STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Metropolitan Alliance of Police, DuPage Sheriff's Police, Chapter 126,	)	
Charging Party	)	
and	)	Case No. S-CA-12-177
County of DuPage and DuPage County Sheriff,	)	
Respondents	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On July 1, 2013, Administrative Law Judge Anna Hamburg-Gal issued a Recommended Decision and Order in the above-captioned case, recommending that the Illinois Labor Relations Board, State Panel (Board) find that the County of DuPage and the DuPage County Sheriff (Respondents) violated Section 10(a)(2) and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) (Act) by removing Deputy Sheriff Eric Koty from the DuPage County Sheriff's Special Operations Unit because he grieved Respondent's change of its overtime policy.

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

ORDER

1) Cease and desist from:
   a) Retaliating against Eric Koty, or any of its other employees, for engaging in union or protected concerted activity.

b) In any like or related manner interfering with, restraining or coercing its 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) Rescind the decision to remove Koty from the Special Operations Unit and return him to the Special Operations Unit.

b) Remove all reference of Koty's removal from the Special Operations Unit from his personnel file.

c) Post, for 60 consecutive days, at all places where notices to employees are normally posted, signed copies of the attached notice. The Respondents shall take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

d) Notify the Board in writing, within 20 days of the date of this decision of the steps Respondent has taken to comply herewith.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

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

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

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

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois, on October 8, 2013, written decision issued at Chicago, Illinois, October 23, 2013.

NOTICE TO EMPLOYEES

FROM THE
ILLINOIS LABOR RELATIONS BOARD

Case No. S-CA-12-177

The Illinois Labor Relations Board, State Panel, has found that the County of DuPage and the DuPage 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 retaliating against Eric Koty, or any of our other employees, for engaging 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 rescind the decision to remove Koty from the Special Operations Unit and return him to the Special Operations Unit.

WE WILL remove all reference of Koty's removal from the Special Operations Unit from his personnel file.

DATE _____

_____

County of DuPage and DuPage 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.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Metropolitan Alliance of Police, DuPage Sheriff's Police, Chapter 126,	)	
Charging Party	)	Case No. S-CA-12-177
and	)	
County of DuPage and DuPage County Sheriff,	)	
Respondents	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On May 17, 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)(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 September 20, 2012, the Board's Executive Director issued a Complaint for Hearing. A hearing was conducted on March 14, 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, 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.
5. Charging Party was certified by the Board on January 15, 2009, in Case No. S-RC-05-153.
6. At all times material, Eric Koty was a public employee within the meaning of Section 3(n) of the Act.
7. At all times material, Koty was a member of a bargaining unit comprised of Deputy Sheriffs below the rank of Sergeant in the Sheriff's Administrative Bureau, Law Enforcement Bureau, Fugitive Apprehension Unit within the Corrections Bureau, School Liaison Unit, Gang Suppression/Problem Investigation Unit, DuPage County Metropolitan Enforcement Group (DUMEG) consortium, and Beat Auto Theft Through Law Enforcement (BATTLE) consortium (Unit).
8. At all times material, Mark Wolenberg was a member of the Unit.
9. Mark Wolenberg currently serves as president of the Unit.

II. ISSUES AND CONTENTIONS

The issue is whether the Respondents[1] violated Sections 10(a)(2) and (1) of the Act when they reassigned Koty from the Special Operations Unit on or about May 2, 2012, allegedly because he filed a verbal grievance on or about April 30, 2012 concerning a new policy regarding Unit employees' compensation for overtime worked.

First, the Respondent-County moves to dismiss on the basis that the County had no involvement in the complained-of conduct and that the Sheriff was not named in the complaint as a respondent. In support, the County asserts that the only individuals involved in the

[1] As discussed below, the Sheriff is still a party to this case. Further, the arguments in the County's brief are attributed to both respondents for the reasons set forth in Section 2.

complained-of conduct were employees of the Sheriff's Department, but that the County cannot be held liable for the Sheriff's actions under the doctrine of *respondeat superior*.[2]

Second, the Respondents contend that the Charging Party has not proven that Koty objected to a new policy, as stated in the complaint. First, the Respondents argue that the Charging Party undermines its claim that Deputy Sheriff Eric Koty objected to a "policy," because the Charging Party argued at hearing that the email, which outlined the allegedly objectionable procedures, did not rise to the level of a departmental policy. Second, the Respondents assert that the requirements set forth in that email were not new and that they merely served as a reminder of a procedure that the Sheriff's Office had used for "quite some time." The Respondent supports its assertion with citations to Sections VII and VIII of General Order PER 1-2, Section IV of General Order 1-5, and the parties' contract which states that "requests for the use of compensatory time off must be made at least seventy-two hours in advance unless the members' immediate supervisory or higher authority grants approval for less notice."

Third, the Respondents argue that the Charging Party did not meet its prima facie burden because it did not demonstrate that Koty suffered an adverse employment action when Sergeant Harris removed Koty from the Special Operations Unit (SOU). The Respondents assert Koty did not lose any pay or benefits and that Koty's testimony, that he missed working in the SOU and wanted to return, did not demonstrate that Koty suffered an adverse employment action.

Finally, the Respondents contend that the Sheriff removed Koty from the unit for a legitimate and unshifting business reason—Koty's untruthfulness. The Respondents also argued, for the first time on brief, that they removed Koty from the SOU pursuant to General Order LEB 7-47 which provides that the Sheriff considers an "applicant's ability to work closely with others" when choosing deputies for SOU membership.

The Charging Party first argues that the Respondent-County waived its argument concerning Board's omission of the Sheriff from the complaint and that the Sheriff is still a party to the case since the Board's failure to include the Sheriff was a clerical error. Specifically, the Charging Party notes that the Respondents waived their argument because they waited until hearing to raise it. Further, the Charging Party states that the Board's failure to include the

[2] The County cites Moy for this assertion. Moy v. Cnty. of Cook, 159 Ill. 2d 519 (1994)(holding that the relationship between the Sheriff and the County is neither an employment relationship nor an agency relationship).

