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

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| Metropolitan Alliance of Police, DuPage Sheriff's Police, Chapter 126, | ) | |
| Charging Party | ) | |
| and | ) | Case No. S-CA-12-085 |
| County of DuPage and DuPage County Sheriff, | ) | |
| Respondents | ) | |

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

On July 1, 2014, Administrative Law Judge (ALJ) Michelle N. Owen issued a Recommended Decision and Order (RDO) recommending that the Illinois Labor Relations Board, State Panel, dismiss the complaint in this case. Charging Party, Metropolitan Alliance of Police, DuPage Sheriff's Police, Chapter 126, had charged that Respondent, County of DuPage and DuPage County Sheriff violated Section 10(a)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315/10(a)(1) (2012), when they transferred Sergeant Williams from the Law Enforcement Bureau to the afternoon shift at the courthouse in the Administrative Bureau, allegedly because of his active and visible support for Charging Party's organizing efforts.

Charging Party filed timely exceptions to the ALJ's RDO pursuant to Section 1200.135 of the Board's rules and regulations, 80 Ill. Admin. Code § 1200.135, and Respondent filed a response. After reviewing the exceptions, the response, and the record, we accept the ALJ's recommendation for the reasons explained in the RDO, and we dismiss the complaint. We add to the ALJ's analysis only a response to Charging Party's assertion that she had overlooked an

allegation of a Section 10(a)(2) violation. While the charge Charging Party initially filed had alleged violations of Section 10(a)(1) and (2), the complaint issued after investigation alleged solely a violation of Section 10(a)(1). Charging Party filed no motion to amend the complaint to add a 10(a)(2) allegation, and the issue of a potential 10(a)(2) violation was not before the ALJ, nor is it before us.[1]

For these reasons, the complaint is dismissed.

**BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL**

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

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

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

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

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on September 9, 2014; written decision issued at Chicago, Illinois, December 31, 2014.

[1] Even if that were not the case, the ALJ recognized that this type of a 10(a)(1) allegation requires the same analysis as a 10(a)(2) allegation, so the ALJ articulated a 10(a)(2)-type analysis without labeling it as such, and we would be able to make a 10(a)(2) determination based on the ALJ's 10(a)(1) recommendation. However, the issue is not before us, and we make no determination on the point.

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## ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On April 25, 2012, the Metropolitan Alliance of Police, DuPage Sheriff's Police, Chapter 126, (Charging Party or MAP) filed a charge with the Illinois Labor Relations Board's State Panel (Board) alleging that the County of DuPage and DuPage County Sheriff (Respondents) engaged in unfair labor practices within the meaning of Section 10(a)(1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2012). The charge was investigated in accordance with Section 11 of the Act and on September 20, 2012, the Board's Executive Director issued a Complaint for Hearing. A hearing was conducted on April 9, 2013, in Chicago, Illinois, at which time the Charging Party 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. At all times material, Respondents have been public employers within the meaning of Section 3(o) of the Illinois Public Labor Relations Act.
2. At all times material, the Respondents have been under the jurisdiction of the State Panel of the Board pursuant to Section 5(a) of the Act.
3. At all times material, the County has been subject to the Act pursuant to Section 20(b) of the Act.

4. At all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.

## II. ISSUES AND CONTENTIONS

The issue is whether the Respondents violated Section 10(a)(1) of the Act when they involuntarily transferred Sergeant Williams from the Law Enforcement Bureau to the afternoon shift at the courthouse in the Administrative Bureau, allegedly because of his active and visible support for the Charging Party's organizing efforts.

The Union argues that the Respondents violated Section 10(a)(1) of the Act by transferring Williams in retaliation for his protected activity. First, the Union asserts that Williams engaged in protected activity when he collected majority interest cards, and that the Respondents knew of it. To prove unlawful causation and motivation, the Union points to (1) the proximity of Williams's transfer to the Respondents' knowledge of his union activity; (2) the Respondents' alleged disparate treatment of Williams after they transferred him; (3) and the Respondents' allegedly shifting and pretextual reasons for the adverse action. The Union contests the legitimacy of the Respondents' business explanation for the transfer, arguing that Williams was not the best candidate for the position. According to the Union, Williams had no experience or training for work at the courthouse and his investigative background served no purpose there since he was not assigned to the investigative unit. The Union likewise contests the Respondents' assertion that they transferred Williams because of his superior supervisory skills. In support, the Union notes that Williams oversees only five deputies during a period of time when the courthouse is mostly closed. For these reasons, the Union likewise argues that the Respondents failed to establish that they would have taken the same action notwithstanding Williams's union activity.[1]

The Respondent asserts that the complaint fails to state a claim because Williams is a supervisor and not a public employee within the meaning of the Act. Next, the Respondent contends that it did not subject Williams to an adverse employment action because the transfer did not result in a loss of pay or benefits. Further, the Respondent argues that there is no causal connection between the protected activity and the purported adverse action because the Sheriff

[1] The Charging Party does not argue that the Respondents' agents made statements indicative of union animus.

had no knowledge of the Charging Party's protected activities until after the transfer. Finally, the Respondents claim that they transferred Williams for a legitimate, non-pretextual reason, namely, their need for an experienced, qualified sergeant to supervise the second shift at the courthouse.

