STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Policemen's Benevolent Labor Committee,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. S-CA-11-169
	)	
County of Bureau and Bureau County Sheriff,	)	
	)	
Respondents	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On August 24, 2012, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued a recommended decision and order (RDO) in the above-captioned case, recommending that the Illinois Labor Relations Board, State Panel: (1) find that the County of Bureau and the Bureau County Sheriff (Respondents) violated Sections 10(a)(2) and (1) of the Act when the Sheriff initiated a complaint with the County's Merit Commission seeking discharge of former employee Dawn Dove in retaliation for her protected concerted activity; (2) defer resolution of that portion of the unfair labor practice allegations concerning a 27-day suspension to the parties' grievance settlement agreement; and (3) find that Respondents did not repudiate the applicable collective bargaining agreement or refuse to bargain in good faith in violation of Sections 10(a)(4) and (1) of the Act. In making these recommendations, the ALJ also recommended that the Board find that Charging Party, Policemen's Benevolent Labor Committee (PBLC), had not waived its right to bring unfair labor practice charges before the Board. Finally, the ALJ recommended that the Board find that sanctions were appropriate against the Respondents for particular denials made in their answer to the complaint for hearing.

Respondents filed timely exceptions to the RDO pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240, and Charging Party filed a timely response to the exceptions. After reviewing the record, exceptions, and response, we adopt the ALJ's Recommended Decision and Order in all but one very minor respect, and wholly adopt her recommendation to defer an aspect of this case and her conclusions that the Respondent violated Sections 10(a)(2) and (1) of the Act, did not violate Section 10(a)(4), and should be sanctioned.

The primary issues are whether Respondent violated Sections 10(a)(2) and (1) of the Act in suspending and seeking the discharge of an employee in retaliation for her having filed grievances and for having supported a new collective bargaining representative and whether Respondent violated Sections 10(a)(4) and (1) of the Act by refusing to proceed to arbitration on her discharge grievance and repudiating a collective bargaining agreement. The relevant facts are fully set out in the ALJ's RDO. We add one new detail and repeat a few essentials.

The County of Bureau maintains a Sheriff's Department and Sheriff John Thompson was the chief law enforcement officer of that agency. Dawn Dove was employed there as a deputy sheriff for 14 years. Dove was discharged from her position in February 2011 on a varicty of charges regarding conduct in which she allegedly engaged during 2010. During the time period immediately prior to her discharge, Dove was engaged in efforts to secure PBLC as the new collective bargaining representative for employees of Respondent previously represented by the Fraternal Order of Police (FOP). Dove was also disciplined in 2010 for an incident where she allegedly left her loaded weapon on the floor of her squad car with the doors locked, as well as for an incident in which she played a prank on the deputy chief of the department.

Dove grieved her discharge on February 24, 2011. PBLC informed Sheriff Thompson and the Merit Commission that Dove would seek arbitration of her discharge grievance pursuant to the FOP contract. The FOP contract expired on November 30, 2010, but provided that the agreement would remain in force after expiration if no successor agreement had been negotiated. Negotiations for a successor agreement were not completed before expiration of the FOP contract on November 30, 2010.

The Sheriff filed an action for declaratory judgment in circuit court regarding Section 16.8 of the FOP contract, which permits arbitration in lieu of administrative review of Merit Commission disciplinary actions. More specifically, the Sheriff sought a declaratory judgment against Charging Party, Dawn Dove, and the County. The circuit court granted summary judgment for the defendants, and that ruling was affirmed by the Appellate Court, Third District, in Thompson v. Policemen's Benevolent Labor Committee, 2012 IL App (3d) 110926, *pet. for leave to appeal den.*, No. 115603 (Ill. March 27, 2013), a decision issued some months after the ALJ issued her RDO in the instant case.[1] Particularly relevant to this matter, the state courts determined that the terms of the collective bargaining agreement between Respondents and FOP remained in full force and effect even after PBLC replaced FOP as the exclusive bargaining representative. Id. at ¶¶13-14.

The complaint before the ALJ alleged that Respondents violated Sections 10(a)(2) and (1) of the Act when they sought to discharge Dove in retaliation for her protected concerted activity in filing grievances and in working to bring in a new representative for Respondents' employees. Although Respondents presented a dual motive case wherein at least one charge

[1] While the Board was not a party to this litigation, the Sheriff apparently asked the court to enjoin our consideration of the complaint presently before us. The circuit court denied that motion. Thompson v. Policemen's Benevolent Labor Committee, 2012 IL App (3d) 110926 at ¶8.

against Dove was facially legitimate, Respondents also included charges that were arbitrary and pretextual, as evident from Respondents' conduct, timing, and shifting explanations. There was simply insufficient evidence to show that Respondents would have taken the same action in seeking Dove's discharge even in absence of the arbitrary and pretextual charges. Moreover, the Charging Party presented credible evidence of anti-union animus by the Respondents, who effectively recommended Dove's discharge. We find that the ALJ correctly analyzed the facts and circumstances involved in this case and properly concluded that Respondents had violated Sections 10(a)(2) and (1). The ALJ also properly deferred unfair labor practice issues regarding Dove's 2010 suspensions to a previously executed settlement on those issues.

The complaint also alleged that Respondents violated Sections 10(a)(4) and (1) by repudiating the collective bargaining agreement and refusing to bargain in good faith when the Sheriff brought an action in circuit court seeking a declaratory judgment that Respondents did not have to arbitrate Dove's discharge grievance, litigation which, as previously noted, proved unsuccessful. On this point, the ALJ found that (1) the FOP collective bargaining agreement became void on the date the Board decertified FOP as the exclusive representative and certified PBLC in its place; (2) the duty to arbitrate nevertheless continued as a matter of statutory right and out of special consideration for protective service employees; but (3) Respondent's conduct did not constitute repudiation of its duty to bargain because it refused to arbitrate only a single class of grievances—those pertaining to discipline imposed by the merit commission. We agree with the ALJ's third point that Respondent's conduct could not constitute repudiation here even if there were an obligation to arbitrate. We find her first point to be inconsistent with the subsequent holding of the Illinois Appellate Court in Thompson v. Policemen's Benevolent Labor Committee, 2012 IL App (3d) 110926 ¶¶13-14, and, while that decision is not binding

upon us as the Board was not made a party to that litigation, and it does not necessarily represent the holding we would have made on the issue, we realize it is binding on the parties before us and out of principles of comity, would not wish to reach a contrary decision. Both for that reason, and in realization that no finding on this point is necessary given our conclusion that the Respondent's actions could not constitute repudiation in any event, we decline to adopt the ALJ's recommendation on the first point concerning the continued vitality of the FOP contract. Similarly, because a ruling on the point is not necessary to a resolution of this case, we also decline to adopt the ALJ's recommendation on the second point concerning whether a duty to arbitrate arises outside of the presence of a valid collective bargaining agreement. In short, we find Respondent did not violate Section 10(a)(4) solely because its conduct in refusing to arbitrate only a single class of grievances did not rise to the level of repudiation.

Respondents argued that Charging Party waived its right to proceed on an unfair labor practice charge before the Board because of a contract provision in the FOP contract providing for waiver of "any other right of recourse of any kind" when electing to use the grievance procedure following disciplinary action by the Merit Commission. Generally, waiver of a statutory right must be clear and explicit; general contract provisions will not be inferred to waive statutorily protected rights unless the provision specifically states as much. See Metropolitan Edison Co. v NLRB, 460 U.S. 693, 708 (1983). Even if it remained binding, the contract provision at issue in this case did not specifically preclude the right to seek statutory relief from the Board; therefore, the Charging Party did not waive its right to bring an unfair labor practice charge against Respondents. Respondents raised a number of other objections to the ALJ's findings in their exceptions and briefs, but we find these objections unpersuasive and without merit. Our examination of the record does not reveal any rulings by the ALJ that were

clearly erroneous or biased, and we are not inclined to disturb her findings regarding credibility of witnesses and evidence in the absence of a compelling reason to do so.

Finally, with regard to sanctions, evidence at hearing revealed that Respondents made two denials in their answer to the complaint that they should have known were false. Limited sanctions regarding these denials serves as a reminder to parties to plead carefully and correctly in proceedings before the Board, and so we also adopt the ALJ's recommendation to impose sanctions.

ORDER

IT IS HEREBY ORDERED that Respondents, their officers and agents, shall:

1) Cease and desist from:
    a. Filing charges against employees with the Merit Commission seeking their termination or otherwise disciplining employees because they have engaged in union or protected concerted activity.
    b. In any like or related manner, interfering with, restraining or coercing their employees in the exercise of the rights guaranteed them in the Act.
2) Take the following affirmative action necessary to effectuate the policies of the Act:
    a. Offer Dawn Dove immediate and full reinstatement to her former, or a substantially similar, position without prejudice to her seniority or other rights and privileges, and make her whole for all losses she suffered because of Respondents' unlawful filing of a complaint against her with the Merit Commission, including back pay plus interest at a rate of seven percent per annum continuing to the date she is reinstated.
    b. Remove from Dove's personnel file and all other records any reference to the complaint brought against her before the Merit Commission and any discipline ensuing therefrom or related thereto, and notify her in writing that this action has been done and that evidence of the unlawful complaint and resulting discipline, will not be used as a basis for future personnel decisions or disciplinary actions.

c. Preserve and, upon request, make available to the Board or its agents all payroll and other records required to calculate the amount of back pay and the terms and conditions of reinstatement as set forth in this Decision.

d. Reimburse the Union for its reasonable expenses, including costs and reasonable attorney's fees, incurred in litigating the factual issues of whether Dove had filed a grievance over her three-day suspension and whether Dove had been active and visible in her support of the Charging Party, and in seeking sanctions against Respondents under Section 11(c) of the Act.

e. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondents will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

f. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondents have taken to comply with this order.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

John Hartnett, Chairman

Paul S. Beeson, Member

James Q. Brennwald, Member

Michael G. Coli, Member

Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois on February 5, 2013, written decision issued in Chicago, Illinois on April 8, 2013.

NOTICE TO EMPLOYEES

FROM THE

ILLINOIS LABOR RELATIONS BOARD

Case No. S-CA-11-169

The Illinois Labor Relations Board, State Panel, has found that the County of Bureau and Bureau County Sheriff have violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from filing charges against employees with the Merit Commission seeking their termination or otherwise disciplining employees because they have engaged in union or protected concerted activity.

WE WILL cease and desist from in any like or related manner, interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL offer Offer Dawn Dove immediate and full reinstatement to her former, or a substantially similar, position without prejudice to her seniority or other rights and privileges, and make her whole for all losses she suffered because of our unlawful filing of a complaint against her with the Merit Commission, including back pay plus interest at a rate of seven percent per annum continuing to the date she is reinstated.

