

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

Pamela Mercer,)	
)	
Charging Party)	
)	
and)	Case Nos. L-CA-13-009
)	L-CA-13-063
County of Cook and)	
Sheriff of Cook County,)	
)	
Respondent)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

On December 18, 2014, Administrative Law Judge Anna Hamburg-Gal issued a Recommended Decision and Order, recommending that the Illinois Labor Relations Board, Local Panel, dismiss the complaints issued in the above-captioned consolidated cases. Charging Party Pamela Mercer alleged that Respondent County of Cook and Sheriff of Cook County violated Section 10(a)(3) and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012)¹ when it retaliated against her for having engaged in activities protected under the Act, specifically her filing of charges with this Board and with other agencies.

Charging Party filed timely exceptions to the Administrative Law Judge's Recommended Decision and Order pursuant to Section 1200.135 of the Illinois Labor Relations Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. Respondent timely filed a response. After reviewing the exceptions, the response, and the record, we adopt the

¹ The 10(a)(1) charge was derivative of the 10(a)(3) charge. Section 10(a)(3) makes it an unfair labor practice for an employer or its agents:

(3) to discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition or charge or provided any information or testimony under this Act[.]

Administrative Law Judge's recommended decision and order and dismiss the complaints for the reasons articulated in that document.

BY THE ILLINOIS LABOR RELATIONS BOARD, LOCAL PANEL

/s/ Robert M. Gierut
Robert M. Gierut, Chairman

/s/ Charles E. Anderson
Charles E. Anderson, Member

/s/ Richard A. Lewis
Richard A. Lewis, Member

Decision made at the Local Panel's public meeting held in Chicago, Illinois on March 10, 2015; written decision issued in Chicago, Illinois on March 31, 2015.

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

Pamela Mercer,)	
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Charging Party)	
)	Case Nos. L-CA-13-009
and)	L-CA-13-063
)	
County of Cook and Sheriff of)	
Cook County,)	
)	
Respondents)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On July 29, 2012, Pamela Mercer (Mercer or Charging Party) filed charge L-CA-13-009 with the Illinois Labor Relations Board’s Local Panel (Board), alleging that the County of Cook and Sheriff of Cook County (Respondents) engaged in unfair labor practices within the meaning of Sections 10(a)(3) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2012). The charge was investigated in accordance with Section 11 of the Act and on May 13, 2013, the Board’s Executive Director issued a Complaint for Hearing. On May 18, 2013, Mercer filed charge L-CA-13-063, which similarly alleged that the Respondents violated Sections 10(a)(3) and (1) of the Act. The second charge was investigated in accordance with Section 11 of the Act and on June 24, 2014, the Board’s Executive Director issued another Complaint for Hearing. I consolidated the two cases. A hearing was conducted on September 18 & 19, 2014 in Chicago, Illinois, at which time Mercer presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. After full consideration of the parties’ stipulations, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate and I find that:

1. County of Cook is a public employer within the meaning of Section 3(o) of the Act.

2. County of Cook is a unit of local government subject to the jurisdiction of the Board's Local Panel pursuant to Section 5(b) of the Act.
3. County of Cook is a unit of local government subject to the Act pursuant to Section 20(b) of the Act.
4. At all times material, Mercer was a public employee within the meaning of Section 3(n) of the Act.
5. At all times material, the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME) has been a labor organization within the meaning of Section 3(i) of the Act.

II. ISSUES AND CONTENTIONS

The issue is whether the Respondents violated Sections 10(a)(3) and (1) of the Act when they allegedly assigned Mercer to perform four consecutive "lunch reliefs," denied Mercer's request for premium pay for that assignment, and issued Mercer a 10-day suspension in retaliation for filing charges before the Board.

Mercer argues that the Respondents knew of her charges before the Board when they took these alleged adverse actions and asserts that documentary evidence supports her contention. To that end, she contends that testimony to the contrary from Commander Edward Byrne and Lieutenant Jerry Camel should not be credited.

Further, Mercer asserts that she demonstrated that the Respondents acted out of animus towards her protected activity. With respect to the assignment, Mercer contends that no other sergeant had ever been required to perform four consecutive lunch reliefs.¹ With respect to the suspension, Mercer contends that the Respondents' basis for the adverse action was pretextual. Although the Respondents suspended Mercer for failing to discipline her subordinate, Mercer claims that she never personally witnessed the subordinate's misconduct. Further, Mercer claims that she could not reasonably discipline her subordinate for failing to perform his duties when he was not sufficiently apprised of his obligations. Finally, Mercer asserts that the Respondents also harbored animus against her because of a lawsuit she filed against them in Federal Court and

¹ Mercer makes no specific arguments concerning the Respondents' denial of her request for premium pay.

because of charges she filed with the Illinois Department of Human Rights (IDHR) and the Equal Employment Opportunity Commission (EEOC).

