STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Metropolitan Alliance of Police of DuPage Sheriff's Police, Chapter 126,	)	
Charging Party,	)	Case No.S-CA-15-073
and	)	
County of DuPage, DuPage County, Sheriff,	)	
Respondent.	)	

ORDER

On November 3, 2015 Administrative Law Judge Anna Hamburg-Gal, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its January 12, 2016 public meeting, the Board, having reviewed the matter, and declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 12th day of January, 2016.

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Kathryn Zeledon Nelson
General Counsel

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County of DuPage and DuPage County Sheriff,	)	
Respondents	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On December 4, 2014, 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 Sections 10(a)(2) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2014), as amended. The charge was investigated in accordance with Section 11 of the Act and on June 12, 2015, the Board's Executive Director issued a Complaint for Hearing. A hearing was conducted on September 9, 2015, 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

The parties stipulate and I find that:

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 Respondent-County has 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 Union has been a labor organization within the meaning of Section 3(i) of the Act.
4. The Union was certified by the Board on January 15, 2009, in Case No. S-RC-05-153.
5. At all times material Eric Koty was a public employee within the meaning of Section 3(n) of the Act.
6. 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).

II. ISSUES AND CONTENTIONS

The issue is whether the Respondents retaliated against Koty for his support for the Union in violation of Sections 10(a)(2) and (1) of the Act when they allegedly refused to assign him an available SUV squad car and permanently transferred him to the Court Security Division in November 2014.

As a threshold matter, the Union rejects the Respondents' claim that the charge is untimely filed. The Union instead argues that the Respondents' ongoing refusal to assign Koty an SUV is a continuing violation of the Act. Similarly, the Union asserts that the allegation concerning the alleged permanent transfer is timely filed because Koty first became aware of the Respondents' action within the six-month limitation period.

On the merits, the Union first claims that the Respondents' decision to deny Koty an SUV had a reasonable tendency to restrain and coerce Koty in the exercise of his protected rights under the Act. Next, the Union argues that the Respondents permanently transferred Koty to the Court Security Division because of animus towards his protected activity, of which they indisputably knew. The Union emphasizes that the Respondents had no legitimate basis for the transfer because Koty could have performed all the work required of him in the Patrol Division, had the Respondents provided him with an SUV. The Union further observes that the Respondents' decision to permanently transfer Koty to the Court Security Division was a pretext

to retaliation because it would have been more operationally sensible for the Respondents to grant Koty an SUV than to effect the permanent transfer. The Patrol Division was understaffed; Koty was trained for Patrol Division work, but not for Court Security work; and the Respondents could have easily provided Koty with an SUV by switching employees' vehicle assignments.

The Respondents argue that the charge is untimely with respect to both allegations. Addressing the first, the Respondents claim that Koty knew of the Respondents' decision to deny him an SUV in January 2014, over four months outside the limitation period. Addressing the second, the Respondents deny that they took any action within the limitation period to change Koty's terms and conditions of employment. They claim that they simply continued a previous, temporary transfer until Koty was medically cleared to perform patrol duties.

In the alternative, the Respondents claim that the Union failed to satisfy its prima facie burden to prove that the Respondent actions were unlawfully motivated. According to the Respondents, the Union presented no evidence that the Respondents' decision-maker knew of Koty's protected activity, no evidence that Koty suffered an adverse action, and no evidence that the Respondents' decisions were motivated by union animus. The Respondents also note that they legitimately refused to provide Koty an SUV because they had none available and because an SUV would not have accommodated his disability, in any case. In addition, they assert that they legitimately maintained Koty in the Court Security Division because they were contractually required to make yearly assignments and could not return Koty to the Patrol Division when he could not drive his assigned vehicle. Finally, the Respondents assert that the Board can provide no remedy because the Respondents ultimately reassigned Koty to the Patrol Division and Koty therefore did not suffer any harm.

III. FINDINGS OF FACT

The DuPage County Sheriff's Office is comprised of three bureaus, Administration, Law Enforcement, and Corrections. The Administration Bureau includes the Court Security Division. The Law Enforcement Bureau includes the Patrol Division. Chief James Kruse heads the Administration Bureau. Chief Alan Angus heads the Law Enforcement Bureau. The Union represents the Respondents' deputy sheriffs ("deputies") who are assigned to each bureau.

All of the Respondents' deputies have the same authorities, but they perform different duties based on their assignments. Deputies in the Court Security Division provide security to

the courthouse. The duties of a deputy in the Court Security Division do not require the use of a vehicle. Deputies in the Patrol Division enforce traffic laws, answer calls for service, serve warrants, serve orders of protection, and respond to crimes in progress. The duties of a deputy in the Patrol Division do require the use of a vehicle and the Sheriff therefore assigns deputies vehicles to use on the job and to take home.