Sheriff on the face of the complaint was a clerical error which should not affect the Sheriff's status as a named respondent because the initial charge, the affidavit of service, and the hearing order name both the County and Sheriff, and the Executive Director did not dismiss the charge with respect to the Sheriff, as required under Section 1220.40(a)(4) of the Board's rules.

Next, the Charging Party asserts that it met its prima facie burden by stating the following: Deputy Eric Koty engaged in Union activity when he expressed his support for the Union over the prior five or six years and when he sought guidance from the Union regarding a grievance[3]; Respondents knew that the Union would file a grievance based on Koty's complaint; Koty suffered an adverse employment action when the Respondents removed Koty from the SOU; and Respondents removed Koty from the SOU because of union animus.

Specifically, the Charging Party argues that Respondents demonstrated union animus when Colonel Pete Sterenberg denied Koty a light duty position in February or March 2010 because of an "unresolved labor issue," since the department had allowed other deputies to work light duty prior to that date. Similarly, the Charging Party contends that the suspicious timing of Koty's removal from the SOU, the Respondents' shifting and pretextual reasons for that removal, and Respondents' disparate treatment of Koty, demonstrate that the Respondents acted out of union animus. First, the Charging Party notes that only two days elapsed between Harris's knowledge of Koty's protected activity and Koty's removal from the SOU. Second, the Charging Party contends that the Respondents presented shifting reasons for Koty's removal. They asserted that they removed Koty for untruthfulness but then later asserted that they removed Koty because he failed to ask advance permission to earn compensatory time.[4] Third, the Charging Party argues that Respondents' stated reason for removing Koty from the SOU, his untruthfulness, is pretextual because Respondents failed to provide Koty with an explanation for his removal, took no disciplinary action against Koty for his alleged lie even though the Department is sensitive about its deputies' truthfulness, and never investigated Koty for untruthfulness. Further, the Charging Party notes that Respondents' reason was pretextual

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[3] The Charging Party also notes that Union President Deputy Mark Wolenberg testified that there has been union animus in the department for the past 14 years and that the Respondents had previously transferred employees because they had expressed support for the Union. Further, the Charging Party also asks the Board to take judicial notice of past unfair labor practices charges which the Union has successfully brought against the Respondents.

[4] There is no evidence in the record that the Respondents ever made the latter assertion. Accordingly, this basis for the Charging Party shifting explanations argument is not addressed below.

because they had no reason to remove Koty since Koty was a model employee and since another member of command staff stated that he did not believe Koty had been untruthful. The Charging Party also points out that Harris did not want to remove members from the unit because there was "no one...knocking down the door to join" the SOU. Finally, the Charging Party states that the Respondents disparately treated Koty because they did not provide Koty with an explanation for his removal even though they did give such an explanation to all other deputies they involuntarily removed from the SOU.

III. FINDINGS OF FACT

Sergeant Robert Harris is the commander of the Special Operations Unit (SOU) at the DuPage County Sheriff's Department (Department).[5] The SOU is a team which addresses high-risk situations such as barricaded subjects, hostage rescues, and high-risk warrants. Membership in the SOU is voluntary. A member of the SOU may quit at any time; the unit commander or higher authority may also terminate a deputy's assignment with the SOU. However, membership in the SOU is open only to those who meet the selection criteria in General Order No. LEB 7-47. That General Order provides, in part, that the applicant must be in excellent physical condition, must have a minimum of two years experience, and must have above-average evaluations during the previous 24 months. The application process includes various physical tests including a bench press, an obstacle course, and a run.

Currently, only 24 of the Department's 140 Deputy Sheriffs are members, or "operators," of the SOU. The operators are split into two small teams (blue and green). The teams train together on a monthly basis for eight hours. In addition, each team trains separately once every other month. The Department sets the SOU training schedule one year in advance. All members of the unit receive a copy of the training schedule before the year begins.

All deputy sheriffs' schedules include regular days off (RDOs). If an operator's SOU training day falls on his regular day off, he must make accommodations to attend the training. The operator may substitute or "exchange" a work day for a training day and take a different day off work. Alternatively, the operator may make a request to earn compensatory time (comp time) or overtime for attending the training on his RDO.

[5] The Special Operations Unit is also sometimes referred to as the Special Operations Team.

The Section 14.10 of the collective bargaining agreement between the Respondents and the Union provides the following:

> Compensatory time may be earned by an employee in lieu of overtime pay, upon request by the employee and with the agreement of the employer and such agreement shall not arbitrarily be withheld. Employees may accrue up to forty (40) hours of compensatory time during each calendar year, which can be replenished upon use."
>
> Requests for the use [of] compensatory time off must be made at least seventy[-]two (72) hours in advance unless the members' immediate supervisor or higher authority grants approval for less notice. Compensatory time-off requests that adversely impact operations of the Sheriff's Office or provide insufficient notice may be denied to the extent allowed by the law. The requirements of overtime shall not be considered as an adverse impact on the operations of the Sheriff's Office.

General Order No. PER 1-2 addresses compensation, benefits, and conditions of work. It provides that "supervisors or bureau chiefs must approve any overtime hours worked." It further provides that "compensatory time may be given to a member in lieu of overtime pay only if approved by the member's supervisor." Similarly, General Order No. PER 1-5 which addresses overtime in specialized positions/situations, states that "a member's immediate Supervisor and/or Bureau Chief shall approve overtime hours worked."

Neither the General Orders nor the collective bargaining agreement state whether the employee must obtain permission to earn comp time before or after he works the hours for which the time is owed.[6] Further, neither the General Orders nor the collective bargaining agreement mention procedures for earning comp time when deputies train with the SOU on their RDOs.

On or around January 2009, all deputies' schedules changed from a 10-hour shift to a 12-hour shift. In addition, each deputy was required to take four hours off work in every pay period. On January 30, 2009, then-SOU Commander Tom Szalinski sent out an email to SOU members which set forth guidelines for SOU training under the new 12-hour patrol shift. It stated that if a deputy was scheduled for SOU training on his regular day off, he was required to fill out an exchange day form and receive approval for the exchange from his patrol supervisor. It further noted that if deputies exchanged a 12-hour work day for an 8-hour training day scheduled on an RDO, the deputies would be required to take their mandated four hours off.