The Respondents counter that none of the cited employment actions constitute adverse employment actions. They assert that Mercer's assignment was not considerably different from her ordinary duties. Further, they claim that Mercer was not entitled to premium pay and never served the suspension. The Respondents also argue that Mercer failed to prove a causal nexus between her protected activity and the alleged adverse actions. They assert that the decision makers did not know of Mercer's protected activity when they took the cited employment actions. In the alternative, the Respondents assert that they legitimately denied Mercer premium pay because she was not entitled to it under the contract and was not in fact working a "lunch relief." Likewise, they assert that they legitimately imposed the suspension because Mercer reported her subordinate's misconduct as fact and failed to issue discipline. Mercer simply reported misconduct up the chain of command, a practice the Respondents repeatedly warned her against.

III. FINDINGS OF FACT

Pamela Mercer is a sergeant in the Cook County Sheriff's Department in the Pre-Release Center. In that capacity, she supervises correctional officers and oversees inmates at the Cook County Jail on the 11 pm to 7 am shift. The American Federation of State, County and Municipal Employees, Council 31 (AFSCME) represents the sergeants. The International Brotherhood of Teamsters, Local 700 (IBT) represents the correctional officers. At all times material, Commander Edward Byrne oversaw the Pre-Release Center, Lieutenant Guy Paleologos was Mercer's immediate supervisor, and Lieutenant Jerry Camel worked on the 11 pm to 7 am shift.

Sometime prior to 2009, Mercer filed charges against the Cook County Sheriff with the United States Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights (IDHR). In 2009, Mercer filed a lawsuit against the Cook County Sheriff. In 2011 or 2012, Mercer filed charges in Federal Court against Lieutenant Jerry Camel for alleged discrimination and harassment.

On August 15, 2011, Mercer filed an unfair labor practice charge with the Board in Case No. L-CA-12-010 alleging that the Respondents issued her a verbal reprimand allegedly in

retaliation for her protected activity.²

On July 1, 2012, the Pre-Release Center was operating with its minimum number of staff. Sergeants are required to work on posts when there is a staffing need, as there was on that day. At around 11 pm, Camel ordered Mercer to stay at Post 1 for four hours³ so that the correctional officer who customarily worked there could perform “lunch reliefs.” Post 1 is less than 20 feet from the location at which Mercer would ordinarily have sat had she not been assigned to Post 1. Post 1 has a computer and Mercer would have been able to perform any duties required of her position at that location. Mercer had free access to the restroom during this assignment.

At around 2:15 am, Camel called Mercer and asked her if she wished to take a lunch break. Mercer declined. Camel later asked Mercer if she wished to fill out a late lunch form, which would allow her to leave work an hour early. Mercer declined, stating “I don’t want to owe the County nothing.” Camel told Mercer that she was entitled to it, but Mercer again refused to take it.⁴

At the end of the day, Mercer submitted a request to then-Acting Director Byrne for one hour of premium/overtime pay for work on Post 1. Mercer characterized the work as a “lunch relief.” An officer performs a lunch relief when he oversees detainees in lieu of another officer, to permit that officer to take a lunch break. Mercer did not perform a lunch relief because she did not oversee detainees while assigned to Post 1. Mercer admitted that she merely facilitated another officer’s performance of a lunch relief.

The AFSCME collective bargaining agreement provides that, “in the event an employee is ordered not to take all or any part of his lunch break, he shall be compensated at the overtime rate of time and one-half (1 1/2) for such work.” Respondents’ witnesses testified that as of July 2012, sergeants and lieutenants were not eligible to earn premium pay for performing lunch

² I take administrative notice of this fact. Mercer produced no evidence at hearing concerning this charge or its contents.

³ Camel claims it was only a three-hour assignment. The documentary evidence supports Mercer’s assertion.

⁴ Mercer sent an interoffice memo to AFSCME on July 1, 2012 stating that, “a supervisor has to do a minimum of 3 lunch reliefs in order to be allowed a premium for lunch.” No foundation was laid for this statement and Mercer did not recount the statement in her testimony. Accordingly, it is not used here for the truth of the matter asserted.

reliefs.⁵ The Respondents denied Mercer's request for premium pay.

That same day, Mercer sent a memo to the AFSCME Union President and the Chief Steward, recounting her request for premium pay. In that memo, Mercer references pending "charges" against Lieutenant Camel, but does not specify where she filed those charges. Mercer carbon copied Byrne on the memo.

On July 3, 2012, Mercer filed a grievance alleging that Camel subjected her to extreme work place abuse by assigning her to perform four consecutive "lunch relief[s]." The grievance mentioned that she had "pending legal issues and charges at OPR, IDHR[,] and ULP's [sic]," but did not expressly relate the grieved conduct to those charges. Mercer did not testify as to whom she submitted the grievance. The grievance form states that it is a second step grievance and that it was submitted to the Assistant Executive Director or his Designee. Mercer testified that she believed Camel retaliated against her because she filed charges against him before the IDHR and the EEOC.

