

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

Lloyd Miller,

Charging Party

and

Mount Prospect Fire Union Local 4119, IAFF,
AFL-CIO,

Respondent

Case No. S-CB-18-001

ORDER

On November 8, 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 February 6, 2020 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the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.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 6th day of February 2020.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

/s/ Helen J. Kim

**Helen J. Kim
General Counsel**

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Administrative Law Judge’s Recommended Decision and Order

On July 3, 2017, Charging Party Lloyd Miller filed an unfair labor practice charge with the Illinois Labor Relations Board, State Panel (Board) in the above-captioned case alleging that Respondent Mount Prospect Fire Union Local 4119, IAFF, AFL-CIO (Respondent or Union or Local 4119) violated Section 10(b) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315/1 *et seq.* (2016). The charge was investigated in accordance with Section 11 of the Act and the Rules and Regulations of the Board, 80 Ill. Admin. Code §§ 1200-1300 (Rules). On September 11, 2017, the Board’s Executive Director issued a complaint for hearing.

The case was heard on March 1 and 2, and April 5, 2018, by the undersigned. Both parties appeared at the hearing and were given a full opportunity to participate. Written briefs were timely filed by both parties. Accordingly, after full consideration of the parties’ stipulations, evidence, arguments, and upon the entire record of this case, I recommend the following.

I. Preliminary Findings

The parties stipulate, and I find:

1. Respondent, Mount Prospect Fire Union, Local 4119, IAFF, AFL-CIO, is a labor organization within the meaning of Section 3(i) of the Act.

2. Local 4119 has been the exclusive representative of a bargaining unit comprised of employees of the Village of Mount Prospect (Village), including full-time Firefighters, Firefighter/Paramedics, Lieutenants, and Lieutenant/Paramedics below the rank of Battalion Chief.
3. Charging Party Lloyd Miller was a public employee within the meaning of Section 3(n) of the Act employed by the Village as a Firefighter/Paramedic and was also a member of Local 4119.
4. Matt Takoy is a public employee within the meaning of Section 3(n) of the Act employed by the Village and a member of Local 4119.
5. Takoy was elected on November 9, 2016, to serve as President of Local 4119 and begin his term in January 2017.
6. On January 17, 2017, Chief Brian Lambel and Deputy Chief John Dolan placed Miller on administrative leave pending an investigation based on a report filed by co-worker Joe Reschke relating to statements Miller allegedly made on January 13, 2017.
7. The Employer ordered Miller to participate in an independent forensic psychiatric evaluation in order to determine his fitness for duty.
8. On January 26, 2017, Miller participated in the psychiatric evaluation conducted by Dr. Carl Wahlstrom.
9. On February 20, 2017, the Employer conducted a formal interrogation of Miller, and Miller was represented by his personal attorney during this interrogation.
10. On April 13, 2017, Chief Lambel presented Miller with formal charges for termination that Chief Lambel had filed with the Village of Mount Prospect Board of Police and Fire Commissioners (Board of Commissioners).

11. On May 15 and 16, 2017, the Board of Commissioners conducted a hearing regarding the charges against Miller.
12. On June 15, 2017, the Board of Commissioners issued a decision to terminate Miller's employment.
13. On June 29, 2017, Miller filed a lawsuit seeking administrative review of the decision of the Board of Commissioners in the Circuit Court of Cook County.¹

II. Issues

The issue in this case is whether Respondent violated its duty of fair representation to the Charging Party in its handling of an allegation that Charging Party threatened to kill people if he did not make the next lieutenant promotion list. Miller alleges that the Union violated its duty under the Act when: (1) Union President Takoy was appointed to represent him and he was not given a choice of representative; (2) without informing him, Takoy rejected a settlement offer from the Village him and recommended that the Village proceed to a formal interrogation into the allegation that Miller made threats against other members of the Village's Fire Department (Department); (3) without informing him, Takoy searched Miller's Facebook page on which he found photos of Miller at a shooting range, and then provided the photos to Department Chief Lambel; (4) Takoy informed Miller that he and the Union's attorney would not represent him at the Village's formal interrogation proceeding but would attend as representatives of the bargaining unit; (5) failed to inform Miller of all of the allegations against him and of all of the evidence against him, including the photographs from his Facebook page, and instead choreographed a

¹ The state court litigation was pending at the time of this hearing. On April 19, 2019, the Illinois Appellate Court issued an unpublished decision in which it affirmed the Board of Fire and Police Commissioners decision to terminate Miller. *Miller v. Vill. of Mt. Prospect*, 2019 IL App (1st) 180772-U.

scenario that made it difficult for Miller to defend himself; (6) in the termination hearing conducted by the Village's Board of Fire and Police Commissioners, Takoy testified on behalf of the Village, stating he was representing the bargaining unit member who made the allegations against Miller and the Union would not file a grievance on Miller's behalf if he was terminated. Miller alleges that the Union, through Takoy, engaged in these acts because he is Jewish and because he opposed the changes in the promotion criteria to which the Union and the Village had agreed in January 2017.

The Union denies the allegations and contends that the evidence does not show that the Union's conduct toward Miller was invidious or that it was motivated by bias against Miller because of his religion, personal animosity, or his Union activity. It also asserts that it acted in the exercise of the broad discretion the law grants it as the exclusive representative to balance the interests of its members and act in the best interest of the bargaining unit.

III. Findings of Fact

Miller's Employment as a Village Firefighter/Paramedic

Miller began working as a firefighter/paramedic for the Village in approximately 2005. He testified that he enjoyed his job and never had any problems with other Department members. In 2015, Miller took the lieutenant promotional examination, but he failed to qualify for placement on the list of candidates for promotion to lieutenant. In the absence of a shift lieutenant, an acting lieutenant is chosen from the promotion list, and acting as lieutenant can aid a firefighter's ultimate promotion to that rank. Miller testified that he was not upset about failing to qualify because it was the first time he took the test and very few firefighters make the promotion list on a first attempt. He stated that he was determined to make the list in 2018, the next time the test would be given, and he began studying for it. He stated that he would study in the firehouse library while the other

firefighters were watching television. Others in the Department, including Chief Lambel and Firefighter/Paramedic Scott Slaasted, who was one of three bargaining unit members on the Department's merit and efficiency panel evaluating the test results in 2015, knew Miller wanted to be promoted to lieutenant and was studying to make the 2018 promotion list. Slaasted testified that sometime in January 2016, Miller approached him on the apparatus floor at the station house and told him he was going to be number one on the promotion list the next time it was given. Slaasted responded "go for it." Miller turned and walked away.

In December 2016, the Department transferred Miller from his assignment on red shift at Station 13 to working the black shift at Station 14. Firefighter/Paramedic Joe Knoll, who was also assigned to the black shift at Station 14 and was on the list for promotion after taking the 2015 promotion exam, asked him if he liked his new shift.² Miller indicated that he did not, but he did not appear to be angry about his transfer.

Miller's Bargaining Unit Participation

On November 9, 2016, and December 21, 2016, the Union held meetings of the bargaining unit members at which they elected members to the Union's executive board. Miller, Firefighter/Paramedic Joe Reschke, Firefighter/Paramedic Michael Romano, and Knoll each sought election to the position of Union Secretary and/or Union board member. Knoll was elected Union Secretary.³ Romano and Firefighter/Paramedic Joe Vena were elected to seats as Union executive board members. Firefighter/Paramedic Brad Peterson was elected as Union Vice

² Knoll was promoted to Lieutenant in November 2017.