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[6] The General Order No. PER 1-2 also states that deputies must obtain prior approval before taking compensatory time off: "Members may take compensatory time due only with the prior approval of their Supervisor. Compensatory time off requests shall be granted subject to the operations needs of the Office."

On March 31, 2010, Szalinski sent out another email which stated the following: "Operators who train on their RDOs need to get their exchange day completed within 30 days. The paper work has to be submitted prior to either the training day or the exchange day[,] whichever comes first. Recall that the training days are normally 8 hrs and you need to cover 12 hrs[,] so the short fall, if not taking your short day, needs to be filled with comp or vacation hours."

The procedures outlined in Szalinski's January 30, 2009 and March 31, 2010 emails remained in effect through to the present. Neither of them discussed the procedures that a deputy must use to earn comp time when training on a regular day off.

Erik Koty has been a deputy sheriff at the DuPage County Sheriff's Department for 11 years. He is currently assigned to the Patrol Division. Koty joined the SOU in July 2008.

Over the past five or six years, Koty has spoken with Sergeant Harris about his support for the Union. Koty told Harris that the Union was needed and that it would bring about positive changes. Koty also spoke with his peers about his support for the Union.

In late February 2010, Operations Commander Colonel Pete Sterenberg informed Koty that the Department denied him a light duty position because of an unresolved labor issue. Koty was not aware that the department had denied other deputies light duty assignments. Rather, the Department had granted those assignments to other deputies.

On April 12, 2012, Koty attended SOU training on his RDO. On April 13, 2012, Koty filed an Absentee Report & Request form which requested comp time for training that he had completed the day before. Koty did not receive approval from his supervisor to earn the comp time before training on his RDO. Harris signed off on Koty's request and did not ask him whether he had obtained preapproval to earn that comp time. Koty had previously submitted a request to earn comp time for training on an RDO on November 10, 2011, and similarly submitted it after working those hours, on November 12, 2011. The department granted his request.

On April 23, 2012, Colonel Sterenberg approached Harris concerning Koty's April 13, 2012 Absentee Report & Request form. Sterenberg wanted to know whether Koty obtained permission to earn comp time prior to training on his regular day off. Harris called Koty to ask him. Koty told Harris that he did not get prior approval to earn the comp time.

Harris testified that Koty was required to obtain prior approval before earning comp time for training on his RDO. Harris further testified that Koty acknowledged the same during their phone conversation. Koty told Harris that he felt as if the department was forcing him to change his schedule so that the department could avoid giving him comp time or paying him overtime. Harris told him that was not the case. Harris explained that a deputy could get compensated with overtime or comp time when training on his RDO but that a deputy was required to obtain prior approval. Harris concluded by telling Koty that he should not train on an RDO and attempt to earn comp time without obtaining prior approval to do so.

Three hours later, Harris received a phone call from Koty. Koty stated that he would not train on his RDO without "getting that worked out" in advance. Harris testified that Koty said that Lieutenant Mendrick approached him and offered him the opportunity to earn comp time when training on his RDO. Harris further testified that he asked Koty twice about what Mendrick had told him and that Koty answered in the same manner both times.

After Harris and Koty concluded their conversation, Harris walked to Mendrick's office and related his conversation with Koty. Mendrick stated that he had never offered Koty comp time for training on his RDO. However, Mendrick noted that he and Koty discussed the use of sick time or vacation time on April 14, 2012, around the time that Koty submitted his Absentee Report & Request form. Colonel Sterenberg then joined the discussion. Harris informed Mendrick and Sterenberg that Koty had been untruthful.

Mendrick then called Koty on the phone for clarification. Mendrick confirmed with Koty that the two never spoke about comp time regarding the April 12, 2012 training day, that Mendrick did not offer Koty the opportunity to earn comp time while training on his RDO, and that their discussion concerned the use of vacation and sick time for a medical procedure. After Mendrick spoke with Koty, he informed Harris that he (Mendrick) and Koty "seemed to be on the same page," and that the issue was between Harris and Koty. Harris testified that Mendrick told him that Koty expressed that there had been some sort of miscommunication or misunderstanding and that Koty believed Mendrick knew Koty was training on his RDO.[7]

[7] Harris testified that Mendrick told him that Koty believed Mendrick had known he was training on his RDO because it might have been noted on Mendrick's outlook calendar. Harris further testified that Mendrick told him that he (Mendrick) does not note those events in his calendar. Harris concluded that this conversation "raised a red flag" for him. Notably, the conversation raised no such red flag for

Harris further testified that although he only heard one half of the conversation "it was obvious...that there was a miscommunication or something like that." Mendrick testified that he did not believe that Koty was untruthful regarding this comp time incident.

Harris and Koty spoke several more times over the phone in the days following their initial conversation. Yet Harris never followed up with Koty to reconcile Koty's two contradictory statements. Harris never asked Koty whether he was confusing two conversations. Harris never told Koty that he had caught Koty in a lie.

On April 24, 2012, Harris sent an email to members of the SOU concerning the procedure that deputies should use to request comp time when attending training on an RDO. The email stated that "if you're on your Regular Day Off (RDO) on a Special Operations Unit training day[,] you're to attempt to work out an exchange day with your Watch Commander in advance. If your Watch Commander cannot facilitate a switch day[,] you must inform me of this prior to the training day. Only with prior approval from your Watch Commander and from me...are you permitted to attend training on your RDO and submit a request for compensatory time or overtime for that Special Operations Unit training day."

That same day, Harris and Koty spoke on the phone. Koty told Harris that he had previously submitted a request to earn comp time after training on his RDOs. They also discussed the fact that there was no written policy which required deputies to obtain advance approval to earn overtime or comp time while training on an RDO. Harris, referencing the April 24, 2012 email, informed Koty that he had just sent out a policy. There is no document which addresses the procedure by which members of the SOU must arrange to earn comp time when they train on their RDOs other than Harris's April 24, 2012 email. At hearing, Koty testified that he understood that deputies were required to "work...out [their] time with [their] watch commanders." Koty did not specify whether deputies were required to do that before or after working on their RDOs.