Under the AFSCME collective bargaining agreement, the first step grievance must be submitted to the Superintendent or his designee. Mercer's grievance over the purported lunch relief assignment does not indicate which of the Respondents' agents received Mercer's grievance.

Around September 4, 2012, Mercer filed a complaint with the Cook County Office of Professional Review (OPR) alleging that Camel engaged in abusive behavior by assigning her to four consecutive "lunch relief[s]."

On July 29, 2012, Mercer filed a charge with the Board in Case No. L-CA-13-009 alleging that the Respondents violated Sections 10(a)(3) and (1) of the Act when they assigned Mercer to four consecutive lunch reliefs and denied Mercer premium pay for that work.

On March 8, 2013, Mercer wrote an email to Lieutenant Paleologos and carbon copied Byrne. Mercer testified that the purpose of the letter was to advise her superiors of the confusion caused by the purported absence of well-displayed post orders. Correctional officers consult post orders to determine the duties they must perform on their shift. Mercer testified that the post orders were not adequately displayed and that her subordinates repeatedly asked her for them. Correctional Officer Vito Zaccaro likewise testified that he had not seen post orders displayed for

⁵ In a July 1, 2012 memo to AFSCME, Mercer mentions a memo issued by Byrne on June 11, 2012 pertaining to lunch reliefs. That memo was not introduced into evidence and there is no indication as to its contents.

a long time. Paleologos testified that in 2013 the Respondents displayed post orders on the bulletin board in the reception area and that they were available to all officers working on the floor. Byrne testified that there was also a full set of post orders in the sergeants' office in Building 4.

Mercer's letter stated that a correctional officer informed her that another officer, assigned to the lobby, was not scanning and searching entrants to the building as required. Mercer explained that some correctional officers had taken the position that officers assigned to the lobby were not required to perform searches. According to Mercer, they based their position on a note posted to the door of Building 4, which stated that entrants would be searched and identified by officers at Post 1. Mercer observed that the identified note did not "preclude the officer assigned [to the lobby] from doing the job."

Mercer continued by recounting her interaction with the allegedly derelict officer who she found in the break room. When she communicated her directives to him, he became disgruntled and stated, "why in the F**K do I have to go to the lobby." Mercer complained that, "we say that the disrespect will not be tolerated but it continues." Mercer further noted that officers "need to know that '...why the F...' is not an acceptable response to a simple directive."

Mercer concluded by asking her superiors to clarify the written directive for the lobby assignment, but noted that "even while there are challenges about post orders[,] the veteran officers know what the assignment is and the officer assigned was specifically directed to scan."

Following these described events, Mercer gave the officer in question a verbal warning, but did not take disciplinary action against him. Mercer claimed there was no basis on which to impose discipline because she did not observe the officer violating the rules and instead received information of his alleged infraction second-hand. Mercer asserted that she is not required to issue discipline against officers based on the say-so of another officer and that, in any event, discipline is not always warranted for a rules infraction.⁶ She further stated that when she confronted the officer about the allegation, he claimed that he had in fact searched the entrants. On cross examination, Mercer conceded that the officer in question had not in fact performed the searches. She explained that the reason he had not performed the searches was because he

⁶ Mercer additionally claims that it is a violation of the officers' collective bargaining agreement to issue them discipline if they are unaware that they have done something wrong.

claimed he was not required to perform them in the absence of a post order, directing him to do so.

Paleologos stated that an officer commits a “Major Cause” infraction when he swears to a sergeant and refuses to search individuals entering the jail. He unequivocally testified that the conduct Mercer described in the email warranted issuance of a disciplinary action form rather than simply a non-disciplinary verbal warning.

On March 8, 2013, Byrne wrote an email to Paleologos stating the following:

Please investigate the attached email cc from Sgt. Mercer. Sgt. Mercer should have disciplined this unnamed officer who was her responsibility. Additionally[,] if Sgt. Mercer witnesses this officer violate any rules or regulations again she should have disciplined the officer. If in your investigation you find that the officer was not disciplined by Sgt. Mercer[,] you are instructed to discipline her for failing to act as a supervisor while witnessing departmental rule violations. Sgt. Mercer can not [sic] sidestep her responsibilities by sending you an email or memo describing the violations without initiating disciplinary action.

Paleologos spoke to Mercer in his office during his investigation of the matter. Mercer told him that another subordinate informed her of the officer’s failure to search and that she did not herself observe it. During the investigation, Paleologos discovered that Mercer had not disciplined the officer.

