

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

Illinois Troopers Lodge No. 41,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-10-130
	)	
State of Illinois, Department of Central	)	
Management Services (State Police),	)	
	)	
Respondent	)	

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

On May 29, 2013, Administrative Law Judge (ALJ) Elaine Tarver issued a Recommended Decision and Order (RDO) recommending that the Illinois Labor Relations Board, State Panel, dismiss a charge filed by the Illinois Troopers Lodge No. 41, (Union or Charging Party) against the State of Illinois, Department of Central Management Services, State Police (Respondent or Employer). The charge alleged that the Respondent violated Section 10(a)(1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2012), as amended,<sup>1</sup> when it issued a five-day suspension to Sergeant Richard Decker because, at the Union's request, he offered to provide testimony on behalf of the Union in a disciplinary matter involving another unit employee named Hicks.

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<sup>1</sup> Section 10(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay[.]

The ALJ dismissed the charge, reasoning that the Respondent did not harbor union animus because it did not know of Decker's protected, concerted activity at the time it initiated discipline against him. The ALJ found that Decker engaged in protected concerted activity because he acted in his capacity as union trustee, to effectuate the grievance process, when he offered his testimony and written report in support of a fellow employee's case before the Merit Board. Further, the ALJ acknowledged that the Respondent initiated discipline against Decker for preparing a report in support of a fellow employee and for volunteering to testify on the employee's behalf in that disciplinary hearing. However, she determined that the Respondent did not know of Decker's protected activity because the Respondent was unaware, when it initiated discipline against Decker, that he acted upon the Union's request or in his capacity as union trustee. On this basis, the ALJ concluded that the Union failed to make its prima facie case because it could not demonstrate the Respondent harbored union animus absent that showing of knowledge.

The Charging Party filed timely exceptions to the ALJ's RDO, pursuant to Section 1200.135 of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code Parts 1200 through 1240 (Board Rules), and the Respondent filed a timely response and cross-exceptions. The exceptions and cross-exceptions raise issue pertaining to (1) the proper legal standard, (2) the Respondent's knowledge of Decker's protected activity, (3) the Respondent's motivation, and (4) the Respondent's business explanation for the adverse action. After reviewing the record, exceptions, response, and cross-exceptions, we reverse the ALJ's conclusions of law and find that the Respondent, by its conduct, violated Section 10(a)(1) of the Act because the Respondent knew of Decker's protected activity, imposed discipline on Decker

because of it, and presented no legitimate business reason for the adverse action. According, we also grant a make-whole remedy.

### **1. Material Facts**

Sergeant Richard Decker works patrol, oversees other officers, and teaches the standard field sobriety testing procedures at the Police Academy. Decker is also a union trustee. In that capacity, he represents other union members in disciplinary matters and files grievances on their behalf.

Sometime in or after October 2008, the Respondent disciplined bargaining unit member Trooper Lyle Hicks for driving under the influence while off-duty. The Respondent based its discipline on a DUI arrest report made by the Jefferson County Sheriff's Department.

In 2009, Hicks's disciplinary case was pending before the Merit Board. The Union planned to provide his defense. In September 2009, Union President Scholl asked Decker to review the Jefferson County arrest report and to discuss his findings with Union attorney Guy Studach.

In early October, Decker attended a command meeting in which Lieutenant Paul Riggio stood in for the commander and represented command for the Chicago District. During the meeting, Decker informed Riggio that the Union asked him to review Hicks's disciplinary case.<sup>2</sup> Riggio informed Decker that "it was a matter between [Decker] and the FOP."

On October 6, 2009, Decker reviewed a packet of information he received from the Union concerning the Hicks case. The packet included the Jefferson County arrest report, photographs taken by Hicks, a DVD of the arresting officer's in-car camera, and the Respondent's Internal Investigation Report into Hicks's conduct.

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<sup>2</sup> Riggio testified that he did not know that Hicks was the particular bargaining unit member at issue. The ALJ found otherwise and thus did not credit this testimony.

On October 24, 2009, Decker prepared a written report for the Union on his own time and without compensation. Decker's report undermined the validity of the standardized field sobriety test performed by the Jefferson County arresting officer. Decker recommended that the Merit Board give no weight to the field sobriety test results. He signed the report as a sergeant and included his State Police ID number; the report does not state that Decker is a union trustee.

Sometime in November, the Respondent's Acting Chief Legal Counsel, John Hosteny learned of Decker's report during discovery in Hicks's disciplinary case. Hosteny did not know that Decker drafted the report in his capacity as Union trustee or that he did so upon the Union's request.

Hosteny initially sought to use Decker as the Respondent's expert witness in the Hicks matter, but ultimately found another individual to perform that task.

On November 19, 2009, Hosteny informed Lieutenant Colonel Delia Diamond that Decker had written a report in support of Hicks and that he (Hosteny) believed that Decker's conduct may have violated the Employer's conflict of interest policy because Decker planned to testify against both the Department and the Jefferson County Sheriff's Office. Diamond informed Region 1 Commander Mark Piccoli of Decker's conduct.

On November 23, 2009, Piccoli filed a complaint against Decker with the Division of Internal Investigations (DII) alleging that Decker voluntarily filed a report on behalf of a respondent in an ISP Merit Board case as an expert witness.

The File Initiation Report generated by the Respondent from that complaint stated the following:

Sergeant Decker voluntarily filed a report on behalf of a respondent in an ISP Merit Board case, acting in the capacity of an expert witness. Sergeant Decker's report, dated October 24, 2009, was submitted in defense of an Illinois State Police (ISP)

employee who was arrested for Driving Under the Influence of Alcohol. The employee is currently involved in the disciplinary process with the ISP Merit Board.

In December 2009, the Illinois Attorney General's Office subpoenaed Decker to testify at Hicks's disciplinary hearing. Decker informed Riggio that he had received this subpoena. However, the Union withdrew Decker as a witness in the Hicks case. As a result, Decker did not testify and the Union never presented his report to the Merit Board.

On January 28, 2010, District Chicago Commander Captain David Nanninga, filed eight charges against Decker based on Piccoli's complaint. The charges alleged that Decker (1) misused his official position, (2) interfered with an investigation, (3) had a conflict of interest, (4) publicly criticized the department, (5) released information without approval, (6) volunteered to testify in a civil action, (7) failed to notify his supervisor when subpoenaed to testify against the department, and (8) undertook an investigation without supervisory approval.

On February 11, 2010, the Respondent's special agents met with Decker at the DII and read Decker the charges against him. The investigative report which documents this meeting states that "the following illegal or improper acts or allegations [were] attributed to Decker: On October 24, 2009, [Decker] voluntarily filed a report with the Fraternal Order of Police (FOP) Troopers Lodge 41, acting in the capacity of an expert witness causing conflict of interest. Furthermore, [he] did not notify [his] chain of command regarding the report."

On February 19, 2010, DII Agent Heather Simental interviewed Decker to investigate these charges. During the interview, Decker told Simental that he reviewed Hicks's report at the Union's request, in his capacity as trustee, and on his own time. He also said that he informed Riggio, in advance, that he planned to write the report.

On March 22, 2010, Agent Simental submitted an Investigative Summary to the Respondent's legal department for review. On March 30, 2010, the Respondent's Legal

Department sustained the following seven charges against Decker: (1) interference in investigation,<sup>3</sup> (2) conflict of interest,<sup>4</sup> (3) publicly criticizing the department,<sup>5</sup> (4) release of information without approval,<sup>6</sup> (5) volunteering to testify in a civil action,<sup>7</sup> (6) failing to notify a supervisor when subpoenaed to testify against the department,<sup>8</sup> and (7) undertaking an investigation without supervisory approval.<sup>9</sup>

<sup>3</sup> **Interference in Investigation** – Rules ROC-002 III.A.29 – Officers will not interfere with cases being handled by other officers of the Department or by any other governmental agency unless (a) ordered to intervene by a superior officer; (b) the intervening officer reasonably believes that a manifest injustice would result from failure to take immediate action. When intervention occurs, a report of such intervention will be made to a superior officer as soon as possible.