³ Knoll became Vice President of the Union in January 2018 and, at the time of the hearing, was serving in that role.

President.⁴ And Firefighter/Paramedic Takoy, who was Union Secretary, was elected as Union President, with a two-year term beginning on January 1, 2017.

In early January 2017, the Union and the Village were completing bargaining for a side agreement concerning the Department's exam for promotion to lieutenant, under which the parties agreed to give less weight to the subjective portions of the exam and more weight to its objective portions. The Union set a bargaining unit meeting for January 11, 2017, to discuss the proposal and vote on its ratification. Some days prior to the meeting, Takoy sent the members a draft version of the proposal. Miller told Takoy that he wanted to talk to him about the proposal and, because he was busy at the time, Takoy told Miller to email or call him with his questions.

On the evening of January 10, 2017, Miller called Takoy and they reviewed the proposed changes. According to Takoy, the conversation opened calmly, but Miller became hostile in his opposition to the proposal. Miller testified that he discussed his concern that although it was a move in the right direction, the subjective portion of the exam was a popularity contest and he thought the Union could get more favorable terms. He denied that he became angry during the conversation. He stated that at the Department's Christmas party a few weeks earlier, his wife had asked Takoy's wife and Takoy to dinner, and he ended their conversation by again extending that invitation. Takoy disputed that Miller did so.

At the January 11, 2017, bargaining unit meeting, Miller stated that the proposed changes still gave the subjective portion of the exam too much weight and he thought it should be given no weight. Two other Firefighters/Paramedics expressed concerns over the agreement's proposed changes to educational credits included in the promotion process. Finally, the members voted to

⁴ Peterson was promoted to Lieutenant before the hearing in this matter commenced and, at the time of the hearing, was no longer involved with the Union.

ratify the agreement. At hearing, several witnesses described Miller's demeanor in the meeting variously as passionate, calm but frustrated, angry, and unhappy about the proposed terms.

When Slaasted heard about Miller's alleged statements about a year after Reschke reported them, he felt afraid because he had been on the evaluation committee. He stated that he knew Miller was unhappy with the changes in the promotion process and believed he made the statements.

Miller's Alleged Threat and the Union's Response

Miller was assigned to work the black shift that began two days after the meeting in which the bargaining unit members ratified the promotion side agreement. The shift began at 8:00 a.m. Friday, January 13, 2017, and ended at 8:00 a.m. on January 14, 2017. Reschke, who had worked for the Department since April 2013, also was assigned to the shift, although it was not his regular shift and station house. Reschke and Miller had worked together on the same shift at firehouse 14 until Miller was transferred in December 2016. Reschke testified that he and Miller had a good working relationship and socialized at Union events.

At approximately 8:00 a.m. on January 14 Reschke approached Firefighter/Paramedic Nick Schlenbecker to tell him of comments that Miller allegedly made to him at approximately 6:00 p.m. the prior evening. Reschke stated Miller told him that if he did not make the next lieutenant promotion list, he was going to kill some people. He said Miller stated he would line them up, so they could watch each other die. Reschke did not immediately feel threatened because he interpreted the statements as a future threat and, so far as he knew, Miller did not have guns with him. Reschke considered Miller to be a friend, and thought Miller was acting angry and that his behavior was out of character. He found Miller's comments unsettling and thought the situation was serious.

Reschke testified he told Schlenbecker because he did not know what to do and wanted the advice of a more senior firefighter. Reschke wanted him to ask Acting Lieutenant Vena if he had been in the area on the other side of the engine where he might have overheard Miller's statements. Schlenbecker also thought it was a serious situation and spoke to Vena. The next day Vena contacted Reschke, and Reschke told him of Miller's alleged statements. Like Reschke and Schlenbecker, Vena thought the situation was serious and told Reschke he would ask a lieutenant what he should do.

On Tuesday, January 17, 2017, Chief Lambel and Deputy Chief John Dolan called Reschke, and Reschke told them what he allegedly heard from Miller. Lambel told Reschke to submit to him a memorandum relating the event. Reschke called Takoy, who, like Schlenbecker and Vena, thought the situation was serious. He told Reschke that his memorandum should be truthful and complete. As ordered, Reschke provided a memorandum to Lambel, in which he recounted Miller's alleged statements. He also wrote that Miller told him he was unhappy with his new station house assignment and upset over the new promotion process. Reschke shared that he did not feel threatened at the time but felt that someone needed to reach out to Miller to learn if he was having issues at work or at home.

After speaking with Reschke, Lambel discussed the matter with Nolan and Village Human Resources Director Joan Bokina. Lambel and Dolan decided to place Miller on paid administrative leave while they investigated the alleged statements. Lambel thought Miller should have a Union representative present when he informed Miller that he was being placed on leave, and so he called Takoy and asked him to come to the station house for a meeting that afternoon.

In the meeting, Lambel informed Miller that a coworker alleged he had made threatening remarks. Miller denied making such statements and asked not to be placed on leave. Lambel

asked him if he had said something that had been misinterpreted, which Miller also denied. Lambel also inquired into whether Miller was having work or home problems and wanted to access the Employee Assistance Program or leave under the Family and Medical Leave Act. Miller wanted to know who made the allegations, but Lambel would not tell him. Lambel told him the Department would investigate the allegation, which would include sending him to a doctor for a fitness for duty examination, and that he would have an opportunity to tell his side of the story. He also instructed Miller that he was not to be at the fire station or talk about the matter to anyone except his Union representative, who he identified as Takoy. According to Miller, Lambel appointed Takoy as his Union representative. However, Lambel testified the choice of representative was between Miller and the Union. Takoy testified Miller was not “officially” given a choice of representative.

Takoy testified he did not know whether Miller or Reschke was telling the truth. Because the firefighters work and live with each other, he had difficulty believing one would make such threats against his fellow firefighters. Takoy and Miller were not assigned to the same shift, and only worked together if one of them worked a hire-back day or a shift trade. They primarily interacted at Union events, such as its Irish fest and Christmas party. However, in 2014, Miller and his wife were invited to, and attended, Takoy’s wedding.

Because he was to be out of town for a few days, Takoy told Union Vice President Peterson, who had helped negotiate the promotion side agreement, of the allegation so that Miller would continue to have a Union official available to him. Peterson was never assigned to the same shift as Miller, but he sometimes worked with him due to trade shifts or other circumstances and characterized their relationship as that of friendly coworkers. The allegation surprised him, and

he did not know who was telling the truth. At the same time, he had safety concerns and suggested changing the firehouse door security codes.

Takoy also spoke with Lambel about scheduling the fitness for duty examination, to which Miller had agreed. And Lambel told Takoy he would talk to the staff to inform them Miller had been put on leave pending an investigation, the firehouse door security codes were to be changed, and what to do if Miller was seen on firehouse property. That same day, Takoy spoke separately with Miller and with Reschke to ask how each was doing. Takoy and Miller agreed to speak every other day.

On January 20, 2017, Lambel told Takoy that the Village's attorney would begin investigating the matter and he had scheduled Miller's fitness for duty exam. Takoy let Miller know of those developments. Miller asked Takoy for a copy of the collective bargaining agreement and the Union's constitution. Following their phone conversation, Takoy emailed Miller the documents he requested, and provided Miller a web link to information explaining his Weingarten rights.

