward and threatening to report Bamberger to the Union. Charging Party claims that because, during the investigatory meeting, Respondent referred to Bezzaz's comment that he was going to report Bamberger to the Union as one of the threats that Bezzaz made during the incident, Respondent was motivated to discharge Bezzaz because of his protected activity of seeking union assistance.

II. DISCUSSION AND ANALYSIS

Section 10(a)(2) of the Act provides that it shall be an unfair labor practice for an employer or its agents, 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. To determine whether the Employer's actions in this case violate the Act, the analysis used in cases arising under Section 10(a)(2), concerns 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) the employee in question engaged in union or other protected concerted activity; (2) the employer was aware of that activity; and (3) the employer took adverse action against this employee for engaging in that activity 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).

Charging Party fails to provide a nexus between Bezzaz's threat to report Bamberger to the Union and his termination. Contrary to Charging Party's claim, it has failed to establish that Bezzaz's statement that he would report Bamberger's actions to the Union was a substantial or motivating factor in Resondent's decision to terminate Bezzaz. Evidence demonstrates that Bezzaz, indeed, was insubordinate, used profane language, and abandoned his shift. Charging Party's accusation that Respondent's action in viewing Bezzaz's statement that he would report Bemaberger's actions to the Union as a threat and caused excessive discipline is unsupported, and Respondent sufficiently establishes that it would have taken the same action notwithstanding protected union activity and that the reason for taking said action was a legitimate business reason. Therefore, its actions do not violate the Act. City of Burbank, 128 Ill. 2d at 345-347. Am. Fed. of State, Cnty. and Mun. Empl. Council 31 v. Ill. State Labor Rel. Bd., 175 Ill. App. 3d 191, 198 (1st Dist. 1988).

Further, Charging Party makes a claim under 10(a)(2) of the Act and does not allege a separate claim under 10(a)(1). However, this allegation fails to raise issue for hearing under

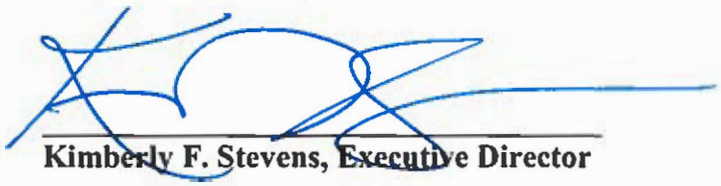
Sections 10(a)(1) and (2) of the Act because the available evidence does not indicate that Respondent took the action of discharging Bezzaz for retaliatory reasons or in an attempt to discourage union membership or support. For these reasons, Charging Party's allegations fail to raise issue for hearing, and this charge is dismissed.

III. ORDER

Accordingly, this charge is hereby dismissed in part. The Charging Party may appeal this dismissal to the Board any time within 10 calendar days of service hereof. 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 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 7th day of October, 2019.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL



Kimberly F. Stevens, Executive Director