On March 18, 2013, Paleologos issued Mercer a disciplinary action form that stated that Mercer would be suspended for 10 days without pay. The form identified the nature of the misconduct as a “Major Cause” infraction and stated that Mercer had engaged in “Major Acts of Insubordination.” A sergeant commits a Major Cause infraction if she fails to perform her duties as a supervisor. The disciplinary action form stated the following:

Sgt. Mercer should have disciplined this officer who was her responsibility, especially after Sgt. Mercer witnessed this officer violate rules or regulations. Sgt. Mercer has been repeatedly warned that she cannot sidestep her responsibility as a front line supervisor by sending [a lieutenant] a[n] email or memo describing the violation without initiating disciplinary action. Sgt. Mercer has been warned in the past a number of times in writing as to her supervisory duties on initiating disciplinary procedures against rule violations. You have not initiated any disciplinary action on the attached violation and have once again expected this [lieutenant] to take on your responsibilities, therefore you are being charged.”

The Respondents attached Mercer’s March 8, 2013 email to Byrne in support of the discipline.

Paleologos testified that he had warned Mercer more than once that she was to discipline officers if she observed a rule violation. Byrne likewise testified that he had warned Mercer at least four times in the past that she was required to initiate progressive discipline instead of simply writing memoranda to her superiors outlining a subordinates' misconduct. The Respondents submitted a second step grievance response and a memo to Mercer from Byrne, both from 2011, which documented some of these warnings.

Mercer testified that when Paleologos handed the disciplinary form to Mercer, he stated that Byrnes told him to "write [her] up." Paleologos testified that it was his decision to issue Mercer the discipline, though he discussed his findings with Byrne.

On direct examination, Mercer testified that she believed that Byrne instructed Paleologos to issue her discipline in retaliation for complaints she filed against him with the Office of Professional Review (OPR) and the lawsuit she filed against the Respondents in Federal Court, in which Byrne was involved. She further stated that she believed Byrne retaliated against her because of unfair labor practice charges she filed against him before the Board. On cross examination, Mercer testified that she believed the Respondents issued her a 10-day suspension in retaliation for filing a charge before the IDHR.

On April 17, 2013, Mercer grieved the Respondents' alleged failure to adequately display post orders. On April 26, 2013, the grievance was heard and denied at the first step.

On May 22, 2013, Mercer wrote a letter to Union agent John DiNicola concerning her 10-day suspension. Mercer stated that the suspension and prior discipline she had received were "in line with the pending IDHR complaints and the matter at the Court of Appeals." The letter does not mention the unfair labor practice charges Mercer filed with the Board.

Camel and Byrne both testified that they were unaware, prior to 2014, that Mercer had filed any unfair labor practice charges against the Respondents. Paleologos similarly testified that no one ever told him that Mercer had filed an unfair labor practice charge against the Respondents. Mercer asserted that she sent the Sheriff's Department a copy of "the charge"⁷ when she filed it. However, she did not address the charge to Byrne, Paleologos, or Camel.

IV. DISCUSSION AND ANALYSIS

The Respondents did not retaliate against Mercer in violation of Sections 10(a)(3) and (1)

⁷ It is unclear to which charge Mercer referred.

of the Act when they assigned Mercer to Post 1 for four hours, denied Mercer's request for premium pay, and issued Mercer a 10-day suspension.

Section 10(a)(3) provides that "it shall be an unfair labor practice for an employer or its agents to discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition or charge, or provided any information or testimony under this Act." 5 ILCS 315 (2012). The same analysis applied to a Section 10(a)(2) allegation applies to a Section 10(a)(3) allegation, except that the Charging Party must demonstrate that she engaged in the particular protected activity described in Section 10(a)(3) of the Act. Vill. of Ford Heights, 26 PERI ¶ 145 (IL LRB-SP 2010) (citing City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989) and applying the court's 10(a)(2) analysis to 10(a)(3)); Sheriff of Jackson Cnty., 14 PERI ¶ 2009 (IL SLRB 1998); Cook Cnty. Sheriff and Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB 1990).

To establish a prima facie case that the employer violated Section 10(a)(2) of the Act, the charging party must prove by a preponderance of the evidence that: 1) the employee engaged in union 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 that it was motivated by the employee's protected activity. City of Burbank, 128 Ill. 2d at 345. 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. Id.

Once the charging party establishes a prima facie case, the employer can avoid a finding that it violated 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, as 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.

1. Four Hour Assignment to Post 1

Mercer failed to demonstrate that the Respondents retaliated against her in violation of the Act when they assigned her to Post 1 for four hours because she has not shown that the assignment constituted an adverse action. Even assuming, *arguendo*, that the assignment was an adverse action, Mercer has failed to demonstrate a causal connection between that action and her protected activity.

Mercer engaged in protected activity when she filed charges with the Board on August 15, 2011 and on July 29, 2012.

Further, the Respondents' decision maker, Camel, indisputably knew of Mercer's protected activity, albeit in 2014, years after he initiated the alleged adverse action in question.