Shortly after Koty received Harris's email, he approached Union Vice President Deputy Joyce Pfeifer and voiced his concern that command staff was encouraging SOU operators to adjust their regular working hours when training on their RDOs instead of allowing them to earn comp time or overtime as they pleased. Koty spoke to Pfeifer to determine whether Pfeifer or

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Mendrick who had first-hand knowledge of it and who testified that he believed Koty had been honest concerning the comp time incident.

the Union believed that this practice violated the contract. Pfeifer informed Koty that she would discuss the matter with Union President Deputy Mark Wolenberg. At the end of April, Pfeifer spoke with Wolenberg about the issues Koty raised.[8]

Over the next few days, Chief Al Angus, Colonel Sterenberg, and Harris discussed Koty's alleged statements to Harris over the phone on April 23, 2012. They considered whether they would pursue an internal investigation into Koty's alleged untruthfulness. Further, Harris considered removing Koty from the SOU. Chief Angus told Harris that it was up to Harris to decide whether to remove Koty.

On April 30, 2012, Wolenberg spoke with Harris about Koty. Specifically, Wolenberg voiced his belief that Harris was asking members of the SOU to exchange work days for training instead of permitting them to earn overtime or comp time. Wolenberg referenced a section of the contract which provided that the employer could not set such a requirement to avoid the payment of overtime. Wolenberg told Harris that the Union would file a grievance over this practice. During this conversation, Harris commented on the strength of the SOU in terms of manpower levels. Harris stated that there was "nobody knocking down his door to join the unit."

On May 2, 2012, Harris hand-delivered a letter to Koty, in Mendrick's presence, which stated, "effective immediately you are relieved of your duties as a member of the Special Operations Unit." Koty testified that Harris stated it was not his decision to remove Koty and that the decision was instead made by one of Harris's superiors. Harris denied making that statement and testified that he instead told Koty, "this was my decision" and "I'm sorry to have to hand you this letter."[9]

Harris testified that he waited a week to decide whether to remove Koty from the SOU because he wanted to do "what was right for the team." Harris explained that he needed to have confidence in the trustworthiness of the members of his team but that he had lost such confidence in Koty.[10]

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[8] As far as Koty is aware, no other members of the SOU approached the Union and requested that a grievance be filed on their behalf.

[9] I credit Koty's testimony based on his demeanor.

[10] Specifically, he stated that "I have to have confidence in the guys on my team that they're going to do as they're told when given an order, and [that] when they're asked a question, they're going to respond honestly and truthfully."

Koty was surprised when he received the letter because no one in the Department had previously informed him that he would be removed from the Unit. No one in the Department told him that he had done anything wrong or broken any rules. No one in the Department ever told Koty why he was removed or told him that he had lied in an official capacity. Harris testified that he had no duty to inform Koty of the reason for his removal.

The Department is sensitive about the truthfulness of its deputies. However, the Department took no disciplinary action against Koty for his alleged untruthfulness. There is no official notation in Koty's record that he was untruthful. Harris testified that he did not charge Koty internally with untruthfulness because "it did not seem appropriate" and because he was "weighing" Koty's career.

Mendrick called Koty on the phone shortly after Koty received the letter of removal. Mendrick asked Koty if he was ok. Koty said yes, but stated that he felt as if he had been removed because he raised the possibility of filing a grievance. Koty asked Mendrick why he was removed from the SOU. Mendrick did not give him an answer and instead stated that, as far as he was concerned, this was an issue between Koty and Harris.

Koty testified that he liked being a member of the SOU, that he got along with his fellow members, that he misses working in the SOU, and that that he filed the instant unfair labor practice charge so that he could be reinstated to that assignment. Since Koty's removal, he no longer has the opportunity to earn comp time or overtime when training with the SOU on his RDO because he is no longer a member of that team and no longer trains with them.

The Department never issued Koty an SOU evaluation that was less than good and it never reprimanded or counseled Koty for violating any rules or regulations during his four-year assignment with the SOU. The Department never issued Koty a written reprimand or suspension during his 11-year employment.[11] The Department never investigated or disciplined Koty for untruthfulness concerning the comp time incident or for any other reason.

Sometime after May 17, 2012, Koty spoke with Harris in the parking lot of the Naperville Police Department about his removal from the SOU. Koty asked Harris whether Harris was mad at him. Harris said no, but then said he could not talk to Koty about his removal.

On June 25, 2012, the Union filed a grievance over the employer's practice of asking members of the SOU team to adjust their regular working hours so that they may participate in

[11] Koty received some verbal reprimands.

training on their regular days off. The grievance requested that "the Employer stop asking members of the SWAT/SOU teams to flex or change their regularly scheduled hours for training, and allow them to put in for over time or compensation time at their pleasure."

Approximately two months after Koty's removal, Koty spoke to Mendrick on the phone. Koty asked Mendrick whether he believed Koty had done something wrong. Mendrick stated that "as far as I'm concerned, you didn't do anything wrong." Mendrick further expressed that he thought Koty should know why he was removed from the SOU.

The Department has involuntarily removed two other individuals from the SOU. Both were removed for cause. However, the Department told those employees why they were removed from the SOU.

IV. DISCUSSION AND ANALYSIS

1. Liability of the County

The Respondent-County is liable for the Sheriff's unfair labor practices because the Sheriff and the County are joint employers under the Act.

Section 3(o) of the Act provides that "[c]ounty boards and county sheriffs shall be designated as joint or co-employers of county peace officers appointed under the authority of a county sheriff." 5 ILCS 315/3(o) (2010). The Third District Illinois Appellate Court has held that "the legislature intended that a county board be liable as a joint employer for any unfair labor practice involving a sheriff's peace officer." Grchan v. Ill. State Labor Rel. Bd., 315 Ill. App. 3d 459, 469-70 (3d Dist. 2000) (distinguishing Moy v. Cnty. of Cook, 159 Ill.2d 519 (1994), finding that a County's liability under the IPLRA was not akin to *respondeat superior*). The Board applied this precedent to hold that the "the absence of an agency relationship does not eliminate [the Board's] responsibility to ascertain whether the Act has been violated." Chief Judge of the Circuit Court of Cook Cnty. (Cook Cnty. Juvenile Temporary Detention Center), 29 PERI ¶ 34 (IL LRB-SP 2012).

