STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Matthew Jennings Birtell, Charging Party and Northern Illinois University, Respondent	)))))))))	Case No. 2020-CA-0046-C

OPINION AND ORDER

I. Statement of the Case

On December 16, 2019, Matthew Jennings Birtell (Birtell or Charging Party) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board) against Northern Illinois University (University) alleging that the University committed unfair labor practices within the meaning of Section 14(a) of the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5/1 *et. seq*. Following an investigation, the Board's Executive Director issued a Recommended Decision and Order (EDRDO) dismissing the charge in its entirety. Birtell filed exceptions to the EDRDO. For the reasons discussed below, we affirm the EDRDO.

II. Factual Background

We adopt the facts as set forth in the underlying EDRDO. Because the EDRDO comprehensively sets forth the factual background of the case, we will not repeat the facts herein.

III. Discussion

The Executive Director dismissed the charge because Birtell failed to show any causal connection between the University's failure to pay him and his grievance filing. Birtell's

exception is that the EDRDO assumed that his reason for filing the charge was that the University acted in retaliation for union activity. He asks that his charge be reassessed in light of his real reason for filing the charge: that his supervisor told him he was salaried and had to work whatever hours were needed to get the job done and that he was instructed to report he worked 37.5 hours per week, even though he often worked more. Stated another way, he did not allege in the charge that the University wronged him by retaliating against him for his union or protected activity, but that it wronged him by telling him to underreport the amount of hours he worked and not paying him for the number of hours he actually worked. Without any connection to his union or protected activity, the misconduct alleged does not violate the Act. Whether Birtell has rights protected by a code or statute other than the Act is beyond the scope of this Board's authority to assess. *General George S. Patton School District 133*, 10 PERI 1118, Case No. 94-CA-0050-C (IELRB Opinion and Order, August 19, 1994).

IV. Order

For the reasons discussed above, IT IS HEREBY ORDERED that the Executive Director's Recommended Decision and Order is affirmed.

V. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the Appellate Court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). Petitions for review of this Order must be filed within 35 days from the date that the Order issued, which is set forth below. 115

ILCS 5/16(a). The IELRB does not have a rule requiring any motion or request for reconsideration.

Decided: **April 15, 2021**
Issued: **April 16, 2021**

/s/ Lara D. Shayne
Lara D. Shayne, Chairman

/s/ Steve Grossman
Steve Grossman, Member

/s/ Chad D. Hays
Chad D. Hays, Member

/s/ Michelle Ishmael
Michelle Ishmael, Member

STATE OF ILLINOIS
ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD

Matthew Jennings Birtell,	)	
Charging Party	)	
and	)	Case No. 2020-CA-0046-C
Northern Illinois University,	)	
Respondent	)	

EXECUTIVE DIRECTOR'S RECOMMENDED DECISION AND ORDER

I. THE UNFAIR LABOR PRACTICE CHARGE

On December 16, 2019, Charging Party, Matthew Jennings Birtell, filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) in the above-captioned case, alleging Respondent, Northern Illinois University, violated Section 14(a) of the Illinois Educational Labor Relations Act (Act), 115 ILCS 5/1, *et seq*. After an investigation conducted in accordance with Section 15 of the Act, the Executive Director issues this dismissal for the reasons set forth below.

II. INVESTIGATORY FACTS

A. Jurisdictional Facts

Northern Illinois University (University) is an educational employer within the meaning of Section 2(a) of the Act and subject to the jurisdiction of the Board. At all times material, Birtell was an educational employee within the meaning of Section 2(b) of the Act, employed by Respondent in the job title or classification of Program Assistant. American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union), is a labor organization within the meaning of Section 2(c) of the Act, and the exclusive representative within the meaning of Section 2(d) of the Act, of a bargaining unit comprised of certain of Respondent's employees, including those in the title or classification of Program Assistant. AFSCME and the University are parties to a collective bargaining agreement (CBA) which provides for a

grievance procedure culminating in arbitration, for the bargaining unit to which Birtell belongs. At all times material, Birtell was a member of AFSCME's bargaining unit.