Miller testified that in their phone conversation he reminded Takoy that he was the guy who attended Star Trek and zombie conventions and was not a violent type of person. He stated that Takoy responded, "don't you think it's a little strange a guy your age being a Jew Trekkie." He testified he considered the comment very offensive, and they did not talk much after that conversation. At hearing, Miller admitted that in his unfair labor practice charge he stated that in their conversation he reminded Takoy that he was a "Jewish Trekkie with no history of violence" to which Takoy responded "it's very rare that a grown man like you would be into Star Trek at your age," and that "there was no laughter or kidding when he said it." Takoy denied calling Miller

a “Jew Trekkie” in that conversation, although he stated that he might have made such a comment at some time in the past.

Miller testified the alleged “Jew Trekkie” comment was not the first such comment Takoy had made. According to Miller, the Union is very political and wants its members to vote its way, but he explained that he thinks independently. He stated that on one occasion, he was watching news coverage of the 2014 gubernatorial race when Takoy approached him and told him that he thought all Jews vote for Democrats. Miller further testified Chief Lambel also remarked on the fact that he is Jewish. He stated he had his newborn daughter’s name tattooed on his arm in approximately 2014, and when Lambel saw it, he told him he thought Jews were not supposed to get tattoos and he might institute a rule requiring Miller to wear long sleeves to cover it. Miller asserted he thought the comment was odd. He stated the Department employed one other Jewish firefighter and he had not heard similar comments made to any of his coworkers.

Lambel testified it was commonly known throughout the Department that Miller is Jewish. Slaasted, who at the time of the hearing had been with the Department for 22 years and had worked with Miller, testified he and Miller had a good work relationship and had socialized outside of work. He explained he knew Miller was Jewish because Miller told him so, and he stated it was well-known among the firefighters that Miller was a Star Trek fan. Slaasted never heard any coworkers or superiors mock Miller for either reason. Knoll also socialized with Miller outside of work. He testified that Miller had told him that he was Jewish and a Star Trek fan. And like Slaasted, he never heard anyone, including Takoy, mock Miller. Peterson testified he learned Miller was Jewish shortly after Miller began working for the Department. He never observed animosity between Takoy and Miller and never heard anyone make disparaging remarks to Miller or about Miller’s religion.

In the days following their January 20, 2016 phone conversation, Miller and Takoy continued to communicate about such matters as whether Miller should respond to his fellow firefighters who had reached out to him, and to confirm the date of the fitness for duty examination. On January 23, 2018, Takoy advised Miller not to discuss the situation with his fellow firefighters. And he emailed Miller's coworkers, who had not been told why Miller had been placed on leave, to tell them to respect Miller's privacy and not spread rumors and speculation about him.

On January 26, 2017, Dr. Wahlstrom, a psychiatrist retained by the Department, administered Miller's fitness for duty exam. Wahlstrom's report, submitted to Lambel on February 2, 2017, concluded that Miller was fit to return to work. However, according to the report, Wahlstrom could not determine whether Miller made the threats that Reschke alleged. The report reflected that Miller owned two guns, for which he had a Firearms Owner Identification (FOID) card. And it recounts that Miller stated he kept the guns for protection, had never fired them, and offered to give them to someone for safekeeping if doing so would help get him returned to his job.

After undergoing the exam, Miller called Takoy and asked how Dr. Wahlstrom knew about the events of the January 11, 2017, bargaining unit meeting and he asked about the real purpose of the investigation. Miller also told Takoy that he did not receive his full pay in his most recent paycheck.

On January 30, 2017, Miller texted Takoy, asking to meet him. Takoy was nervous about meeting alone with Miller because he did not know whether he made the statements Reschke reported, so he asked Peterson to accompany him. Peterson was unable to do so. Takoy agreed to meet Miller at a Starbucks location because other people would be present, and he let both his wife and Peterson know when he arrived to and departed from the meeting. Takoy testified that, at their

meeting the next day, Miller told him to instruct Lambel that unless he was returned to work by February 3, 2017, he would sue the Village and contact IAFF President Pat Devaney about the matter. Miller testified he did not demand but only asked to be reinstated to his job.

Takoy met later that day with Deputy Chief Dolan and told him that Miller demanded to be reinstated by February 3, 2017. He also told him Miller had not received his full paycheck. Subsequently, Miller's paycheck was corrected.

On approximately January 31, 2017, Miller contacted Associated Firefighters of Illinois (AFFI) District 5 Vice President Art Thompson for assistance.⁵ The AFFI does not control the IAFF-affiliated locals but provides guidance, education, and resources to them. Thompson had been vice president since June 2016 and served as its president for the previous 12 to 15 years. At the time of the hearing, he had been employed for 22 years as a Firefighter/Paramedic for the Village of Barrington and, currently, was vice president of his local bargaining unit. Takoy had already sought Thompson's advice and Thompson thought it would be useful to talk to Miller to get his version of events.

In their conversation, Miller explained to Thompson the circumstances that resulted in his placement on administrative leave. He told Thompson that everyone in the Department knew him and he did not have any problems with his coworkers, and he thought he already would have been returned to work. Because of the gravity of the allegation, Thompson thought that Miller would be better represented by an attorney rather than simply by a Union representative and he advised him to retain an attorney. He also advised Miller that he should be honest in the Village's investigation because even if he was not disciplined for the alleged statements, he could be disciplined for dishonesty.

⁵ The AFFI is an affiliate of the IAFF.

Thompson subsequently spoke with Takoy. He testified that whenever he speaks with a member of a local bargaining unit, he contacts the local's president to let him know he has done so. Takoy asked him for advice on how to proceed in the circumstances, and whether it is the Union's practice to provide an attorney for a member of a local's bargaining unit. Thompson told him that it is not, but he could recommend an attorney to Miller and let him know that the local was doing everything it could to assist him. Thompson testified he did not know that Miller was Jewish, and the subject never came up.

The Union Rejects the Village's Settlement Offer

On February 2, 2017, Lambel presented Takoy and Peterson with a proposed settlement agreement. Under the agreement, Miller would return to work, but he would be required to store the two guns he owned with a third party. Additionally, Miller and the Union would agree to waive their right to file grievances or any other legal claims concerning Miller's placement on administrative leave. Lambel testified that even though he did not yet know if the allegations were true, he hoped that the settlement would close the matter. At the same time however, Lambel testified he was beginning to hear from Takoy and Peterson that some of the firefighters had safety concerns over Miller returning to work. And he had instructed his wife to double-lock the doors at home and be diligently aware of her surroundings.

Takoy and Peterson also did not know whether the allegation against Miller was true and wanted to confer with an attorney for the Union before deciding whether to accept the settlement offer. Accordingly, Takoy spoke with attorney J. Dale Berry, informing him of the allegations but not of the proposed settlement agreement. Takoy did not divulge Miller's name to Berry. In any event, Berry and Miller did not know each other, and Berry did not know that Miller was Jewish. Berry told Takoy the allegation was serious, and the Village should conduct a formal

interrogation in accordance with the Firemen's Disciplinary Act⁶ because that would be the best way to find the truth. Berry advised Takoy not to file a grievance over the matter before they knew the facts and, therefore, whether such a grievance would be meritorious.