Eric Koty is a deputy for the DuPage County Sheriff's Office. He began working in the Patrol Division in 2005. The Respondents assigned Koty a Ford Crown Victoria, a four-door car, for his work in that Division. Koty is also a member of a SWAT team called the Special Operations Unit (SOU). The SOU is a collateral, voluntary assignment for which participants received three months of special training.

Sometime before 2011, Koty assisted the Union's negotiation team in proofreading drafts of the contract. He testified that he spoke openly in front of supervisors about the contract and about whether he believed the Respondents were following it; however, he did not elaborate on the times or places at which he made such statements. Koty similarly claims that he spoke to Sergeants Harris and Stelter about his involvement with the Union, but could not identify when or where those conversations occurred.

On January 3, 2012, Koty wrote a memo to then-Law Enforcement Bureau Chief Bilodeau,[1] via the chain of command. He requested that the Respondents remove the hip retention bars located in the back seat of his patrol car because he was experiencing pain and numbness in his hip and right leg. Koty believed that the pain could be alleviated if the Respondents removed the hip retention bars because their removal would allow Koty to push his seat farther back and fully extend his legs.

When Koty submitted his request, the Respondent instructed him to go home and told him that he should submit a doctor's note in support of his requested accommodation.

On January 6, 2012, Koty provided the Respondents with a doctor's note, which stated that Koty could return to full duty with the requested seat modification. The Respondents removed the hip retention bars and Koty returned to work.

On February 2, 2012, Koty submitted another doctor's note to the Respondents that stated, "the patient requires more leg room in his driver seat in order to avoid continued nerve compression in the leg."

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[1] Chief Bilodeau's first name does not appear in the record.

On May 17, 2012, the Union filed an unfair labor practice charge against the Respondents in Case No. S-CA-12-177, alleging that the Respondents violated Sections 10(a)(2) and (1) of the Act by retaliating against Koty for grieving the Respondent's change of their overtime policy. The case went to hearing on March 14, 2013, at which Koty testified. On October 23, 2013 the Board issued a decision affirming the ALJ's determination that the Respondents violated the Act.[2]

In the summer of 2013, Koty helped inform union members of a Union meeting.

In or around late 2013, the Respondents began assigning Sports Utility Vehicles (SUVs) to deputies in the Patrol Division. At that time, Koty spoke with Sergeant Moore and Lieutenant Mendrick about his medical condition. He asked them whether they thought he would be able to get an SUV. They informed him that they had no power to assign him an SUV.

On January 9, 2014, Koty wrote a memo to Law Enforcement Bureau Chief Angus, via the chain of command. Koty asked to be assigned to a vehicle with more legroom. He stated that he had sat in one of the Respondent's SUVs and found that the vehicle had enough legroom to alleviate his discomfort. He then asked for a "reasonable accommodation to a vehicle of a similar size to prevent [his] current discomfort from turning into a medical condition."

The Respondent did not assign Koty an SUV and Koty continued to perform his duties using the Crown Victoria.

In January 2014, Koty again sought medical treatment for his hip condition. On January 21, 2014, Koty received the results of an MRI performed on his hip.

On or about January 22, 2014, Koty spoke with Lieutenant Mendrick about the results of the MRI and gave Lieutenant Mendrick a doctor's note. The note stated that Koty required "increased leg room in vehicle to allow for right hip to heal."

That day, Mendrick informed Koty that Chief Angus had forwarded Koty's request for an accommodation to Assistant State's Attorney Paul Bruckner. Mendrick also informed Koty that the Respondents could not give Koty an SUV because the SUVs the Respondents had received were intended to replace those vehicles that the Respondents were taking out of service.

Koty testified that the Respondents moved vehicles around at will and that they did not simply assign an SUV to the deputy whose vehicle they took out of service. For example, when the Respondents removed Deputy Connell's car from service, they gave him Deputy Obrochta's

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[2] Cnty. of DuPage and DuPage Cnty. Sheriff, 30 PERI ¶ 115 (IL LRB-SP 2013).

old vehicle and gave Obrochta the SUV. Koty further testified that the Respondents initially distributed the SUV based on seniority but then "started handing the vehicles out" in a manner that did not conform to seniority.[3] Koty claims that the Respondents could have given him an SUV to use if they had wanted to.

At hearing, Kruse stated that he did not have an SUV to assign to Koty because all vehicles had already been assigned by the Respondents to other deputies. There is no policy that prohibits the Respondents from reassigning vehicles once the Respondents have assigned them. However, Kruse stated that if he had taken an SUV away from someone else, he would have had other problems to contend with. He explained that a decision to remove an SUV from another employee might have triggered a grievance or an unfair labor practice charge.

Later that day, the Respondents called Koty to the office so that the Respondents' risk manager, Patrick Genovese, could evaluate his vehicle. At Kruse's request, the risk manager measured the seat and the driver's compartment with a tape measure.