<sup>4</sup> **Conflict of Interest** – Rules ROC-002 III.A.40 – Personal associations of an officer that knowingly create an apparent or real conflict of interest with the conduct of official duties are prohibited. A “conflict of interest” arises when an officer’s private interest, whether of a financial nature or otherwise, conflicts with the officer’s impartial conduct of official duties and responsibilities.

<sup>5</sup> **Publicly Criticize the Department** – Rule ROC-002 III.A.24 – Officers will not publicly criticize or ridicule the Department, its policies or other employees by speech, writing or other expression, where such speech, writing or other expression is defamatory, obscene, unlawful, undermines the effectiveness of the Department, interferes with the maintenance of discipline or is made with reckless disregard for truth.

<sup>6</sup> **Release of Information Without Approval** – Rules ROC-002 III.A.25 – Officers will not address public gatherings, appear on radio or television, prepare any articles for publication, act as correspondents to a newspaper or a periodical, release or divulge information, or any other matters of the Department while holding themselves out as representing the Department in such matters without the authority of the district commander or the functional equivalent, or their designee.

<sup>7</sup> **Volunteer to Testify in Civil Actions** – Rules ROC-002 III.A.57 – An officer will not volunteer to testify in civil actions and will not testify unless lawfully and properly subpoenaed or when directed to do so by the officer’s commanding officer upon the advice of the Department legal section. If a subpoena arises out of Department employment or if the officer is informed they are a party to a civil action arising out of Department employment, the officer will immediately notify their commanding officer of the service or notification and of the testimony he/she is prepared to give. Whenever an officer is subpoenaed to testify in a civil or criminal proceeding other than Department related, the officer will appear and testify on his/her own time and will provide his/her own transportation. The appearance and testimony will be made in appropriate civilian attire. Members and employees will not enter into any financial understanding for appearance as witnesses prior to any trial except in accordance with current directives.

<sup>8</sup> **Officers will Notify Supervisor When Subpoenaed To Testify Against the Department** – Rules ROC-002 III.A.53 – Any officer subpoenaed to testify for the defense in any trial or hearing, or against the Department in any proceeding, will notify his/her commander upon receipt of the subpoena, notice or request to do so.

<sup>9</sup> **Undertake Action Without Permission** – Rules ROC-002 III.A.30 – Officers will not undertake any investigation or other official action not part of their regularly assigned duties without obtaining permission from a supervisor unless the exigencies of the situation require immediate police action.

On April 21, 2010, Deputy Directors Jack Garcia and Michael Snyders wrote a memo to Captain Nanninga informing him that DII had completed its investigation into Decker's alleged misconduct.

On August 28, 2010, Deputy Director Garcia presented Decker's case to the Disciplinary Review Board (DRB). Garcia recommended that the DRB issue Decker discipline. At the time, Garcia knew Decker had authored his report at the Union's request. Garcia testified that he recommended discipline based on the fact that Decker violated the rules of conduct by submitting his report as an expert witness.

The DRB recommended that the Director issue Decker a suspension of less than 30 days. On May 6, 2010, Acting Director Jonathon Monken concurred in the DRB's decision.<sup>10</sup> On May 13, 2010, Monken issued Decker a five-day suspension for violating seven different sections of the Illinois State Police Rules and Regulations.<sup>11</sup> On May 24, 2010, Lieutenant Lance Adams informed Decker of his suspension. Decker appealed his suspension to the Merit Board; the hearing is stayed pending the resolution of this charge.

## **2. Relevant legal standard**

As a preliminary matter, we address the Union's exception concerning the relevant legal standard in this case. Here, the Union objects to the ALJ's application of the burden-shifting framework, her requirement that the Union prove the Respondent's union animus, and her failure to address the Union's assertion that the Respondent's rules objectively violate Section 10(a)(1) of the Act. For the reasons that follow, we find that the ALJ correctly set forth the legal

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<sup>10</sup> Garcia knew, before Monken issued his decision to impose discipline on Decker, that the Union attorney removed Decker from the witness list and that Decker consequently never testified on Hicks's behalf. However, he never informed Monken of these facts.

<sup>11</sup> On May 21, 2010, Snyders wrote a memo to Garcia recommending that he close the case against Decker, classify the charges against Decker as sustained, and note that Decker received a five-day suspension for his misconduct.

framework, properly disregarded the Union's argument concerning the objective invalidity of the Respondent's rules, and erred only when she required the Union to prove the Respondent's union animus in this case.

First, the ALJ correctly held that the motivation of a public employer is relevant to a Section 10(a)(1) analysis where the Charging Party alleges an adverse employment action. Similarly, she properly noted that the Board applies a Section 10(a)(2)-type burden-shifting analysis under these circumstances.

Section 10(a)(1) of the Act provides, in relevant part, that "it shall be an unfair labor practice for an employer or its agents to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act." 5 ILCS 315/10(a)(1) (2012). Section 6 of the Act broadly states that public employees have the right to join unions, to bargain collectively and to "engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion." 5 ILCS 315/6 (2012).

Here, the ALJ properly noted that the motivation of a public employer is relevant to a Section 10(a)(1) analysis where the Charging Party alleges that the employee at issue suffered an adverse employment action, as it has here. See Pace Suburban Bus Div. v. Ill Labor Rel. Bd., State Panel, 406 Ill. App. 3d 484, 494-95 (1st Dist. 2010). Further, she correctly stated that the Board follows the analytical framework applied to claims arising under Section 10(a)(2), in such cases, to determine whether a public employer took adverse action against an employee for an illegal motive. Pace Suburban Bus Div., 406 Ill. App. 3d at 495.

Under Section 10(a)(2), a charging party must show, by a preponderance of the evidence, that (1) the employee at issue was engaged in union or protected, concerted activity; (2) the

employer knew of his conduct, and (3) the employer took the adverse action against him in whole or in part because of union animus or that it was motivated by his protected conduct. City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989). The Union may prove the third prong of this test through direct or circumstantial evidence. Circumstantial evidence of an unlawful motive includes the timing of the employer's action in relation to the protected concerted activity, hostility toward protected concerted activities, disparate treatment, and shifting or inconsistent explanations for the adverse action. Id.

Once the union makes its prima facie case, the employer has the burden to advance a legitimate reason for the adverse employment action. Cnty. of Cook, 2012 IL App (1st) 111514, ¶ 25. Merely offering a legitimate business reason for the adverse action does not end the inquiry, because the reason advanced by the employer must be bona fide and not pretextual. Pace Suburban Bus Div., 406 Ill. App. 3d at 500. North Shore Sanitary Dist. v. State Labor Rel. Bd., 262 Ill. App. 3d 279 (2nd Dist. 1994). In other words, the employer must show that it relied on that reason to take the adverse employment action. Cnty. of Cook, 2012 IL App (1st) 111514, ¶ 25. “[W]here an employer advances legitimate business reasons for the adverse employment action and is found to have relied upon them in part, then the case is characterized as one of ‘dual motive’ and the employer must demonstrate, by a preponderance of the evidence,” that it would have taken the adverse action notwithstanding the employee’s protected activity. City of Burbank, 128 Ill. 2d at 345.

Thus, the ALJ correctly held that the motivation of a public employer is relevant here and accurately identified the proper analytical framework because the Charging Party alleged an adverse employment action in this case.