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor
Springfield, Illinois 62702
(217) 785-3155

160 North LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400

THIS IS AN OFFICIAL GOVERNMENT NOTICE

AND MUST NOT BE DEFACED.

NOTICE TO EMPLOYEES

FROM THE

ILLINOIS LABOR RELATIONS BOARD

WE WILL remove from Dove's personnel file and all other records any reference to the complaint brought against her before the Merit Commission and any discipline ensuing therefrom or related thereto, and notify her in writing that this action has been done and that evidence of the unlawful complaint and resulting discipline, will not be used as a basis for future personnel decisions or disciplinary actions.

WE WILL preserve and, upon request, make available to the Board or its agents all payroll and other records required to calculate the amount of back pay and the terms and conditions of reinstatement as set forth in the Decision.

WE WILL reimburse the Charging Party for its reasonable expenses, including costs and reasonable attorney's fees, incurred in litigating the factual issues of whether Dove had filed a grievance over her three-day suspension and whether Dove had been active and visible in her support of the Charging Party, and in seeking sanctions against Respondents under Section 11(c) of the Act.

DATE _____

_____
County of Bureau and Bureau County Sheriff
(Employer)

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor
Springfield, Illinois 62702
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160 North LaSalle Street, Suite S-400
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ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On February 3, 2011, the Policemen's Benevolent Labor Committee (Charging Party or PBLC) filed a charge with the Illinois Labor Relations Board's State Panel (Board) alleging that the County of Bureau and Bureau County Sheriff (Respondents) engaged in unfair labor practices within the meaning of Section 10(a)(4), (2) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2010), as amended. The charge was investigated in accordance with Section 11 of the Act and on April 29, 2011, the Board's Executive Director issued a Complaint for Hearing. The complaint was amended on February 14 and March 11, 2012. A hearing was conducted on April 12 and 13, 2012, in Chicago, Illinois, at which time the Union 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

1. Respondents are public employers within the meaning of Section 3(o) of the Act.
2. Respondent County of Bureau is a unit of local government subject to the Act pursuant to Section 20(b) thereof.
3. PBLC is a labor organization within the meaning of Section 3(i) of the Act.

II. ISSUES AND CONTENTIONS

There are two main issues in this case: (1) whether Respondents violated sections 10(a)(2) and (1) of the Act when they issued Deputy Sheriff Dawn Dove a 27-day suspension and initiated charges against her before the Bureau County Merit Commission seeking her discharge allegedly in retaliation for the grievance she initiated concerning her earlier suspension and/or in retaliation for her active and visible support for the Union's organization campaign; (2) whether Respondents failed and refused to bargain in good faith in violation of sections 10(a)(4) and (1) of the Act when they refused to proceed to arbitration on Dove's discharge grievance and allegedly repudiated the terms of the Respondents' collective bargaining agreement with the predecessor union, Fraternal Order of Police.

The Union argues that Respondents violated Sections 10(a)(2) and (1) of the Act when they suspended Dove for 27 days and initiated charges against her before the Bureau County Merit Commission because Respondents knew Dove engaged in protected activity when she filed the grievance and supported the Union's organization campaign, and because direct and circumstantial evidence demonstrate that Respondents retaliated against her because of it.

The Union asserts that the Sheriff's and Chief Deputy's comments demonstrate animus. Further, the Union argues that Respondents' disparate treatment of Dove and the timing of the adverse actions further support a finding of animus. With respect to the Merit Commission charges, the Union asserts that Respondents offered shifting and inconsistent reasons for initiating those proceedings and that none of them were legitimate.

Finally, the Union asserts that Respondents repudiated the collective bargaining agreement, signed by Respondents and the predecessor union, by refusing to arbitrate Dove's discharge grievance and by attacking, in court, the validity of the clause that permits employees to arbitrate discipline imposed by the Merit Commission. As a preliminary matter, the Union asserts that the contract is still in effect because the parties have maintained its terms and because "employers do not escape their...past bargains with the employees when the employees exercise their freedoms [to choose a new representative] under the Act." Further, the Union asserts that Section 9 of the Act, which permits employees to change their representative, does not negate collective bargaining agreements. Lastly, the Union argues that the Respondent's conduct amounts to more than a good faith objection over the arbitrability of a particular grievance

because case law and statute do not support the Respondents' position that the challenged clause of the contract is illegal.

Respondents first contend that the Union waived its right to proceed before the Board by grieving Dove's discharge while simultaneously asserting that the parties are bound by the FOP contract because that contract provides that "the Employee and/or the Lodge waives any other right of recourse of any kind" by "electing to utilize the grievance procedure following disciplinary action by the Merit Commission."

On the merits, Respondents argue that the Union has not proven that Respondents acted with an unlawful motive because (1) there is no evidence that the Sheriff was hostile toward Dove's efforts to replace FOP as the employees' exclusive bargaining representative, (2) there is similarly no evidence that any members of the Commission harbored union animus, (3) Respondents did not treat Dove disparately and (4) Respondents had legitimate reasons for disciplining Dove.[1] Further, Respondents assert that they would have taken the same actions against Dove regardless of any alleged union animus.

In the alternative, Respondents argue that the Sheriff's initiation of Merit Commission proceedings against Dove cannot support a finding that Respondents violated the Act because the petition for Dove's removal was supported by probable cause and Respondents' filing of it therefore constituted protected activity under the First Amendment, the Citizens Participation Act, and the Local Governmental Immunities Act. Further, Respondents argue that the Sheriff should not be held responsible for Dove's discharge because he had no final authority to remove her. In addition, Respondents argue that the parties' settlement agreement resolves all issues relating to Dove's 27-day suspension. Finally, Respondents assert that even if the Board finds the Sheriff acted unlawfully in taking either disciplinary action, the County of Bureau should not be held liable for the Sheriff's actions because it had no authority over him.[2]

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[1] Respondents also contend that the witness who testified to the Sheriff's threat concerning Dove's grievance misconstrued the Sheriff's words. In the alternative, Respondents argue that the Sheriff's statement cannot be used to support a finding of unlawful motive because (1) he made that statement in his capacity as a law enforcement officer acting under a statutory duty to enforce the laws of Illinois, not as an employer and (2) because it was made over a year before the charge was filed.

[2] The Court has clearly rejected this argument and it is therefore not addressed in the body of the RDO. Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000), aff'g Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 FN 6 (IL SLRB 1998) ("The County has cited no relevant labor relations authority for its argument that the Sheriff's unfair labor practices should not be imputed to the County.")

Next, Respondents argue that the Board has no jurisdiction to determine whether Respondent repudiated the FOP collective bargaining agreement by refusing to arbitrate the grievance at issue because the Board has no jurisdiction to determine whether that grievance is arbitrable. In the alternative, Respondents argue that they did not repudiate the FOP collective bargaining agreement because the agreement expired and also became null and void when the Board decertified FOP as the unit's exclusive representative. Respondents further argue that even if the Board finds that they materially breached the FOP contract, Respondents did not act unlawfully because the Union materially breached first, thereby "suspend[ing] any duty upon either Respondent's part under Sections 10(a)(4) and (1)."[3]

Finally, Respondents argue that they are immune from liability for initiating the court proceedings under the Local Governmental Immunity Act, the First Amendment, and the Citizens Participation Act. 745 ILCS 10/2-208 (2010); 735 ILCS 110/5 (2010).

Both parties moved for sanctions.

III. FINDINGS OF FACT

The Bureau County Sheriff's Department is located in Princeton, Illinois, a city with a population of 6000. John Thompson has held the office of Sheriff of Bureau County since December 1, 2002. The rank structure of the department in descending order is as follows: Sheriff, Chief Deputy, Lieutenants/Commanders, Sergeants, and Patrol Officers. The department's command staff includes Sheriff Thompson, Chief Deputy Larry Floyd, Commander Jim Shipp, Lieutenant Bret Taylor, Lieutenant Tim Trevier and Lieutenant Randal Hasbrook. At all times material to this case, Dawn Dove was a deputy Sheriff with the department. She was initially assigned to the investigations unit, under supervisor Lieutenant Hasbrook. Between around 2004 and January 11, 2011, the Illinois Fraternal Order of Police Labor Council (FOP) represented deputy patrol officers, sergeants, investigators, lieutenants, radio dispatchers and jailers, employed by the Sheriff's Department.

On November 21, 2007, Lieutenant Hasbrook issued Dove a written documentation of a verbal reprimand, at Chief Deputy Floyd's direction, which stated that Dove needed to improve

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[3] Respondents also note that evidence concerning Respondent's suit challenging the arbitration clause is inadmissible because a party's pleadings in court are absolutely privileged.

her attitude and needed to treat ranking deputies and other members of the department with respect and professionalism.

In late 2008 or early 2009, Dove's attitude, and the manner in which she handled herself with respect to other department personnel, changed. For example, Dove once sought to put a new radio operator employee "to the test" by enlisting other employees to maximize the number of traffic stops they made. In another case, Dove stared at two radio operators until one of them cried and they complained that they felt intimidated by Dove's behavior.[4] Floyd issued verbal reprimands to Dove over both incidents but did not put them in writing. In addition, Dove engaged in verbal altercations with individuals who used to be her friends. Floyd attempted to address these changes with Dove, but she refused to engage in discussion on the subject.

On April 7, 2009, Floyd and other command staff members, excluding the Sheriff, held a non-disciplinary personnel meeting with Dove. They advised Dove that they would no longer tolerate her disrespect and bad attitude toward command staff because it was disruptive. They instructed her to change her behavior. Lieutenant Hasbrook drafted a summary of the meeting and placed it in Dove's file.

On April 15, 2010, two of Dove's coworkers signed statements informing Hasbrook and Floyd that Dove had engaged in political activity while on duty and in uniform between January and March 2010, and specifically on January 29, 2010.[5] They stated that Dove had encouraged fellow employees to "vote for [Joe] Bertetto for Sheriff. He's the one." According to one account, Dove had met with Bertetto while on duty and told others that she would refuse to write tickets because she did not like Sheriff Thompson. Two individuals were present when Dove allegedly made these statements. Hasbrook overheard one of the conversations on the dispatch radio, however Dove asserted that her statements were part of a private conversation and that none of the statements were made in Bertetto's presence. No member of command staff brought the matter to Dove's attention at the time.