Takoy and Peterson decided not to accept the settlement offer for several reasons. They were concerned about waiving the Union's right to pursue a grievance or other legal claims over Miller's placement on administrative leave. They also were concerned about allowing Miller to return to work at the firehouse without a full investigation into whether he made the alleged threat. Takoy also stated he only learned that Miller owned guns when he read the terms of the proposed settlement requiring him to give his guns to a third party. He testified he did not know how the requirement could be enforced or how anyone would know if Miller purchased additional guns

⁶ The Firemen's Disciplinary Act provides, in part, as follows:

(c) "Formal investigation" means the process of investigation ordered by a commanding officer during which the questioning of a fireman is intended to gather evidence of misconduct which may be the basis for filing charges seeking his or her removal, discharge, or suspension from duty in excess of 24 duty hours.

(d) "Interrogation" means the questioning of a fireman pursuant to an investigation initiated by the respective State or local governmental unit in connection with an alleged violation of such unit's rules which may be the basis for filing charges seeking his or her suspension, removal, or discharge. The term does not include questioning as part of an informal inquiry as to allegations of misconduct relating to minor infractions of agency rules which may be noted on the fireman's record but which may not in themselves result in removal, discharge or suspension in excess of 72 hours.

50 ILCS 745/2 (2016).

No fireman shall be subjected to questioning in relation to an allegation of misconduct without first being informed in writing of the allegations and whether the allegations, if proven, involve minor infractions or may result in removal, discharge, or suspension from duty in excess of 24 duty hours. If an administrative proceeding is instituted, the fireman shall be informed beforehand of the names of all complainants and all information necessary to reasonably apprise the fireman of the nature of the charges and the preparation of a defense.

50 ILCS 745/3.2 (2016).

after giving up the two he currently owned. And he explained he was concerned that the agreement would infringe on Miller's Second Amendment rights and, possibly, those of other bargaining unit members in the future.

Peterson and Takoy each testified they did not tell Miller of the settlement offer because they did not want to risk putting him back to work without a full investigation. Peterson stated he never heard Miller talk about guns, but nevertheless had safety concerns and felt threatened. He explained given events that occurred throughout the country, he thought the allegations could be true.

On about that same date, Takoy, who was a "Facebook friend" with Miller, viewed Miller's Facebook page on which he found photos of Miller holding and firing guns at a shooting range in Las Vegas. The photos were taken on one of Miller's annual trips with his wife to that city to attend the Star Trek convention. Miller testified his wife posted the photos on his page in 2010.

On February 3, 2017, an attorney for the Village individually interviewed Lambel, Dolan, Reschke, and Takoy to try to determine Reschke's credibility. The next day, Lambel told Takoy the Village's attorney considered Reschke, Takoy, Lambel, and Dolan to be credible. Lambel also thought Reschke was credible, and therefore, he did not push the Union to accept the settlement agreement. He testified he was concerned over the safety of the other firefighters and was beginning to feel that he did not want Miller in the firehouse. Lambel asked Takoy what next steps the Union recommended, and Takoy told him Berry recommended that the Village undertake a formal interrogation under the Firemen's Disciplinary Act.

That same day, Takoy asked Lambel if he had seen Miller's Facebook photos. And he told Lambel that Miller was upset about the new promotion agreement. Lambel requested copies of the photos, and on February 6, 2017, Takoy emailed them to him. Takoy also spoke to Berry about

the photos and, at Berry's request, sent them to him as well. Takoy testified he felt he had a duty to the bargaining unit and to the larger community to tell Lambel of the photos given the incidents of mass shootings throughout the country. But he did not tell Miller he sent the photos to Lambel. He testified that, in retrospect, perhaps he should have done so but, at the time, he did not think about it. He noted the photos were on Miller's online profile where anyone could view them.

As he stated he would do, Thompson contacted an attorney who represents the IAFF to ask for an attorney recommendation for Miller. The IAFF's attorney provided the name of a criminal attorney who is familiar with labor law. On February 6, 2017, Thompson emailed Miller the recommendation. Thompson did not know if the allegations were true but given the nature of the allegations he thought a criminal attorney would better protect Miller's personal rights as opposed to safeguarding only his procedural rights in the formal investigation. Miller contacted Thompson once or twice more in February and March 2017.

On February 7, 2017, at Lambel's request, Takoy asked Miller if he would agree to take a polygraph test, to which Miller initially agreed. Takoy testified he explained to Miller that he was not being ordered to take a polygraph test and it was up to him whether to do so, and he recommended that he retain an attorney rather than rely only on him for representation. According to Miller, Takoy told him the fitness for duty exam was inconclusive and he had to submit to a polygraph test, and if he did not do so, he needed to get an attorney for himself. On approximately that same date, Miller told Takoy that, relying on legal advice, he decided not to take the test. Miller testified he had done research on the internet and learned that Illinois does not require firefighters to submit to such tests. Takoy testified that, as of that time, he believed Miller had retained counsel and was no longer relying on him for representation. However, he never asked Miller if he had retained an attorney.

Takoy told Berry of Miller's decision and Berry again advised him that he should ask Lambel to order Miller to undergo a formal interrogation. Berry also suggested to Village Attorney Jill O'Brien that the Village should consider conducting a formal interrogation. Lambel testified he needed more information to determine the true circumstances and, after consulting with O'Brien, he decided to proceed with the interrogation.

The Village Conducts a Formal Interrogation

On February 10, 2017, Lambel issued a Notice of Interrogation under the Firemen's Disciplinary Act to Miller. Miller had retained attorney Daniel Herbert to represent him, rather than the attorney the AFFI had recommended. Herbert asked Lambel to reschedule the interrogation from its original date. Lambel granted the request and scheduled the hearing for February 20, 2017. The notice informed Miller the interrogation would address the statements he allegedly made on January 13, 2017, and his alleged interference with the investigation into those statements by providing false and/or misleading information and and/or altering or removing photos on social media sites. Lambel testified the allegations concerning interference with the investigation related to Miller's statements provided in Dr. Wahlstrom's report that he did not practice target shooting and was not interested in guns, and to information Lambel received that the photos of Miller with guns had been removed from Miller's Facebook page.

Berry told Takoy he would attend the interrogation as representative of the entire bargaining unit. Takoy then told Miller he and Berry would not be present at the interrogation as his representatives and asked him if he wanted separate union representation. Miller informed him he would follow his attorney's advice and did not know if he wanted a union representative.

Herbert represented Miller at the interrogation. Lambel, Dolan, Takoy, and Berry also were present. Before the interrogation began, Berry spoke with Miller and Herbert to confirm to

them he was not there to represent Miller but to represent the bargaining unit as a whole, and to witness the process to ensure the Village complied with the requirements of the Firemen's Disciplinary Act. Berry advised them that, in his experience, truthfully answering the questions asked in the interrogation could mitigate the severity of any punishment ultimately issued. He also reminded them that an interrogation is not a criminal proceeding and, therefore, Miller did not have the option of remaining silent. During the interrogation, Herbert accused the Union of acting in concert with the Village against Miller. And he claimed it was a conflict of interest for Berry to provide Miller advice because he had already stated he was representing the Department members who claimed to be "whistleblowers" against Miller. Berry responded that the Union had an interest in the matter and was present so that it could evaluate the credibility of the allegation and whether to file a grievance if the Department disciplined Miller.

The Village's Board of Police and Fire Commissioners Terminates Miller's Employment

Lambel testified he found Miller's answers to the questions the Village's attorney asked in the interrogation to be evasive, untruthful, and confusing, answering "I don't know" to even simple questions. He explained that, for example, Miller stated he was not really interested in promotion to lieutenant, did not remember when the shooting range photos were taken, whether the holes in the shooting range targets in the photos were made by bullets, whether he had made them, and the difference between a handgun and a rifle.