Similarly, the ALJ properly refused to rule on the Union's assertion that the Respondent's rules constitute an objective violation of Section 10(a)(1) of the Act because that allegation is not covered by the complaint and the ALJ never amended the complaint to include it. Indeed, the ALJ would have prejudiced the Respondent if she had ruled on this issue because the Respondent had no opportunity to refute the allegation on brief. As such, the ALJ correctly declined to rule on the Union's assertion that the Respondent promulgated unlawful rules.

However, the ALJ erred when she required the Union to demonstrate that the Respondent acted out of union animus because the Union may meet its prima facie burden under Section 10(a)(1) simply by demonstrating that the Respondent took adverse action against an employee for engaging in protected activity. Pace Suburban Bus Div., 406 Ill. App. 3d at 494-95; see also City of Burbank, 128 Ill. 2d at 345 (charging party may meet its prima facie burden under even section 10(a)(2) by proving union animus **or** by showing that the Respondent was motivated by the employees' protected activity). In Pace, the appellate court based its rationale for this conclusion on the distinction between Section 10(a)(1), which broadly protects public employees in the exercise of their rights under the Act, and Section 10(a)(2), which more narrowly prohibits employers from discriminating against employees based on union membership and union activities. Id. at 496. The court concluded that when a complaint broadly alleges that the Respondent took adverse action against an employee in retaliation for exercising his rights under the Act, as it does in this case, the Board should not unduly burden the Union by requiring it to also prove that the Respondent acted out of union animus. Id. ("Requiring the employee to also

prove that her employer's actions were motivated by animus toward the union would unduly burden an employee seeking redress against an employer interfering with those rights.”<sup>12</sup>

Contrary to the Union’s urging, we do not eschew the Section 10(a)(2)-type burden-shifting analysis here because this case is distinguishable from the other adverse action cases arising under Section 10(a)(1) in which we have avoided that analysis. The Union, citing Village of Barrington Hills, rightly notes that that the Board has applied a traditional Section 10(a)(1)-restraint/coercion/interference analysis in certain cases, even where the complaint alleges an adverse employment action. See Vill. of Barrington Hills, 29 PERI ¶ 15 (IL LRB-SP 2012), aff’d unpub. order, 2013 IL App (1st) 12182-U (employer froze wages during the pendency of representation proceedings; Board applied interference/coercion analysis). However, we do not follow the Village of Barrington Hills approach here because it is one of a line of cases which addresses the special circumstance in which an employer changes the status quo during the pendency of representation proceedings. The Illinois Labor Relations Board, following the lead of the National Labor Relations Board, has not applied the burden-shifting analysis in such cases. Vill. of Barrington Hills, 29 PERI ¶ 15; City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995) (employer increased insurance premiums during the pendency of representation proceedings; Board applied interference/coercion analysis; case was also analyzed under Section 10(a)(2)); Vill. of Elk Grove Vill., 10 PERI ¶ 2001 (IL SLRB 1993)(Board addressed the employer’s decision to freeze employees’ wages and health insurance benefits

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<sup>12</sup> Notably, the Board and the courts infer an employer’s animus towards an employee’s protected activity from proof that the employer took adverse actions against him because of it. See Pace Suburban Bus Div., 406 Ill. App. 3d at 494-95 (Union must demonstrate that the Employer “took adverse action against the employee for discriminatory reasons, i.e., animus toward [the employee’s] participation in such [protected] activities.”); City of Harvey, 18 PERI ¶ 2032 (IL LRB-SP 2002) (union demonstrated both unlawful motivation for suspending employee and Respondent’s animus towards employees’ protected concerted activity where Respondent expressly disciplined employee for the conduct which qualified as protected concerted activity).

during the pendency of representation proceedings; Board applied interference/coercion analysis); City of Chicago, 3 PERI ¶3011 (IL LLRB 1987)(citing Plasticrafts, Inc. v. NLRB, 586 F.2d 185, 99 LRRM 3204 (10th Cir. 1978); Sun Chemical Corp. v. NLRB, 560 F.2d 470, 96 LRRM 2051 (1st Cir. 1977); NLRB v. Otis Hospital, 545 F.2d 252, 93 LRRM 2778 (1st Cir. 1976)(illicit motive is irrelevant where employer withholds scheduled wage increases or benefits because of the pendency of representation proceedings). Here, the complaint does not allege that the Respondent changed the status quo during the pendency of representation proceedings. Thus, we apply the Section 10(a)(2)-type burden shifting analysis in this case because the circumstances which would warrant an alternate analysis are not present here.

In sum, we reverse the ALJ's decision to require the Union to prove union animus in this case, but leave undisturbed her remaining findings on the related issues set forth above.

### **3. Respondent's Knowledge of Decker's Protected Activity**

We find merit to the Union's exception that the Respondent had knowledge of Decker's protected, concerted activity because the Respondent knew Decker had offered to provide favorable testimony in support of a fellow employees' Merit Board case when it initiated discipline against him.

First, Decker engaged in protected concerted activity when he offered to provide testimony in support of Union member Hicks's disciplinary case before the Merit Board. An employee engages in concerted activity when he or she acts with or on the authority of other employees or invokes a right under a collective bargaining agreement, but not when the employee acts solely on his own behalf. Bd. of Educ. of Schaumburg Comm. Consolidated School Dist. 54 v. Ill. Educ. Labor Rel. Bd., 247 Ill. App. 3d 439 (1st Dist. 1993) (addressing similar language under the Illinois Educational Labor Relations Act, 115 ILCS 5). In other

words, concerted activity is conduct undertaken jointly by two or more employees, or by one employee on behalf of others. Cnty. of Cook (Mgmt. Information Serv.), 11 PERI ¶ 3012 (IL LLRB 1995). All union activity is concerted activity, but not all protected concerted activity is union activity. City of Elmhurst, 17 PERI ¶ 2040 (IL LRB-SP 2001); Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993).

Concerted activity is protected if it is for the purpose of collective bargaining, for other mutual aid or protection, or if it is aimed at improving wages and terms and conditions of employment. Vill. of New Athens, 29 PERI ¶ 27 (IL LRB-SP 2012); Cnty. of Cook (Mgmt. Information Serv.), 11 PERI ¶ 3012 (IL LLRB 1995). As long as the employee's conduct is lawful and not indefensible in its context, it is generally deemed to be protected. Cnty. of Cook, 27 PERI ¶ 57 (IL LRB-LP 2011).

Here, Decker engaged in concerted activity because he acted on behalf of another union employee (Hicks), and not for his own benefit alone. Decker offered favorable testimony and a written statement to support Hicks's disciplinary case before the Merit Board and prepared the statement on his own time, without compensation.

Further, Decker's concerted activity is also protected because he sought to help enforce a right rooted in the parties' contract, here, the just cause standard. "One employee's assertion of a right rooted in a collective bargaining agreement is protected, under the theory that such action is an extension of the concerted activity that produced the agreement in the first place."<sup>13</sup> See City of Chicago (Mulligan), 11 PERI ¶ 3008 (IL LLRB 1995); City of Chicago, Chicago Police Dep't

<sup>13</sup> Decker individually asserted a right rooted in the CBA, even though he did so on another employee's behalf. The Board distinguishes between two types of protected concerted activity, those in which an employee asserts a right rooted in a collective bargaining agreement, and those in which an employee engages in lawful activity that does not involve a right contained in a collective bargaining agreement, but which the employee undertakes for the purpose of mutual aid or protection of fellow employees. City of Chicago, Dep't of Police, 7 PERI ¶ 3035 (IL LRB-LP 1991). Decker's conduct falls into the former category.