On April 21, 2009, command staff transferred Dove from investigations to patrol. Floyd testified that they made the transfer because of Dove's disruptive behavior. Sheriff Thompson, on the other hand, said they did so because they observed inefficiencies in her performance and

[4] As a result, of their complaints, the County implemented a policy that the operators could tell unwanted individuals to leave the area.

[5] Lieutenant Hasbrook witnessed the employees' statements.

because Dove had also expressed a preference to work on patrol. The letter which documented Dove's transfer merely stated that command staff transferred Dove "in furtherance of the operational needs of the Office of the Sheriff."

Around January 7, 2010, Dove removed a box of sweatpants from Floyd's office as a joke. Floyd concluded that Dove's action violated the Bureau County Sheriff's Merit Commission Rules and Regulations and violated the Bureau County Sheriff's Office Administrative Policies and Procedures because she had accessed his office and removed property without his, or the Sheriff's, knowledge and authority. On January 12, 2010, Floyd suspended Dove for three days without pay for her conduct. Dove served the suspension on January 22, 23, and 24, 2010.

On January 14, 2010, Mike Shelley, Fraternal Order of Police Field Representative, filed a grievance on Dove's behalf over the three-day suspension. Rebecca Ann Gosch, deputy with the department, signed the grievance because Shelley was unavailable. Sometime after January 14, 2010, Gosch informed Sheriff Thompson over the phone that she had signed the grievance as a substitute for Shelley. Gosch testified that during this phone call Sheriff Thompson told her to "make Deputy Dove aware that if she wanted to proceed with the grievance that he would rescind the suspension and charge her" criminally for her behavior. Gosch relayed the Sheriff's message to Dove. The Sheriff testified that he spoke openly to Gosch about the fact that he was investigating the criminal nature of Dove's actions but denied that he ever threatened to charge Dove criminally if she proceeded with the grievance.[6] I credit Gosch's testimony based on her demeanor.

On April 22, 2010, the Sheriff issued Dove written documentation of an oral reprimand for damaging her vehicle. The Sheriff issued only minor discipline, even though Dove had received a three-day suspension earlier, because he wanted to give her an opportunity to improve her performance.

In September 2010, Dove contacted Sean Smoot, the chief legal counsel and director of the PBLC, to try and effect a change in union representation at the department. Smoot placed Dove in contact with labor representative Kasey Groenewold who asked Dove to distribute interest cards and post flyers in the department concerning the proposed change. In mid-2010,

[6] The Sheriff considered pressing criminal charges, but ultimately decided not do to so after discussing the matter with the County's legal advisor.

Dove chose an employee from corrections, one from dispatch and one from patrol to meet with Groenewold to discuss how to bring in a new union and how to obtain information about PBLC. She and Groenewold also organized an employee meeting at the Road Ranger, a truck stop/diner, because Sheriff Thompson told Dove during the last quarter of 2010 that employees could not have such a meeting at the Sheriff's department. Dove also created a flier with information on how to contact Kasey Groenewold with questions about PBLC, posted the flier on the employees' union board at work and in employees' mailboxes, and answered employees' questions concerning the representation process. In fact, Dove spoke with most of her fellow employees and a number of command staff officers about her efforts to bring in a new union. In the last quarter of 2010, she spoke with Lieutenant Taylor, in early December 2010, she spoke with Commander Shipp, and in December 2010, she spoke with Sheriff Thompson.

Floyd testified that on a date prior to December 27, 2010, he observed Dove with three or four on-duty officers in discussion during the 12:00 to 8:00 shift. Floyd stated that he was "smoking" and angry because Dove had taken the whole shift off their jobs when they should have been patrolling. Floyd did not listen to their conversation, but he was later informed that the employees were discussing union matters. Floyd then told the Sheriff that deputies were discussing union business on duty instead of patrolling.

On September 17, 2010, Groenewold filed a certification petition on behalf of PBLC to represent sworn personnel in the rank of deputy patrol, sergeant, investigator, lieutenant, radio, dispatchers and jailers who were represented by FOP Lodge 222.[7] The Board issued the petition in Case Number S-RC-11-058. Sergeant Walter Mack testified that when the Sheriff posted the Board's notice to employees, the Sheriff stated that he "didn't care who [the employees] had [as a representative], but [that] until...the agency is certified, they are not going to be allowed into...the facility." Once they were certified, however, he would "welcome them with open arms." Lieutenant Taylor similarly testified that the Sheriff stated, "they're not coming into the building until they have been certified." The Sheriff, on the other hand, testified that the only statement he made concerning PBLC's representation petition was "I don't care who represents the member of the Sheriff's office, as long as they are represented." I credit Mack's and Taylor's testimony because they corroborate each other.

[7] On September 21, 2010, Lori Novak, assistant to the Board's Executive Director, wrote a letter to Sheriff Thompson, Dale Anderson, Bureau County Chairman and David Wickster, FOP attorney, that the Board had received PBLC's representation petition. It was accompanied by a certificate of service.

In November, 2010, the voters of Bureau County reelected John Thompson as Sheriff.

On November 17, 2010, a Board agent notified Sheriff Thompson that the Board approved a consent election agreement. The notice to employees provided by the Board for the employer to post stated that the ballots would be mailed on November 29, 2010, that they were due back to the Board by Thursday, December 16, 2010, and that they would be counted the following day at the Board's Chicago office. The ballots were instead counted on December 22, 2010.

Halfway through November, Thompson spoke to Dove in the squad room at the Bureau County Jail when she showed up for her regular patrol shift. He told her to park her squad car because he was assigning her to the jail, effective immediately.[8] The Sheriff did not call Dove before she left home telling her of her new assignment nor did he instruct her to leave her weapon at home. Dove parked her squad car in the municipal lot; the lot is located in a residential area and has no fences or locks. Dove also left her weapon in her locked car before entering the jail for her new assignment because the jail does not permit officers to wear guns inside. Although Dove did not have a lockbox assigned specifically to her, there are lockboxes at the jail in which officers may keep their guns secure.

Sometime in the second half of November, Sergeant Mack assigned Dove's car to another deputy. The deputy found Dove's duty weapon and holster on the back seat floorboard of the patrol car. There was no gun lock on the trigger. The deputy gave the gun to Mack who then secured it in the jail vault which is used to store weapons. Mack wrote a letter to Commander Shipp informing him of the incident.

Bureau County deputy sheriffs who are issued side arms must secure their weapon in a safe manner. If they visit the jail, they must put their weapon in a lockbox. Both Floyd and Mack testified that they were unaware of any other employee who had left his service revolver unsecured in the back seat of a vehicle parked outside. While officers carry shotguns in cars they park in the municipal lot, those guns are secured electronically so that they cannot be unlocked without starting the car.

On November 21, 2010, Hasbrook directed Dove and another deputy to bring two suspects up from the cells for interviews. Hasbrook later learned from a correctional officer that Dove had had a conversation with one of the suspects. Dove allegedly asked the suspect

[8] Throughout the remainder of 2010, Dove remained posted at the jail.

whether he had "lawyered up." When the suspect answered yes, Dove stated "that's smart, that's good, is your friend going to lawyer up too?" The suspect had already exercised his right to silence and had requested a lawyer. There is no evidence that Dove made any comment to the suspect before he exercised his Fifth Amendment rights.

On November 22, 2010, Sheriff Thompson mailed to the Board a certification of posting and a list of employees eligible to vote in the representation election.

Sometime between November 23 and 26, 2010, the Sheriff held a command staff meeting, attended by Lieutenant Floyd, Lieutenant Hasbrook, Commander Shipp, and Lieutenant Tim Trevier.[9] At this meeting, command staff discussed Dove's failure to properly secure her weapon. The Sheriff relied on command staff for a recommended course of action. Floyd recommended that the Sheriff impose a 27-day suspension and training or retraining. Floyd testified that the fact that Dove had filed a grievance contesting her three-day suspension and the fact that there was an ongoing union campaign to replace FOP with PBLC had no impact on his decision to recommend discipline.

On November 26, 2010, Sheriff Thompson issued Dove a letter informing her that an investigation had been conducted into her accountability for, and security of, her handgun on November 22, 2010. The Sheriff notified Dove that she violated the Bureau County Sheriff's Merit Commission Rules and Regulations and the Bureau County Sheriff's Office Administrative Policies and Procedures when she left her fully functional weapon on the rear floorboard of her patrol vehicle, secured only by the car door's locking mechanism, while it was parked in the public parking area, accessible from anywhere in the adjacent residential area. The Sheriff concluded that he would take action on the matter following a meeting of the Bureau County Sheriff's Merit Commission, scheduled for December 6, 2010.

That same day, Dove received another letter from Sheriff Thompson notifying her that participants in recent staff meetings had specifically and repeatedly cited her as the "causing influence and the initiating factor of various inter-agency employment issues and problems."[10] The meeting participants stated that Dove "creat[ed] certain unprofessional and hostile

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[9] From time to time, command staff documents matters discussed at the meeting when the department takes certain action. However, the meetings usually generate no documentation.

[10] The Sheriff and command staff met with the Bureau County Sheriff's supervising sergeants on November 22, 2010, the Bureau County Correctional Staff, on November 23, 2010, and the Bureau County Sheriff's communications staff, on November 24, 2010.

employment conditions" and placed department employees in "an unwanted and undesirable working environment." The Sheriff's letter warned Dove that her actions were considered a violation of some of the Bureau County Sheriff's Merit Commission Rules and Regulations and could be considered a violation of other rules. The Sheriff asked Dove to "correct the problem to [his] satisfaction." Dove testified that the Sheriff never explained what he meant by his statements or how Dove could correct the problem to his satisfaction.

On November 29, 2010, the Sheriff informed Dove that the political statements she made in January and March 2010 violated the Bureau County Merit Commission Rules and Regulations.

On December 4, 2010, Dove reportedly absented herself from the jail without contact for long periods of time during her shift. Command staff assigned Deputy Sheriff Bret Taylor to investigate those reports. Taylor reviewed video footage to determine that Dove had been standing by her van on and off during her shift, for about an hour total, talking with other deputies and talking on the phone. Taylor testified that Dove's absence created safety concerns for other jailers because she could not communicate with them if she was outside the jail and not wearing her portable radio. Taylor testified that while he did not always see Dove's radio, he could not be sure that she was not in fact carrying it the entire time.

Sometime in the first part of December, the County placed Dove back on patrol duty.

On December 22, 2010, PBLC won the representation election.