On January 22, 2014, Genovese sent James Kruse the results of his evaluation of the Crown Victoria and the SUV. The email stated the following: "Attached are the results of my evaluation of the 2 vehicles. I would recommend replacing the driver seat in the Crown Vic with a newer one as the seat has a lot of wear and probably is not supporting the driver as intended." The attachment contained measurements of the two vehicles including (1) height from floor to top of front seat; (2) length of seat pan; (3) front edge of seat to pedals; (4) steering wheel tilt; (5) bottom of steering wheel to top of legs; and (6) driver height.

Kruse determined based on Genovese's email and measurements that there was more leg room in the Crown Victoria than in the SUV. Kruse did not explain how he reached this conclusion.[4] Kruse also went to the Ford website to compare the legroom in the Crown Victoria with the legroom in the SUV. Kruse relied on information from the website to conclude that there was more legroom in the Crown Victoria. Based on this investigation, Kruse determined that the Respondents did not have any vehicles with more legroom that the Crown Victoria, the car Koty was already assigned.

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[3] The basis for Koty's statement was the following: "Deputy Martinez got an SUV...before Deputy Fifer. That vehicle was supposed to go to Deputy Fifer because he asked [the quartermaster], wasn't this supposed to go to Fifer." There is no evidence in the record concerning the seniority of either named deputy.

[4] A sum of the relevant measurements taken on the SUV is in fact greater than the sum of the measurements taken on the Crown Victoria.

Mendrick gave Koty a copy of the email and stated that the risk manager had determined that the Crown Victoria was a "better fit" for Koty than the SUV. The Respondents did not explain how the risk manager arrived that his determination. The Respondents did not go over the risk manager's measurements with Koty.

Koty testified that he believed that the SUV had more leg room than the Crown Victoria based on his experience of sitting in both vehicles. He also noted that there were other aspects of the SUV that made it more suitable for his condition than the Crown Victoria. It was higher off the ground, the driver's seat and the pedals were adjustable, and the seats were cut out to provide room for the duty belt.

The Respondents reupholstered Koty's seat and Koty continued to perform his duties, but the replaced seat actually increased Koty's discomfort.

Koty sought medical care from a hip surgeon and took time off work. On February 13 or 14, 2014, Koty submitted a doctor's note to Sergeant Ruff. The note stated that Koty could drive, discharge a firearm, and otherwise perform all duties of an active, full duty law enforcement official. It further provided that "if available, because of a hip condition, a squad car with more legroom, like an SUV, would be preferable." Ruff told Koty that he would forward the note to Lieutenant Mendrick.

In early April 2014, Koty filed a charge with the Equal Employment Opportunity Commission alleging that the Respondents discriminated against him because of his disability by failing to provide him a reasonable accommodation.[5]

On April 7, 2014, Koty submitted another doctor's note to the Respondents, through the chain of command. The note, dated April 4, 2014, reaffirmed that Koty could "drive, discharge a firearm, and otherwise perform all duties of an active, full duty law enforcement official." However, the note further stated that "because of a hip condition, a squad car with more legroom, like an SUV, is necessary."

On April 8, 2014, Chief Kruse delivered a letter from Chief Angus to Koty regarding Koty's work assignment. Sergeant Moore and Lieutenant Mendrick were also present. The letter stated that Angus had received Koty's doctor's note of April 4, 2014. It further stated that "this note prevents you from working in the current vehicle supplied by the employer, and we

[5] The exact date on which Koty filed the charge is unclear from the record. Koty initially stated that he filed it on April 4 or 5, 2014. He later asserted that he filed the charge later, on April 7, 2014.

have no vehicles conducive to the recommendation of your doctor." Angus explained that Chief Kruse met with the State's Attorney's Office and that they recommended that the Respondents transfer Koty's work assignment to the courthouse. He concluded that "the work assignment [would] be reevaluated after [Koty] supplied the additional information requested regarding this matter."

Kruse then summarized Angus's letter, explaining that the Respondents were transferring Koty to Court Security because he could not drive his assigned vehicle, the Crown Victoria. In that meeting, Kruse also discussed Koty's membership in the SOU and stated that he did not know whether Koty could remain on the SOU if he was not part of the Patrol Division.

On April 9, 2014, Director of Court Security Major Romanelli came to Koty's office to deliver another letter from Chief Angus. The letter stated the following: "Please be advised that since your work assignment has been temporarily transferred to the Courthouse you will be temporarily placed as inactive on the Special Operations Team (deployment & training). This decision was based on the advice of the State's Attorney's Office. This collateral assignment will be reevaluated after you supply the additional information requested regarding this matter."

Koty testified that he believes that the Respondent punishes employees by involuntarily transferring them from the Patrol Division to the Court Security Division, but he provided no foundation for his belief.