(Karson), 7 PERI ¶ 3035 (IL LLRB 1991)(quoted text); City of Chicago, Chicago Police Dep't (Kostro), 3 PERI ¶ 3028 (IL LLRB 1987); See also, NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984); Interboro Contractors, Inc., 157 NLRB 1295 (1966), enf'd 388 F.2d 495 (2d Cir. 1967); El Gran Combo, 284 NLRB 1115 (1987), enf'd 853 F.2d 996 (1st Cir. 1988); Cnty. of Jersey (Lewis and McAdams), 7 PERI ¶ 2023 (IL SLRB 1991). The parties' contract provides that "disciplinary action shall be imposed upon an officer only for just cause." See, CBA Article 12, Section 1. In Hicks's case, the Respondent imposed discipline based on Hicks's DUI arrest, documented in the Jefferson County DUI police report. Hicks appealed the Respondent's decision to the Merit Board, necessarily contending that the Respondent had no just cause to discipline him. Decker's witness statement and proposed testimony supported Hicks's assertion because Decker reviewed the police report and determined that the Respondent based its discipline of Hicks on an arrest which contained serious flaws. Thus, Decker engaged in protected activity when he agreed to offer favorable testimony and a witness report in support of a fellow bargaining unit member's assertion that the Respondent failed to adhere to the contract's just cause standard.

Contrary to the Respondent's contention, and as discussed above, Decker's activity is protected and concerted, even though his opinion statement was not directly aimed at improving employees' working conditions, because he sought to enforce a right rooted in the collective bargaining agreement. Further, contrary to the Respondent's contention, Decker engaged in protected, concerted activity whether he acted in his capacity as union trustee or not. However, we note that this case would have been more straightforward had Decker identified himself as a union trustee when he signed the witness report. Indeed, we believe that such proper

identification would have clarified the circumstances under which Decker drafted the report and may have obviated the need for Board action here.

Second, the Respondent unequivocally knew of Decker's protected activity. Here, Respondent attorney Hosteny informed Lieutenant Colonel Diamond that Decker had written a report in support of bargaining unit member Hicks's disciplinary case before the Merit Board. Diamond, in turn, informed Commander Piccoli who filed a complaint against Decker which asserted that he "voluntarily filed a report" as an expert witness "in defense" of an employee who was "involved in the disciplinary process with the ISP Merit Board."

Thus, we reverse the ALJ's determination on this issue and find that the Respondent knew of Decker's protected activity at the time the Respondent initiated discipline against him.

#### **4. Causal Nexus/Motivation**

Next, we find that the Respondent took adverse action against Decker for engaging in protected, concerted activity because the Respondent admitted that it disciplined Decker for voluntarily filing an expert witness report on behalf of a fellow bargaining unit member, in support of that employee's position in a disciplinary hearing before the Merit Board.

Where an employer asserts that it disciplined an employee for rule violations, the Union may show a causal nexus between that discipline and the employee's protected activity by demonstrating that the employer founded its citation of the employee on the same conduct which constitutes the protected activity. In such cases, the Union need not introduce circumstantial evidence of the Respondent's animus towards the employee's protected activity because the Respondent's own proffered reason for the adverse action sufficiently reveals the Respondent's disapproval, i.e., animus towards that conduct. See Cnty. of Cook and Sheriff of Cook Cnty., 25 PERI ¶ 74 (IL LRB-LP 2009) (employees engaged in protected activity when they concertedly

refused to transport an arrestee with MRSA; causal nexus shown where Respondent disciplined employees for insubordination expressly based on that refusal); City of Harvey, 18 PERI ¶ 2032 (IL LRB-SP 2002) (employee engaged in protected activity when he stated his objection to employer's drug testing policy on the drug testing form; causal nexus found where the Respondent stated that it disciplined the employee because he violated the Respondent's rules by making that written protest); State of Ill. Dep't of Cent. Mgmt. Serv. Dep't of Mental Health and Developmental Disabilities, 12 PERI ¶ 2037 (IL LRB-SP 1996) (employee engaged in protected activity by approaching the union with workplace safety concerns; causal nexus found where Respondent asserted that it disciplined employee because he violated a rule by approaching the union before approaching his superiors); Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993) (full-time employee engaged in protected activity when he had conversation with paid-on-call employee regarding loss of overtime opportunities for full-time employees from employer's use of paid-on-call personnel; causal nexus found where Respondent asserted that it disciplined employee because he violated the employer's policy against disrupting services by making such remarks).

Here, the Respondent justified Decker's discipline by asserting that he violated ISP's rules. Yet, the Respondent consistently based that finding on the fact that Decker voluntarily drafted an expert witness report and offered testimony in support of a bargaining unit member's disciplinary case before the Merit Board. As discussed above, Decker engaged in protected activity when he drafted his opinion report for a fellow bargaining unit member and offered to provide him with testimony in support of his disciplinary case. Thus, the Union demonstrated a causal connection between the adverse action and the protected activity because the conduct

which the Respondent cited as the sole basis for Decker's rule violations (and the ensuing discipline) is the very conduct which the Act protects.

Consequently, we conclude that the Union demonstrated the Respondent disciplined Decker because of his protected activity.

### **5. Legitimate Business Explanation/Burden-shifting**

Finally, we find that the Respondent has offered no legitimate explanation for its decision to discipline Decker because it has not shown that Decker actually committed all the rule violations with which the Respondent has charged him and because it has not articulated any substantial business interest which justifies the application of its remaining rules to restrict Decker's otherwise protected activity.

As a preliminary matter, the Respondent has not demonstrated that Decker actually committed all the rule violations which it used to support the discipline. First, Decker did not violate the rule that prohibits public criticism of the Department (Respondent) because Decker never made any public statements and did not critique the Respondent. Here, Decker made no public statements because he never actually testified on Hicks's behalf and the Union never used his opinion statement in the disciplinary hearing. Further, Decker did not criticize the Respondent because his witness statement discredits solely Jefferson County's police work and not the Respondent's. Finally, even if we determined that Decker's truthful and lawful opinion statement constituted public criticism of the Respondent (it doesn't), Decker still did not violate the rule because the Respondent has not shown how his statement "undermined the effectiveness of the Department" or "interfered with discipline," as the rule requires.

Second, Decker did not violate the rule that requires an officer to notify his commander when subpoenaed to testify against the department because he informed Riggio of the Union's request for his testimony (October 2009) and of the subpoena (December 2009).

Contrary to the Respondent's contention, Decker followed the protocol for informing his commander of the Union's request for his testimony because Riggio was the acting commander at the time Decker informed him of the Union request. Thus, Decker followed the letter of the rule, even though Decker did not contact the ISP legal department or his own lieutenant. Notably, there is no evidence as to whether Riggio was acting as captain when Decker informed him of the subpoena, however, this gap in the record must be construed against the Respondent because it is the Respondent's burden to provide a legitimate explanation for its adverse action.

Further contrary to the Respondent's contention, there is no reason to disturb the ALJ's decision to credit Decker's testimony that he received a subpoena and that he told Riggio about it. The ALJ hears the testimony and observes the witnesses. On this basis, the Board has a well-established policy to accept an ALJ's credibility determinations unless the Board is convinced, by a preponderance of the evidence, that those assessments are clearly and demonstrably incorrect. Pace Heritage Division, 25 PERI ¶ 72 (IL LRB-SP 2009); Vito Zaccaro/Cnty. of Cook/Sheriff of Cook Cnty., 21 PERI ¶ 125 (IL LRB-LP 2005); Chicago Transit Auth., 16 PERI ¶ 3021 (IL LLRB 2000); City of Chicago, 12 PERI ¶ 3022 (IL LLRB 1996); Cnty. of Jersey, 7 PERI ¶ 2023 (IL SLRB 1991); Chicago Housing Auth., 6 PERI ¶ 3012 (IL LLRB 1990); Vill. of Lyons, 5 PERI ¶ 2007 (IL SLRB 1989); Am. Fed. of State, Cnty. and Mun. Empl. (Mathis), 4 PERI ¶ 2048 (IL SLRB 1988); State of Ill. (Dep'ts. of CMS and Employment Security), 4 PERI ¶ 2005 (IL SLRB 1988); Town of Decatur, 4 PERI ¶ 2003 (IL SLRB 1987); Township of Worth, 3 PERI ¶ 2019 (IL SLRB 1987). The mere fact that Decker

did not mention the subpoena in the DII interview does not demonstrate that he never received one or that he never told Riggio about it because the investigator never directly questioned him about the subpoena. Thus, we do not disturb the ALJ's credibility findings.