On December 27, 2010, Dove received a notice from the Sheriff which informed her that she was suspended for 27 days because she violated the Bureau County Sheriff's Merit Commission Rules and Regulations by leaving her "unsecured duty weapon in pain view on the floor in the back of [her] squad car [which was] parked in a public place." The notice further stated that Dove's actions violated Sheriff Admin. Policy number 508 because she "fail[ed] to exercise care, and follow safety standards."[11] The suspension was effective from December 27, 2010, to January 27, 2011.[12]

Another Deputy, Pat Linder, once placed a handgun in the door of his wife's Suburban truck on July 20, 2008. The handgun was subsequently lost and later found on the street. The

[11] The notice refers to the collective bargaining agreement between the County of Bureau and FOP and states that Dove was disciplined pursuant to that agreement.

[12] The initial notice contained a typo which stated that the suspension would end on January 14, 2011. Sheriff Thompson corrected this error in a January 10, 2011 letter to Dove.

Sheriff did not discipline Linder for his actions, although he required Linder to undergo retraining. The gun was not Linder's service weapon.

Dove grieved the 27-day suspension immediately. She testified at hearing that she did not believe that she had engaged in an unsafe practice when she left her gun on the floorboard of her car's back seat. There is no policy prohibiting an officer from keeping a gun in his patrol car.

Sometime in December, Floyd and Hasbrook discussed with the Sheriff and command staff the possibility of Dove's removal. Floyd recommended that the Sheriff terminate Dove's employment because her conduct posed safety issues to other officers and the public and because she was non-compliant with the rules and insubordinate to her superiors. Hasbrook similarly recommended that the Sheriff file a petition for Dove's removal with the Merit Commission. Floyd and Hasbrook both testified that Dove's decision to grieve her three-day suspension and her involvement in changing the employees' union representative had no effect on their recommendations to impose discipline.[13]

On January 6, 2011, while Dove was still serving her 27-day suspension, Sheriff Thompson filed a petition for Dove's removal before the Bureau County Merit Commission. The petition had four counts. First, it alleged that Dove had engaged in the unauthorized practice of law when she asked a suspect if he had exercised his right to counsel. Although the Sheriff could not explain the basis of this charge at hearing, he testified that his attorney explained the charge to him and that he understood, accepted, and supported it at the time.

Second, it alleged that Dove's actions on December 4, 2010, constituted a dereliction of duties because she spent over 90 minutes out of a 12-hour shift at the jail in her personal car, without her portable radio, conducting private business on her cell phone, without advising dispatch or her fellow jailers of her whereabouts.

Third, the complaint alleged that Dove used and disseminated unauthorized captured photographs from the Illinois Secretary of State Law Enforcement Agencies Data System (LEADS) without a lawful civil or criminal law enforcement investigatory purpose. Specifically, it stated that she used the system to display a copy of a woman's photograph as a

[13] Although Floyd testified he did not know about Dove's work in organizing the new union and advocating a change from FOP to PBLC his statement is refuted by an earlier one in which Floyd acknowledged that he was told, after the fact, that when Dove was speaking with some other deputies rather than working, they were discussing union business.

"means of spiteful retaliation against a fellow employee [Gary Becket], who may or may not have had a personal relationship with" that woman. This incident first came to command staff's attention when Becket complained that Dove was creating a hostile work environment. Lieutenant Taylor investigated the matter and determined that Dove told a jailer to find and post the photo of the woman in question. While there was a video camera monitoring the area in which the LEADS photo had been posted, command staff never reviewed the video to confirm whether Dove herself had posted the photograph. Dove was first informed of the alleged LEADS violation in January 2011.

Fourth, the complaint alleged that Dove engaged in private business while in uniform and while on duty by approaching a fellow employee at her home and asking her to join Dove's complaint against the department for sexual harassment, and by showing that employee the personnel records of other employees which Dove had obtained through a FOIA request. This count stated that Dove's conduct "damaged morale by attempting to create discord among the employees of the department, as well as creating a hostile work environment for those who interact with her by attempting to invoke fear through threats of legal action."

Fifth, the complaint stated that Dove actively engaged in political activity on duty while in uniform. It specified that she had encouraged fellow employees to "vote for [Joe] Bertetto for Sheriff. He's the one." The rules concerning political activity state "nothing in this section shall be construed to prohibit or prevent any such person from ...expressing privately his opinion on all political questions." Dove testified that she was aware that it is a violation of Merit Commission rules to campaign on duty in uniform but she disagreed that she had campaigned on duty.

The Sheriff testified that he sought to terminate Dove's employment because Dove's misconduct was excessively frequent and not corrected, and because her termination was necessary to "salvage the balance of the good employees within the agency." He further stated that the totality of Dove's actions seemed to necessitate such action. At hearing, both Floyd and the Sheriff offered evidence concerning Dove's poor performance in 2008 and 2009. Indeed, the Sheriff explained that Dove's conduct during that period was significant to his decision to terminate her employment. However, the complaint submitted to the Merit Commission did not assert that Dove's employment should be terminated for misconduct that had occurred prior to January 2010. In addition, Floyd testified that Dove's attitude was a contributing factor to her

termination. Floyd gave an example of Dove's bad attitude stating that she had asked whether she needed a union representative on three or four occasions. However, none of the counts in the Merit Commission complaint against Dove alleged a bad attitude or general poor performance over a lengthy period of time. The Sheriff testified that neither Dove's prior grievances nor her participation in a campaign to replace the FOP with PBLC had any bearing on his decision to file a petition for her removal. The Sheriff had never recommended the discharge of a non-probationary deputy prior to January 2011.

On January 20, 2011, the Sheriff notified Dove by letter that she was officially placed on suspension from her position of Deputy Sheriff pursuant to section 4.02 of the Merit Commission Rules which provide that "upon the filing of [charges with the Merit Commission], the Sheriff may suspend the certified employee pending the decision of the Commission on the charge."[14] Mack testified that he was not familiar with any situation in which an individual who had received a lengthy suspension (one longer than 20 days) was brought up on termination charges before they returned to work. Floyd testified that in his 27 years of experience at the Bureau County Sheriff's Department, he could not recall an employee with a similar range of personnel problems as Dove's.[15]

Dove also received some positive feedback on her work at the department. For example, Floyd testified that Dove wrote good reports. Report writing is a significant part of a law enforcement officer's job. In addition, on January 19, 2008, Steve Samet, General Manager of Central Radio Group, wrote a letter to the Sheriff praising and expressing thanks for Dove's work and that of her superior in investigating and stopping harassing phone calls the business had received. Further, the Sheriff stated that he was proud of all his deputies including Dove.

On January 6, 2011, County attorney Chris Walters informed Dove that her step 1 grievance over her 27-day suspension was denied.

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[14] The rules further provide that "after the charges have been heard, the Commission may direct that the person receive his pay for any part or all of this suspension period, if any."

[15] The Union introduced examples in which the County issued other employees warnings concerning their behavior including written documentations of verbal reprimands and other warnings. All the employees who received the reprimands for insubordination or disrespect changed their behavior. Floyd testified that Dove was given verbal warnings concerning her behavior but that she did not attempt to correct it.

On January 11, 2011, the Board issued the official certification of representative, certifying PBLC as the exclusive representative of sworn personnel in the rank of deputy patrol, sergeant, investigator, lieutenant, radio, dispatchers and jailers.

On January 19, 2011, Commissioner and Commission Secretary Raymond White wrote a letter informing Sheriff Thompson that Dove's Merit Commission hearing would be held on February 9, 2011. The next day, Sheriff Thompson officially placed Dove on suspension pending the resolution of charges filed with the Commission.

On February 22, 2011, Commissioner White issued the Bureau County Sheriff's Merit Commission's findings concerning Dove's discharge proceedings. The Commission ordered Dove's dismissal and removal from the Bureau County Sheriff's department for violating rules, regulations and orders.

PBLC informed the Sheriff that Dove would seek to arbitrate her discharge grievance. The Sheriff's attorney recommended that the Sheriff file a declaratory judgment in the circuit court concerning the lawfulness of Section 16.8 of the FOP contract which permits employees to arbitrate disciplinary action imposed by the Merit Commission in lieu of administrative review under the Merit Commission Act. Section 16.8 states the following:

> Any disciplinary action imposed by decision of the Merit Commission may be the subject of a grievance pursuant to this Article and Article 13 of this Agreement. If a bargaining unit member and/or the Lodge elects to utilize the grievance procedure, he shall deliver written notice of that election to the Sheriff and the Chairperson of the Merit Commission within five (5) days (excluding Saturdays, Sundays and Holidays) of the action imposed by the Commission. Upon election, the grievance procedure shall be implemented at Step 4. By electing to utilize the grievance procedure following disciplinary action by the Merit Commission, the Employee and/or the Lodge waives any other right or recourse of any kind.
>
> However the parties agree to reserve the legality of this Section. Specifically, the parties agree that pursuant to NALL v. INTERNATIONAL ASS'N OF MACHINISTS AND AEROSPACE WORKERS, ALF-CIO, LOCAL LODGE 822, DISTRICT 123, 307 Ill. App. 3d, 719 N.E.2d 300, 241 Ill. Dec. 439 (4th Dist. 1999) (Adams County) and laws of this State that this provision may or may not be permissible and each party reserves the right to dispute the legality of this provision in a Court of law.

The FOP contract expired on November 30, 2010. It provided that that "if negotiations for a successor agreement have not been completed by the expiration date of the agreement, this

agreement shall remain in full force." Negotiations for a successor agreement were not completed before the expiration of the FOP contract on November 30, 2010.[16]

On February 22, 2011, Sheriff Thompson filed suit against Dove and the Policemen's Benevolent and Protective Association of Illinois in circuit court for a declaratory judgment concerning the validity of the arbitration clause, and injunctive and other relief.[17] The Sheriff later amended the complaint to include PBLC, the proper defendant.

On February 24, 2011, Dove grieved her termination. That same day, Shane Voyles, attorney for PBLC, mailed Sheriff Thompson and the Chairman of the Bureau County Sheriff Merit Commission a formal notice of intent to arbitrate pursuant to FOP's collective bargaining agreement.

On March 14, 2011, the Sheriff sent a letter to Dove informing her that "pursuant to the findings of the Bureau County Sheriff's Merit Commission, [her] termination of employment as Deputy Sheriff of Bureau County [was] confirmed and [e]ffective February 21, 2011.

On September 13, 2011, Dove signed a grievance settlement agreement withdrawing the grievances over the three-day and the 27-day suspensions and agreeing to withdraw any demand to arbitrate them in exchange for $2350. The agreement states that the settlement "shall not serve as precedent, nor be admissible for any purpose except to enforce its terms. The settlement shall have no effect upon pending litigation involving discipline other than the two 2010 suspensions contested in the two grievances."