Sometime in April 2014, Koty filed a grievance concerning the Respondents' refusal to assign him an SUV. There is no evidence in the record as to whether Koty filed the grievance before or after the Respondents transferred Koty to the Court Security Division. The Union did not submit a copy of the grievance into evidence. Koty testified that he did not know for certain whether Chief Angus knew about his grievance. Kruse testified that he did not know if Koty had filed a grievance.

On May 27, 2014, Koty submitted a doctor's note stating that he was cleared for work on the SOU.

Around August 14, 2014, Kruse informed Koty that the Respondents would allow Koty to participate in the SOU while using his personal vehicle. However, the Respondents first required Koty to submit a proposal as to how he would secure his SOU weapons because his personal vehicle did not have blacked-out windows to obscure the weapons from view.

On or around August 18, 2014, Koty submitted a proposal to the Respondents explaining how he would secure his SOU weapons in his personal vehicle. In September 2014, the Respondent reactivated Koty in the SOU. Kruse stated Respondents did not reinstate Koty to the SOU earlier because Koty had not yet submitted a plan for securing his SOU weapons in his personal vehicle. Koty stated that he did not submit a plan earlier because the Respondents only instructed him to submit one in August.

On August 21, 2014, Koty submitted a shift preference request for the 2015 calendar year, as part of the Respondents' annual shift bidding process. The collective bargaining agreement requires the Respondents to perform annual shift bidding by October 15 of each year. Koty sought an assignment in the Patrol Division, but still could not drive his assigned vehicle at the time and therefore could not perform all of the duties required of him in the Patrol Division.

In September or October of 2014, Koty helped other deputies file grievances by giving them advice on the interpretation of the collective bargaining agreement and encouraging them to tell their Union steward about the problem. Koty made the general claim that he discussed other employees' grievances with the Respondents, but could not identify whether he had such discussions with respect to the September/October grievances.

On November 3 or 4, 2014, Koty participated in a Union meeting at a restaurant in Naperville. No members of management were present at the meeting.

On November 10, 2014, Romanelli called Koty into his office and handed him a letter from Chief Kruse. In the letter, Kruse noted that Koty "[had] been temporarily assigned to the Court Security division for a period of seven months." Kruse further observed that Koty was still restricted from performing at full duty in the Law Enforcement Bureau's Patrol Division, but that he was able to fully perform the duties of a deputy in the Court Security Division. Kruse concluded that, "effective November 10, 2014 you are assigned to the Court Security [D]ivision."

At hearing, Kruse explained that the Respondents assigned Koty to the Court Security Division in November 2014 because the Respondents were contractually required to assign him to an annual shift at that time and Koty could perform all work required in that division without restriction. By contrast, Koty had medical restrictions on the performance of his duties in the Patrol Division because he could not drive his assigned vehicle.

Kruse takes into consideration the staffing levels in the bureau when making operationally necessary assignments. The Patrol Division was short-staffed when the Respondents initially transferred Koty to Court Security in April 2014. At that time, the Respondents asked other deputies who were "LAB certified" if they wished to come back to the Patrol Division. Kruse testified that his November 2014 decision to maintain Koty in Court Security Division was based solely on the information provided to him by Koty's medical provider and not on staffing needs.

Sometime in February 2015, Koty took medical leave from work to surgically correct his hip condition.

In March 2015, Koty informed the Respondents that doctors had medically cleared him to perform work in the Patrol Division without restriction, as of March 23, 2015. Koty expressed a desire to return to work in that Division and planned to return to work on March 23, 2015. Kruse instructed Koty to file a form indicating his desire to transfer back to the Law Enforcement Bureau. Deputies must complete this form to transfer from one division to another. Koty submitted the form on March 4, 2015, and the Respondents placed Koty on a wait list for admission to the Patrol Division.

On March 16, 2015, Romanelli informed Koty that when he returned to work on March 23, 2015, he would return to the Court Security Division. That day, Koty complained of this decision to management and inquired why he would not return to the Patrol Division when his medical condition, the only reason for his transfer, no longer existed.

On March 24, 2015, Koty received a letter from Kruse that transferred him to the Law Enforcement Bureau's Patrol Division, effective March 30, 2015. On March 30, 2015, Koty returned to work in the Patrol Division.

The Respondent never assigned Koty an SUV. Kruse testified that between January 2014 and the present, the Respondents did not have a vehicle available to Koty that had more legroom than his Crown Victoria.

IV. DISCUSSION AND ANALYSIS

1. Timeliness

The Union's charge is timely with respect to the allegation that the Respondents retaliated against Koty by permanently transferring him to the Court Security Division. However, the Union's charge is untimely with respect to the allegation that the Respondents retaliated against Koty by denying him the use of an SUV.