## III. FINDINGS OF FACT

The Sheriff's Office is divided into three bureaus, the Law Enforcement Bureau, the Corrections Bureau, and the Administrative Bureau. The Law Enforcement Bureau has oversight over the Patrol Unit, the Investigations Unit, the Community Resource Unit, and the Forensic Unit. The Corrections Bureau has oversight over the jail. The Administrative Bureau oversees the Courthouse Communications Division, the Division of Court Security, IT, the Civil Division, and the Quartermaster. John Zaruba is the Sheriff. James Kruse is Chief of the Administrative Bureau.

The courthouse deputies provide security throughout the courthouse, including the hallways, the courtrooms, and the annex, which houses the States Attorney's office, the Public Defender's office, the Jury Commission, and the clerk's office. They ensure that individuals are screened for weapons upon entering the building.

The courthouse has two shifts, the day shift (8 am to 4 pm) and the afternoon shift (2 pm to 10 pm). Approximately 60 deputies work on the day shift. Approximately 5 or 6 deputies work on the afternoon shift. Two individuals oversee the day shift. Each oversees 25 to 30 deputies. One individual oversees the afternoon shift deputies.

Many of the courtrooms close between noon and 4 pm and the courthouse is largely empty after 4 pm. There is not much activity at the courthouse after noon unless there is a trial. Individuals must access the courthouse even when the courtrooms are closed to use psychological services, undergo DUI evaluations, and report for probation. Judges work in their offices when court is not in session.

James Williams is a sergeant employed by the Sheriff's office. For 18 years, Williams worked in the patrol unit of the Law Enforcement Bureau. For approximately six to seven years, Williams oversaw between 8 and 12 subordinates. For the last two of his years in the Law Enforcement Bureau, Williams worked a 12-hour afternoon shift from 3 pm to 3 am. Every

other week, Williams worked only two out of the five work days. Williams never oversaw personnel in court security.

In September 2011, Williams began speaking with the Respondents' sergeants and lieutenants about obtaining union representation. During that time, he collected authorization cards in support of MAP's representation petition.

On October 11, 2011, Williams met with Chief James Bilodeau of the Law Enforcement Bureau at a Starbucks in Glen Ellyn. At that meeting, Williams told Bilodeau that he had begun collecting authorization cards from sergeants and lieutenants in support of MAP's representation petition. Williams testified that Bilodeau said MAP was confrontational and that he did not want to "deal with them." According to Williams, Bilodeau also stated that the Sheriff did not care for MAP and that MAP was very confrontational.[2] Bilodeau admitted that he "most likely" told Williams that he (Bidoleau) did not like MAP, but asserts that he did not share with Williams the Sheriff's views on unionization.

Sometime prior to November 15, 2011, the Sheriff called a staff meeting to choose a sergeant to oversee the deputies at the courthouse on the afternoon shift. At the time, a corporal performed that task. However, the corporals had recently obtained representation and belonged in a bargaining unit which included their subordinate deputies. The Sheriff believed that it would be better if a non-bargaining unit sergeant oversaw the deputies instead of a member of their own union.

During the meeting, members of staff collectively expressed that Williams would be a good choice for the position. According to Kruse, the Respondents required a reliable and experienced sergeant for the job who could act in the absence of the Court Security Director, an individual who would not be present during the afternoon shift. The Respondent sought a sergeant "who did not need his hand held" and who would be self reliant in making decisions, guiding his subordinates, and evaluating his personnel. Kruse stated that the Respondents chose Williams because he has a good work ethic, has an investigative background, and can obtain answers without supervision. Kruse explained that Williams's background as a field training officer would make him a good mentor to the newer deputies routinely assigned to the afternoon shift and that his investigative background would help the Office identify members of an

[2] This statement is used to support the finding that the Sheriff had notice and knowledge of MAP's organizing effort and not for the truth of the matter asserted.

increasingly active domestic terrorist group, the Sovereign Citizens Movement. Kruse added that the Sheriff sought to transfer an individual already assigned to an afternoon shift because it would be least disruptive to the individual transferred.[3]

Williams is not officially involved in the investigative unit which the Sheriff formed at the courthouse in 2012, after his arrival. Bilodeau testified that all the patrol sergeants have the ability to effectively supervise subordinates without additional supervision.

On November 15, 2011, Bilodeau gave Williams an envelope which contained a letter of transfer from Sheriff Zaruba. When Bilodeau first approached Williams with the envelope, Williams stated "I'm guessing that's not good news." Bilodeau responded, "no, it's not." The letter stated that Williams would be transferred from the Law Enforcement Bureau to the Division of Court Security, effective November 28, 2011. It specified that Williams would work the afternoon shift at the courthouse. This afternoon shift required Williams to work five days a week, every week, for eight hours each day — 2 pm to 10 pm on Monday through Thursday, and 12 pm to 8 pm on Fridays.[4] Williams reviewed the letter and asked Bilodeau why the Sheriff selected him for the transfer. Bilodeau replied that Williams had the skills, knowledge, and ability to do the job. Williams testified that no member of command staff ever described the skill set he possessed which warranted the transfer.

The transfer changed Williams's hours of work but not his rank or salary. Williams testified that a transfer to the courthouse from patrol is not a promotion or anything to be proud of.

On November 16, 2011, Williams wrote a memo informing the Sheriff that he did not wish to be transferred. Williams explained that the transfer interfered with his court-ordered visitation of his daughter and that it would reduce his visitation by more than 50%. Williams requested to be retained in his position in the Law Enforcement Bureau.