On September 30, 2011, the trial court ordered arbitration of Dove's termination grievance. On October 18, 2011, the Sheriff filed a Motion to Stay Ancillary Proceedings Pending Arbitration, seeking to prevent PBLC from proceeding with this unfair labor practice charge. The trial court denied the Motion to Stay on November 23, 2011.[18] The Sheriff appealed the court's order of arbitration and its denial to stay ancillary proceedings to the Appellate Court for the Third District. The case is still pending.

The parties scheduled arbitration of Dove's grievance for June 26, 2012 with arbitrator Paul Betts pursuant to the Circuit Court's order. The County and the Sheriff have expressly

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[16] PBLC and Bureau County are currently bargaining a contract. They have reached impasse and are selecting an interest arbitrator.

[17] Dove testified that she was served with a copy of the complaint on February 21, 2011, a day before she was fired.

[18] The Sheriff also filed a Combined Reply and Motion for Breach of Contract on January 4, 2012.

reserved their right to continue their various court challenges to the contract's arbitration clause and Dove's right to arbitrate her discharge grievance.

IV. DISCUSSION AND ANALYSIS

1. Waiver

The Union has not clearly and unmistakably waived its right to bring this case before the Board.

Waiver of a statutory right must be clear and unmistakable. Am. Fed. of State Cnty. and Mun. Empl. v. State Labor Rel. Bd., 190 Ill. App. 3d 259 (1st Dist. 1989); Vill. of Oak Park v. Ill. State Labor Rel. Bd., 168 Ill. App. 3d 7, 20-21 (1st Dist. 1988); Metro. Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated."); Rockwell Int'l Corp., 260 NLRB 1346, 1347 (1988). The contractual language must evince an unequivocal intent to relinquish such rights. City of Aurora, 24 PERI ¶ 25 (IL LRB-SP 2008) (citing, Am. Fed. of State Cnty. and Mun Empl. v. State Labor Rel. Bd., 190 Ill. App. 3d 259 (1st Dist. 1989)). There can be no contractual waiver of a statutory right where the language of the contract is ambiguous. Id. (No waiver found where contract clause clearly raised an ambiguity). Waivers by express agreement are construed as applicable only to the specific item mentioned. Illinois Secretary of State, 24 PERI ¶ 22 (IL LRB-SP 2008) (citing, New York Mirror, 151 NLRB 834 (1965)). Moreover, where a contract is silent on the subject matter in dispute, a finding of waiver by contract is absolutely precluded. Id. (citing, Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'")).

Assuming, *arguendo*, that the FOP contract is still in force and binding upon Respondents and PBLC, the contract language does not demonstrate waiver of the right to pursue this unfair labor practice charge because it does not specifically limit that course of action. Rather, the contract merely states broadly that the employee or union "waives any other right of recourse of any kind" by electing to utilize the grievance procedure following disciplinary action by the Merit Commission. Such language is too generalized to demonstrate that the Union intended, particularly, to waive its statutory right to pursue unfair labor practice charges when it

filed grievances on related matters.

Thus, there is no waiver here.

2. 10(a)(2) and (1)

Respondents violated sections 10(a)(2) and (1) of the Act by retaliating against Dove for her active and visible support of the Union and for filing a grievance over her three-day suspension when the Sheriff initiated a complaint with the Merit Commission seeking Dove's discharge.

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. ISLRB, 128 Ill. 2d 335, 345, 538 N.E.2d 1146, 1149 (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. City of Burbank, 128 Ill. 2d 335, 538 N.E.2d 1146. 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 targeting of union supporters; 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.

Once the union establishes a prima facie case, the employer can avoid a finding that it violated section 10(a)(2) 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. 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. 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 the action would have been taken notwithstanding the employee's union activity. Id.

a. Charges with the Merit Commission

i. Union's Prima Facie Case

The Union has proved its prima facie case that Respondents retaliated against Dove for her active and visible support of PBLC's organization campaign when the Sheriff filed a complaint before the Merit Commission seeking Dove's dismissal. First, Dove's effort to organize support for PBLC and her act of filing a grievance over her three-day suspension constitute protected activity. See 5 ILCS 315/6(a) (2010)[19]; Pace Suburban Bus Div. of Regional Transp. Auth. v. Ill. Labor Rel. Bd. (Panikowski), 406 Ill. App. 3d 484, 495 (1st Dist. 2010).

Second, the Sheriff and command staff knew of Dove's protected activity during the last quarter of 2010. In fact, Dove spoke directly with Lieutenant Taylor, Commander Shipp, and Sheriff Thompson concerning her union activity in December. Third, Respondents took adverse action against Dove when the Sheriff filed charges with the Merit Commission seeking her discharge. Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998), aff'd Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000) (adverse action found where Sheriff suspended employee and filed charges against him before the Merit Commission). Finally, the Union has demonstrated a causal connection between Dove's protected activity and Respondents' adverse action through direct and circumstantial evidence including the Sheriff's and command staff's hostile comments concerning Dove's union activity, Respondents' shifting reasons for Dove's discharge, the proximity of Dove's organizing activities to the adverse action, and Respondents' dubious assertion that they employed progressive discipline.

Here, the Sheriff's and command staff's statements concerning Dove's union activity show union animus.[20] First, the Sheriff's threat that he would file criminal charges against Dove if she filed a grievance over her three-day suspension establishes Respondents' hostility towards union activity. Cnty. of Jersey (Lewis and McAdams), 7 PERI ¶ 2023 (IL SLRB 1991); Town of Decatur, 4 PERI ¶ 2003 (IL SLRB 1987); but see City of Chicago, Chicago Police Dept., 12

[19] Section 6(a) of the Act provides in relevant part that "[e]mployees of the State and any political subdivision of the State, excluding employees of the General Assembly of the State of Illinois, have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing." 5 ILCS 315/6(a) (2010).

PERI ¶ 3013 (IL LLRB ALJ 1996) ("Merely because at some point in time animus against protected and concerted or union activity is evident on the part of an employer, this animus cannot be ascribed to all subsequent actions of that employer without some other evidence suggesting a causal connection.")

Similarly, Floyd's statement that Dove had a bad attitude demonstrates union animus because he explained that it was evidenced by her repeated inquiries as to whether she needed union representation. It is well-established in the private sector that employer comments about an employee's "attitude" can be evidence of hostility toward union activity. Cairo Unit School Dist. 1, 23 PERI ¶ 136 (IELRB 2007) (citing, SCA Tissue North America, LLC, 338 NLRB 1130 (2003), enf'd, 371 F.3d 983 (7th Cir. 2004); James Julian Inc. of Delaware, 325 NLRB 1109 (1998); MJS Garage Mgmt. Corp., 314 NLRB 172 (1994)). Here, the animus is even more apparent because Floyd himself drew the connection between Dove's alleged bad attitude and her inquiries concerning union representation. Id. (Union could likely show employer's animus and pretext where employee's "uncooperative attitude" may have been a euphemism for his protected activity).

Contrary to Respondents' contention, the Union need not show that any members of the Commission harbored union animus because it is sufficient to demonstrate that an employer's agent with the authority and responsibility to effectively recommend or carry out the adverse action made anti-union statements. Macon Cnty. Highway Dep't, 4 PERI ¶ 2018 (ISLRB 1988); Cnty. of Menard, 3 PERI ¶ 2043 (ISLRB 1987). Here, both Floyd, who recommended that the Sheriff file charges against Dove before the Merit Commission, and the Sheriff, who ultimately took that adverse action upon Floyd's recommendation, had such authority.[21]

Further, the Union may use the Sheriff's statement to demonstrate animus, even though it was made prior to six months before the Union filed its charge, because a charging party may use evidence from outside six month limitation period to demonstrate that a respondent's conduct

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[20] However, Floyd's statement that he was "smoking" angry when he saw Dove speaking with fellow patrol officers during their shift does not demonstrate union animus because Floyd provided a plausible and uncontroverted reason for this statement, namely that he was upset because Dove had assembled employees to talk when they should have been working. Notably, Floyd became angry before he knew the content of their discussions because he stated that he was only told after the fact that Dove and the other deputy Sheriffs were discussing PBLC.

[21] As noted above, the filing of charges with the Merit Commission is itself an adverse employment action. Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998), aff'd Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000).

within that six month limitation was unlawfully motivated. See PACE, 25 PERI ¶ 188 (IL LRB-SP 2009) (A charging party may properly use events outside the limitations period to show the true nature of the event timely pled, however, charging party cannot prove the timely pled event simply by proving that the occurrences outside the six-month limitations period were in fact a series of unremedied unfair labor practices).

Moreover, the Sheriff's statement is not protected speech because it contained an unlawful threat. Although the Sheriff may have a professional duty to prosecute wrong-doing and a First Amendment right to voice his opinions on the criminal nature of an employee's conduct, as Respondents assert, the Act provides that an employer's statements are only protected if they "contain no threat of reprisal or force or promise of benefit." 5 ILCS 315/10(c) (2010). Here, the Sheriff statement is not protected because he threatened that he would bring charges against Dove if she did not withdraw the grievance.

Notably, the Union need not submit direct evidence that the Sheriff harbored hostility specifically toward Dove's efforts to replace FOP as the employees' exclusive bargaining representative when the Union has introduced circumstantial evidence connecting the adverse action to the particular union activity at issue.

Next, Respondents' shifting reasons for seeking Dove's discharge demonstrate that those reasons were pretextual. Here, the Sheriff testified that Dove's conduct during 2008 and 2009 was significant to his decision to seek her discharge, yet the Merit Commission complaint was silent on Dove's conduct prior to January 2010 and did not otherwise state that she had performed poorly over a long period of time. Further, Floyd testified that Dove's attitude was a contributing factor to her termination, yet none of the counts in the Merit Commission complaint alleged that Dove had a bad attitude. Indeed, Floyd's explanation is particularly specious because the example provided by Floyd at hearing to describe Dove's bad attitude consisted of Dove's repeated inquiries into her need for union representation.