Based on Miller's responses, Lambel filed formal charges for termination with the Village's Board of Police and Fire Commissioners, which he served on Miller on April 13, 2017. On May 15 and 16, 2017, the Board of Commissioners conducted a hearing on the charges. Miller testified on his own behalf and was again represented by Herbert. In addition to Lambel, the Village called Takoy and Reschke to testify. Berry was present to ensure that the hearing was

conducted according to required procedures. On June 5, 2017, the Board of Commissioners issued a unanimous decision in which it found that Miller's denial of the allegation that he threatened to kill people if he did not make the next promotion list was not credible. It also found that Miller had been dishonest in the investigation, particularly in the interrogation. The Commission voted to terminate Miller's employment. Miller did not file a grievance or ask the Union to file one on his behalf, and the Union did not do so.

IV. Discussion and Analysis

It is an unfair labor practice for a Union to “restrain or coerce public employees in the exercise of the rights guaranteed in this Act[.]” 5 ILCS 315/10(b)(1) (2016). Section 10(b)(1) provides “that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act[.]” 5 ILCS 315/10(b)(1)(ii) (2016). To establish that a union has committed intentional misconduct within the meaning of Section 10(b)(1), a charging party must prove by a preponderance of the evidence that the union's conduct (1) was intentional, invidious, and directed at charging party, and (2) occurred because of and in retaliation for charging party's past activity, or because of charging party's status (such as his or her race, gender, or national origin), or animosity between charging party and the union's representatives (such as that based on personal conflict or charging party's dissident union support). *Metro. Alliance of Police v. Ill. Labor Relations Bd., Local Panel*, 345 Ill. App. 3d 579, 588 (1st Dist. 2003); *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31 (Robertson)*, 18 PERI ¶ 2014 (IL LRB-SP 2002); *see also Murry v. Am. Fed'n of State, Cnty. & Mun. Emps., Local 1111*, 305 Ill. App. 3d 627, 632-33 (1st Dist. 1999), *aff'g Am. Fed'n of State, Cnty. & Mun. Emps., Local 1111 (Murry)*, 14 PERI ¶ 3009 (IL LLRB 1998).

To prove unlawful discrimination, which is necessary to establish the second element of a Section 10(b)(1) violation, a charging party must demonstrate, by a preponderance of evidence, that:

- (1) the employee has engaged in activities tending to engender the animosity of union agents or that the employee's mere status, such as race, gender, religion or national origin, may have caused animosity; (2) the union was aware of the employee's activities and/or status; (3) there was an adverse representation action taken by the union; and (4) the union took an adverse action against the employee for discriminatory reasons, *i.e.*, because of animus towards the employee's activities or status.

Metro. Alliance of Police, 345 Ill. App. 3d at 588-89. To establish a prima facie case of a violation of Section 10(b)(1), the Charging Party must provide credible evidence that the Union's action was intentionally directed to disadvantage him.

To prove the requisite causal connection between the employee's protected activities and the adverse representation action, the charging party must submit direct or circumstantial evidence establishing the union's unlawful motive. *Id.* at 589. Such circumstantial evidence includes the timing of the union's action in relation to the employees' activities; expressions of hostility toward protected activities; disparate treatment of employees or a pattern of conduct targeting certain employees for adverse action; inconsistencies between the proffered reason for the adverse action and other actions of the union; and shifting or inconsistent explanations for the adverse representation action. *Id.*

Miller contends that the Union engaged in intentional misconduct designed to prejudice him in his defense against the allegation that he made threatening comments. He asserts that Takoy's actions, in fact, prejudiced him in the interrogation, with the consequence that he was subject to the Board of Commissioners' termination hearing and, ultimately, terminated. Miller asserts that Takoy, as the Union's representative, engaged in this conduct because Takoy harbored bias against him because of his religion and had animosity against him because he opposed and

spoke out against the changes to the promotion test that Takoy helped to negotiate. The evidence does not support Miller's contentions, and for that reason, he cannot establish that the Union violated its duty of fair representation in violation of Section 10(b)(1) of the Act.

a. The Evidence Establishes Takoy Knew that Miller Is Jewish and He Opposed the Promotion Side Agreement, and that the Union Took Adverse Representation Action Against Miller.

The following facts are not in dispute: (1) Takoy knew Miller is Jewish; (2) Takoy knew Miller opposed the lieutenant promotion side agreement the Union entered into in January 2017; (3) Takoy served as Miller's union representative during and following the meeting on January 17, 2017, in which Lamb notified Miller that he was being placed on paid administrative leave while the Department investigated Reschke's report that Miller made threatening statements; (4) without informing Miller, Takoy and Peterson did not accept the Department's settlement offer that would have returned Miller to work and Takoy asked Lambel to conduct a formal interrogation into Reschke's allegation; (5) also without telling Miller, Takoy located photos of Miller with guns on a firing range and gave copies of the photos to Chief Lambel; (6) Takoy informed Miller that the Union's attorney would be present at the interrogation on behalf of the entire bargaining unit and not as his representative; (7) and, Takoy testified in the Board of Commissioners' termination hearing as a witness for the Village.

Accordingly, the evidence shows that Miller is Jewish, and he vocally opposed the promotion side agreement, an activity that could tend to engender animosity of the Union's agents. And, Takoy knew of Miller's status as Jewish and that he opposed the agreement that the Union supported. Accordingly, Miller demonstrated that Takoy was aware of his religious status and of his past activity. Additionally, the Village offered a settlement agreement that would have placed Miller back in his job. However, after conferring with Berry, Takoy and Peterson did not accept

the agreement and, on Berry's advice, Takoy instead told Chief Lambel the Union wanted the Village to conduct a formal interrogation into whether made the threat as Reschke alleged. And Takoy gave the photos of Miller on the shooting range to Lambel. Given that the Union suggested the formal interrogation which preceded the Board of Commissioners' termination hearing, I find that Miller also established that the Union took adverse representation action against Miller. *See Am. Fed'n of State, Cnty. & Mun. Emps., Council 31 (Jones)*, 33 PERI ¶ 59 (IL LRB-SP 2016).

b. Miller Failed to Establish that Takoy's Actions Were Motivated by Bias Against Miller Based on His Religion, Animosity Against Him Because He Opposed the Promotion Side Agreement, Or Personal Animosity.

To establish a prima facie violation of Section 10(b)(1) of the Act, Miller also had to present evidence establishing that Takoy's actions were motivated by Miller's status as Jewish or animosity engendered by Miller's vocal opposition to the promotion side agreement or personal animosity toward Takoy. He did not do so.

First, to support his contention that Takoy was biased against him because he is Jewish, Miller asserted that that in their January 20, 2017, phone conversation, Takoy referred to him as a "Jew Trekkie." Takoy denied doing so, although he stated it was possible he made such a statement sometime in the past. I find his testimony on this point to be more credible than Miller's. Miller's testimony is undermined by his own unfair labor practice charge in which he wrote that in the January 20 phone conversation he referred to himself as a "Jew Trekkie." And the only other evidence that Miller presents to support his contention that Takoy was biased against him because he is Jewish is Takoy's alleged statement that he thought Jews always vote Democratic. But even assuming Takoy made such a comment, it does not necessarily evidence hostility and could easily be interpreted as innocuous small talk. Also inconsistent with his contention is the fact that Miller attended Takoy's wedding in 2014, and his testimony that, at the Department's December 2016

Christmas party, his wife invited Takoy's wife and Takoy to their home for dinner. Miller provided no reason that he and his wife would attend the wedding of a person who exhibited hostility toward him for his Jewish heritage or invite him to his home for dinner. Likewise, Miller did not provide any reason that, despite his allegation of Takoy's bias, he maintained Takoy as a "Facebook friend." Further, the other witnesses consistently testified they never heard anyone, including Takoy, make disparaging remarks to or about Miller. There was no evidence of any animosity between Miller and Takoy.