Third, Decker did not violate the rule that prohibits officers from releasing information without approval because Decker did not release or divulge any departmental information at all. Here, the only information that Decker arguably released was the opinion statement he drafted himself. However, that opinion statement contains no departmental information, confidential or otherwise, because it solely addresses conduct undertaken by the Jefferson County Sheriff's Department.

Fourth, Decker did not violate the rule which prohibits an officer from interfering with cases handled by other governmental agencies because Decker did not inject himself into Jefferson County's investigation of Hicks's alleged DUI. In fact, Decker sought to intervene in a disciplinary matter, not a criminal investigation, and intended to use his opinion statement only to affect discipline that ISP had imposed on Hicks, but not to affect criminal proceedings or investigations initiated by Jefferson County. To illustrate, there is no evidence that Decker submitted his report to Jefferson County or petitioned the County to reconsider its DUI citation of Hicks, based on Decker's independent assessment of the police report. Instead, Decker merely sought to ensure that the Respondent imposed discipline on Hicks only for just cause, as required by the collective bargaining agreement. Thus, Decker did not interfere with the Jefferson County investigation, even though his opinion statement discredited the Jefferson County DUI report, because there is no evidence that Decker intervened in the Jefferson County investigation or the County's subsequent criminal proceedings.

Further, the Respondent has articulated no substantial legitimate business interest which justifies the application of its remaining rules to restrict Decker's protected activity. First, the Respondent has not demonstrated that the character of Decker's conduct warrants such a restriction. Second, the Respondent has not shown its desire to prevent "conflicts of interest" constitutes a legitimate interest, as applied to the facts of this case.

Employees' rights are not absolute and they must be balanced against the employer's right to maintain order and respect. Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). However, the Respondent must demonstrate that it has a legitimate and substantial business interest which overrides the employee's right to engage in protected concerted activity and consequently warrants a restriction on it. State of Ill. (Dep't of Cent. Mgmt. Serv., Dep't of Mental Health and Developmental Disabilities), 12 PERI ¶ 2037 (IL LRB-SP 1996). For example, "an employee does not lose the protection of the Act unless his misconduct is so violent or of such character as to render the employee unfit for further service." Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). Similarly, an employee's right to engage in protected activity prevails "unless the employer can demonstrate special circumstances indicating a restriction on activity is necessary for the maintenance of safety, efficiency, or discipline." Id. (restriction must be necessary; employer's interest in enforcing the rule, to maintain order and respect, must outweigh employee's interest in engaging in protected activity); Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998) ("We must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement."). Public and private sector labor boards have identified certain substantial, legitimate business interests which may override an employee's right to engage in protected activity. These include the interest to ensure uniformity in the

application of information disclosure rules—particularly in the law enforcement context,<sup>14</sup> to prohibit disparaging statements of the employer or its business when such statements do not relate to an ongoing labor dispute,<sup>15</sup> and to prohibit false allegations or affidavits against the employer which are deliberately/maliciously false or made with reckless disregard for their truth.<sup>16</sup> However, an employer’s interest in enforcing its work rules does not alone present a justification for curtailing an employee’s protected activity. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 16-17 (1962); Chicago Transit Auth., 30 PERI ¶ 9 (IL LRB-LP 2013); City of Allentown, 26 PPER ¶ 26143 (PLRB 1995).

First, Decker’s activity remains protected because the character of his conduct does not harm or even impact any of the legitimate, substantial business interests noted above. To illustrate, the Respondent does not assert that Decker’s proposed testimony or his opinion statement were knowingly false, malicious, made with reckless disregard for the truth, or that they were unlawful. Similarly, the Respondent does not identify any documents or information that Decker released in violation of Respondent’s disclosure policy. Likewise, the Respondent

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<sup>14</sup> Ingham Cnty. v. Capitol City Lodge No. 141 of the Fraternal Order of Police, 275 Mich. App. 133 (2007) (peace officer’s disclosure of employer’s internal document to union was not protected, even though the document itself was not confidential, because the sheriff had an interest in ensuring uniform application of its disclosure rules which prohibited disclosure of documents without advance permission).

<sup>15</sup> Jefferson Standard Broadcasting Co., 94 NLRB 1507, enf’d. sub nom. Local Union Number 1229, Intern’l Bhd. of Electrical Workers v. NLRB, 346 U.S. 464 (1953)(employee’s distribution of handbills which made a sharp, public, disparaging attack on quality of station’s products and its business policies was not protected activity where the handbill made no reference to the union, labor controversies or collective bargaining); But see Comm. Hosp. of Roanoke Valley v. NLRB, 538 F.2d 607 (4th Cir. 1976) (Upholding the Board’s finding that a nurse’s statement on TV protesting wages and staffing conditions at the hospital were protected because they were directly related to protected concerted activity in progress, even though the hospital argued that the statements were disparaging and disloyal).

<sup>16</sup> ABA SECTION OF LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW at 268 (6th Ed. 2012); Sheriff of Jackson Cnty., 14 PERI ¶ 2009 (IL SLRB 1998) (Where employer could not demonstrate that employee’s testimony was false, and where employer characterized employee’s testimony as disloyal, Board affirmed the ALJ’s conclusion that employee engaged in protected activity and that the employer violated the Act by disciplining employee because of her testimony supporting the union’s organizing campaign).

does not explain how Decker's proposed testimony (which he never gave) or his written statement (which the Union never used) before the Merit Board (concerning a labor dispute) constitutes unprotected public disparagement of the Department. Finally, the Respondent failed to otherwise demonstrate how Decker's protected activity disrupted the workplace or interfered with the Respondent's maintenance of safety, efficiency, or discipline.

Second, Respondent's desire to prevent "conflicts of interest" within its ranks does not justify Respondent's application of its rules to curtail Decker's otherwise protected activity because the Respondent has not identified a valid conflict in this case which would warrant such a restriction. First, Decker did not have a punishable conflict of interest when he used his professional expertise, learned on the job, to discredit the Jefferson County police report because police officers do not owe fealty to law enforcement universally. Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) (applying similar rationale to a First Amendment claim outside the labor context).<sup>17</sup> Similarly, Decker did not have a punishable conflict of interest when he used his professional expertise to undermine the Respondent's disciplinary case against Hicks because Decker criticized only a report filed by a different law enforcement agency and did not apply his training to discredit the Respondent's own DUI arrest procedures.<sup>18</sup>

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<sup>17</sup> In Kinney, two police instructors brought suit, under the First Amendment, against police chiefs and sheriffs who allegedly tried to remove the instructors from their positions at the police academy after they provided expert testimony against a police officer from a different jurisdiction in an excessive-force case. The defense asserted that the instructors' testimony was not protected by the First Amendment because it created a "conflict of interest" and "violat[ed] ... principles of cooperative responsibility [and] trust." Id. at 364. The court held that the defendant's asserted notion of conflict of interest "swe[pt] so broadly as to undermine its status as a legitimate government interest that [could] properly weigh in the Pickering balance." Id. Further, the majority criticized the dissent, which "trumpet[ed] the need for institutional loyalty," noting that the defense's charge of disloyalty would make sense only if the instructors owed fealty to law enforcement universally. Id.

<sup>18</sup> Notably, the Respondent has cited no case law for the proposition that it may punish Decker's offer of testimony simply because the Respondent provided Decker the training which qualified him as an expert. Further, the fact that Decker has provided expert testimony for the Respondent in other cases has no bearing on this case.