Further, the timing of Respondents' adverse action provides additional circumstantial evidence of union animus because the Sheriff filed a complaint with the Merit Commission (January 6, 2011) seeking Dove's discharge a mere three weeks after she had engaged in protected activity (December 16, 2010).[22] Moreover, although Dove consistently engaged in

[22] Since the ballots were due at the Board on December 16, 2010, Dove's organizing activities must have ceased as of this date.

organizing activity as early as September, the Sheriff imposed this adverse action only in early January, close to the time he first received notice of Dove's participation in changing the employees' representative (December, 2010). See, Sarah D. Culbertson Memorial Hosp., 25 PERI ¶ 11 (IL LRB-SP 2009) ("few weeks" between employees' testimony before Board and adverse action sufficient to demonstrate proximity indicative of animus); Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007) (three weeks between protected activity and adverse action sufficient to demonstrate employer's union animus though proximity); Cnty. of Williamson and Sheriff of Williamson Cnty.,14 PERI ¶ 2016 (IL SLRB 1998) (discriminatory motive inferred where adverse action occurred contemporaneously with employees' active participation in union and protected activities).[23]

Finally, the Sheriff's assertion that he sought Dove's discharge because her misconduct was excessive and not corrected likewise demonstrates pretext because the Merit Commission complaint relied on events which took place prior to Dove's most recent suspension but which had gone unremarked and unpunished for many months. See Grchan, 315 Ill. App. 3d at 468 (Court held that Sheriff's assertion that he applied progressive discipline was incredible in light of the fact that he sought employee's removal for an incident which took place prior to the employee's suspensions; two month delay between misconduct and issuance of suspensions was likewise suspicious); Cnty. of DeKalb and DeKalb Cnty. State's Attorney, 6 PERI ¶ 2053 (IL SLRB 1990); Vill. of Lyons, 5 PERI ¶ 2007 (IL SLRB 1989). Here, the charge which alleges Dove campaigned on duty addresses conduct which came to Respondents' attention over eight months earlier yet went unaddressed until after the Sheriff suspended Dove for different misconduct. Although Respondents argue that they delayed discipline because it would have been inappropriate for the Sheriff to punish an employee for campaigning against him while running for office, the Sheriff still waited two months after he was reelected to discipline Dove

[23] The lack of proximity (a one-year gap) between Dove's grievance filing and the County's adverse action does not absolve the County of culpability because the Union has presented additional and sufficient evidence of unlawful motive including the County's shifting explanations for initiating Dove's discharge proceedings and direct evidence of the County's union animus. See PACE Northwest Division, 25 PERI ¶ 188 (IL LRB-SP 2009)(finding that three-year gap between protected activity and adverse action did not bar relief since "those who seek revenge or [who] are motivated by retaliation can be patient and seize opportunity when it comes"; yet relying on shifting explanations rather than timing to prove unlawful motive), aff'd Pace Suburban Bus Div. of Regional Transp. Auth. v. Ill. Labor Rel. Bd. (Panikowski), 406 Ill. App. 3d 484 (1st Dist. 2010).

for that conduct. These circumstances therefore demonstrate that the Sheriff's reasons for seeking Dove's discharge were pretextual because he undertook a concerted attempt to piece together an adequate disciplinary record against Dove to account for his initiation of Merit Commission proceedings against her. Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998), aff'd Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000).[24]

Contrary to the County's contention, the Union may meet its prima facie burden of proof even without showing disparate treatment because disparate treatment is only one of several factors which the Union may use to demonstrate union animus. See, City of Burbank, 128 Ill. 2d at 346.

ii. Dual Motive Analysis

This case is one of dual motive because Respondents have presented at least one legitimate charge in their Merit Commission complaint against Dove seeking her dismissal. Ordinarily, it is not the function of the Board or its administrative law judges to substitute the Board's judgment for that of the employer in the discipline of public employees. Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998), aff'd Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000) (citing Cnty. of DeKalb and DeKalb Cnty. State's Attorney, 6 PERI ¶ 2053 (IL SLRB 1990), aff'd, (2nd Dist. 1991), No. 2-90-1309 (unpublished order under Supreme Court Rule 23); see also Union-Tribune Publishing Co. v. Nat'l Labor Rel. Bd., 1 F.3d 486 (7th Cir. 1993); Turnbull Cone Baking v. Nat'l Labor Rel. Bd., 778 F.2d 292 (6th Cir. 1985); Elyria Foundry Co., 321 NLRB 1222 (1996)). However, where a disputed disciplinary action appears to have been taken for 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. Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998), aff'd Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459 (3rd Dist. 2000).

[24] Notably, it is immaterial that the Sheriff identified some of Dove's alleged rule violations in November, prior the time when he indisputably knew of her organizing activities (December) because the Sheriff knew Dove had engaged in the other instance of protected activity at-issue here (grievance filing) before he identified any rule violations and because he actually imposed discipline on Dove at a time when his knowledge of both those activities is clear.

Here, not all the grounds for seeking Dove's termination are arbitrary, implausible or unreasonable. The first count, which alleged the unauthorized practice of law, was not unreasonable because the Sheriff relied on his attorney's recommendation that Dove had in fact engaged in that conduct when she spoke to a suspect and asked him whether he had "lawyered up." Macon Cnty. Highway Dep't, 4 PERI ¶ 2018 (IL SLRB 1988) (a decision is not arbitrary, implausible or unreasonable merely because it is ill-informed or ill-considered).

Similarly, the second count which alleged the dereliction of duties was plausible because Respondents were entitled to rely on Lieutenant Taylor's investigation of Dove's actions on December 4, 2010, which determined that she had indeed spent her time on duty engaged in personal business. Although the Union argues that Taylor could not be sure that Dove did not have her radio with her at all times and that she may have been permitted such breaks, Respondents' decision is not devoid of legitimacy merely because it may have been ill-informed or ill-considered. See Id.

Next, the fourth allegation, which asserts that Dove engaged in private business while in uniform and harassed a fellow employee, is credible on its face.

Nevertheless, the allegation that Dove improperly accessed the LEADS database is not legitimate because Respondents' own investigation, as testified to by Lieutenant Taylor, demonstrated that Dove herself did not in fact access the database or post the photo. While an employer's decision to discipline is not devoid of legitimacy merely because it is ill-informed or ill-considered, as noted above,[25] that decision lacks legitimacy entirely when the ultimate decision maker ignores the facts gathered by an investigation conducted by his own command staff and instead imposes a penalty based on facts that are not based in reality. Accordingly, this count is arbitrary and illegitimate.

Similarly, the allegation that Dove engaged in political activity while on duty is not legitimate because Respondents did not address that conduct for months and because it does not violate Respondents' rules. As stated earlier, the long lag between Respondents' knowledge of Dove's alleged misconduct and Respondents' imposition of discipline demonstrates that this charge is merely an attempt to piece together an adequate disciplinary record against Dove so as to account for the initiation of Merit Commission proceedings. Moreover, the evidence demonstrates this conduct did not in fact violate the rules because Dove merely voiced her

[25] See Macon Cnty. Highway Dep't, 4 PERI ¶ 2018 (IL SLRB 1988).

political views privately to two individuals and "express[ed] privately [her] opinion[s] on all political questions" within the confines of Respondents' rules.

Yet, Respondents have not proven by a preponderance of the evidence that they would have pursued Dove's discharge absent her protected activity because there is no indication that the Sheriff would have recommended the same course of action had he considered only the demonstrably legitimate allegations of Dove's misconduct. To illustrate, the Sheriff broadly testified that the "totality" of Dove's actions necessitated his decision to recommend her dismissal. But, the "totality" of circumstances which initially justified the Sheriff's decision is no longer present here, since at least two of the allegations against Dove are arbitrary and pretextual. As such there is insufficient evidence from which to infer that Respondents would have made the same decision to pursue Dove's dismissal absent Dove's union activity, which constituted a motivating factor in Respondents' decision.

Contrary to Respondents' contention, the First Amendment, the Citizens Participation Act and the Local Governmental Immunities Act do not provide them with safe harbor to retaliate against an employee based on her union activity even though Respondents arguably engaged in petitioning activity by filing a complaint with the Merit Commission where the complaint itself is not reasonably-based. In fact, the Sheriff's testimony indicates that the legitimate charges alone would not have warranted filing the petition for Dove's removal since the Sheriff relied on the "totality" of circumstances, including pretextual ones, to initiate such action. But see BE & K Construction v. NLRB, 536 US 516, 531 (2002)(Pursuant to the First Amendment, NLRB could not enjoin a reasonably based state court lawsuit against a union even if the respondent filed it out of a retaliatory motive).

Thus, Respondents retaliated against Dove, in violation of sections 10(a)(2) and (1) of the Act, when the Sheriff filed charges with the Merit Commission seeking to terminate Dove's employment because of her participation in organizing PBLC and because she filed a grievance over her 3-day suspension.

b. 27-day Suspension – Deferral

It is proper to defer to the parties' September 13, 2011, grievance settlement agreement of Dove's 27-day suspension, issued on December 26, 2010.

Section 11(i) of the Act provides that: "If an unfair labor practice charge involves the interpretation or application of a collective bargaining agreement and said agreement contains a grievance procedure with binding arbitration as its terminal step, the Board may defer the resolution of such disputes to the grievance and arbitration procedure contained in said agreement." 5 ILCS 315/11(i) (2010). There are three tests used by the NLRB and adopted by the Board to determine whether deferral is appropriate: the Collyer test applies where the union has not yet initiated a contract grievance. Collyer Insulated Wire, 192 NLRB 837 (1971); State of Ill. (Dep't of Cent. Mgmt Serv.), 9 PERI ¶ 2032 (IL SLRB 1993). The Dubo test applies in cases where the union has voluntarily initiated a grievance and is involved in the grievance arbitration process. Dubo Manufacturing Corp., 142 NLRB 431 (1963); City of Mount Vernon, 4 PERI ¶ 2006 (IL SLRB 1988). The Spielberg/Olin test applies where an arbitrator has already heard the grievance and has issued an award. Spielberg Manufacturing Co., 112 NLRB 1080 (1955); Olin Corp., 268 NLRB 573, (1984); City of Alton, 22 PERI ¶ 102 (IL LRB-SP 2006). In addition, the NLRB and the ILRB have expanded the Spielberg/Olin policy by permitting deferral to prearbitration grievance settlements. U.S. Postal Service, 300 NLRB 196 (1990); Alpha Beta Co., 273 NLRB 1546 (1985); Vill. of Lyons, 16 PERI ¶ 2032 (IL LRB-SP 2000).

This case concerns deferral to a grievance settlement agreement. The Board will defer to a grievance settlement where the process appears fair and regular and where there is no evidence that the labor organization is indifferent to the individual's interests or any alleged discrimination. Vill. of Lyons, 16 PERI ¶ 2032 (IL LRB-SP 2000). In Village of Lyons, the Board held those criteria were met because all parties were aware of the pending unfair labor practice charge, the employee approved settlement of the grievance and there was no evidence that the settlement was contingent on the employee's ability to pursue the charge before the Board. Id.