Pursuant to Section 11(a) of the Act, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board...unless the person aggrieved thereby did not reasonably have knowledge of the alleged unfair labor practice." The six month limitations period begins to run when a charging party has knowledge of the alleged unlawful conduct or reasonably should have known of it. Moore v. Ill. State Labor Rel. Bd., 206 Ill. App. 3d 327, 335 (4th Dist. 1990); Serv. Empl. Int'l Union. Local 46 (Evans), 16 PERI ¶ 3020 (IL LLRB 2000).

The Union's charge is timely with respect to the allegation that the Respondents permanently transferred Koty to the Court Security Division because the Respondents first announced that assignment by memorandum on November 8, 2014, less than a month before the Union filed its charge on December 4, 2014. Accordingly, the Union had reason to know of the Respondents' action only as of November 8, 2014, well within the limitation period.

Contrary to the Respondents' contention, the memorandum was not simply a reiteration of the temporary assignment first announced in April 2014. Rather, it constituted a new employment action that effected a permanent change. It articulated an effective date, which would have been unnecessary had the Respondents intended to simply continue an existing assignment. In addition, the described assignment articulates no end date, terminating condition, or limitation, an omission that is rendered more telling for two reasons: First, it is juxtaposed with a description of Koty's earlier work in Court Security as "temporary." Second, it is different from the announcement of the temporary assignment made in April, which specified that the Respondents would "reevaluate" that assignment when Koty provided the "additional information requested."

Furthermore, the Respondents' relatively swift return of Koty to the Patrol Division, following his medical leave, does not indicate that the November assignment was temporary because the circumstances surrounding that reassignment suggest otherwise. Koty's assignment

in Court Security did not simply terminate upon Koty's fitness for duty in the Patrol Division, as the Respondents claim. Instead, the Respondents initially instructed Koty to fill out a transfer request form, placed him on a wait list for the Patrol Division, and then directed him to report to work in the Court Security Division. They only reassigned Koty to the Patrol Division after he complained to management and asked why the Respondents did not return him to the Patrol Division when the only reason for his initial transfer no longer existed.

Most importantly, the Respondents' reassignment of Koty to the Patrol Division in March 2015 would not inform the timeliness analysis, even if it did show that the November assignment was temporary, because it postdated the charge. Moore, 206 Ill. App. 3d at 335 (timeliness analysis focuses on what the charging party knew well before he filed his charge).

For these reasons, the Union's allegation regarding the permanent transfer is timely filed and any analysis of that action's impact on Koty's terms and conditions of employment is more properly addressed in a discussion of the merits.

By contrast, the Union's charge is untimely with respect to the allegation that the Respondents unlawfully denied Koty the use of an SUV because the Union reasonably should have known of facts underlying that charge on January 22, 2014. On that date, Lieutenant Mendrick first denied Koty's request for an SUV, and Koty testified that it "seemed pretty clear" from that initial conversation that he would not receive an SUV. Koty even filed a grievance over the Respondents' denial sometime in April 2014. Accordingly, the Union should have filed a charge on this allegation no later than July 22, 2014, within six months of the initial denial, but instead filed more than four months too late on December 4, 2014.

Contrary to the Union's contention, the Respondents' refusal of Koty's request for an SUV is not a continuing violation within the meaning of the Act that would extend the limitation period. Where the Board applies the continuing violation theory, each repeated act of prohibited conduct that occurs within the six-month limitations period may constitute a separate violation of the Act and is actionable despite the fact that an initial identical action took place outside the statute of limitations. Elmhurst Park District, 18 PERI ¶ 2065 (IL LRB-SP 2002); City of Darien, 12 PERI ¶ 2002 (IL SLRB 1995); Vill. of Elk Grove, 6 PERI ¶ 2048 (IL SLRB 1990). Thus, the "continuing violation" doctrine creates an exception to the general rule that the Board must dismiss charges filed more than six months after the events giving rise to them. Elmhurst Park District, 18 PERI ¶ 2065. Generally, a continuing violation exists only where the charging party

can establish illegality without reliance upon events outside the six-month limitations period. Elmhurst Park District, 18 PERI ¶ 2065; Vill. of Elk Grove, 6 PERI ¶ 2048; City of Chicago, 7 PERI ¶ 3023 (IL LLRB 1991). While circumstances outside the limitations period can be used to shed light on an unfair labor practice occurring within the statutory period, a finding of violation which, by necessity, relies on events predating the limitations period is directly at odds with the Act. Elmhurst Park District, 18 PERI ¶ 2065.