Sometime after November 17, 2011, Williams wrote a letter to Chief Bilodeau to follow up on his request, noting that he had not yet received a response from the Sheriff and asking

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[3] There is no evidence that Bilodeau participated in the decision-making process, that he made any recommendations supporting Williams's transfer, or that he was even at the staff meeting. Indeed, Bilodeau testified that he could not remember such a meeting at all.

[4] Williams testified that based on his experience, the chief assigns shift, not the sheriff. Bilodeau testified that the chiefs do not always make those shift assignments.

when he could expect one.[5] Williams reminded Bilodeau that the two had discussed the fact that Williams was more senior than the two other sergeants assigned to the courthouse. Williams asked Bilodeau whether his "seniority would be held in the same regard as it [had been] in his patrol assignment."

On November 22, 2011, Williams received a memo from Bilodeau reminding Williams that Bilodeau already told him that the Sheriff would not rescind the transfer. Bilodeau instructed Williams to raise issues concerning the treatment of his seniority with Chief Kruse.

On November 28, 2011, Williams sent a memo to Chief Kruse, via the chain of command. Williams asked that his "seniority be held in the same regard as it had been in the patrol division." Williams explained that he was more senior, based on time in grade, than the other two sergeants assigned to the courthouse. On this basis, he asked Kruse to allow him to choose to work the day shift instead of the afternoon shift.

That same day, the Sheriff promoted Cory Orphan to sergeant and allowed him to choose the shift he worked. The Charging Party introduced no further evidence with respect to this employee.

On November 29, 2011, Williams received the title Secord Watch Screening Supervisor, effective December 5, 2011.[6] There was no position with that title prior to Williams's transfer to the courthouse.

On November 30, 2011, Williams received a memo from Kruse explaining that the Office selected Williams for the transfer "due to the requisite skills, knowledge and abilities this assignment required, and [based on] the office's belief that [Williams] possess[ed] the skills necessary to effectively perform the duties of [the] position." The memo denied Williams's request to change his work hours to the day shift.

On February 3, 2012, Williams completed a 40-hour training course on an Introduction to Court Security. Williams previously completed 400-hours of training to become a law enforcement officer of the state, which included training on criminal law, officer safety, traffic laws, and arrest procedures. The courthouse security training encompassed some of those same areas of training. Williams testified that he did not have the training or skills to perform the functions at the courthouse.

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[5] This document is dated November 16, 2011 but references a conversation that happened on November 17, 2011. Accordingly, the November 16 date is a typographical error.

[6] This position is also referred to as PM Screening Sergeant.

On March 1, 2012, the Respondents transferred Bilodeau to the courthouse and demoted him from Chief to Major. As a result of the transfer, Bilodeau oversaw Williams at the Courthouse.

On March 5, 2012, Williams sent a memo to Kruse, via the chain of command. Williams stated that he wished to be considered for a vacant sergeant position on the day shift at the courthouse if the Sheriff would not transfer him back to the Law Enforcement Bureau. Kruse denied Williams's request. The Sheriff promoted a less senior employee into the vacant position instead.

Bilodeau likewise made requests on Williams's behalf to move him to the day shift. Chief Kruse denied those requests, even though the day shift had openings, and even though his denial left Bilodeau shorthanded for a sergeant on the day shift.

In April 2012, Williams spoke to Bilodeau in person at Bilodeau's office about the upcoming hearing before the Board on the instant charge. Bilodeau said he would testify that he could not remember whether he told the Sheriff of Williams's union activity before or after the Sheriff transferred him. Williams confronted Bilodeau and said, "this is disappointing...this is not what you've been telling me all along." According to Williams, Bilodeau told him that he (Bilodeau) informed the Sheriff of Williams's union activity a couple of weeks prior to Williams's transfer.

At hearing, Bilodeau initially testified that he could not remember whether he told the Sheriff about Williams's union activity before or after the transfer. He later testified that it was more likely that he told the Sheriff of Williams's union activity after Williams's transfer. Given the inconsistency in Bilodeau's testimony, I credit Williams's testimony that Bilodeau admitted he told the Sheriff of Williams's union activity a couple weeks prior to Williams's transfer.

On July 30, 2012, MAP filed its petition to represent the sergeants and lieutenants employed by the Respondents. On January 22, 2013, MAP withdrew its petition, without prejudice.

The Office's General Orders provide that a transfer may be voluntary or involuntary. The Sheriff's office has no policy to grant more senior sergeants preference in job assignments.

Sergeants Mike Kuczynski, Ed Moore, and Dave Sand have experience in the courthouse. They filled in for courthouse deputies when they held the position of detective, but the Sheriff

never permanently assigned them to the courthouse. There is no evidence that any of these employees served as field training officers.

At the courthouse, Williams assists in escorting jury members to the court room; assists deputies with arrests; escorts witnesses to the parking lot; takes evidence into the courtroom; screens incoming individuals for weapons; and answers questions at the information desk. Williams also schedules vacations for his subordinate deputies and likewise schedules or approves their time off. He makes decisions on these matters based on Office policy. He also evaluates his subordinates.

Bilodeau believes Williams is underutilized at the courthouse and stated that "[Williams] could probably be doing more." Kruse testified that the objective of a transfer is to meet the needs of the office. Kruse explained that Williams's transfer met those needs.

## IV. DISCUSSION AND ANALYSIS

1. Affirmative Defense

   a. Supervisory status is an affirmative defense to Williams's claim of retaliatory transfer in this case

The Respondent has the burden to prove that Williams is a supervisor and therefore not protected in his own right from retaliation for engaging in activities set forth in Section 6 of the Act.