Deferral is appropriate here because the parties were aware of the related pending unfair labor practice charge, Dove approved the settlement, and the settlement is not contingent on Dove's ability to pursue this charge. First, the parties knew of the charge at the time they agreed to settle the grievance because the charge was first filed on February 3, 2011, and last amended on March 11, 2011, nearly six months prior to the settlement's execution on September 13, 2011. Indeed, the Executive Director even issued the complaint (April 28, 2011) before the parties

reached settlement. Next, Dove herself signed the settlement agreement.[26] Lastly, the agreement does not expressly provide that it is contingent on the Dove's ability to pursue the instant unfair labor practice charge.

Thus, it is proper to defer to the parties' grievance settlement agreement to resolve issues concerning Dove's 27-day suspension because this case meets all the criteria for deferral set forth by the Board in Village of Lyons.

3. 10(a)(4) and (1)

a. Repudiation of the Contract

Respondents did not repudiate the collective bargaining agreement by challenging the FOP contract's arbitration clause in court because Respondents had no purely contractual duty to arbitrate grievances, the abrogation of which would support a finding that they repudiated the expired contract.

The National Labor Relations Board has held that an employer may repudiate an expired contract by failing to adhere to terms, such as an arbitration clause, that survive its expiration. Ind. and Michigan Elec. Co., 284 NLRB 53 (NLRB 1987) ("in certain circumstances the arbitration commitment survives the expiration of the collective bargaining agreement"; finding Respondent repudiated expired contract and did not merely breach the arbitration clauses)(citing Nolde Bros v. Bakery Workers Local 358, 430 U.S. 243 (1977)). An employer may similarly repudiate an expired contract by failing to arbitrate post-expiration disputes if they concern rights "arising under" the expired contract, and if the contract does not negate, expressly or by clear implication, the presumption favoring their arbitration. Ind. and Michigan Elec. Co., 284 NLRB at 60. Nevertheless, when a union ceases to be the employees' representative, the contract ends, and any obligation on the part of the employer to abide by it as part of its duty to bargain likewise ends. Vill. of Lisle, 23 PERI ¶ 111 (IL LRB-SP 2007)(citing Retail Clerks v. Montgomery Ward & Co., 316 F.2d 754, 757 (7th Cir. 1963)); Vill. of Franklin Park, 2 PERI ¶ 2023 (IL SLRB 1986) ("where there is an enforceable collective bargaining agreement and the exclusive representative is lawfully replaced by another labor organization, the collective bargaining agreement becomes null and void."); National Licorice Co. v. NLRB, 309 U.S. 350,

[26] Dove received a total of $2350, less payroll deductions, for the nine days of wages lost from the 27-day suspension and the earlier 3-day suspension in exchange for withdrawing the grievances over both.

364-5, 6 LRRM 674, 681-82 (1940). Thus, the NLRB has concluded that when a successor union replaces a predecessor, an employer has no contractual obligation to arbitrate even those grievances which arise under the predecessor's expired contract unless the contract contains clear consent by the employer to arbitrate those grievances with a different bargaining representative. Arizona Portland Cement Co., 302 NLRB 36 (1991).

Here, Respondents did not repudiate the FOP contract on February 22, 2011 when it brought its court action because the FOP collective bargaining agreement became void on January 11, 2011, the date on which the Board decertified FOP, and because Respondents never contractually agreed to arbitrate still-pending or post-expiration grievances with a new union.[27]

Contrary to the Union's contention, the fact that the FOP contract provides that it may remain in force after its expiration under certain circumstances does not override these tenets since the parties here are different than the contracting ones.[28]

Thus, the County did not repudiate the agreement when it challenged, in court, the validity of the FOP contract clause which provides for the arbitration of disputes over discipline issued by the Merit Commission.[29]

b. Refusal to Bargain in Good Faith/Repudiation of the Duty to Bargain in Good Faith

Respondents did not fail to bargain in good faith by refusing to arbitrate Dove's discharge grievance or by refusing to arbitrate grievances of discipline imposed by the Merit Commission because this refusal was limited to a discrete class of grievances.

As a preliminary matter, the bargaining unit employees at issue have a right to arbitrate their grievances, even after the predecessor union's contract became void, because the employer's duty to arbitrate is statutory and not contractual. As such, the right inures to

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[27] The case cited by the Union in support of the proposition that a predecessor's contract remains in force despite its decertification does not so hold. Instead, the Court merely held that the predecessor union had no more rights to union dues after decertification. Indeed, the Court explicitly held that "whether or not the substantive provisions as to wages, hours, etc., were still binding after the certification of [the new union] is not the question presented here." Modine Manufacturing Co. v. Grand Lodge Intern. Ass'n of Machinists, 216 F.2d 326 (6th Cir. 1954).

[28] Specifically, the contract provides that "if negotiations for a successor agreement have not been completed by the expiration date of the agreement, this agreement shall remain in full force."

[29] For these reasons it is unnecessary to address the Respondents' remaining defenses.

employees even in the absence of a contractual obligation as a term and condition of employment where the employer had previously arbitrated grievances.

The extent of an employer's duty to arbitrate is different in the public sector than it is in the private sector because the origin of employees' right to arbitrate is different in each. In the private sector, employees' right to arbitrate derives from contract. As such, under federal law, "arbitration is a matter of consent and... it will not be imposed upon parties beyond the scope of their agreement." Litton Financial Printing Div. v. Nat'l Labor Rel. Bd., 501 US. 190, 201 (1991). Accordingly, while the Supreme Court has affirmed the obligation of an employer to arbitrate post-expiration grievances, the obligation must originate from the contract itself. Litton Financial Printing Div., 501 U.S. at 201. Indeed, on this basis, the Supreme Court expressly rejected the notion that the obligation to arbitrate is a term and condition of employment excluded from the prohibition on unilateral changes. Id. at 199-200.

In the public sector, by contrast, the Illinois Labor Relations Board and the boards of other public sector jurisdictions have held that under state law employees' right to arbitrate grievances derives from statute. Vill. of Lisle, 19 PERI ¶ 132 (IL LRB-SP 2003)(finding that employer's refusal to arbitrate grievances with a successor union arising under the terms of a predecessor union's contract constituted an unfair labor practice even though employer had no contractual duty to arbitrate those grievances). However, unlike the Supreme Court, the Board has never addressed an employer's duty to arbitrate post-expiration grievances.[30] Nevertheless, the Board's designation of arbitration as a statutory right and its special consideration for protective service employees mandate a conclusion that these employees' right to arbitrate extends past the expiration and nullification of the predecessor's contract even if the grievance did not arise under that contract and even if the employer did not agree to arbitrate those grievances with the new union.

First, the Board's designation of arbitration as a statutory right renders arbitration a term and condition of employment which must be maintained as part of the status quo. See Vill. of Lisle, 19 PERI ¶ 132 (IL LRB-SP 2003) (holding that the NLRB's contractual approach "appears

[30] The Board has only addressed an employer's duty to arbitrate grievances filed during the term of a predecessor union's contract which are still unresolved when the Board certifies the successor as the employees' collective bargaining representative. Under those circumstances, "the duty to arbitrate continues with respect to those grievances that remain unresolved at the time the collective bargaining agreement between a predecessor union and employer expires." See Vill. of Lisle, 19 PERI ¶ 132 (IL LRB-SP 2003).

inconsistent with the statutory framework of our Act"; requiring employer to arbitrate absent a contractual obligation). The Supreme Court's reasoning in Litton supports that finding because, in the public sector, the right to arbitration not a purely contractual right and is therefore no different from other terms and conditions of employment which the employer must maintain. In Litton, the Supreme Court explained that an employer must maintain employees' terms and conditions of employment after a contract's expiration even though they "no longer have force by virtue of the contract" because those terms and conditions instead "continue in effect by operation of [statute,] the NLRA." Litton, 501 U.S. at 206. Nevertheless, the Court held that the right to arbitration "does not...continue in effect after expiration of a collective-bargaining agreement" because the right to arbitration is purely contractual. Id. at 200 & 206. Yet, where the right to arbitration derives from statute, as it does in the public sector, the employer must maintain that right as a term and condition of employment because there is no basis on which to exclude that right from the general rule. Accordingly, in the public sector, the right to arbitration is a term and condition of employment which continues past the contract's expiration or nullification.

Second, the Board's special consideration for protective service employees, at issue here, further supports a finding that the right to arbitration continues post-expiration and nullification of the contract because any alternate finding would be contrary to the Act. First, an alternate finding would render these employees "powerless to seek redress, as they would be unable to pursue arbitration or a strike." Vill. of Lisle, 19 PERI ¶ 132 (IL LRB-SP 2003) (applying the same rationale to employer's obligation to arbitrate those grievances left unresolved on date of successor union's certification). Similarly, it would penalize employees for exercising their rights under Section 9 to designate a representative of their own choosing by foreclosing arbitration of grievances during negotiations for the successor union's initial contract, a right they would have enjoyed had they not changed their representative.

Thus, employees have a right to arbitrate their grievances even though the employer has no contractual duty to do so since the right to arbitrate constitutes a term and condition of employment which Respondents are required to maintain.

Nevertheless, Respondents' conduct here does not amount to a repudiation of their duty to bargain because they refused to arbitrate only a single class of grievances, those pertaining to disputes over discipline imposed by the Merit Commission. In general, a single refusal to

arbitrate is not, in itself, a refusal to bargain in violation of the Act. Vill. of Lisle, 19 PERI ¶ 132 (IL LRB-SP 2003); Cnty. of Cook and Sheriff of Cook Cnty., 6 PERI ¶3019 (IL LLRB 1990); Chicago Transit Auth., 4 PERI ¶3012 (IL LLRB 1988); Vill. of Creve Coeur, 3 PERI ¶2063 (IL SLRB 1987), supplemental decision at, 4 PERI ¶2002 (IL SLRB 1987); see also, GAP Corp., 265 NLRB 1361 (1982); Whiting Roll Up Door Mfg. Corp., 257 NLRB 734 (1981). Similarly, the Board has held that where a failure to process a grievance occurs because of an employer's good faith defense to the grievance, such a failure to process a grievance is not an unfair labor practice. Cnty. of Cook and Sheriff of Cook Cnty., 6 PERI ¶3019 (IL LLRB 1990); Vill. of Creve Coeur, 3 PERI ¶2063 (IL SLRB 1988); Chicago Transit Auth., 4 PERI ¶3012 (IL LLRB 1988). Indeed, a respondent's conduct represents a wholesale repudiation of the its duty to bargain only where the respondent does not limit its refusal to a certain class of grievances or one particular grievance arising under the expired agreement but instead denies the existence of the duty to arbitrate altogether. Vill. of Lisle, 19 PERI ¶ 132 (IL LRB-SP 2003).