However, Mercer's assignment to Post 1 is not an adverse employment action. An action does not need to have an adverse tangible result or adverse financial consequences to constitute adverse employment action sufficient to satisfy the third prong of the 10(a)(2)-type analysis. City of Chicago v. Illinois Local Labor Rel. Bd., 182 Ill. App. 3d 588, 594-95 (1st Dist. 1988); Chicago Transit Auth., 30 PERI ¶ 9 (IL LRB-SP 2013); City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012); Circuit Court of Winnebago, 17 PERI ¶ 2038 (IL LRB-SP 2001) (absence of negative financial consequences resulting from charging party's transfer did not defeat her Section 10(a)(2) claim). Nevertheless, while the definition of an adverse employment action is generous, the Charging Party must show either some qualitative change in terms or conditions of employment or some sort of real harm. City of Lake Forest, 29 PERI ¶ 52; Dep'ts of Cent. Mgmt. Serv. and Agriculture, 6 PERI ¶ 2012 (IL SLRB 1990) (refusal to recall employee constitutes an adverse action).

Here, the Respondents merely required Mercer to work 20 feet away from where she ordinarily would have worked. At Post 1, Mercer had access to a restroom and a computer. Further, she was able to perform all the duties she would have otherwise performed at her customary work location, just feet away. Notably, Mercer has not explained how the length of her assignment at the Post 1 affects this analysis, where her terms and conditions of employment remained substantially the same. Thus, although Mercer clearly preferred not to work at Post 1,

Mercer failed to demonstrate that she suffered any real harm from that assignment. Clerk of the Circuit Court of Champaign Cnty., 8 PERI ¶ 2025 (IL SLRB 1992) (transfer of an employee from his preferred shift did not constitute an adverse action, absent other evidence of real harm).

Assuming, *arguendo*, that the assignment did constitute an adverse action, Mercer failed to prove a causal nexus between that action and her protected activity. Here, Respondents' decision maker, Camel, testified that he did not know that Mercer had filed a charge with the Board as of July 1, 2012, the date of the alleged adverse action. Indeed, he testified that he only learned of the charges nearly two years later, in July of 2014. Moreover, there is insufficient basis on which to disregard this testimony. Mercer stated that she sent the Sheriff's Department a copy of the charge when she filed it with the Board; however, she concedes that she did not address the charge to Camel. Vill. of Stickney, 31 PERI ¶ 77 (IL LRB-SP 2014) (no causal connection found where decision maker did not know of the employees' protect activity at the time he made the decision to take adverse action).

Second, Mercer presented insufficient evidence of disparate treatment because she failed to demonstrate the Respondent treated other sergeants more favorably than they treated her. Although Mercer claims that the Respondents order no other sergeant to serve four consecutive "lunch reliefs," this testimony is inconsequential because Mercer did not in fact perform "lunch reliefs" at all. She simply worked at Post 1 so that another officer could perform lunch relief by overseeing detainees in place of yet a third officer who took a lunch break. Indeed, Mercer conceded that she merely facilitated the performance of another employees' lunch relief. Thus, Mercer's testimony concerning lunch reliefs is irrelevant to determining whether the Respondents ever required other sergeants to perform a four hour assignment at Post 1.

Finally, there is no proximity between the alleged adverse action and Mercer's protected activity. Mercer filed one of the charges a full year prior to the assignment at issue. See Cnty. of Cook (Mgmt. Info. Servs.), 11 PERI ¶ 3012 (IL LRB-LP 1995) (proximity in time not found where termination occurred four months after employee's last concerted activity). She filed the second charge after the Respondents assigned her to Post 1 for four hours. East St. Louis Hous. Auth., 29 PERI ¶ 154 (IL LRB-SP ALJ 2013) ("an employer generally cannot be found to have retaliated against a [charging party] for activity which had not yet occurred" at the time of the adverse action). Accordingly, the adverse action is too far removed from one of Mercer's filings and patently unrelated to the other.

Thus, the Respondents did not violate the Act by assigning Mercer to Post 1 for four hours.

2. Denial of Premium Pay

Mercer failed to demonstrate that the Respondents retaliated against her in violation of the Act when they denied her premium pay because Mercer did not establish a causal nexus between her protected activity and the Respondents' denial of her request.

As noted above, Mercer engaged in protected activity. Further, the Respondents' decision maker Byrne indisputably knew of Mercer's protected activity, albeit in 2014, years after he initiated the alleged adverse action in question.

Next, as a general matter, the denial of overtime pay is an adverse employment action because it negatively affects an employee's compensation.⁸ Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶ 2022 (IL SLRB 1995)(a reduction in pay is an adverse employment action).