The Illinois Public Labor Relations Act is similar to the National Labor Relations Act, which specifically excludes supervisors from the definition of employee. 5 ILCS 315/3(n), 28 U.S.C. § 152(3). Under both statutes, supervisors are unprotected and a supervisor who participates in pro-union activity may be disciplined for such activity. Forest Preserve Dist. of Cook Cnty., 5 PERI ¶ 3002 (IL LLRB 1988). This fact entitles an employer to insist on the loyalty of his supervisors and means that a supervisor is not free to engage in activity which, if engaged in by a rank-and-file employee, would be protected. Id.; Florida Power & Light v. Electrical Workers, 417 U.S. 790, 806-09 (1974).

Although there are cases in which a supervisor has a viable claim under the Act, the supervisor is not protected in his own right. Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204, 206–07 (8th Cir. 1977). Rather, his "basis for relief ... is that his [discipline or] discharge had a tendency to interfere with, restrain, or coerce the protected employees in the exercise of their

[protected] rights."[7] Id.; Forest Preserve Dist. of Cook Cnty., 5 PERI ¶ 3002; See Int'l Longshoremen's Ass'n, AFL–CIO v. Davis, 476 U.S. 380, 384 n.4 (1986) ("Even though supervisors are not covered by the Act, a discharge may constitute a § 8(a)(1) unfair labor practice if it infringes on the § 7 rights of the employer's nonsupervisory employees.").

As such, supervisory status is an affirmative defense to a complaint alleging retaliation against a public employee for engaging in protected activity; it is the respondent-employer's burden to plead and prove it. Cnty. of DuPage and DuPage Cnty. Sheriff, 6 PERI ¶ 2018 (IL SLRB 1990) (applying NLRB's approach).

Here, Williams's supervisory status constitutes an affirmative defense to this complaint because the complaint alleges that the Respondents retaliated against Williams for engaging in protected activity as a public employee.[8] A discussion of Williams's alleged supervisory status follows.

2. Williams's Supervisory Status

The Respondents failed to prove that Williams is a supervisor within the meaning of the Act.

A peace officer is a supervisor within the meaning of Section 3(r) of the Act if he (1) has principal work substantially different from that of his subordinates; (2) has authority to perform one or more of the 11 enumerated supervisory functions—hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, discipline, adjust grievances—or to effectively recommend such performance; and (3) consistently exercises independent judgment in the interest of the employer in connection with his supervisory activity. City of Freeport, 135 Ill. 2d at 511.

As a preliminary matter, the Respondents' arguments do not demonstrate that Williams is a supervisor within the meaning of the Act. First, the Respondents have made no attempt on brief to address the prongs of the supervisory test. Second, the sole basis for the Respondents' position, Williams's statement that he "supervises deputies," constitutes the type of vague,

[7] The NLRB has found that a supervisor has a viable claim under the NLRA when he is terminated or disciplined (1) for refusing to commit unfair labor practices, (2) for testifying before the Board or during the processing of an employee's grievance, or (3) where a supervisor who hired his own crew was discharged as a pretext for terminating his pro-union crew. Forest Preserve Dist. of Cook Cnty., 5 PERI ¶ 3002.

[8] There is no allegation or argument in this case that the complained of action interfered with the protected rights of public employees.

generalized, and conclusory testimony which the Board has repeatedly rejected as evidence of supervisory authority. State of Ill.. Dep't of Cent. Mgmt Servs. (Dep't of Public Health), 24 PERI ¶ 112 (IL LRB-SP 2008); Cnty. of Union, 20 PERI ¶ 9, fn 2 at p. 59 (IL LRB-SP 2003).

A fact-specific application of the statutory test, set forth below, likewise shows that Williams is not a supervisor.

3. Principal work requirement

The nature and essence of Williams's principal work is not substantially different from that of his subordinates.

In determining whether the principal work requirement has been met, the initial consideration is whether the work of the alleged supervisor and that of his subordinates is obviously and visibly different. City of Freeport, 135 Ill. 2d at 512; City of Chicago, 28 PERI ¶ 86 (IL LRB-SP 2011) aff'd by 2013 IL App (1st) 120279; Vill. of Justice, 17 PERI ¶ 2007 (IL LRB-SP 2000). However, if the work is not obviously and visibly different, then "the Board will look at what the alleged supervisor actually does, to determine whether the 'nature and essence'" of the superior's work is substantially different from that of his subordinates. City of Freeport, 135 Ill. 2d at 512; City of Chicago, 28 PERI ¶ 86 aff'd by 2013 IL App (1st) 120279. The nature and essence test requires a qualitative rather than a quantitative analysis. Id.

Here, Williams's work is not obviously and visibly different from that of his subordinates. Based on this sparse record, Williams and his subordinate deputies perform substantially similar duties, rather than obviously different ones, because both Williams and his subordinates provide security to the courthouse.[9]

Further, the nature and essence of Williams's work is not substantially different from that of his subordinates because there is no evidence that he has the authority to adversely impact his subordinates' terms and conditions of employment. The Illinois Supreme Court has held that the existence of supervisory authority, and the ability to use it at any time, changes the nature of the relationship between a ranking officer and a subordinate officer to an extent which renders the nature of their functions very different, despite their facial similarity. City of Freeport, 135 Ill. 2d

[9] It is difficult to undertake the comparative analysis required here because there is very little evidence concerning the work performed by Williams's subordinates. Job descriptions would have been helpful, but the Respondent provided none.

at 514. However, the mere possession of any indicium of supervisory authority is itself insufficient to change the "nature and essence" of substantially similar principal work. City of Chicago, 28 PERI ¶ 86 aff'd by 2013 IL App (1st) 120279; Chief Judge of the Cir. Court of Cook Cnty., 6 PERI ¶ 2047 (IL SLRB 1990). Rather, the Board "must identify the point at which an employee's supervisory obligation to the employer conflicts with his participation in union activity with the employees he supervises." City of Freeport, 135 Ill. 2d at 518.