More specifically, the Board has held that the continuing violation theory does not apply to an employer's repeated refusals to bargain over a unilateral change, where the charging party had clear and unambiguous notice of the employer's initial refusal outside the limitations period. Vill. of Wilmette, 20 PERI ¶ 85 (IL LRB-SP 2004) citing Wapella Education Ass ' n v. Ill. Educ. Labor Rel. Bd., 177 Ill. App. 3d 153 (4th Dist. 1988). Likewise, the Board has held that the continuing violation theory does not apply to an employer's refusal to deduct dues from probationary employees where the action was a continuing effect of Respondent's initial decision not to recognize probationary employees as members of the bargaining unit. Vill. of Elk Grove, 6 PERI ¶ 2048. Similarly, the Board has held that a union's repeated refusal to process a grievance does not give rise to a continuing violation where charging party had clear and unambiguous notice outside the limitations period that the union refused to process the grievance. LIUNA Local 2, (Mazzie), 10 PERI ¶ 3004 (IL LLRB 1993). In the same vein, the Board has approvingly cited National Labor Relations Board case law for the proposition that the continuing violation theory does not apply to repeated refusals to execute a collective bargaining agreement, where the charging party had clear and unambiguous notice of the employer's initial refusal outside the limitations period. Vill. of Elk Grove, 6 PERI ¶ 2048, citing NLRB v. McCready & Sons, Inc., 482 F.2d 872 (6th Cir. 1973).

The Respondents' refusal to grant Koty an SUV, at issue here, is similar to the refusals addressed by the Board in the above-referenced cases and consequently warrants the same result. Koty's allegation as to this matter is therefore untimely filed because the Respondents clearly refused Koty an SUV outside the limitation period and the Respondent's repeated refusal within the limitations period does not warrant the application of the continuing violation rule. Any alternate conclusion would undermine the purposes of the limitations period by reviving a defunct charge and destabilizing the existing bargaining relationship between the Union and the

Respondents. Vill. of Elk Grove, 6 PERI ¶ 2048 (explaining the policy underlying the limitation period).

In sum, the Union's charge is timely with respect to the allegation that the Respondents violated the Act when they permanently transferred Koty to the Court Security Division, but it is untimely with respect to the allegation that the Respondents violated the Act when they refused to grant Koty an SUV.

2. Allegedly Permanent Transfer to the Court Security Division

The Respondents did not violate Sections 10(a)(2) and (1) of the Act when they permanently transferred Koty to the Court Security Division in November of 2014.

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 and/or protected activity, 2) the Respondent was aware of that activity, and 3) the Respondent took adverse action against the employee 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); Vill. of Orland Park, 30 PERI ¶ 28 (IL LRB-SP 2013). 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 the protected activity was a substantial or motivating factor. Id. Union animus is demonstrated through the following factors: expressions of hostility toward unionization, together with knowledge of the employee's union activities; timing; disparate treatment or 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.

Here, Koty engaged in protected activity when he sought the Union's assistance in filing an unfair labor practice charge on his behalf, on or around March 14, 2013, and when he subsequently testified in support of the Union's charge on May 17, 2012. Georgetown-Ridge Farm Comm. Unit School Dist. No. 4 v. IELRB, 239 Ill. App. 3d 428, 464 (4th Dist. 1992) (invoking the assistance of the Union is protected activity within the meaning of Section 10(a)(2) of the Act); see also Cnty. of DuPage and DuPage Cnty. Sheriff, 30 PERI ¶ 115 (IL LRB-SP 2013) (invoking the assistance of the Union is protected activity within the meaning of Section 10(a)(2) of the Act). Further, Koty engaged in protected activity in the summer of 2013, when he helped spread the word to Union members of a Union meeting. Wal-Mart Stores, Inc, 340 NLRB 220, 220-2 (2003)(employee engaged in protected activity when she encouraged fellow workers to attend union meetings). He likewise engaged in protected activity in April 2014, when he filed a grievance over the Respondents' refusal to provide him with an SUV, and in September and October 2014, when he helped other deputies file grievances. State of Ill., Secretary of State, 31 PERI ¶ 7 (IL LRB-SP 2014); Vill. of Calumet Park, 22 PERI ¶ 23 (IL LRB-SP 2006); State of Ill. (Dept. of Human Servs. Ann Kiley Dev. Ctr.), 20 PERI ¶ 73 (IL LRB-SP 2004).

Furthermore, the Respondents' decision-maker, Chief Kruse, knew of at least some of Koty's protected activity. Knowledge of an employee's protected activity must be specifically imputed to an appropriate agent of the employer who is in some manner responsible for the adverse employment action. Cnty. of Cook and Sheriff of Cook Cnty., 31 PERI ¶ 171 (IL LRB-LP 2015); Macon Cnty. Bd. and Macon Cnty. Highway Dep't, 4 PERI ¶ 2018 (citing Cnty. of Menard, 3 PERI ¶ 2058 (IL SLRB 1987)). A manager's or a supervisor's knowledge of an employee's union activities will ordinarily be imputed to the employer, but a finder of fact may not do so in light of affirmative evidence to the contrary. Macon Cnty. Bd. and Macon Cnty. Highway Dep't, 4 PERI ¶ 2018. Here, Chief Kruse made the November decision to retain Koty in the Court Security Division and it is accordingly his knowledge of Koty's protected activity that is relevant to this inquiry.