Contrary to the Respondent's assertion, the Respondent cannot simply declare a legitimate interest in enforcing its rules here, where it shoehorns Decker's conduct to fit its existing prohibitions and interprets its rules to expressly bar Decker's protected activity. As a preliminary matter, an employer's interest in enforcing its work rules does not alone present a sufficient justification for the adverse action where, as in this case, the Respondent has indentified no independent substantial interest which warrants their application to restrict otherwise protected activity. See Chicago Transit Auth., 30 PERI 9 (IL LRB-LP 2013) (employee who cursed at his boss, after the employer stickered the vehicle he used on union duty, engaged in protected activity even though he violated a work rule which prohibited disrespect to management and use of profanity); City of Allentown, 26 PPER ¶ 26143 (PLRB 1995) (finding that union president's alleged circumvention of the chain of command would not necessarily be unprotected when he did so to determine whether a superior officer had acted criminally in the course of bringing disciplinary charges against a fellow bargaining unit member); NLRB v. Washington Aluminum Co., 370 U.S. at 16-17 (employees who engaged in lawful work stoppage engaged in protected activity, even though they violated the work rule that prohibited them from leaving work without permission).

More importantly, we have previously held that an employer cannot interpret its work rules to prohibit otherwise lawful group activity designed to influence its employment practices, as the Respondent has done here. Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). The proposition finds additional support in NLRB case law which provides that an employer violates the National Labor Relations Act when it enforces a neutral-worded rule to restrict the exercise

of protected rights. Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004).<sup>19</sup> As discussed above, Decker engaged in protected activity because he offered his expert testimony to help a fellow bargaining unit member preserve his contractual rights and, in doing so, did not impact the Respondent's professional functions. Accordingly, the Respondent cannot interpret its "conflict of interest" rule to bar such testimony, even if it would have served to undermine the Respondent's disciplinary case against another employee. Cnty. of Cook (Cook Cnty. Hosp.), 10 PERI ¶ 3029 (IL LLRB 1994)("concerted activity does not lose its protection simply because it may be prejudicial to the employer"). Similarly, the Respondent cannot characterize its rule, which prohibits employees from volunteering testimony in civil actions, as also barring Decker's offer of expert testimony in support of Hicks's disciplinary case. For the same reason, the Respondent cannot construe the prohibition against unauthorized "investigations" or "official actions" to reach Decker's review of the Jefferson County police report, a document which the Union provided him, which he assessed at the Union's request, and which enabled his proposed testimony.

Thus, the Respondent has identified no legitimate interest which warrants a restriction on Decker's protected activity and outweighs the significant right of employees to freely testify on behalf of other workers. Ebasco Services, Inc., 181 NLRB 768, 770 (1970) ("employees have a...right to a full and fair hearing on the grievances under contract procedures which must...be protected from interference or limitation."). Accordingly, we conclude that the Respondent violated Section 10(a)(1) of the Act when it issued Decker a five-day suspension for offering

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<sup>19</sup>In this case, the NLRB held that, where a rule does not expressly restrict activity protected under Section 7 of the National Labor Relations Act, 29 U.S.C. §157, the rule will violate Section 8(a)(1) of that act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; or (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 2 (2004).

expert testimony and a witness report on behalf of a fellow bargaining unit member in a disciplinary hearing and we order the following remedy.

**6. Order**

Based on the foregoing, we hereby order the Respondent, State of Illinois, Department of Central Management Services (State Police), its officers and agents to:

1. Cease and desist from:
  - a. Retaliating against Richard Decker, or any of its other employees, for engaging in protected concerted activity.
  - b. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them under the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act:
  - a. Rescind the suspension of Decker by the Respondent, State of Illinois, Department of Central Management Services (State Police), issued on or about May 13, 2010;
  - b. Make Richard Decker whole for all losses he incurred as a result of his suspension, including interest at seven percent per annum;
  - c. Expunge from Respondent's files any reference to the complained-of suspension and notify Decker in writing both that this has been done and that evidence of the unlawful suspension will not be used as a basis for future personnel actions against him;
  - d. Preserve, and upon request, make available to the Board or its agents for examination and copying, all records, reports and other documents necessary to analyze the amount of compensation to which Decker may be entitled, under the terms of this decision;

- e. Post, for 90 consecutive days, at all places where notices to employees of Respondent, State of Illinois, Department of Central Management Services (State Police), are regularly posted, signed copies of the attached notice. Respondent shall take reasonable steps to insure that the notices are not altered, defaced, or covered by any other material.
3. Notify the Board, in writing, within 36 days of the date of this order, of the steps that Respondent, State of Illinois, Department of Central Management Services (State Police), has taken to comply herewith.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett  
John J. Hartnett, Chairman

/s/ Paul S. Besson  
Paul S. Besson, Member

/s/ James Q. Brennwald  
James Q. Brennwald, Member

/s/ Michael G. Coli  
Michael G. Coli, Member

/s/ Albert Washington  
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on August 13, 2013, written decision issued in Chicago, Illinois on August 30, 2013.

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

Illinois Troopers Lodge No. 41,	)	
Fraternal Order of Police,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-10-130
	)	
State of Illinois, Department of Central	)	
Management Services (State Police),	)	
	)	
Respondent	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On February 26, 2010, Charging Party, Illinois Troopers Lodge No. 41, Fraternal Order of Police, filed a charge with the State Panel of the Illinois Labor Relations Board (Board) in Case No. S-CA-10-130, alleging that Respondent, State of Illinois, Department of Central Management Services (State Police), engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act). On June 30, 2010, the Board’s Executive Director dismissed a portion of the charge, but also issued a Complaint for Hearing. Respondent filed a timely answer.

A hearing on the matter was conducted on April 1 and 4, 2011, in Chicago, Illinois. The Charging Party and Respondent presented evidence through witness testimony, documentary exhibits, oral argument and written briefs. After full consideration of the parties’ stipulations, evidence, arguments and briefs, I recommend the following.

**I.     PRELIMINARY FINDINGS**

The Charging Party and the Respondent stipulate, and I find, as follows:

1. The State of Illinois Department of Central Management Services is a public employer within the meaning of Section 3(o) of the Act.
2. The Board has jurisdiction to hear this matter pursuant to Section 5(a) and 20(b) of the Act.
3. Illinois Trooper Lodge No. 41 is a labor organization within the meaning of Section 3(i) of the Act.
4. The issue for hearing is whether or not the Respondent violated Section 10(a)(1) of the Act.

## **II. ISSUES AND CONTENTIONS**

The Charging Party alleges that the Respondent violated Section 10(a)(1) of the Act when it interfered with, restrained and coerced Sgt. Richard Decker in the exercise of his rights to assist the Union and to engage in mutual aid, protection or other concerted activities related to collective bargaining. The Charging Party claims that Sgt. Decker engaged in protected concerted activity when he reviewed and reported on Trooper Lyle Hick's case by request from the Union. Lastly, the Charging Party argues that the Respondent's imposition of discipline on Sgt. Decker violated the Act and the Board applied standard does not require proof of "anti-union" animus or intent on the part of the Respondent.

The Respondent alleges that it did not violate Section 10(a)(1) of the Act when it disciplined Sgt. Decker. The Respondent maintains that due to the allegation of an adverse employment action, the case should be analyzed under the Section 10(a)(2) standard, which requires proof of anti-union animus. The Respondent argues that the Charging Party can only prove that an adverse employment action was taken against Sgt. Decker, and that this is not enough to establish its prima facie case. The Respondent also argues that Sgt. Decker did not engage in

union protected activity and, even if he did, the Charging Party has not shown that the Respondent was aware of his union protected activity. Moreover, the Respondent alleges that the Charging Party failed to provide any evidence of the Respondent's anti-union animus. Lastly, the Respondent maintains that even if the Charging Party can establish its prima facie case, the Respondent had a legitimate business reason for disciplining Sgt. Decker.