In Freeport, the Court found that the nature and essence of ranking officers' work was substantially different from that of their patrol officer subordinates because the ranking officers exercised supervisory authority in several areas likely to fall within the scope of union representation. Id. Neither the Freeport chief nor the assistant chief were involved in the patrol officers' daily supervision. Id. at 519. As such, the chief "relie[d] on the ranking officers to observe, direct, evaluate, and discipline their subordinates[,] and to ensure that the patrol officers...properly [performed] their jobs." Id.

The distinguishing factor between this case and Freeport is that there is insufficient evidence to demonstrate that Williams possesses the authority to adversely affect his subordinates' terms and conditions of employment. The Respondents' evidence does not satisfy the requirement for specific examples required by the First and the Third District Appellate Courts. Ill. Dep't of Cent. Mgmt. Serv. (State Police), 382 Ill. App. 3d at 228-9 (holding that although a job description purported to give authority to alleged supervisors, these alleged supervisors did not "in practice" perform the tasks with significant discretionary authority); Vill. of Broadview v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 503, 208 (1st Dist. 2010)(rules and regulations or job descriptions therein are not alone sufficient to meet the burden of proof); City of Peru v. Ill. State Labor Rel. Bd., 167 Ill. App. 3d 284, 291 (3rd Dist. 1988)(same). Indeed, the Respondents have not even satisfied the most lenient standards of proof applied by the Fourth and Fifth District Appellate Courts because they have introduced no job descriptions outlining Williams's actual authority in his position and have introduced no policies and procedures which confer such authority. Ill. Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App 4th 090966 (4th Dist. 2011) (finding job description satisfied the requirement that the alleged supervisor directed employees with independent judgment and had authority to affect employees' terms and conditions of employment); Vill. of Maryville v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 369, 372 (5th Dist. 2010) (finding of supervisory authority based on the fact that

sergeants had written authority via the policies-and-procedures manual to issue oral and written reprimands, conduct oral and written performance evaluations, and memorialize counseling sessions which were placed in subordinates' personnel files). As discussed more thoroughly below, the Respondents' reasons for choosing Williams for this position—his self-reliance, and his ability to work without supervision to guide, mentor, and evaluate his subordinates—do not indicate that the Respondents in fact granted Williams the authority to affect his subordinates' terms and conditions of employment.

Contrary to the Respondents' anticipated contention, Williams's status as the highest ranking officer at the courthouse does not alone provide a sufficient basis on which to find that the nature and essence of Williams's work differs substantially from that of his subordinates. Vill. of Broadview, 402 Ill. App. 3d at 510 (status as watch commander did demonstrate that employees had significant discretionary authority to affect subordinates' terms and conditions of employment); but see City of Freeport, 135 Ill. 2d at 514.

Thus, Williams's work is not substantially different from that of his subordinates.

4. Direction[10]

Williams does not direct his subordinates within the meaning of the Act. Although Williams oversees his subordinates using independent judgment, there is insufficient evidence that he possesses significant and discretionary authority to affect their terms and conditions of employment.

The term 'direct' encompasses a number of distinct, yet related, functions including review and monitoring of work activities, scheduling of work hours, approving time off and overtime, assigning duties, and formally evaluating job performance when the evaluation is used to affect employees' pay and employment status. Ill. Dep't of Cent. Mgmt. Servs. (State Police), 382 Ill. App. 3d at 224; Vill. of Plainfield, 29 PERI ¶ 123 (IL LRB-SP 2013). However, employees cannot be found to be supervisors based solely on their ability to direct, unless they also have significant discretionary authority to affect their subordinates' employment in areas likely to fall within the scope of union representation, such as hiring, promotion, transfer, or discipline. State of Ill., Dep't of Cent. Mgmt. Servs. (State Police), 382 Ill. App. 3d at 224; Vill.

[10] Direction is the only indicium potentially implicated by the record.

of Plainfield, 29 PERI ¶ 123; Cnty. of Lake, 16 PERI ¶ 2036 (IL SLRB 2000); City of Bloomington, 13 PERI ¶ 2041 (IL SLRB 1997); City of Sparta, 9 PERI ¶ 2029 (IL LRB-SP 1993).

As a preliminary matter, Williams does not exercise independent judgment when approving time off, scheduling his subordinates' vacation, or completing evaluations. Williams's decisions concerning time off and vacation time do not require independent judgment because they are based on department policy. Vill. of Broadview, 402 Ill. App. 3d at 512 (leave decisions constrained by seniority and pre-determined staffing requirements do not establish supervisory authority); Vill. of Morton Grove, 23 PERI ¶ 72 (IL LRB-SP 2007)(overtime decisions based on department policy are routine and clerical in nature). Further, there is insufficient evidence that Williams exercises independent judgment when completing evaluations because there is no evidence as to the categories in which he evaluates his deputies. State of Ill., Dep't of Cent. Mgmt. Servs. (State Police), 382 Ill. App. 3d at 227 (Where there was no evidence concerning the categories in performance evaluations, the Court was "unable to say that the categories [were] more subjective than quantitative," and therefore found that the petitioned-for employees did not exercise independent judgment).