Moreover, there is no evidence of such bias against Miller by other Union officials or on a more Department-wide basis. The alleged comment by Lambel that he thought Jews could not have tattoos came from the Employer, not from the Union. If Miller is suggesting the comment evidences a hostile Department environment in which the Union was complicit, the evidence fails. This comment allegedly was made to him approximately two years prior to Reschke's allegation and the Village's investigation thereof. Otherwise, Miller identified as evidence of hostility against him only the two comments that he attributes to Takoy. Notably, he did not present any evidence or testimony that he ever alerted anyone – either his coworkers or his superiors – that he considered such remarks offensive or he believed that Takoy, or any other Department member, harassed him because he is Jewish.

To the contrary, Miller testified he did not have any problems with his fellow Department members. Consistent with his testimony, Lambel knew of no history of Miller having difficulty working with other people or of any personality conflicts between Miller and his coworkers. Likewise, the testimony of Miller's fellow firefighters indicates he and they had friendly relationships. Peterson and Slaasted each testified they knew Miller was Jewish because he told them so, and each knew he was a huge Star Trek fan. Slaasted testified that, on impulse, he bought

Star Trek figurines for Miller simply because he thought Miller would like them. Reschke had a friendly working relationship with him and hesitated to report Miller's alleged statement because he did not want to cause trouble for him. And in his memorandum to Lambel, he expressed concern that Miller might be experiencing personal troubles and needed the Department to reach out and offer him support. In sum, the overall tenor of the testimony is that Miller relished his identity in the Department as both Jewish and an enthusiastic Star Trek fan, and it suggests that his coworkers took their cues from him in their relationships with him, which were cordial and friendly.

Miller also asserts Takoy acted against him because he vocally opposed the changes to the lieutenant's promotion criteria, urging that the Union push for what he considered to be more favorable terms. But the evidence does not support Miller's contention that Takoy was hostile to him because in the January 11, 2017, bargaining unit members' meeting he spoke in opposition to the promotion criteria changes. Miller does not identify any statement Takoy made that indicates he harbored animosity toward him because he opposed the changes. Indeed, Takoy had sent the bargaining unit members a copy of the proposed agreement days prior to the meeting so they could review it and consider whether to ratify it. Takoy spoke with Miller the evening before the meeting and told him he would have the opportunity to voice his concerns at the meeting before the members would vote on its ratification. And Miller was not the lone bargaining unit member to voice concern over the proposed agreement.

Miller further asserts that while Takoy described his demeanor in the meeting as angry, others described him as direct and cordial, noting he did not use profanity, make threats or make a scene. But Takoy did not state that Miller used profanity or made threats or a scene. He stated Miller appeared to be angry and his testimony is consistent with the other witnesses who described Miller as unhappy at the ratification meeting. Indeed, Slaasted, who had considered himself a

friend of Miller's, testified Miller appeared to be angry during the meeting. He further explained that when he learned the details of the alleged threat approximately one year after Reschke reported it to the Department, he believed Miller made the threat because he remembered how angry Miller had been at the time. Accordingly, Miller's testimony is consistent with and supported by that of the other witnesses.

Moreover, Takoy's conduct in the days following the January 17, 2017, meeting at which Miller was placed on administrative leave are inconsistent with Miller's allegation that Takoy harbored animosity toward him. For instance, Takoy spoke with Miller every few days to find out if he needed anything or wanted to communicate anything to Lambel. And because he would be out of town for several days, Takoy told Peterson of the situation to ensure that Miller would have a Union representative available to him. At Miller's request, Takoy sent him copies of the CBA and the Union's constitution and bylaws, and he sent him a weblink explaining his Weingarten rights. Additionally, Takoy instructed the other firefighters to respect Miller's privacy and refrain from spreading rumors and speculation. And he met with Miller on January 30, 2017, after which he communicated to Lambel Miller's instruction that he wanted to be reinstated and the fact that Miller's paycheck was deficient. All these actions contradict Miller's assertion that Takoy harbored animosity against him.

Miller failed to present direct evidence establishing Takoy harbored bias against him because he is Jewish. And he failed to present evidence establishing Takoy harbored personal animosity against him because he vocally opposed the promotion side agreement in January 2016.

Nevertheless, Miller asserts that the Union did not present any legitimate non-discriminatory reason for Takoy's conduct and that Takoy's actions can only be attributed to religious bias and animosity against Miller. But Miller did not present sufficient circumstantial

evidence that Takoy actions were motivated by such. He states the Union's explanation that it took the actions it did because it did not know whether to believe Miller or Reschke and had safety concerns is not credible. He contends the record lacks evidence that Takoy and the other Union officials acted because the allegations created fear over what he might do. He argues this lack of evidence, coupled with the comments he alleges Takoy directed at him because he is Jewish and Takoy's exaggeration of Miller's conduct at the January 2017 bargaining unit meeting, demonstrates that Takoy acted from bias against him based on his religion and from hostility toward him because of his opposition to the promotion side agreement. But as explained, there is no convincing evidence that Takoy made disparaging statements to Miller or was hostile to him because he opposed the promotion agreement or for any other reason.

In support of his argument, Miller notes that Reschke did not feel there was an imminent threat when he reported that Miller made the statements. He also points out that the Department had been ready to put Miller back to work. And he asserts Takoy would not have met with him at Starbucks on January 30, 2017, if he genuinely viewed Miller as threatening. But Peterson, Slaasted, Romano, and Knoll each testified to being concerned, if not fearful, after learning of the allegation. And Reschke became emotional while testifying in the hearing to the extent that it was necessary to take a break in the hearing. *See* Tr. 428-29, 432, 437. Further, Lambel ordered the firehouse door security codes be changed and told his wife to be diligently aware of her surroundings. This evidence supports Takoy's testimony regarding the effect that Reschke's allegation had on him.

Miller identifies several of Takoy's actions that he argues can be attributed only to religious bias and personal animosity toward him. He claims Takoy was appointed as his representative and he was not given his choice of representative. Takoy testified Miller was not "officially" given

a choice as to his Union representative. It is unclear what he meant by “officially,” but it is reasonable to interpret it as meaning that in the January 17, 2017, meeting, no one asked Miller if he wanted Takoy or some other unit member as his Union representative. But the evidence does not indicate that the Union deprived Miller of a choice of Union representative. Rather, it suggests Miller and Takoy both understood that the Chief had instructed Miller to speak only with Takoy. Miller explained he had never needed Union representation prior to this incident, but he believed he had the right to choose his Union representative. Even if Takoy should also have understood that the Chief did not have authority to appoint Miller’s representative, there is no evidence Miller voiced any objection to Takoy as his representative. And although he believed he could do so, he never told Lambel or Takoy that he wanted someone other than Takoy to serve as his Union representative.