### **III. FINDINGS OF FACT**

The Illinois State Police (ISP) divides its employees between sworn personnel and unsworn employees. Sworn personnel are officers with full arrest powers and are subject to the jurisdiction of the Illinois State Police Merit Board for matters such as the hiring of new officers, promotion of current officers and discipline. All other employees are subject to the state personnel code. The Merit Board is a five member panel created by the Illinois State Police Act and appointed by the Governor. The Merit Board conducts quasi-judicial administrative hearings, with its decisions subject to administrative review in Circuit Court.

The Respondent's disciplinary process begins with a Division of Internal Investigation (DII) interview. At this stage, the employee and an employer representative have a conversation to determine whether the employee should be disciplined. If the Respondent decides the employee should be disciplined, the Disciplinary Review Board (DRB) reviews the charges. The DRB is comprised of four colonels and meets at least once a month. Representatives from the Respondent's labor unit, legal office, equal employment office, Respondent's investigator and the disciplined officer may attend DRB meetings. The investigator presents the case for discipline and the DRB makes a recommendation to the ISP Director. If the employee receives a 30 day suspension or less, he or she may appeal directly to the Merit Board. If the employee

receives a suspension of greater than 30 days, up to and including discharge, any appeal must go directly to the Merit Board.

When a Union member is disciplined, the Charging Party's legal committee will review the case to determine whether the Charging Party will provide the member with legal representation in the disciplinary process. The parties' collective bargaining agreement gives an officer the right to be represented by one of the Charging Party's lawyers throughout the disciplinary process, including representation for long-term suspension and discharge cases in front of the Merit Board.

Officers who are subject to disciplinary proceedings often call other officers to testify as fact witnesses or as character witnesses. The testifying officers might give testimony that contradicts the Respondent's position. The Charging Party cited two specific situations where officers gave testimony as witnesses in other officers' disciplinary cases but were not disciplined for testifying. The Respondent also employs officers who are allowed to engage in secondary employment and act as accident reconstruction experts. The Respondent has allowed these officers to testify in cases involving other police departments as long as they hold themselves out as private experts.

The Respondent employs Richard Decker as a Sergeant. As such, Sgt. Decker is in a bargaining unit represented by the Charging Party. From 1985 through 1998, Decker was a Road Trooper. In June 1998, he became a Sergeant and he held that position at the time of the hearing in 2011. As a Sergeant, Decker supervises other officers and works patrol in the "south sector", covering the Stevenson, Dan Ryan, I-57, Bishop Ford and I-394. Sgt. Decker has been instructing new employees on proper field sobriety testing procedures since 1999.

Sgt. Decker was elected Union Trustee in 2003. He was re-elected in 2006 and 2009 and held the position at all times material to this case. As Union Trustee, Sgt. Decker represents and

advocates for other members in the Chicago District. He also files grievances on behalf of fellow union members facing discipline. As a Union Trustee, he also attends monthly trustee meetings where the Charging Party and Respondent discuss issues that affect union members. Sgt. Decker takes notes at these meetings and distributes a report to his fellow union members. Sgt. Decker also serves on the Charging Party's legal committee which meets three times per year to review disciplinary cases and determine whether a Lodge attorney will represent members involved in these disciplinary cases. Finally, Sgt. Decker serves on the safety, magazine and grievance committees.

In the fall of 2009, Trooper Lyle Hicks' disciplinary case was before the Merit Board after he was arrested for driving under the influence (DUI) while off-duty. In September of 2009, Lodge President Scholl approached Sgt. Decker and asked him about his experience with DUI arrests. Sgt. Decker told Scholl that he was not an expert but that he had just finished teaching a DUI class and probably had more DUI arrests than any other ISP officer at the time. Scholl asked Sgt. Decker to review Hicks' DUI arrest and disciplinary case with Lodge counsel Guy Studach.

On October 6, 2009, Sgt. Decker received and reviewed a copy of the Jefferson County Sheriff's investigation report of Hicks' DUI arrest. This report included police reports, a DVD of the video from the arresting officer's in-car camera and photographs provided by Studach. At a command trustee meeting, Sgt. Decker told Lieutenant Paul Riggio that the Lodge asked him to review Hicks' case. Lt. Riggio told Sgt. Decker the matter was between Sgt. Decker and the Lodge. Sgt. Decker did not provide a subpoena for this case or notify the legal team. He reviewed the documents given to him by Studach and prepared a written report as an "opinion witness." In the report, Sgt. Decker stated that several parts of the standardized field sobriety test

performed by Jefferson County Sheriff Deputy Porter were incorrect. Sgt. Decker recommended that no weight be given to the field sobriety test results.

Around the same time, in a different case, the Cook County State's Attorney's Office subpoenaed Sgt. Decker to testify as an expert witness in a criminal DUI court case against an ISP officer. During an October 2009 command trustee meeting, Sgt. Decker notified Lt. Riggio of the subpoena in the criminal case. Riggio told Sgt. Decker to notify the Lodge's legal team. Sgt. Decker reviewed the field sobriety test and refuted 11 of the 13 challenges raised by the defense. Sgt. Decker drafted a report claiming that the trooper administering the test committed two errors. Since Sgt. Decker's report was favorable to the defendant, the State's Attorney turned the report over to the defendant's attorney and the defense subpoenaed Sgt. Decker to testify. Ultimately, the case was resolved by a plea bargain and Sgt. Decker did not testify in the criminal case.

In December of 2009, the Illinois Attorney General's office subpoenaed Sgt. Decker to testify at Hicks' disciplinary hearing before the Merit Board. Sgt. Decker asked Lt. Riggio if he should appear before the Merit Board in his capacity as ISP Sergeant or as Lodge Trustee. Lt. Riggio told Sgt. Decker to act as a Lodge Trustee. However, Sgt. Decker ultimately did not testify in Hicks' case and his report was never presented to the Merit Board.

Acting Chief Legal Counsel for ISP, John Hosteny learned of Sgt. Decker's report through the discovery process of Hicks' disciplinary case. Hosteny learned that the Lodge was relying on two expert opinions, one of which was Sgt. Decker's report. Hosteny's staff attorney wanted to send Sgt. Decker's report to ISP's own expert when he discovered Sgt. Decker was ISP's expert. Hosteny believed that Sgt. Decker may have violated ISP's conflict of interest policy by submitting a report contradicting an ISP disciplinary charge. Hosteny was not aware that Sgt.

Decker submitted his report on behalf of the Lodge or that he was a Lodge Trustee who reviewed the field sobriety test at the request of the Lodge. Hosteny asked another officer who taught field sobriety to review the Jefferson County Sheriff's field sobriety report for Hicks' disciplinary case.

On November 18, 2009, Hosteny reported the potential violation to Lieutenant Colonel D. Diamond in Sgt. Decker's division to conduct an investigation. After an internal investigation, charges were recommended against Sgt. Decker and submitted to Hosteny for review. Hosteny did not sustain one, amended others and sent the remaining charges to the DRB.

After submitting his report, Sgt. Decker began hearing rumors that he was under investigation by the ISP. In December of 2009, Sgt. Decker received official notice of the investigation. On January 28, 2010, Sgt. Decker was charged with 8 counts including, misuse of official position, interference in investigation, conflict of interest, publicly criticizing the department, release of information without approval, volunteering to testify in a civil action, failing to notify his supervisor when subpoenaed to testify against the department and undertaking an investigation without supervisory approval.

On February 19, 2010, Special Agent Heather Simental interviewed Sgt. Decker as part of the DII investigation. At that time, Sgt. Decker told Simental that he reviewed the Hicks arrest at the request of the Lodge in his capacity as a Lodge representative on the legal committee and that he did it all on his own time. Sgt. Decker stated that he reviewed the tape and police report of Hicks' arrest and found discrepancies in the report. Sgt. Decker also told Simental that he felt it was his duty as Lodge representative to review Hicks' disciplinary case.