B. Facts relevant to the unfair labor practice charge

Birtell worked for the University from on or about July 15, 2019 until the date of his resignation, November 15, 2019. As noted above, the University hired Birtell into the job title or classification of Program Assistant. Specifically, in that position, Birtell was an assistant to the University's Assistant Director of Football Operations, Dan Wolfe. According to the position job description, Birtell was responsible for "daily student athlete support, video editing production, including all related computer/server systems, social media, marketing, graphic design, and logistical organization and leadership for team/staff functions." The description also indicated the employee in the position should have the "[f]lexibility to work beyond the scope of normal university hours of 8:00 a.m. to 4:30 p.m., including evening and weekend work." It further indicated the position's work hours were Monday through Friday, 8:00 a.m.to 4:30 p.m., "nights and weekends as needed." In addition, as the program assistant, Birtell was responsible for overseeing and coordinating the schedules for a graduate assistant student helper and an "extra help" assistant.

In practice, Wolfe allowed Birtell to set his own schedule, provided the functions of the video room were covered whenever the football coaches were on the premises. According to the University, the total amount of "mandatory work" for Birtell, the graduate assistant helper, and the extra help assistant was somewhere between 46.5 and 49.5 hours per week, depending on whether the football team had a home or away game. The University asserts Birtell was to schedule himself for 37.5 hours of this work per week and schedule the graduate assistant helper, and the extra help assistant for the remainder. According to Birtell, by the end of July 2019, his hours began to steadily increase, such that during a two week pay period, he might work anywhere from 20 to 119 hours beyond those for which he was being paid. Overall,

Birtell claims the University owes him pay for 530.25 hours at the overtime rate, for a total of $16,310. On a couple of occasions early in Birtell's tenure with the University, he discussed with Wolfe his concerns regarding the amount of unpaid work he was performing. According to Birtell, Wolfe's position was he should not concern himself about the unpaid time and that he needed to do whatever was necessary to meet the needs of the coaching staff. Birtell also contends Wolfe promised he would get the entire month of January off, without loss of pay and without using benefit time, if he kept quiet about the number of hours he was actually working.

On or about October 7, 2019, Birtell discussed his concerns about the amount of unpaid/unrecorded work he was performing with the University's human resources department. Shortly thereafter, someone from the University's human resources department contacted Wolfe about Birtell's concerns, which according to Birtell, greatly upset Wolfe. From at or about that time until the end of Birtell's tenure, Wolfe set out in writing the hours Birtell was to work each day and the tasks he was to complete, so as to ensure he would not work more than 37.5 hours per week. On or about October 9, 2019, Birtell contacted the local Union president for assistance with getting paid for all the hours he had worked.

In or about mid-October 2019, AFSCME filed a grievance on behalf of Birtell, contending the University had violated the CBA in that it failed to pay Birtell for all hours worked. The grievance is currently pending at the third step of that process. Birtell voluntarily resigned his position on November 15, 2019.

III. THE PARTIES' POSITIONS

Birtell contends the University owes him pay at the overtime rate for hundreds of hours of uncompensated work, and further contends that to allow the University to engage in this type of behavior is unfair and unjust. The University denies the complained-of conduct violated the Act, and further denies Birtell is entitled to the overtime pay he seeks, as he set his own schedule and did not, as required by the

CBA, receive advanced, written permission from his supervisor to work such overtime, so as to be eligible for payment.

IV. DISCUSSION AND ANALYSIS

Under Section 3 of the Act, educational employees are guaranteed the right of self-organization, the right to form, join or assist any labor organization, and the right to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment. Section 14(a)(1) of the Act makes it an unfair labor practice for an employer or its agents to interfere with, restrain or coerce educational employees in the exercise of their Section 3 rights.