Assuming, *arguendo*, that the Respondents' denial of Mercer's request for overtime in this case is an adverse employment action, Mercer's claim still fails. First, there is insufficient evidence that the Respondents' decision maker, Byrne, knew that Mercer had filed charges with the Board at the time he denied her request. Knowledge of an employees' protected activity must be specifically imputed to an appropriate agent of the employer who is in some manner responsible for the adverse employment action. Macon Cnty. Bd. and Macon Cnty. Highway Dep't, 4 PERI ¶ 2018 (IL SLRB 1988). A manager's or supervisor's knowledge of an employee's union or protected activities will ordinarily be imputed to the employer. *Id.* However, a finder of fact may not do so in light of affirmative evidence to the contrary. *Id.*

Here, Byrne is presumably the agent who denied Mercer's request for premium pay because Mercer submitted her request to Byrne. Yet, Byrne testified that he did not know that Mercer had filed a charge with the Board as of July 1, 2012, the date of the alleged adverse action. Indeed, he testified that he only learned of the charges nearly two years later, in July of

⁸ The Respondents present a reasonable interpretation of the contract to support their contention that Mercer was not entitled to premium pay for her work; alternate interpretations permit the inference that she was in fact entitled to it. As the outcome of this prong of the analysis depends in large part on contract interpretation, I do not expressly choose between the various possible interpretations where it is unnecessary to do so, in light of the remaining analysis.

2014. Moreover, there is insufficient basis on which to disregard this testimony. Mercer stated that she sent the Sheriff's Department a copy of the charge when she filed it with the Board⁹; however, she concedes that she did not address the charge to Byrne, or any of the other members of management she accuses of retaliatory conduct.¹⁰ Vill. of Stickney, 31 PERI ¶ 77 (no causal connection found in the absence of employer knowledge of protected activity).

Second, as discussed above, there is no proximity between the adverse action and Mercer's protected activity. Mercer filed one of the charges a full year prior to Respondents' denial of her request for premium pay. See Cnty. of Cook (Mgmt. Info. Servs.), 11 PERI ¶ 3012 (IL LRB-LP 1995) (proximity in time not found where termination occurred four months after employee's last concerted activity). She filed the second charge after the Respondents denied her request for premium pay. East St. Louis Hous. Auth., 29 PERI ¶ 154 (IL LRB-SP ALJ 2013) ("an employer generally cannot be found to have retaliated against a [charging party] for activity which had not yet occurred" at the time of the adverse action). Accordingly, the adverse action is too far removed from one of Mercer's filings and patently unrelated to the other.

Third, Mercer introduced insufficient evidence that the Respondents granted premium pay to other sergeants who facilitated, or actually performed, lunch relief work.

Finally, the dearth of such evidence lends credence to the Respondents' assertion that sergeants and lieutenants were not entitled to premium/overtime pay for performing "lunch reliefs" or for facilitating them, as Mercer did. The Respondents' reasonable interpretation of the collective bargaining agreement, as applied to the instant case, likewise bolsters this assertion. Although the collective bargaining agreement permits a sergeant to earn overtime pay "in the event that [he] is ordered not to take all or any part of his lunch break," Mercer was not so ordered in this case. Rather, Camel assigned Mercer to Post 1 for four hours, an assignment that ended well before the completion of Mercer's shift. He offered to relieve her from that post

⁹ Notably, Mercer does not specify which of the two charges she mailed to the Respondents.

¹⁰ In reaching this decision, I do not rely on documents referenced by Mercer's counsel, where they were not introduced into evidence at hearing, because doing so would be both unfair and contrary to the Board's rules. Here, counsel references documents that were attached to the charge when Mercer initially filed it, but which were neither discussed nor introduced at hearing. It would unfairly prejudice the Respondents to rely on them because the Respondents have had no opportunity to authenticate them, examine their foundation, or cross examine Mercer as to their contents. Moreover, considering attachments to the charge as evidence does not comport with the requirement set forth in the rules, that an ALJ "shall obtain a full and complete record *either by evidentiary hearing and/or stipulation.*" 80 Ill. Admin. Code 1220.50(g)(emphasis added). Here, the parties did not stipulate to the admission of these documents, nor did they move for their admission at hearing.

after she had served there for less than half her shift. When Mercer declined, Camel offered her a late lunch form, which would have allowed her to leave work early. Thus, the Respondents reasonably argue that they denied Mercer premium pay because she was not entitled to it, and Mercer has offered little to rebut this assertion.¹¹

In sum, Mercer has failed to demonstrate that the Respondents violated Section 10(a)(3) and (1) of the Act when they denied her request for premium pay.

3. Suspension

Mercer failed to demonstrate that the Respondents retaliated against her in violation of the Act when they issued her a 10-day suspension because Mercer did not establish a causal nexus between her protected activity and the suspension. Mercer did not demonstrate that the decision maker had knowledge of her protected activity; further, she failed to identify any evidence that the Respondents harbored an unlawful motive.

As noted above, Mercer engaged in protected activity when she filed charges with the Board on August 15, 2011 (Case No. L-CA-12-010) and on July 29, 2012 (Case No. L-CA-13-009).