On March 22, 2010, an investigative summary removed the charges of conflict of interest and undertaking an investigation without supervisory approval but sustained all other charges. On

March 30, 2010, the ISP legal department sustained all of the original eight charges against Decker.

On April 28, 2010, the eight charges against Sgt. Decker were presented to the DRB. Colonel Jack Garcia presented ISP's case against Sgt. Decker to the DRB. At that time, Garcia was aware that Sgt. Decker prepared his report acting on behalf of the Lodge. On May 13, 2010, Sgt. Decker was charged with filing a report on behalf of a respondent in an ISP Merit Board case, in the capacity of an expert witness. On May 21, 2010, ISP Deputy Director Michael Snyders wrote a memorandum to Deputy Director Jack Garcia stating that Sgt. Decker voluntarily reviewed and filed a report on behalf of a respondent in an ISP Merit Board case, in the capacity of an expert witness. Snyders recommended that the charge against Sgt. Decker be sustained and that Sgt. Decker receive a five-day suspension. Sgt. Decker was suspended for five days. Sgt. Decker appealed his suspension to the Merit Board, but that hearing has been stayed pending the resolution of this unfair labor practice.

#### **IV. DISCUSSION AND ANALYSIS**

The Respondent did not violate Section 10(a)(1) of the Act when it disciplined Sgt. Decker because the Charging Party has not met its prima facie case to show that the Respondent acted out of union animus.

Section 10(a)(1) of the Act prohibits an employer from restraining or coercing an employee from engaging in exercise of rights guaranteed by the Act, such as supporting a labor organization or participating in and supporting its activities. Although the motive or intention of a public employer is not usually considered in the context of a Section 10(a)(1) violation, where an employee is allegedly discharged or laid off or suffers other adverse employment action for engaging in protected, concerted activity under the Act, the motivation of the public employer

must be examined in the same manner as cases arising under Section 10(a)(2) of the Act. County of Jersey, 7 PERI ¶2023 (IL SLRB 1991), aff'd by unpub. order County of Jersey v. Illinois State Labor Relations Board, 8 PERI ¶4015 (1992); Kirk and Chicago Housing Authority, 6 PERI ¶3013 (IL LLRB 1990).

To establish a prima facie case that the Employer violated section 10(a)(2) of the Act, the Union must prove that: 1) the employees engaged in union activity, 2) the Employer was aware of that activity, and 3) the Employer took adverse action against the employees for engaging in that activity in order to encourage or discourage union membership or support. City of Burbank v. Ill. State Labor Relations Bd., 128 Ill. 2d 335, 345 (1989). With respect to the last element, the Union must introduce evidence that the adverse action was based, in whole or in part, on union animus, or that union activity was a substantial or motivating factor. Id. Union animus is demonstrated through the following factors: expressions of hostility toward unionization, together with knowledge of the employee's union activities; timing; disparate treatment or a pattern of conduct which targets union supporters for adverse employment action; inconsistencies between the reason offered by the employer for the adverse action and other actions of the employer; and shifting explanations for the adverse action. Id.

If by these various means a charging party establishes a prima facie case, the burden shifts to the respondent, who may demonstrate that even absent that prohibited motivation, it would have taken the same action against the charging party for legitimate business reasons. 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.

The Charging Party's post-hearing brief argued that this charge should be analyzed as a stand-alone violation of Section 10(a)(1) of the Act where no animus is necessary for a violation.

However, the case law is clear that where an employee suffers an adverse employment action for engaging in protected, concerted activity under the Act, the motivation of the public employer must be examined in the same manner as cases arising under Section 10(a)(2). Here, because Sgt. Decker was suspended for five days as a result of reviewing Trooper Hicks' disciplinary file, this case has to be examined using the standard established in City of Burbank.

Concerted activity is activity undertaken jointly by two or more employees, or by one employee on behalf of others. County of Cook (Management Information Services), 11 PERI ¶ 3012 (IL LLRB 1995). To be protected, concerted activity must be for the purpose of collective bargaining, “other mutual aid or protection”, or aimed at improving the wages and terms and conditions of employment. Id. Public sector labor agencies generally take a broad view as to what constitutes protected activity. Village of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993). “Where it can be shown that the complained-of employer actions directly affect their working conditions, employees are permitted a wide range of protest.” Id. As long as the activities engaged in are lawful and the character of the conduct is not indefensible in its context, employees are protected by... the Act.” Id., citing Reef Industries v. NLRB, 952 F.2d 830, 836 (5th Cir. 1991).

Here, Sgt. Decker’s report on behalf of Hicks at his Merit Board disciplinary hearing was protected, concerted activity. Sgt. Decker acted in his role as Union Trustee when he filed a report on Hicks’ behalf. Sgt. Decker was asked to do so by other Union officials and as such, drafting the report in preparation for Trooper Hicks' case at Merit Board disciplinary hearing became part of Sgt. Decker’s role as Union Trustee. Sgt. Decker’s report was offered in the Respondent’s grievance process. Under the National Labor Relations Act, a Union Steward is protected when fulfilling his role in processing a grievance. Union Fork and Hoe Co., 241 NLRB

907 (1979); see also Crown Central Petroleum Corp., 430 F.2d 724 (5<sup>th</sup> Cir. 1970); American Red Cross Blood Services Division, 316 NLRB 783 (1995); Syn-Tech Windows Systems, Inc., 294 NLRB 791 (1989); Clara Barton Terrace Convalescence Center, 225 NLRB 1028 (1976); Hawaiian Hauling Service, Ltd., 219 NLRB 765 (1975). Although filing a report regarding proper DUI arrest protocol is not normally part of Decker's duties as Union Trustee, it became one of his duties once the Union determined Sgt. Decker's report could aid Hicks in the grievance process before the Merit Board. As a result, Decker's activity is protected. The activity was concerted because Sgt. Decker offered the report on behalf of a fellow employee and Union member.

Although Sgt. Decker engaged in protected, concerted activity, the Charging Party failed to present any evidence that the Respondent knew of the concerted activity and acted with union animus when disciplining Sgt. Decker. There is no evidence that at the time the Respondent initiated discipline against Sgt. Decker, the Respondent was aware of Sgt. Decker's protected activity. In fact, Sgt. Decker did not inform the Respondent that his review of Trooper Hicks' case was on behalf of the Union until he was being interviewed as it related to his discipline in February 2010. Hosteny initiated discipline against Sgt. Decker as early as December 2009. Moreover, it is undisputed that Sgt. Decker signed his report with his name, title and badge number. This is further evidence that, other than Sgt. Decker's admission during his interview, there was no other evidence that the Respondent knew or should have known of his union activity.

Because the Charging Party has failed to establish its prima facie case, there is no need to analyze whether the Respondent had a legitimate business reason in disciplining Sgt. Decker.

**V. CONCLUSIONS OF LAW**

I find that the Charging Party failed to prove, by a preponderance of evidence, that the Respondent violated Section 10(a)(1) of the Act.

**VI. RECOMMENDED ORDER**

IT IS HEREBY ORDERED that the complaint in this case be dismissed in its entirety.

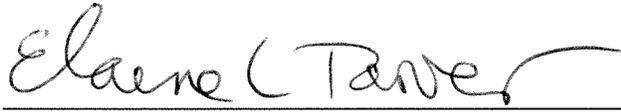
**VII. EXCEPTIONS**

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 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 29<sup>th</sup> day of May, 2013.

STATE OF ILLINOIS LABOR RELATIONS BOARD

STATE PANEL

A handwritten signature in black ink, reading "Elaine L. Tarver", written over a horizontal line.

Elaine L. Tarver, Administrative Law Judge