Miller also contends the Union engaged in intentional misconduct when Takoy did not accept the proposed settlement agreement and did not inform him of the offer. But Section 6(d) of the Act provides a union “considerable discretion in evaluating and deciding the proper course of action in carrying out its duties and responsibilities.” *Metro. Alliance of Police, Chapter 159 (McGreal)*, 30 PERI ¶ 29 (IL LRB-SP 2013); *see also Moore v. Ill. State Labor Relations Bd.*, 206 Ill. App. 3d 327, 339 (4th Dist. 1990); *ATU, Local 241 (Lawrence)*, 14 PERI ¶ 3011 (IL LLRB 1993); *Laborers’ Int’l Union North Am., Local 2 (Mazzie)*, 10 PERI ¶ 3004 (IL LLRB 1993). A union has discretion to reject a settlement offer so long as it did not act from bias or personal animosity. *Teamsters, Local 744 (Harbin)*, 5 PERI ¶ 2003 (IL SLRB 1988), *aff’d, sub nom. Harbin v. Local 744, Int’l Bhd. of Teamsters*, 198 Ill. App. 3d 788 (1st Dist. 1990). As the Board long ago explained, “a union is empowered to reject a settlement offer which it reasonably considers not to be in the best interests of the entire bargaining unit even if doing so is contrary to

the interests of an individual unit member,” and it “is not obligated to even report a settlement offer to a discharged employee.” *Id.* The Union did not have a duty to tell Miller of the offered settlement agreement and it had discretion to decide not to accept any such agreement before it had enough facts to determine whether the allegation was credible.

Miller takes issue with Takoy’s testimony that he was concerned that the settlement offer might violate Miller’s and, possibly in the future, the other bargaining unit members’ Second Amendment gun rights. He accurately states that neither Lambel nor Peterson testified that Takoy told them of such a concern and Takoy did not tell Berry of the settlement offer or that Miller passed the fitness for duty exam when he phoned him for advice later that day. But even taking this argument as a suggestion of a shifting explanation for rejecting the agreement, it fails. The evidence amply supports the Union’s claim that it did not want to settle the matter before it knew all the facts surrounding the reported incident, and that there was uncertainty about who was telling the truth and how best to handle the situation. Indeed, underlining the ambivalence which the situation engendered, it is notable that Chief Lambel offered the settlement even though he admittedly did not know who was telling the truth in the matter, had changed the firehouse door security codes, and instructed his wife to be diligently aware of her surroundings. And, ultimately, after the Village’s attorney interviewed Lambel, Dolan, Takoy, and Reschke, Lambel did not press Takoy to accept the proposed settlement and decided to conduct a formal interrogation to pin down the facts surrounding the alleged threat.

Takoy’s testimony that he did not know whether Reschke’s or Miller’s version of events on January 13, 2017, was true and he was concerned about both men is consistent with that of Peterson and Lambel. It is clear that after learning from the contents of the settlement agreement that Miller had guns, he became doubtful that Miller was being truthful, but he did not tell Miller

of his doubts. But his failure to do so does not indicate that he acted from bias or animosity against Miller. Takoy was inexperienced as Union President, having taken office as such approximately two weeks before he learned of Reschke's allegations, and having served for two years as Union Secretary. And neither the bargaining unit or the Department had dealt with a similar allegation in the past. Because he was inexperienced, Takoy sought advice on how to proceed from the more experienced Peterson, Thompson, and Berry on several occasions. The reasonable inference from the evidence is that Takoy acted from his limited experience rather than from bias or animosity toward Miller.

Miller also points out that Takoy accessed his Facebook page and gave copies of photos of Miller at a shooting range to Lambel without telling him he had done so. He contends Takoy did so to show that he was untruthful, and Takoy never told him he would use the photos in a case against him. According to Miller, Takoy wanted to use the photos to corroborate Reschke's allegation. He states there is no evidence of any clearly established motive for Takoy's actions other than that Takoy was biased against him because he is Jewish and harbored personal animosity against him because of his objection to the change in the promotion project.

It is true that Takoy searched Miller's Facebook page and provided the pictures he found on it to Lambel without telling Miller he had done so. Takoy explained he did not tell Miller of his actions because he did not think to do so, and the photos were available to anyone with access on Facebook. Regardless of the reasonableness of Takoy's conduct and his explanation for it, "a union breaches its duty of fair representation *only* if it deliberately and unjustifiably refuses to represent an employee. Thus, negligence, even gross negligence, is not sufficient to violate Section 10(b)(1) because intentional misconduct may not be inferred from negligence, whether simple or gross." *Am. Fed'n of State, Cnty. & Mun. Emps., Local 2912 (McGloin)*, 17 PERI ¶ 3001 (IL

LRB-LP 2000); *see also Amalgamated Transit Union, Local 308 (McLaurin)*, 16 PERI ¶ 3015 (IL LLRB 2000); *Am. Fed'n of State, Cnty. & Mun. Emps., Local 1111 (Murry)*, 14 PERI ¶ 3009. It is not enough to allege that the union's conduct was arbitrary or in bad faith, *see Murry*, 305 Ill. App. 3d at 632-33, or that it was inadvertently or grossly negligent, *see Jones v. Ill. Educ. Labor Relations Bd.*, 272 Ill. App. 3d 612, 627 (1st Dist. 1995).

Here, as explained, Takoy and Peterson, as well as Lambel, were considerably uncertain of the truth of the allegations and how best to proceed in the circumstances. Contrary to Miller's claim that there is no evidence of any other motivation for Takoy's action, the evidence indicates that Takoy was unsure as to his role as bargaining unit president after Lambel told him of Reschke's report that Miller said he would kill some people if he did not make the next promotion list. Takoy knew both Reschke and Miller and he had no reason to disbelieve either of them when the allegation first came to light. The most reasonable inference from the evidence is that Takoy began to believe that Reschke, not Miller, was telling the truth and in these circumstances, as an inexperienced Union official, he was in over his head. As noted above, Takoy repeatedly sought advice from Peterson, Thompson, and Berry on how best to handle the situation. Berry advised him that to enable the Union to determine whether it could present a meritorious grievance on Miller's behalf, the Union should ask the Department to do a full investigation as provided under the Firefighter's Discipline Act. Takoy did so and, having done so, he subsequently passed the Facebook photos to Lambel. There is no evidence that Peterson, who had worked with Miller, harbored bias or animosity against him. Moreover, neither Thompson nor Berry had ever met Miller and there is nothing in the record that even suggests either man provided advice for invidious reasons.