Here, as in Grchan, the County and the Sheriff are joint employers. Accordingly, the County is equally liable as the Sheriff for any unfair labor practice involving Eric Koty, a deputy sheriff.

2. Liability of the Sheriff

The Sheriff is still a party to this case, even though he is not a named party on the complaint, because the Board's failure to include the Sheriff on that document was a clerical error.

The Board's failure to include the Sheriff on the complaint was a clerical error because it was not the deliberate result of administrative or judicial reasoning and determination. The Illinois Appellate Court has held that "clerical errors or matters of form are those errors, mistakes or omissions which are not the result of the judicial function." Dauderman v. Dauderman, 130 Ill. App. 2d 807, 810 (5th Dist. 1970). Further, "mistakes of the court are not necessarily judicial errors....the distinction between a clerical error and a judicial one does not depend so much upon the source of the error as upon whether it was the deliberate result of judicial reasoning and determination." Dauderman, 130 Ill. App. 2d at 810. The court has further held that "such a mistake may be amended nunc pro tunc on the basis of a definite and certain record." Id. at 810; Ashline v Verble, 130 Ill. App. 3d 544, 546 (1st Dist. 1984). The Board adopted a similar approach in City of Mattoon when it held that certain clerical errors on a complaint and hearing order did not remove a respondent's obligation to file an answer. City of Mattoon, 9 PERI ¶ 2016 (IL SLRB 1993)(respondent was required to file an answer even though the complaint listed wrong case number and the order for hearing inverted the names of the charging party and respondent).

Here, the Board never intended to omit the Sheriff from the complaint because the Union filed its charge against both the Sheriff and the County, the Executive Director never dismissed the charge against the Sheriff, and the affidavit of service and the hearing order include both parties.[12] As the Charging Party notes, the Board's rules indicate that a Respondent may be relieved from defending an action only if the Executive Director dismisses the charge with respect to that respondent. See 80 Ill. Admin. Code § 1220.40(a)(4)("If the charge does not state a claim on its face or if the investigation reveals that there is no issue of law or fact

[12] Contrary to the Charging Party's contention, the Sheriff's failure to file a separate answer does not warrant a default judgment against the Sheriff where the Sheriff and the County are joint employers and where the County's agent filed an answer to the complaint on the Sheriff's behalf.

sufficient to warrant a hearing, the Executive Director *shall* dismiss the charge.") (emphasis added). Yet, in this case, the Executive Director issued no dismissal with respect to the Sheriff. The Board's inadvertence is further illustrated by the fact that the complaint's affidavit of service and the hearing order list both the Sheriff and the County.[13]

Thus, the Sheriff is still a respondent in this case, even though he was not listed as a respondent on the face of the complaint, because the Board's omission was a clerical error.

3. Amending the Complaint

The complaint is amended to conform to evidence presented at hearing that the Sheriff is not an agent or employee of the County but is instead is a joint employer, and that the Sheriff, not the County, employs the deputy sheriffs.[14]

Section 1220.50(f) of the Rules and Regulations of the Illinois Labor Relations Board (Rules) provides that "[t]he Administrative Law Judge, on the judge's own motion or on the motion of a party, may amend a complaint to conform to the evidence presented in the hearing or to include uncharged allegations at any time prior to the issuance of the Judge's recommended decision and order." 80 Ill. Admin. Code § 1220.50(f). "The Board's case law provides two specific instances in which a complaint may be amended: (1) where, after the conclusion of the hearing, the amendment would conform the pleadings to the evidence and would not unfairly prejudice any party; and (2) to add allegations not listed in the underlying charge, so long as the added allegations are closely related to the original charge, or grew out of the same subject matter during the pendency of the case." Forest Preserve Dist. of Cook County v. Ill. Labor Rel. Bd., 369 Ill. App. 3d 733, 746 (1st Dist. 2006) (citing, Vill. of Wilmette, 20 PERI ¶ 85 (IL LRB-SP 2004)). Only the first instance is at issue here.

First, this amendment conforms the pleadings to the evidence because the County presented evidence at hearing that the Sheriff, not the County, employs the deputy sheriffs, and

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[13] Notably, the Sheriff is not prejudiced by this finding because the County and the Sheriff share the same attorney, as demonstrated by the initial notice of appearance, discussed at hearing, and the Board served that attorney with the complaint. City of Mattoon, 9 PERI ¶ 2016 (IL SLRB 1993) (rejecting attorney's argument that it was not the respondent's agent at the time the complaint was served where he had represented the respondent in a prior representation case, even where he had not served the Board with a written notice of appearance).

[14] The complaint erroneously states that the Sheriff "was an agent of the County authorized to act on its behalf" and that "[Sergeant] Harris was an agent of the County, authorized to act on its behalf."

that the Sheriff is not an employee or an agent of the County but is instead a joint employer with the County.

Second, this amendment does not unfairly prejudice the Respondents because the County presented a defense to this charge that was responsive to a correctly worded complaint which reflects the proper legal relationship between the Sheriff, his deputies, and the County. Indeed, the County's brief carefully asserts that "the Sheriff committed no violation of the Act" and proceeds to argue against the Charging Party's prima facie case with respect to the Sheriff's conduct. Forest Preserve Dist. of Cook Cnty., 369 Ill. App. 3d at 746 (no prejudice where Respondent was not precluded from filing an answer to the amendment and was able to address the issue relating to the amendment in its post-hearing brief); Cnty. of Lake, 28 PERI ¶ 67 (IL LRB-SP 2011) (no prejudice where Respondent presented argument on brief which addressed the amendments and where Respondent's defense in the face of the amendments remained unchanged).

Thus, the complaint is amended to conform to evidence presented at hearing so that it properly reflects the legal relationship between the Respondents.

4. Section 10(a)(2) and (1) Allegation

The Respondents violated Sections 10(a)(2) and (1) of the Act when they removed Koty from the SOU.

To establish a prima facie case that a Respondent violated Section 10(a)(2) of the Act, the Union must prove that: 1) the employee engaged in union activity, 2) the Respondent was aware of that activity, and 3) the Respondent 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 at 345. 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.