Chief Kruse is presumed to know of the Union's May 2012 charge against the employer and the subsequent Board hearing in March 2013 at which Koty testified because Koty's

supervisors knew of it and Kruse never denied having such knowledge. Specifically, both Lieutenant Mendrick and Sergeant Harris testified at the Board hearing. Knowledge of this protected activity is properly imputed to decision-maker Kruse, where Kruse never denied knowing about it. Cnty. of Cook, 31 PERI ¶ 108 (IL LRB-LP 2014)(knowledge of employees' testimony before the board was imputed to the respondent's unnamed decision-maker where high-level agent of respondent testified at the hearing); Macon Cnty. Bd. and Macon Cnty. Highway Dep't, 4 PERI ¶ 2018; cf. Cnty. of Cook and Sheriff of Cook Cnty., 31 PERI ¶ 171 (respondent's knowledge of employee's protected activity was not presumed where decision-maker denied knowledge that employee filed a charge with the Board).

Similarly, Kruse is presumed to know of Koty's support for the Union because Koty discussed that support with Respondents' agents Sergeants Harris and Stelton, and Kruse never denied awareness of Koty's union support. Macon Cnty. Bd. and Macon Cnty. Highway Dep't, 4 PERI ¶ 2018.

However, there is no indication that Kruse knew that Koty helped spread the word about a union meeting in the summer of 2013. Although Koty generally claims that he never hid his union activities from his superiors, there is insufficient evidence that Koty informed employees of union meetings in an open and notorious manner. Even if he did, there is insufficient evidence concerning the size of the Respondents' workforce to permit application of the small plant doctrine and to impute knowledge of this activity on that basis. Cf. City of Sycamore, 11 PERI ¶2002 (IL SLRB 1994)(small plant doctrine applies where respondent's department qualifies as small work site and when the employee engages in union activity in a manner, and at such times, that an employer may be presumed to have noticed them); Champaign Cnty. Clerk of the Circuit Court, 8 PERI ¶2025 (IL SLRB 1992); Vill. of Glenwood, 3 PERI ¶ 2056 (IL SLRB 1987); Cnty. of Peoria, 3 PERI ¶2028 (IL SLRB 1987).

Next, there is insufficient evidence that Kruse knew of Koty's grievance over the Respondents' refusal to provide Koty an SUV. There is little to suggest that Kruse participated in processing Koty's SUV grievance or that he would have seen the grievance through the chain of command because the Union did not present testimony to that effect or introduce the grievance form into evidence. Admittedly, the parties' collective bargaining agreement provides that second step grievances must be submitted to the employees' division head and that third step grievance must be submitted to the sheriff or his designee at the third step. However, it is

unclear whether Kruse was Koty's division head at the time Koty filed his grievance in April 2014. Koty transferred divisions on April 8, and the Union never stated whether Koty filed the grievance before or after that date. Moreover, Koty did not testify that Kruse knew of his grievance and Kruse himself testified that he did not know whether or not Koty had filed one.

In addition, there is insufficient evidence in the record that Kruse knew that Koty helped other deputies file grievances in September and October of 2014. The Union provided no foundation for Koty's assertion that he assisted employees by serving as their representative in speaking with the Respondents' agents. Indeed, the only instance that Koty described with specificity demonstrates that acted in a capacity that was unseen by the Respondents by merely encouraging another employee to file a grievance.

Furthermore, there is insufficient evidence that the Respondents took adverse action against Koty in November 2014 when they chose to retain him in the Court Security Division. The definition of an adverse employment action is generous; the union need only show some qualitative change in 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 an adverse employment action sufficient to satisfy the third prong of the 10(a)(2) 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. Cnty. of DuPage and DuPage Cnty. Sheriff, 31 PERI ¶ 112 (IL LRB-SP 2014)(transfer that significantly altered employees' work schedule, to the detriment of his personal obligations, constituted an adverse employment action); see also Station Casinos, 358 NLRB No. 153 (2012); Flagstaff Medical Center, Inc., 357 NLRB No. 65 n.21 (2011). However, an employee's mere preference for one assignment over another does not render a transfer to the less favored assignment an adverse action. City of Chicago (Dep't of Buildings), 15 PERI ¶ 3012 (no adverse employment action from transfer where duties, hours, pay, and benefits remained identical).

The Board has never addressed whether an employer's decision to make permanent a temporary work assignment can constitute a materially adverse change in employees' terms and conditions of employment. Case law addressing similar issues arising under other statutes suggests that it may. Courts have held that the very temporary nature of an adverse action

ordinarily precludes a finding that it is adverse, even though that action would be adverse if it were permanent. Bowman v. Shawnee State Univ., 220 F.3d 456, 462 (6th Cir. 2000) ("cases where the employment action, while perhaps being materially adverse if permanent, is very temporary...do not constitute materially adverse employment actions"; addressing Title VII). By extension, an employer's decision to make permanent a previously temporary employment action is an adverse change if the temporary employment action would have been deemed adverse, but for its limited duration. Consistent with this rationale, one court found that an employee stated a claim under the Americans with Disabilities Act where he alleged that his employer retaliated against him by making permanent a previously temporary reduction in hours, initially instituted for medical reasons. Magnotti v. Crossroads Healthcare Mgmt., LLC, 2015 WL 5173528 (E.D.N.Y. Sept. 3, 2015) (employer allegedly made permanent a reduction in hours following employee's complaint over temporary reduction, made for medical reasons).