Moreover, Takoy's failure to tell Miller he asked the Department to conduct a formal investigation, and afterward found the shooting range photos on Miller's Facebook page and gave copies of them to Lambel is not so unreasonable that it compels a finding that the Union violated its statutory fair representation duty. In *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31 (Jones)*, 33 PERI ¶ 59 (IL LRB-SP 2016), the Board rejected a claim that the union there committed an unfair labor practice when a union steward submitted a memorandum to the employer in which he reported that in a meeting over an already-pending disciplinary action against Jones, whom the union was representing, Jones threatened a supervisor. Jones claimed the union steward's action ultimately led to his discharge. The Board explained that although Jones arguably established the union took adverse representation actions against him when it reported his statement and refused to advance his discharge grievance to arbitration, Jones did not show the union acted based on bias or a grudge against him or treated him in a discriminatory manner. It explained, "without some evidence that AFSCME and/or [the union steward] took action against Jones for a discriminatory reason, this aspect of the charge fails to raise a question for hearing. It is not a per se violation of the Act for a union steward to report alleged misconduct of a bargaining unit member." *Id.*

This position is consistent with caselaw under the National Labor Relations Act. Under the federal statute's less-stringent standard, a union violates its duty of fair representation when its conduct toward a member of its bargaining unit is arbitrary, discriminatory, or in bad faith. *Agric. Implement Workers of Am. v. Nat'l Labor Relations Bd.*, 844 F.3d 590, 603 (6th Cir. 2016). In *Caravan Knight*, 362 NRLB 1802 (NLRB 2015), *vacated in part, sub nom. Agric. Implement Workers*, 844 F.3d 590, the NLRB considered whether a union committed an unfair labor practice when its agent reported to the employer a bargaining unit member's threat of violence against

another even though he knew his action was likely to result in the employee's discharge. In the absence of an allegation of discrimination, the NLRB found that the union committed an unfair labor practice when the union steward reported her statement to the employer without disclosing to the employee that it had done so.

The federal court of appeals vacated the NLRB's decision. The court explained that the union's conduct did not violate its duty of fair representation because "the union had a legitimate interest in reporting such threats consistent with its duty to represent all unit members." *Id.* at 604. It held that the union's action was not arbitrary, discriminatory, or in bad faith but based on a legitimate consideration relevant to the representation of the entire bargaining unit. *Id.* at 604-05. *See also Good Samaritan Med. Ctr. v. Nat'l Labor Relations Bd.*, 858 F.3d 617, 641-42 (1st Cir. 2017) (union did not violate its duty of fair representation when it reported to management what it believed to be one employee's mistreatment of another relevant to representation of entire bargaining unit); *Pegump v. Rockwell Internat'l Corp.*, 109 F.3d 442 (8th Cir. 1997) (dismissing plaintiff's claim that union sided with employer and thereby violated duty of fair representation when union urged her to cooperate with employer's request to produce her mental health records to establish her mental competency after she allegedly threatened to shoot plant managers, which she denied, and then ceased processing her grievance after she declined to produce records).

It is not necessarily an unfair labor practice for a union representative to supply information relevant to an investigation into employee misconduct to the employer, as Takoy did here, even though that information may be disadvantageous to the bargaining unit member. As explained, Takoy and the Union representatives who he consulted were uncertain about and concerned over the allegation against Miller, and therefore Takoy asked the Village to conduct a formal investigation under the Firemen's Discipline Act. Even if his judgment with respect to his

discovery and handling of the photos was questionable, the evidence supports the conclusion that it was based on uncertainty and concern, not bias or animosity.

Miller further asserts that the Union prejudiced him when Takoy told him on February 17, 2017, that he would attend the February 20, 2017, interrogation as the representative of the entire bargaining unit rather than on only Miller's behalf, and that the Union pressured him to retain an attorney. But the evidence does not show that the Union pressured Miller in such a manner. Rather, Miller was receiving consistent advice from Takoy – who had sought Berry's advice – and from Thompson that given the nature of the allegation he should seek legal advice, and the Union tried to help him do so. On January 31, 2017, Takoy advised Miller that he should speak with an attorney. And because he thought Miller would be better served by an attorney's representation than by that of a union representative, Thompson provided him with an attorney recommendation. And on approximately February 4, 2017, on Berry's advice, Takoy told Miller that it would be a good idea for him to retain legal counsel and that typically the Union does not provide such counsel. Although Miller did not retain the attorney the Union recommended, by February 10, 2017, he had retained attorney Daniel Herbert, who represented him in the February 20, 2017, interrogation and in the discipline hearing before the Board of Commissioners. Contrary to Miller's characterization, Miller was advised to retain an attorney because Union officials thought it was in his best interest that he do so, and the Union tried to help him in that respect. The evidence does not support Miller's claim that the Union disadvantaged him by pressuring him to retain an attorney.

Moreover, even if Takoy should have explained to Miller before February 17, 2017, that he would attend the February 20 interrogation on behalf of the entire bargaining unit and not Miller, his failure to do so does not constitute an unfair labor practice. Miller had legal

representation by that time and there is no indication that Miller expected Takoy or any other Union representative or bargaining unit member to represent him in the interrogation. Miller also asserts that the Union disadvantaged him in the interrogation when it did not notify him of all the charges against him, and of the existence of the shooting range photos. But, as explained, Miller had retained an attorney prior to the interrogation and the record does not indicate that he could not identify the allegations set forth in the Village's notice of interrogation or discover any documents or other evidence that would be at issue in the interrogation.⁷ Further, even though Berry was present at the interrogation on the Union's behalf, rather than as Miller's legal representative, he advised Miller and Herbert as to what he thought Miller should do to give himself the best chance in that process to avoid or mitigate any discipline that might result.

Similarly, Miller contends that Takoy intentionally disadvantaged him when he testified on behalf of the Village in the Board of Commissioners' hearing, destroying Miller's trust in his Union representative. But nothing in the record suggests that he believed Takoy would act as his Union representative at that hearing, or that he wished him to do so. As at the interrogation, Miller was represented at the Board of Commissioners' hearing by an attorney, as the Union recommended. Even if Takoy's testimony weighed in favor of Miller's termination, Miller has not shown that Takoy was motivated to testify because he was biased or harbored animosity against Miller. Because the evidence does not show that Takoy, or any other Union representative, acted for an impermissible reason under the Act, Miller's claim fails.

Finally, Miller's contention that the Union failed to fairly represent him when Takoy testified in the Board of Commissioners' hearing that the Union would not file a grievance if the

⁷ In *Lloyd Miller*, 2019 IL App (1st) 180772, ¶ 22, the appellate court rejected Miller's contention that he did not receive personnel and medical files he needed to rebut the allegations against him in the Board of Commissioners' hearing.

Board of Commissioners terminated Takoy must be rejected. Even leaving aside that the Union has discretion to decide not to pursue a grievance, 5 ILCS 315/6(d); *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31 (Robertson)*, 18 PERI ¶ 2014, the record does not reflect that Miller made such a statement in that hearing.

Because Miller did not present evidence that the Union acted from bias based on his religion or hostility or animus against him because of his opposition to the promotion side letter, his unfair labor practice charge fails.

V. Conclusions of Law

For the reasons set forth above, Charging Party failed to prove that Respondent violated Section 10(b)(1) of the Act.

VI. Recommended Order

The complaint for hearing is dismissed.

VII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules, the parties may file exceptions to this Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommended Decision and Order. Parties may file responses to exceptions and briefs in support of the response no later than 15 days after service of the exceptions. In such responses, parties who have not previously filed exceptions may include cross-exceptions to any portion of the Recommended Decision and Order. Within 7 days of the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and responses to cross-exceptions must be filed with the Board's General Counsel, at 160 North La Salle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email for

electronic filings at ILRBFiling@Illinois.gov. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office.

All filings, including the exceptions and/or cross-exceptions, must be served on all other parties pursuant to Section 1200.20(f) of the Board's Rules.

If no exceptions are filed within the 30-day period, the parties will be deemed to have waived their exceptions, and unless the ILRB decides on its own motion to review this matter, this Recommended Decision and Order will become final and binding on the parties.

Issued at Chicago, Illinois this 8th day of November, 2019

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

/s/ Sharon Purcell

**Sharon Purcell
Administrative Law Judge**