First, Koty engaged in protected concerted activity when he discussed the possibility of filing a grievance against his employer for encouraging employees to switch work days instead of earning overtime or comp time when training on their RDOs. Invoking union assistance and engaging in a union's grievance procedure are both activities protected by the Act. Georgetown-Ridge Farm Comm. Unit School Dist. No. 4 v. IELRB, 239 Ill. App. 3d 428, 464 (4th Dist. 1992) (employee engaged in protected activity, within the meaning of the IELRA, when he sought the Union's assistance regarding his reduction of hours); Cnty. of Cook and Sheriff of Cook Cnty., 18 PERI ¶ 3023 (IL LRB-LP 2002)(employee who sought to enforce rights under the collective bargaining agreement engaged in protected activity when he made complaints to the Department of Labor regarding contaminants in the workplace where agreement provided that sheriff was subject to applicable statutes regarding pollutants affecting safety and health). Here, the parties' collective bargaining agreement provides that "[c]ompensatory time may be earned by an employee in lieu of overtime pay, upon request by the employee and with the agreement of the employer and such agreement shall not arbitrarily be withheld." On April 24, 2012, Harris informed SOU members by email that they should "attempt to work out an exchange day" with their watch commanders if they were scheduled to train on an RDO and that they could only submit a request for comp time and overtime if they received prior approval. In response, Koty approached the Union to ascertain whether the employer's practice of asking employees to alter their schedules violated the contract. The Union ultimately did file a grievance as a result of Koty's complaint which requested that "the Employer stop asking

members of the SWAT/SOU teams to flex or change their regularly scheduled hours for training, and allow then to put in for over time or compensation time at their pleasure." Thus, Koty engaged in protected activity when he approached the Union concerning the employer's comp time-approval practices.

Contrary to the Respondents' assertion, the directive in Harris's email sets forth a relatively new policy, as evidenced by the Respondents' past practice and the absence of other documentation addressing the procedures outlined in the email. First, there is evidence that the policy did not exist as recently as five months prior to Koty's complaint to the Union. In fact, Koty testified that in November 2011, his supervisors did not object to his request for comp time, even though he only received permission to earn it after performing the work.[15] Second, the policy is new, at least in its current codified form, because Harris's email is the only document that addresses the procedure by which members of the SOU must arrange to earn comp time when they train on their RDOs. Indeed, the other emails in the record and the contract that governs the parties' relationship address only the use of comp time and the requirement that deputies obtain advance permission to exchange work days for RDOs. Thus, the policy is relatively new, even though the email states that it serves as a "reminder."

Further contrary to the Respondents' contention, the Charging Party's denial at hearing that Harris's email constitutes a policy does not undermine the Charging Party's claim as set forth in the complaint, in light of the Charging Party's arguments on brief and the Respondents' own assertions. First, the Charging Party did not deny, on brief, that Harris's email was a policy and instead argued that the email did not constitute an official order of the department, akin to the formal general orders. Second, Sergeant Harris himself referenced the email as a policy in his conversation with Koty. Accordingly, there is no argument or evidence to refute the conclusion that Harris's email was a policy.[16]

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[15] The fact that Koty may have previously submitted requests to earn comp time in advance of training on his RDO does not establish that he was required to do so or that a policy existed which mandated such action.

[16] To the extent that the email does not reflect a new policy, the complaint is properly amended to conform to evidence presented at hearing which shows that Koty objected to the employer's practice set forth in Harris's email regarding unit employees' compensation for overtime worked. Such an amendment prejudices no party because it only changes the label attached to the objectionable conduct which served as the basis for Koty's protected activity and does not alter the Respondents' defenses to the charge.

Second, the County knew of Koty's protected activity because Union president Wolenberg informed Harris on April 30, 2012 that Koty had approached the Union concerning the Employer's practice of asking employees to alter their schedules when training on an RDO instead of permitting them to request comp time or overtime at will.

Next, the Union demonstrated that Koty suffered an adverse employment action when the Respondents removed him from the SOU because Koty can no longer earn overtime or comp time when training on his RDOs and because he has experienced a significant loss of responsibility concomitant with a loss of prestige. 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) analysis. City of Chicago v. Illinois Local Labor Rel. Bd., 182 Ill. App. 3d 588, 594-95 (1st Dist. 1988); Circuit Court of Winnebago, 17 PERI ¶2038 (IL LRB-SP 2001) (merely because Charging Party did not suffer any negative financial consequences due to her 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) and City of Chicago (Dep't of Buildings), 15 PERI ¶ 3012 (IL LLRB 1999)(no adverse employment action from transfer where duties, hours, pay, and benefits remained identical).

Here, Koty lost the opportunity to earn overtime or comp time when training on an RDO because Koty no longer trains with SOU and thus cannot collect comp time or overtime for the training he no longer performs. City of Highland Park, 18 PERI ¶ 2012 (IL LRB-SP 2002) (employer's restriction on opportunity for overtime constituted an adverse employment action); see also Broska v. Henderson, 70 Fed. Appx. 262, 267-68 (6th Cir. 2003) (lost opportunities for

overtime and secondary employment constitute adverse employment actions; addressing Title VII claims).

Further, Koty experienced significantly diminished responsibility and an accompanying loss of prestige as a result of his removal from SOU because SOU is an elite team with rigorous selection criteria, and serious responsibilities. Notably, SOU membership is not open to all deputies and the Respondents instead require applicants to pass numerous physical tests, which demonstrate the applicant's "excellent physical condition," and require them to possess above average evaluations. Further, assignment to SOU carries with it heavy responsibility to address dangerous situations including hostage rescues and high-risk warrants. Accordingly, removal from this elite unit and divestment of such responsibility necessarily reflect badly on Koty's prestige and standing among his peers.[17] Thus, Koty suffered an adverse employment action, even though the SOU assignment was voluntary, because his removal from the SOU constituted a significant adverse change in his working conditions.