In order for the Board to issue a complaint for hearing on allegations of a violation of Section 14(a)(1), the charging party, Birtell in this case, must at least be able to make some showing he engaged in protected activity, Respondent knew of that activity, and Respondent took adverse action against him as a result of his involvement in that activity. Neponset Community Unit School District No. 307, 13 PERI ¶1089, 1997 WL 34820232 (IELRB 1997). Birtell made a sufficient showing he engaged in protected activity. At his behest, in or about mid-October 2019, the Union filed a grievance on his behalf, regarding his overtime claim. Likewise, the University clearly knew Birtell engaged in protected activity, as it had to respond to the grievance. The adverse action element is satisfied by the University's refusal to compensate Birtell for the additional pay he claims he is due. Birtell's claim nonetheless fails, as the investigatory facts do not indicate that the complained-of act was committed against him because of, or in retaliation for, the exercise of rights protected under the Act. Consequently, he cannot make any showing as to the causation element.

As the Illinois Supreme Court noted in City of Burbank, the existence of a causal link herein indicating the complained-of act was committed against Birtell because of, or in retaliation for, the exercise of rights protected under the Act, is a fact based inquiry and may be inferred from various factors, including:

an employer's expressed hostility towards unionization or grievance filing, together with knowledge of the employee's protected activities; proximity in time between the employee's protected activities and the disciplinary action; inconsistencies between the proffered reason for discipline and other actions of the employer; shifting explanations for the discipline or discharge of the employee; and disparate treatment of employees or a pattern of conduct which targets union supporters for adverse employment action. City of Burbank v. ISLRB, 128 Ill. 2d 335, 538 N.E.2d 1146, 5 PERI ¶4013 (1989)(citations omitted). The evidence in this matter, however, does not reveal a causal connection between Birtell's protected activity and the adverse action.

Birtell contacted the local Union president on or about October 9, 2019, and in or about mid-October 2019, AFSCME filed the grievance on his behalf. By that time, Birtell had worked most of the additional hours for which he now seeks to be paid and had several discussions with Wolfe who had made it plain Birtell was not going to be paid for all the hours he worked. In other words, Birtell's protected activity, filing a grievance, occurred later in time than the claimed adverse action including the refusal by Wolfe and the University to pay him for all hours worked, and thus, the filing of the grievance, which constitutes concerted protected activity, could not have been the cause of the refusal to pay Birtell for all hours worked.

Likewise, there is no evidence of hostility by the University toward grievance filing or unionization in general, nor inconsistencies between its proffered reasons for refusing to pay Birtell for all hours worked and its other actions. There is no allegation or evidence of shifting explanations by the University for its conduct in connection with Birtell. With regard to the disparate treatment factor, the relevant inquiry is whether the University treated employees similarly situated to Birtell, in a manner better than he was treated, and herein, there is no evidence this occurred. Moreover, according to Birtell, the Union has found several other situations in University sports where program assistants or employees in similar titles are

strongly encouraged to work hours beyond that for which they are paid. Simply put, there is no evidence the University's refusal to pay Birtell for all hours worked was in retaliation for the protected activity he engaged in. Without some showing Birtell's protected activity caused Respondent to take the complained-of action, his claim fails to raise an issue of law or fact sufficient to warrant a hearing.

V. ORDER

Accordingly, the instant charge is hereby dismissed in its entirety.

VI. RIGHT TO EXCEPTIONS

In accordance with Section 1120.30(c) of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code §§1100-1135, parties may file written exceptions to this Recommended Decision and Order together with briefs in support of those exceptions, not later than 14 days after service hereof. Parties may file responses to exceptions and briefs in support of the responses not later than 14 days after service of the exceptions. Exceptions and responses must be filed, if at all, with the Board's General Counsel, 160 North LaSalle Street, Suite N-400, Chicago, Illinois 60601-3103. At this time, the parties are highly encouraged to direct said exceptions and responses, if any, to the general email account at ELRB.mail@illinois.gov. Pursuant to Section 1100.20(e) of the Rules, the exceptions sent to the Board must contain a certificate of service, that is, **"a written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service."** If any party fails to send a copy of its exceptions to the other party or parties to the case, or fails to include a certificate of service, that party's appeal will not be considered, and that party's appeal rights with the Board will immediately end. See Sections 1100.20 and 1120.30(c) of the Rules, concerning service of exceptions. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions, and unless the Board decides on its own motion to review this matter, this Recommended Decision and Order will become final and binding on the parties.

Issued in Chicago, Illinois, this 1st day of September, 2020.

STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Victor E. Blackwell
Executive Director

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