Nevertheless, Williams exercises independent judgment when overseeing his subordinates because he acts without supervision and his subordinates are new, inexperienced deputies who likely need extensive hands-on guidance. A superior's oversight and review of a subordinate's work constitutes the statutory authority to direct if the superior is responsible for his subordinate's work. Cnty. of Lake and Sheriff of Lake Cnty., 16 PERI ¶ 2036. That responsibility must involve more than merely observing and monitoring subordinates, or being responsible for the operation of a shift. Id. Rather, the supervisor is required to be actively involved in checking, correcting, and giving instructions to subordinates, without guidelines or review by others. Id.; City of Lincoln, 5 PERI ¶ 2041 (IL SLRB 1988); State of Ill., Dep't of Cent. Mgmt. Servs., 4 PERI ¶ 2013 (IL SLRB 1988); City of Chicago, 10 PERI ¶ 3017 (IL LLRB 1994). Williams is the highest ranking officer on site during his shift and his superiors chose him for the position because they wanted someone who would make decisions, guide his inexperienced subordinates, and be self-reliant. Such oversight necessarily involves checking subordinates' work, correcting their work, and giving them instructions—tasks which require independent judgment.

However, there is no evidence that Williams has the authority to affect his subordinates' terms and conditions of employment, despite the fact that he completes his subordinates' performance evaluations. The completion of performance evaluations that have only a limited role, or no role, in determining pay or employment status does not constitute supervisory direction. Vill. of Elk Grove Village, 245 Ill. App. 3d 109 (2nd Dist. 1993); Serv. Empl. International Union, Local 73 v. Ill. Labor Rel. Bd., 2013 IL App (1st) 120279 ¶ 61 (1st Dist. 2013) (finding direction affected subordinates' terms and conditions of employment where petitioned-for employees evaluated their subordinates and where the subordinate employees' collective bargaining agreement required performance evaluations to be considered in promotions); Vill. of Plainfield, 29 PERI ¶ 123 (sergeants' authority to evaluate their subordinates was supervisory in nature when they had significant discretion in evaluating their subordinates and where the evaluations were a significant factor in their subordinates' successful promotion to sergeant); State of Ill., Dep't of Cent. Mgmt. Servs., 12 PERI ¶ 2032 (IL SLRB 1996). Here, the Respondents did not explain how they use performance evaluations and there is no evidence that the evaluations have any effect on pay or promotion. Thus, Williams does not possess the supervisory authority to direct when he oversees his subordinates.

In sum, the Respondent did not show that Williams is a supervisor within the meaning of the Act.

5. Section 10(a)(1) Allegation

The Respondents did not violate Section 10(a)(1) of the Act when they transferred Williams from the Law Enforcement Bureau to the afternoon shift in the Court Security Division because there is insufficient evidence that they took such action because of Williams's protected activity.

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

The motivation of a public employer is relevant to a Section 10(a)(1) analysis where the Charging Party alleges that the employee at issue suffered an adverse employment action, as it has here. See Pace Suburban Bus Div. v. Ill Labor Rel. Bd., State Panel, 406 Ill. App. 3d 484, 494-95 (1st Dist. 2010). The Board follows the analytical framework applied to claims arising under Section 10(a)(2), in such cases, to determine whether a public employer took adverse action against an employee for an illegal motive. Pace Suburban Bus Div., 406 Ill. App. 3d at 495; Dep't of Cent. Mgmt. Servs. (State Police), 30 PERI ¶ 70 (IL LRB-SP 2013).

Under Section 10(a)(2), a charging party must show, by a preponderance of the evidence, that (1) the employee at issue was engaged in union or protected, concerted activity; (2) the employer knew of his conduct, and (3) the employer took the adverse action against him in whole or in part because of union animus or that it was motivated by his protected conduct. City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989). The Union may prove the third prong of this test through direct or circumstantial evidence. Circumstantial evidence of unlawful motive includes the timing of the employer's action in relation to the protected concerted activity, hostility toward protected concerted activities, disparate treatment, and shifting or inconsistent explanations for the adverse action. Id.

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

Here, Williams engaged in protected concerted activity when he solicited authorization cards from lieutenants and sergeants, and when he voiced his interest to Chief Bilodeau that he wished to join a union. Cnty. of Cook, 7 PERI ¶ 3017 (IL LLRB 1991) (solicitation

of authorization cards and voicing interest in joining union to supervisors constitutes protected activity).

Further, the Respondents knew of Williams's protected activity because Williams informed Respondents' agent, Chief Bilodeau, of his protected activity on October 12, 2011. Bilideau, in turn, told the Sheriff decision-maker of Williams's protected activity approximately two to three weeks later.