Finally, the Respondents acted out of union animus because the timing of Koty's removal is suspect, the Respondents' stated reasons for Koty's removal are shifting and pretextual, and Respondents treated Koty disparately. First, the timing of Koty's removal is suspicious because Harris removed Koty from the SOU on May 2, 2012, two days after he learned of Koty's protected activity from President Wolenberg on April 30, 2012. City of Burbank, 128 Ill. 2d at 349 (discharge which occurred two days before Union's certification was "telling" and contributed to a finding of animus); 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 demonstrates proximity); Cf. Forest Preserve Dist. of Cook

[17]This finding adopts the rationale used in a non-precedential decision in which ALJ John Clifford found that the Respondents' involuntary transfer of the Charging Party constituted an adverse employment action where it resulted in significantly diminished responsibility and a loss of prestige, even though the Charging Party lost no benefits, pay, or rank. Cnty. of Cook and Sheriff of Cook Cnty., 15 PERI ¶ 3002 (IL LLRB ALJ 1998). Notably, the United States Supreme Court has also recognized that loss of prestige can constitute an adverse employment action in the Title VII context when the employer also changes the employee's duties. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 71 (2006) (reassignment of railroad employee to track laborer position from forklift operator position constituted an adverse employment action under Title VII where forklift operator position carried with it higher prestige and required more qualifications), but see Grayson v. City of Chicago, 317 F.3d 745, 750 (7th Cir. 2003) (no adverse employment action under Title VII based on loss of prestige from change in title where responsibilities, salaries, and benefits remained the same). Notably, Illinois has a far broader interpretation of adverse employment action under the IPLRA than do the Federal courts under Title VII.

Cnty., 7 PERI ¶ 3016 (IL LLRB 1991) (four month time span between protected activity and adverse action did not demonstrate proximity to support a finding of anti union animus).

Second, the Respondents offered shifting reasons for Koty's removal because the Respondents presented an additional basis for Koty's removal on brief which was not mentioned at hearing. At hearing, Harris testified that he removed Koty for untruthfulness. On brief, the Respondents repeated this assertion, but also added that Harris removed Koty "pursuant to General Order LEB 7-47." Yet, that General Order does not address a deputy's truthfulness and instead provides that the Sheriff will consider a deputy's "ability to work closely with others" when deciding whether to admit him into the SOU. More importantly, Harris never equated truthfulness with an "ability to work closely with others," and never offered the language of that General Order as a justification for Koty's removal.[18]

Third, Harris presented a pretextual reason for removing Koty from the unit because Harris demonstrated that he did not believe Koty's untruthfulness warranted Koty's removal and he never investigated the matter, never charged Koty with dishonesty, and never told Koty the reason for his removal.

As a preliminary matter, Harris's conduct shows that he did not believe that Koty's untrustworthiness jeopardized the SOU because he kept Koty in the Unit even after learning of Koty's alleged untruthfulness. In fact, Harris maintained Koty in a position of trust for a week, performing in high-risk situations, despite his assertion that he had lost confidence in Koty's trustworthiness. See Cnty. of DeKalb, 6 PERI ¶ 2053 (IL SLRB 1990), aff'd in unpub. ord. no. 2-90-1309, Cnty. of DeKalb v. Ill. Labor Rel. Bd. (Ill. App. Ct., 2nd Dist. 1991) (risk to office security due to employee's alleged drug connections was pretextual reason for discharge where employer assigned employee files with sensitive, confidential information even after supervisor learned of the alleged risk); but see, Vill. of Frankfort, 15 PERI ¶ 2012 (IL LRB-SP 1999) (in light of employee's repeated poor performance, including past dishonesty (i.e., failing to accurately report his time), and given the version of events provided by the employee's coworkers and supervisors, it was reasonable for Respondent to believe that the charging party had lied about the condition of a valve box he had inspected; employer's decision to terminate

[18] Notably, this reason is also pretextual because according to Koty's unrebutted testimony, Koty got along with the other members of the SOU.

employee on that basis was not pretextual even though the Respondent waited several days to clean the valve while still asserting that it posed a safety risk).

Notably, in the absence of an adequate explanation for Harris's decision to maintain Koty in the Unit during this time, the Board must give considerable weight to the fact that the only intervening event between Koty's alleged lie and his removal from the unit a full week later was his protected activity. See, Food Cart Market, 286 NLRB 1016 (1987)("In the absence of an acceptable explanation for the timing of the Respondent's actions ... we give considerable weight to the fact that the only intervening event between [the employee's] last layoff request and her actual layoff was the Union's recognition demand.").

Second, under these circumstances, Harris's failure to fully investigate the matter adds weight to a finding of pretext. The Board has taken two approaches to assessing an employer's investigation of employee conduct prior to taking the adverse employment action. On the one hand, the Board has held that an employer's decision to institute an adverse action is not pretextual merely because it is ill-informed or ill-considered. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012); Macon Cnty. Highway Dept., 4 PERI ¶ 2018 (IL SLRB 1988). On the other hand, the Board considers the character of the employer's investigation and may use it as a factor to buttress a finding of an unlawful motive where the totality of the circumstances suggests that an employer's justification for the adverse action is disingenuous. Cnty. of DeKalb, 6 PERI ¶ 2053 (IL SLRB 1990), aff'd in unpub. ord. no. 2-90-1309, Cnty. of DeKalb v. Ill. Labor Rel. Bd. (Ill. App. Ct., 2nd Dist. 1991).

For example, in City of Lake Forest, the Board held that the Respondent did not harbor union animus when it disciplined a firefighter for leaving the workplace without permission, even though the Respondent's investigation failed to uncover that another employee who had received the same level of discipline had engaged in a similar infraction more than once. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012). Likewise, in Macon County Highway Department, the Board held that the Respondent's decision to eliminate jobs for economic reasons was not pretextual merely because it was based on incomplete information where the basis for the decision otherwise appeared honest. Macon Cnty. Highway Dept., 4 PERI ¶ 2018 (IL SLRB 1988).