Here, Respondents have not failed to bargain in good faith because they have limited their refusal to arbitrate to one class of grievances, those which challenge disciplinary action imposed by a decision of the Merit Commission. Cf. Vill. of Lisle, 19 PERI ¶ 132 (IL LRB-SP 2003) (repudiation found where Village's representative simply stated that the Respondent had no duty to arbitrate). In fact, the Merit Commission does not issue all discipline imposed by Respondents. Indeed, the Sheriff may unilaterally issue oral warnings, written warning, and may suspend employees for up to 30 days within a twelve-month period without obtaining leave to do so from the Merit Commission. As a result, employees may file grievances that are unaffected by Respondents' refusal to arbitrate this particular class of grievances. Consequently, Respondents' refusal to arbitrate those disputes relating to discipline issued by the Merit Commission does not amount to a blanket refusal to arbitrate all grievances and likewise does not amount to a repudiation of Respondents' duty to bargain.[31]

[31] Notably, the expired contract itself reserves the employer's right to challenge, in court, the lawfulness of the contract provision which requires the employer to arbitrate grievances that challenge Merit Commission discipline.

4. Sanctions

Respondents' motion for sanctions is denied because Respondents did not set forth the basis for their motion; the Union's motion for sanctions is granted because Respondents made false denials without reasonable cause.

Section 11(c) of the Act provides that the Board has discretion to include an appropriate sanction in its order if a party has made allegations or denials without reasonable cause and found to be untrue, or has engaged in frivolous litigation for the purposes of delay or needless increase in the cost of litigation. The test for determining whether a party has made factual assertions which were untrue and made without reasonable cause is an objective one of reasonableness under the circumstances. Chicago Transit Auth., 16 PERI ¶ 3021 (IL LLRB 1999); Chicago Transit Auth., 15 PERI ¶ 3018 (IL LLRB 1999); Cnty. of Rock Island, 14 PERI ¶ 2029 (IL SLRB 1998), aff'd, 315 Ill. App. 3d 459, 734 N.E.2d 33, 16 PERI ¶ 4008 (2000). The test for determining whether a party has engaged in frivolous litigation is whether the party's defenses to the charge were not made in good faith or did not represent a "debatable" position. Chicago Transit Auth., 16 PERI ¶ 3021 (IL LLRB 1999); Cnty. of Cook, 15 PERI ¶ 3001 (IL LLRB 1998); Cnty. of Cook and Sheriff of Cook Cnty., 12 PERI ¶ 3008 (IL LLRB 1996); City of Markham, 11 PERI ¶ 2019 (IL SLRB 1995).

a. Respondents' Motion

Here, the Respondents' motion for sanctions is denied it does not specifically set forth the basis for the motion. Vill. of Barrington Hills, 29 PERI ¶ 15 (IL LRB-SP 2012) (sanctions denied where party did not set forth a basis for their imposition). Further, the motion does not otherwise demonstrate that the Union made untrue factual assertions without reasonable cause or that the Union engaged in frivolous litigation. Id.

b. The Union's Motion[32]

The Union's motion for sanctions is granted because the Respondents made denials with reasonable cause and found to be untrue when they denied, in their answer, that (1) Dove had initiated a grievance concerning her three-day suspension and that (2) at all times material, Dove was active and visible in her support for the Union's activities.

Respondents falsely denied, without reasonable cause, that Dove had filed a grievance over her three-day suspension because Respondents indisputably possessed correct information pertaining to that answer at the pleading stage which was readily available to them without serious investigation or factual development. But see, City of Bloomington, 26 PERI ¶ 99 (IL LRB-SP 2010) (granting leeway when respondent made clearly false denials, not debatable after a full factual development at hearing, when there were limits on the information available at the early stages of the adjudicative process). First, Respondents' knowledge, at the pleading stage, that Dove filed a grievance over the three-day suspension is indisputable because the Sheriff, when asked whether he knew about Dove's grievance in 2010, plainly asserted, "yes, we've already stipulated to that."[33] Further, such information was readily available to Respondent's attorneys early in the adjudicative process because the Sheriff himself possessed that information, not merely a lower-ranked employee whose knowledge may not have been discovered prior to hearing. Thus, Respondents had no reasonable cause to deny the allegation that they knew of Dove's grievance because the information was indisputably possessed at the highest levels of the hierarchy and its disclosure required no investigation or factual development.

By the same rationale, Respondents similarly denied without reasonable cause that "Dove was active and visible in her support for the Charging Party's activities" at all times material because the Sheriff testified at hearing that he "must have known" of Dove's organizing efforts in late 2010. In addition, the Sheriff's statement prohibiting Dove from holding organizational meeting at the jail, which he made during that time, further demonstrates such knowledge.[34]

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[32] Since the Union has not argued that the County engaged in frivolous litigation, that prong of the section 11(c) test is not discussed here.

[33] The complaint in this case issued on April 29, 2011.

[34] Notably, while the date of the Sheriff's statement prohibiting meetings at the jail is not in the record, it must have occurred at the material time prior to December 27, 2010, the date of Respondents' first

However, the Respondents' denial that the parties have "operated under the terms of the [FOP] Agreement" was not made without reasonable cause and found to be untrue because that statement itself is equivocal in meaning. On the one hand, it could be read to mean that Respondents maintained employees' terms and conditions as set forth in the contract—a fact proven true and supported by the record. On the other hand, it could be read to mean that the Respondents and the Union formally agreed to be bound by the expired FOP contract—a fact not supported by the record. Thus, Respondents denial of this allegation was made with reasonable cause because the truth or falsity of the denial depends on the manner in which the statement is interpreted.

Finally, Respondents did not make an untrue factual assertion without reasonable cause when they denied the Board's jurisdiction because that statement was legal and not factual in nature. The Board's case law suggests that any untrue allegations or denials sufficient to support the imposition of sanctions must address issues of fact rather than issues of law. See Chicago Transit Auth., 19 PERI ¶ 12 (IL LRB-LP 2003) (addressing allegedly untrue "factual assertions" when ruling on a motion for sanctions), see also Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998), but see Wood Dale Fire Protection Dist. v. Ill. Labor Rel. Bd., 395 Ill. App. 3d 523, 535-36 (2nd Dist. 2009) (Court analyzed Respondent's assertion that its failure to file a timely answer did not constitute an admission of the legal conclusions in the complaint under the frivolous litigation prong of section 11(c)). Indeed, the fact that Section 11(c) already provides a separate avenue by which the Board may examine a party's legal assertions further suggests that the Act's drafters intended that "allegations or denials" made without reasonable cause include factual allegations and denials, but not legal ones. Here, Respondents' denial does not warrant the imposition of sanctions because their allegedly untrue assertion concerning the Board's jurisdiction sets forth a legal conclusion and is not an untrue statement of fact.

Thus, the Union's motion for sanctions is granted with respect to Respondents' statements which were made without reasonable cause and found to be untrue.

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adverse action against Dove, because there would have been no need for such organizational meetings after the election which took place five days earlier on December 22, 2010.

V. CONCLUSIONS OF LAW

1. Respondents retaliated against Dove, in violation of sections 10(a)(2) and (1) of the Act, when the Sheriff filed charges with the Merit Commission seeking to terminate Dove's employment because of her participation in organizing PBLC and because she filed a grievance over her 3-day suspension.
2. It is proper to defer to the parties' September 13, 2011, grievance settlement agreement of Dove's 27-day suspension, issued on December 26, 2010.
3. Respondents did not repudiate the FOP contract or fail to bargain in good faith, in violation of sections 10(a)(4) and (1) of the Act, by refusing to proceed to arbitration on Dove's discharge grievance or by challenging section 16.8 of the FOP contract in court.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that Respondents, their officers and agents, shall:

1) Cease and desist from:
    a. Filing charges against employees with the Merit Commission seeking their termination or otherwise disciplining employees because they have engaged in union or protected concerted activity.
    b. In any like or related manner, interfering with, restraining or coercing their employees in the exercise of the rights guaranteed them in the Act.
2) Take the following affirmative action necessary to effectuate the policies of the Act:
    a. Offer Dawn Dove immediate and full reinstatement to her former, or a substantially similar, position without prejudice to her seniority or other rights and privileges, and make her whole for all losses she suffered because of Respondents' unlawful filing of a complaint against her with the Merit Commission, including back pay plus interest at a rate of seven percent per annum continuing to the date she is reinstated.
    b. Remove from Dove's personnel file and all other records any reference to the complaint brought against her before the Merit Commission and any discipline ensuing therefrom or related thereto, and notify her in writing that this action has been done and that evidence of the unlawful complaint and resulting discipline, will not be used as a basis for future personnel decisions or disciplinary actions.

c. Preserve and, upon request, make available to the Board or its agents all payroll and other records required to calculate the amount of back pay and the terms and conditions of reinstatement as set forth in this Decision.

d. Reimburse the Union for its reasonable expenses, including costs and reasonable attorney's fees, incurred in litigating the factual issues of whether Dove had filed a grievance over her three-day suspension and whether Dove had been active and visible in her support of the Charging Party, and in seeking sanctions against Respondents under Section 11(c) of the Act.

e. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondents will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

f. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondents have taken to comply with this order.

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 Board's General Counsel at 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 24th day of August, 2012

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge

NOTICE TO EMPLOYEES

FROM THE

ILLINOIS LABOR RELATIONS BOARD

The Illinois Labor Relations Board, State Panel, has found that the County of Bureau and Bureau County Sheriff have violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from filing charges against employees with the Merit Commission seeking their termination or otherwise disciplining employees because they have engaged in union or protected concerted activity.

WE WILL cease and desist from in any like or related manner, interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL offer Offer Dawn Dove immediate and full reinstatement to her former, or a substantially similar, position without prejudice to her seniority or other rights and privileges, and make her whole for all losses she suffered because of our unlawful filing of a complaint against her with the Merit Commission, including back pay plus interest at a rate of seven percent per annum continuing to the date she is reinstated.

WE WILL remove from Dove's personnel file and all other records any reference to the complaint brought against her before the Merit Commission and any discipline ensuing therefrom or related thereto, and notify her in writing that this action has been done and that evidence of the unlawful complaint and resulting discipline, will not be used as a basis for future personnel decisions or disciplinary actions.

WE WILL preserve and, upon request, make available to the Board or its agents all payroll and other records required to calculate the amount of back pay and the terms and conditions of reinstatement as set forth in the Decision.

DATE _____

_____
County of Bureau and Bureau County Sheriff
(Employer)

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor
Springfield, Illinois 62702
(217) 785-3155

160 North LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400

THIS IS AN OFFICIAL GOVERNMENT NOTICE

AND MUST NOT BE DEFACED.