Further, Mercer suffered an adverse employment action when the Respondents issued her a 10-day suspension because there is no indication that the Respondents rescinded the discipline and removed reference to it from her personnel file. The Respondents documented the suspension in a Disciplinary Action Form, which reasonably became part of, and remained in, Mercer's personnel file. Indeed, Byrne informed Mercer that the discipline was final because she failed to file a grievance within the contractually-specified time frames.¹² Further, this record of the suspension would be used to escalate penalties imposed on Mercer for future acts of misconduct since the Respondents follow principles of progressive discipline. Thus, Mercer's suspension constitutes an adverse action, even though Mercer had yet to serve it as of the date of hearing. Cnty. of Cook/Hektoen Institute, 30 PERI ¶ 252 (IL LRB-LP 2014) (formal warning was adverse, though it was ultimately rescinded, where it was placed in employee's personnel file and would be used to escalate future disciplinary actions until it was removed); but see City

¹¹ Notably, Mercer herself does not claim, on brief, that the collective bargaining agreement entitles her to premium pay for performing lunch reliefs.

¹² Mercer attempted to file a step two grievance, but there is no indication that it was granted or that the Respondents rescinded the discipline.

of Chicago (Dep't of Bldg.), 15 PERI ¶ 3012 (IL LLRB 1999) (written reprimand was not adverse where it was never placed in the employee's personnel file).

However, Mercer failed to demonstrate that decision maker Paleologos knew of her protected activity. Knowledge of an employee's protected activity must be specifically imputed to an appropriate agent of the employer who is in some manner responsible for the adverse employment action. Macon Cnty. Bd. and Macon Cnty. Highway Dep't, 4 PERI ¶ 2018 (citing Cnty. of Menard, 3 PERI ¶ 2058 (IL SLRB 1987)). Here, Paleologos imposed the disciplinary action. Yet, Paleologos testified that no one had ever told him that Mercer had filed an unfair labor practice charge against the Respondents. Mercer has offered no basis on which to question the veracity of this testimony.

Contrary to Mercer's anticipated contention, it is Paleologos's knowledge that is relevant to this inquiry, not the knowledge of Commander Byrne. Although Byrne directed Paleologos to make an investigation into Mercer's conduct, Paleologos testified that the decision to impose discipline was his.¹³ Moreover, there is no indication that Byrne influenced or directed the outcome of the investigation, though he articulated the circumstances under which discipline would be appropriate (ie, Mercer's failure to impose discipline).

Even if Byrne's initiation of the investigation or his instructions to Paleologos impacted the adverse action in this case, there is insufficient evidence to suggest that even Byrne knew of Mercer's protected activity during the relevant time period. Byrne affirmatively testified that he had no knowledge that Mercer filed unfair labor practice charges with the Board until July 2014. Mercer points to no documentary evidence or testimony in the record that contradicts Byrne's statements. Although Mercer references a "ULP" in her July 3, 2012 grievance over her assignment to Post 1, there is no indication that Byrne received or read the grievance. In fact, the form indicates that the document submitted is a second step grievance that was submitted to the Assistant Executive or his designee. Further, there is no indication that Byrne heard the grievance at the first step such that he would have seen reference to the pending unfair labor practice. Thus, the instant allegation is properly dismissed simply on the basis that Mercer failed

¹³Mercer testified that Paleologos unqualifiedly told her that Byrne instructed him to write her up for discipline. I credit Paleologos's account to the extent that his testimony conflicts with Mercer's because it is further supported by the emails in the record showing that Byrne gave Paleologos free reign to investigate the incident.

to prove that the decision-makers had knowledge of her protected activity. See Vill. of Stickney, 31 PERI ¶ 77.

Assuming, *arguendo*, that the Respondents' decision makers did know of Mercer's protected activity when they suspended her, Mercer has still failed to demonstrate that they suspended her because of union animus. As a preliminary matter, Mercer has provided no direct evidence of animus and no evidence of disparate treatment. Next, she has not presented evidence of suspicious timing because the suspension (March 8, 2013) occurred over seven months after the most recent of her protected activities (July 29, 2012). See Cnty. of Cook (Mgmt. Info. Servs.), 11 PERI ¶ 3012. In addition, the Respondents have consistently offered the same rationale for taking the adverse action—Mercer failed to discipline her subordinate. Finally, as discussed below, the Respondents' reason for the adverse action withstands scrutiny, despite Mercer's assertions to the contrary.