Next, the Union demonstrated that Williams suffered an adverse employment action when the Respondents transferred him because the transfer significantly altered Williams's work schedule. The definition of an adverse employment action is generous; the union need only show some qualitative change in the terms or conditions of employment or some sort of real harm. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012) (employee suffered no adverse employment action from negative comments made by management). An action does not need to have an adverse tangible result or adverse financial consequences to constitute adverse employment action sufficient to satisfy the third prong of the 10(a)(2)-type analysis. City of Chicago v. Ill. Local Labor Rel. Bd., 182 Ill. App. 3d 588, 594-95 (1st Dist. 1988). A change to an employee's work schedule constitutes an adverse employment action. Station Casinos, 358 NLRB No. 153 (2012); Flagstaff Medical Center, Inc., 357 NLRB No. 65 n.21 (2011). Prior to the transfer, Williams worked a 12-hour shift which allowed him to work only two out of five days, every other week. After the transfer, by contrast, Williams worked an 8-hour shift which required him to work five days a week, every week. Although the total hours of Williams's work remained the same, this substantial change in his schedule constitutes an adverse employment action. Station Casinos, 358 NLRB No. 153 FN 100 (2012)(change in employee's work schedule, which interfered with his ability to hold down a second job, constituted an adverse employment action); Flagstaff Medical Center, Inc., 357 NLRB No. 65 n.21 (2012)(the days of the week worked by an employee constitutes a term of condition of employment; finding that schedule change was an adverse employment action); Circuit Court of Winnebago, 17 PERI ¶2038 (IL LRB-SP 2001) (the absence of negative financial consequences stemming from Charging Party's involuntary transfer to the traffic division did not defeat her section 10(a)(2) claim); Clerk of the Circuit Court of Champaign Cnty., 8 PERI ¶ 2025 (IL SLRB 1992)(considering other factors besides economic ones, such as isolation from employees, as possible basis for adverse employment action but finding none; employee preference

insufficient); but see City of Chicago (Dep't of Buildings), 15 PERI ¶ 3012 (IL LLRB 1999)(no adverse employment action from transfer where employee's duties, hours, pay, and benefits remained identical); City of Elmhurst, 17 PERI ¶ 2040 (IL LRB-SP 2001)(transfer was not an adverse employment action where it did not change employee's job duties and had no negative impact on his employment such as a loss of pay or benefits, but noting that changes in working hours would constitute an adverse action) and City of Chicago (Dep't of Buildings), 15 PERI ¶ 3012 (no adverse employment action from transfer where duties, hours, pay, and benefits remained identical); Chicago Transit Auth., 21 PERI ¶ 38 (IL LRB-SP ALJ 2005)(transfer of employee constituted adverse action where it increased her commuting time).

However, there is insufficient evidence to demonstrate that the Respondents took such action to retaliate against Williams for his protected activity because the only evidence of suspicious circumstances is the proximity between Williams's organizing activity and the transfer. Pace Suburban Bus Division, 406 Ill. App. 3d at 498 (timing alone is not enough to prove unlawful motivation).

As the Union notes, the Respondents transferred Williams soon after they learned of his protected activity. Williams told respondent-agent Bilodeau of his organizing activities on October 11, 2011. Bilodeau told the Sheriff decision-maker of Williams's protected activity soon thereafter. The Sheriff issued the memo of transfer a couple weeks after obtaining knowledge of Williams's protected activity.[11] See Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007) (three weeks between protected activity and adverse action sufficient to demonstrate suspicious proximity); Sarah P. Culbertson Memorial Hosp., 25 PERI ¶ 11 (IL LRB-SP 2009) ("few weeks" between employees' testimony before board and adverse action sufficient to demonstrate suspicious proximity); but see City of Lake Forest, 29 PERI ¶ 52 (one year gap between protected activity and adverse action does not demonstrate suspicious circumstances); City of Highland Park, 18 PERI ¶ 2012 (IL LRB-SP 2002) (four month gap between protected activity and adverse action not sufficiently close to demonstrate suspicious timing).

However, there is no other evidence that the Respondents transferred Williams under suspicious circumstances. First, the Respondents' reasons for the transfer are not shifting.

[11] As noted earlier, I credit Williams's testimony that Bilodeau told the Sheriff of Williams's protected activity a couple weeks prior to the transfer.

Rather, the Respondents consistently asserted that they transferred Williams because he possessed the skills required for the position and that he was, altogether, the most suitable sergeant for the job. On November 16, 2011, Bilodeau told Williams that he had the skills, knowledge, and ability to perform the work at the courthouse. Approximately two weeks later, Chief Kruse provided Williams the same explanation for the transfer in writing. At hearing, Kruse testified similarly that the Sheriff chose Williams for the position based on his skills and qualifications: the Respondents required a reliable and experienced sergeant for the job who could act in the absence of the Court Security Director. Kruse explained that Williams's background as a field training officer, his experience as a supervisor, and his investigative knowledge qualified him for this position.

Contrary to the Union's contention, Kruse's reference to Williams's investigative background does not reveal a shifting explanation because Williams's background is part and parcel of his skills, knowledge, and ability to perform the work. Town of Cicero, 27 PERI ¶ 5 (IL LRB-SP 2011) (additional reason for the adverse action, provided by Respondent at hearing, was not shifting where it fell under the more broadly worded infractions cited in the initial notice to the employee).

Further, the Respondents' reasons for the transfer are not shifting, even though the Sheriff considered Williams' prior assignment to the afternoon shift in addition to Williams's qualifications for the position. The Sheriff's consideration of the sergeants' shifts merely sets forth a minimum criterion which placed Williams into the pool of candidates. As such, it does not constitute a shifting explanation for the Sheriff's selection of Williams over others who worked the same shift. But see Vill. of Barrington Hills, 29 PERI ¶ 15 (IL LRB-SP 2012)(finding Village's reasons for adverse action to be shifting where it presented one reason as the sole basis for the adverse action and then provided additional reasons) and Illinois State Toll Highway Auth., 25 PERI ¶ 4 (IL LRB-SP 2009) (finding shifting explanations where supervisor told employee she was terminated for failing to attend holiday parties but when the Respondent witnesses testified that they terminated her because she was not properly certified and was not skilled).