However, in County of DeKalb, the Board determined that the Respondent's proffered reason for terminating an employee was pretextual and used the Respondent's inadequate

investigation of the charges against her to bolster that finding. Cnty. of DeKalb, 6 PERI ¶ 2053 (IL SLRB 1990), aff'd in unpub. ord. no. 2-90-1309, Cnty. of DeKalb v. Ill. Labor Rel. Bd. (Ill. App. Ct., 2nd Dist. 1991). In that case, the Respondent asserted that it terminated a clerical employee at the State's Attorney's Office because her possible drug associations represented a security risk. Id. The Board held that the Respondent's reason was pretextual, finding that the employee's supervisor never truly harbored such a fear because he assigned the employee to felony files which contained the names of confidential informants and which were accessible only to trusted employees, even after learning of her alleged drug associations. Id. Under those circumstances, the Board noted that the Respondent's failure to investigate the allegations supported the finding of pretext, particularly where there was evidence that the investigation would have exonerated the employee. Id. (evidence showed that employee was subject to a malicious accusation by a badly-intentioned coworker).

Here, under the circumstances set forth above, Harris's failure to fully investigate Koty's inconsistent statements supports a finding of pretext because Harris both had notice that his assumptions might be wrong and had ample opportunity to easily disprove or verify them. Cnty. of DeKalb, 6 PERI ¶ 2053 (IL SLRB 1990) (supervisor knew that accuser hated the accused charging party and often lied about her but still never investigated the accusations); see also Cnty. of Bureau and Sheriff of Bureau Cnty., 29 PERI ¶ 163 (IL LRB-SP 2013). First, Harris had sufficient information to undermine his own assumption about Koty's truthfulness because the facts indicate that Koty could have misremembered or misunderstood and that he did not intentionally misrepresent. Indeed, Mendrick informed Harris that he and Koty did in fact speak (April 14, 2012) around the time that Koty trained on his RDO (April 12, 2012), and that they discussed a subject related to comp time, namely the use of accumulated benefit time.[19] Further, Mendrick told Harris that he believed that he (Mendrick) and Koty were "on the same page" concerning that conversation. Most importantly, Harris admitted that "it was obvious [from Koty and Mendrick's conversation]...that there was a miscommunication or something like that"; indeed, Mendrick told Harris after the phone call that Koty said there had been some

[19] Notably, the Respondents also conflate the earning of comp time with the use of it when referencing the contents of the documents in the record and employer's procedural requirements.

miscommunication.[20] As such, Harris reasonably knew that Koty could have been confused about the contents of a conversation which was temporally related to the comp time incident and contextually-related to the conversation Mendrick recalled. Cnty. of Bureau and Sheriff of Bureau Cnty., 29 PERI ¶ 163 (IL LRB-SP 2013) (a decision lacks legitimacy entirely when the ultimate decision maker ignores the facts gathered by an investigation); but see, City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012) (no impetus to investigate discipline imposed on other employees to ensure consistency in discipline; accordingly, failure to perform complete investigation was not indicative of pretext). Thus, Harris's failure to follow up with Koty to reconcile his contradictory statements adds weight to a finding of pretext in the face of this glaring ambiguity.

Second, Harris's failure to ask Koty about his inconsistent statements also supports a finding of pretext because Harris had multiple opportunities to do so but did not. Here, Harris and Koty spoke a number of times on the phone after their initial conversation, but Harris never broached the subject of Koty's alleged lie, even though they discussed the new comp time policy outlined in Harris's email. Thus, Harris's failure to ask Koty for an explanation adds weight to the finding of pretext because the circumstances begged for clarification and Harris could have easily obtained it.

Third, Respondents' failure to inform Koty of his alleged untruthfulness and their failure to discipline him for it likewise demonstrates that Koty's infraction is a pretext for Respondents' action. First, Respondents' failure to inform Koty of his alleged misconduct is suspicious because the accusation is serious and maintaining trust among law enforcement personnel is important. Indeed, Harris testified that untruthfulness is a significant infraction and that the Department is sensitive about the truthfulness of its deputies. Yet neither Harris nor any other member of command staff ever told Koty why they removed him from the SOU, even though Koty asked. Although Harris's assertions, that "it did not seem appropriate" to charge Koty with dishonesty and that he was "weighing" Koty's career, may explain why the Respondents chose not to impose discipline, they do not explain the shroud of secrecy that surrounded Harris's reasoning which obscured Harris's stated motivation for at least two months after Koty's removal. Given the stated importance of trustworthiness in law enforcement, it is

[20] Although Harris testified that Koty's reference to Mendrick's outlook calendar raised a "red flag," such a reference notably did not raise a red flag for Mendrick who testified at hearing that he believed Koty had been truthful with respect to the comp time incident.

incumbent on the Respondents to explain why they did not seek to deter similar conduct by informing Koty of his breach of trust or by disciplining him. Respondents' failure to do so here supports a finding of pretext and Harris's statement that he had no duty to explain his decision should be disregarded under such circumstances. See City of Evanston, 8 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, Respondents disparately treated Koty because they refused to give him the reason for his removal while Respondents told all other individuals who they involuntarily removed from the SOU why they took such action.

Thus, the Respondents violated Sections 10(a)(2) and (1) of the Act when they removed Koty from the Special Operations Unit.

V. CONCLUSIONS OF LAW

The Respondents violated Sections 10(a)(2) and (1) of the Act when they removed Koty from the Special Operations Unit.

VI. RECOMMENDED ORDER

1) Cease and desist from:
   a) Retaliating against Eric Koty, or any of its other employees, for engaging in union or protected concerted activity.
   b) In any like or related manner interfering with, restraining or coercing its 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) Rescind the decision to remove Koty from the Special Operations Unit and return him to the Special Operations Unit.
   b) Remove all reference of Koty's removal from the Special Operations Unit from his personnel file.

c) Post, for 60 consecutive days, at all places where notices to employees are normally posted, signed copies of the attached notice. The Respondents shall take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

d) Notify the Board in writing, within 20 days of the date of this decision of the steps Respondent has taken to comply herewith.

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, 2013

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

Case No. S-CA-12-177

The Illinois Labor Relations Board, State Panel, has found that the the County of DuPage and the DuPage 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 retaliating against Eric Koty, or any of our other employees, for engaging 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 rescind the decision to remove Koty from the Special Operations Unit and return him to the Special Operations Unit.

WE WILL remove all reference of Koty's removal from the Special Operations Unit from his personnel file.

DATE _____

_____

County of DuPage and DuPage 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.