Where a disputed disciplinary action appears to have been taken on arbitrary, implausible or unreasonable grounds, an administrative agency may properly infer that the stated rationale was not in fact the reason for the discipline and that the actual motivation was the employee's involvement in protected activities. State of Ill., Secretary of State, 31 PERI ¶ 7 (IL LRB-SP 2014)(finding basis for discipline non-pretextual where it was issued on plausible grounds); Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SRLB 1998) aff'd Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000); Cnty. of DeKalb and DeKalb Cnty. State's Attorney, 6 PERI ¶ 2053 (IL SLRB 1990), aff'd by unpub. order No. 2-90-1309 (Ill. App. Ct., 2d Dist. 1991). However, it is not the function of the Board or its administrative law judges to substitute the agency's judgment for that of the employer in the discipline of public employees. *Id.*

The Respondents in this case presented a compelling, eminently plausible reason for imposing the suspension: Mercer's refusal to discipline her subordinate for observed rule violations. As a preliminary matter, an officer's refusal to search and an officer's insubordination constitute Major Cause rule violations. Mercer's letter provides ample support for the conclusion that Mercer had first-hand knowledge of both. It describes Mercer's discovery of evidence corroborating a report that an officer refused to search entrants. In fact, Mercer recounts that she found the officer in the break room rather than at his assigned location (the lobby), where he should have been performing searches. Further, it describes the officer's

insubordinate cursing and questioning of Mercer's directive to go to the lobby. In sum, Mercer's letter demonstrates that she knew her subordinate committed two serious rule violations.

After reading the letter, Byrne reasonably determined that the only remaining inquiry relevant to assessing Mercer's conduct was whether she had disciplined her subordinate for the described violations. First, Paleologos credibly testified that the officer's conduct described by Mercer warranted the imposition of discipline, and that Mercer therefore did not have latitude to merely issue a verbal warning. In addition, Byrne justifiably determined that Mercer's subordinates knew their required duties, such that their failure to perform them warranted corrective action. The Respondents' witnesses credibly testified that the post orders were well-displayed and readily available. Mercer herself concedes, in her letter, that the allegedly conflicting postings "did not preclude the officer assigned from doing the job." Finally, Byrne understandably suspected that Mercer failed to impose discipline for one or both of the violations because she had shown repeated reluctance to do so in the past. Indeed, the Respondents issued Mercer multiple verbal and written warnings informing her that she must not simply report officers' misconduct up the chain of command, as she appeared to have done in this case. Thus, Byrne reasonably instructed Paleologos to investigate Mercer's conduct and to impose discipline on Mercer if he determined that Mercer had not properly cited her subordinate. Cnty. of Cook and Sheriff of Cook Cnty., 28 PERI ¶ 155 (IL LRB-LP 2012)(employer's repeated prior counseling of Charging Party for conduct at issue supported a finding that its decision to discipline was not pretextual); City of Decatur, 14 PERI ¶2004 (IL SLRB 1997) (reports of employee's poor performance that predate protected activity undermine arguments that the protected activity motivated the employer's negative reports); but see Cnty. of Williamson and Sheriff of Williamson Cnty., 14 PERI ¶ 2016 (IL SLRB 1998)(pretext found where decision-maker seized upon whatever information he could find to bolster the disciplinary decision).

Finally, there is no merit to Mercer's suggestion that Paelologos's limited investigation is evidence of pretext. A respondent's failure to adequately investigate a charging party's alleged misconduct adds weight to a finding of pretext, but does not alone constitute evidence of unlawful motive. Cnty. of DuPage and DuPage Cnty. Sheriff, 30 PERI ¶ 115 (IL LRB-SP 2013). Here, there is insufficient evidence that the investigation was in fact inadequate. Rather, Paleologos simply investigated the narrow question reasonably put to him by Byrne, whether Mercer failed to impose discipline on her subordinate. Moreover, had Paleologos strayed from

his limited assignment to perform a broader investigation, he still would have been justified in disregarding Mercer's excuses since they lack credibility. It is hard to believe that Mercer reasonably credited the officer's claim that he performed the searches as assigned, given the facts set forth in her letter. Similarly, it is incredible that Mercer did not view the officer's conduct as insubordination, when her letter acknowledges that the officer's reply was "not an acceptable response to a simple directive." Lastly, any perceived flaws in the investigative process would not indicate pretext here, where Mercer has otherwise presented little evidence to impugn the Respondents' motives. See Cnty. of Cook and Sheriff of Cook Cnty., 28 PERI ¶ 155 (superior's decision to credit one employee over another during investigation was not evidence of pretext); Macon Cnty. Highway Dep't, 4 PERI ¶ 2018 (ill-informed or ill-considered decisions are not necessarily pretextual); but see Cnty. of DeKalb, 6 PERI ¶ 2053, aff'd in unpub. ord. no. 2-90-1309, Cnty. of DeKalb v. Ill. Labor Rel. Bd. (Ill. App. Ct., 2nd Dist. 1991) (employer's failure to investigate allegations supported finding of pretext where there was evidence that the investigation would have exonerated the employee).

In sum, Mercer failed to prove the Respondents violated Sections 10(a)(3) and (1) of the Act when they issued her a 10-day suspension.

V. CONCLUSIONS OF LAW

The Respondents did not violate Sections 10(a)(3) and (1) of the Act when they assigned Mercer to Post 1 for four hours, denied Mercer premium pay, and issued her a 10-day suspension.

VI. RECOMMENDED ORDER

The consolidated cases are dismissed.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation.

Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 18th day of December, 2015

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**