Second, the Union has not demonstrated that the Respondents treated Williams disparately from other employees because it introduced no evidence of employees who were similarly situated yet treated more favorably. Where an employee is unique with respect to

his employment circumstances, he cannot demonstrate disparate treatment based on his protected activity. Am. Fed. of State, Cnty. and Mun. Empl., Council 31 v. Ill. State Labor Rel. Bd., 175 Ill. App. 3d 191, 198 (1st Dist. 1988); Vill. of Oak Park, 28 PERI ¶ 111 (IL LRB-SP 2012)(employee could not demonstrate disparate treatment where he had "comparatively unique circumstances and background"); City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997) (charging party bears the burden of demonstrating employees who engaged in protected activity received disparate treatment). Here, the Respondents chose Williams for the position in part because his background as a field training officer qualified him to oversee and mentor the more inexperienced deputies regularly assigned to the afternoon shift. Although all sergeants can effectively oversee subordinates without outside guidance, none are similarly situated to Williams because there is no evidence that they possess the field training background and mentoring skills needed to supervise the particular deputies on the afternoon shift.

Similarly, the Respondents' refusal to allow Williams to switch to the day shift, after his initial transfer, fails to demonstrate disparate treatment. Williams's presence on the afternoon shift met the Respondent's specialized need for the oversight of unseasoned deputies. There is no evidence that other employees, who were given a choice of shift, met a similar specialized need. Thus, the Respondents did not treat Williams disparately when they refused him a transfer to the day shift, even though they allowed another sergeant to choose the shift he preferred.[12]

Third, the Respondents' failure to expand on their explanation for the transfer does not warrant an inference of unlawful motive. Although a respondent's refusal to provide a charging party an explanation for the adverse action can support a finding of union animus, there is no case law which stands for the proposition that an employer must explain the minutia of its decision-making process. Here, Bilodeau promptly provided Williams with the reasons for his transfer, upon issuing Williams the notice. Further, Chief Kruse provided the very same explanation in writing two weeks later. Under these facts, there is no basis for an inference of unlawful motive. But see Cnty. of DuPage and DuPage Cnty. Sheriff, 30 PERI ¶ 115 (IL LRB-SP 2013) (employer's failure to provide deputy with any explanation for the adverse action, even months later upon repeated request for it, supported finding of animus); City of Evanston, 8

[12] The Union places great weight on the seniority of various sergeants. However, seniority is immaterial to this case because the Sheriff's office has no policy to grant more senior sergeants preference in job assignments.

PERI ¶ 2001 (IL SLRB 1991) (Respondent's failure to provide an explanation for Charging Party's removal, implemented just days after he engaged in protected activity, supported a finding of animus); Cnty. of DeKalb, 6 PERI ¶ 2053 (IL SLRB 1990) (rejecting employer's justification that he did not give a written reason for employee's discharge because he was not a labor lawyer).

Finally, the Respondents' reasons for the transfer are not pretextual. Williams's supervisory skill constitutes a legitimate basis for the transfer, despite the fact that he oversees fewer deputies than sergeants on the day shift (5 versus 20-30). Indeed, Williams's specialized background as a field training officer renders him particularly qualified to oversee the inexperienced, newer deputies routinely assigned to the second shift, who necessarily need more hands-on guidance than the seasoned deputies assigned to the day shift.[13] Williams's lack of experience at the Courthouse does not detract from his qualifications in light of his background, which includes 18 years at the Sheriff's office, including six years of supervisory duties. Indeed, the Court Security training course Williams attended included some of the same topics covered in Williams's initial, qualifying course of study. Furthermore, the routine substitution of Law Enforcement Bureau detectives for courthouse deputies lends weight to the finding that the skills acquired in the Law Enforcement Bureau division are transferrable to work in the Court Security Division.[14] Thus, Williams was amply qualified to serve as sergeant on the afternoon shift at the Courthouse and the Charging Party's arguments otherwise are specious.

Similarly, Williams's investigative background likewise constitutes a legitimate basis for the transfer, and the Respondents' failure to assign Williams to the investigative unit does not undermine this rationale. Williams necessarily uses his investigatory skills in the regular course of his duties to identify members of domestic terror groups, even though he is not a member of the investigations unit. Indeed, Williams must routinely assess visitors during the screening process and building occupants after hours. These duties require the investigative acumen for which Williams was chosen because they call for a trained eye to spot domestic terrorists and guard against interlopers.

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[13] Arguably, the oversight of a smaller number of inexperienced deputies entails greater supervisory responsibility than the oversight a larger number of experienced ones.

[14] Law Enforcement Bureau Sergeants Mike Kuczynski, Ed Moore, and Dave Sand all periodically filled in for courthouse deputies when they held the position of detective.

Thus, the Respondents did not violate Section 10(a)(1) of the Act when they transferred Williams from the Law Enforcement Bureau to the afternoon shift in the Court Security Division.

## V. CONCLUSIONS OF LAW

The Respondents did not violate Section 10(a)(1) of the Act when they transferred Williams from the Law Enforcement Bureau to the afternoon shift in the Court Security Division.

## VI. RECOMMENDED ORDER

I recommend that the Board dismiss the Complaint in this matter.

## VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

**Issued at Chicago, Illinois this 1st day of July, 2014**

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

/S/ *Michelle N. Owen*

**Michelle N. Owen**
**Administrative Law Judge**