Applying these principles here, the inquiry is whether the Respondents' initial transfer of Koty to Court Security would have been deemed adverse, had that transfer been permanent, as it later became. For the reasons set forth below, it was not.

Koty's permanent assignment in the Court Security Division was not materially different from his assignment in the Patrol Division. Koty's retained all his authority as a deputy while assigned to Court security, and his wages, hours, and benefits remained the same. There is no evidence that Koty had a longer commute or that the permanent transfer limited Koty's contact with fellow employees. Koty claimed that the Respondents transfer employees to Court Security as a punishment, but the Union provided no foundation to support this assertion. Indeed, the Union failed to identify any punitive aspects of Court Security work and failed to otherwise show that the work of that division was less desirable or more onerous that the work of the Patrol Division. Cf. Circuit Court of Winnebago Cnty., 17 PERI ¶ 2038 (IL LRB-SP 2001)(transfer was adverse where employer moved employee from group of 20 to group of three; work was more onerous where she had to work in a "cage"); cf. Cannonade Corp., 310 NLRB 845 (1993)(transfer from day shift to night shift was adverse); cf. Laminates Unlimited, Inc., 292 NLRB 595 (1989) (involuntary transfer to more arduous and onerous job was adverse); cf. Chicago Transit Auth., 21 PERI ¶ 38 (IL LRB-SP ALJ 2005)(transfer constituted adverse action where it increased employee's commuting time).

Even assuming, *arguendo*, that the Respondents took adverse action against Koty when they permanently transferred Koty to the Court Security Division, there is insufficient evidence that they did so because of animus towards Koty's protected activity. First, there is no evidence on this record that the Respondents targeted union supporters for adverse actions and no evidence that the Respondents' agents expressed hostility toward unionization.

Second, the Respondents presented a legitimate and unshifting reason for their November 2014 decision to retain Koty in the Court Security Division that is consistent with their other actions. They unwaveringly asserted that they were contractually required to make yearly assignments at that time and that they chose to assign Koty to Court Security because they wished to assign Koty to a division in which he could perform all the required work. As of November, Koty still could not drive his assigned vehicle and therefore could not perform all the work required of him in the Patrol Division because he could not patrol the streets. By contrast, Koty could perform all the work assigned in the Court Security Division, without restriction.

Contrary to the Union's contention, the Respondents' low staffing levels in the Patrol Division as of April 2014 do not render pretextual the Respondents' decision to permanently transfer Koty to Court Security in November 2014. First, Kruse testified that he did not issue Koty's assignment based on staffing levels and instead effected the permanent transfer because of Koty's medical condition. Even assuming that the Respondents could have returned Koty to Patrol while accommodating his disability, as the Union claims, there is insufficient evidence that the Patrol Division remained understaffed as of November 2014, such that the Respondents' decision to retain Koty in Court Security was inconsistent with the Respondents' administrative needs. Indeed, the Respondents reasonably could have used the October 2014 shift-bidding period to correct any imbalance in employee assignments.

Similarly, there is insufficient evidence that it would have been more operationally efficient for the Respondents to assign Koty an SUV than to maintain him in the Court Security Division, assuming for the sake of argument that both courses of action accommodated Koty's disability.[6] First, there is no indication that Koty was unqualified or untrained to perform Court

[6] The Employer claims that the SUV would not have accommodated Koty's disability because the SUV did not have more legroom than the Koty's Crown Victoria. On the other hand, Koty asserts that the SUV would have accommodated his disability because it alleviated his pain. For the reasons below, it is unnecessary to determine whether the SUV would have accommodated Koty's disability because the Respondents' had a legitimate basis for the permanent transfer, in any event.

Security work at the time of the permanent transfer on November 10, 2014, as the Union asserts. Indeed, by that date, Koty was well-trained in Court Security work because he had spent seven months in that assignment. Contrary to the Union's assertion, it is immaterial that Koty was not trained in Court Security work prior to the temporary assignment because the lawfulness of that transfer is outside the scope of this Complaint and the Board's jurisdiction.

In addition, there is insufficient evidence that the Respondents could have easily provided an SUV to Koty. Rather, the Respondents had already assigned all SUVs to other employees and Kruse testified that a decision to remove an SUV from one employee to give to another might give rise to an unfair labor practice charge or a grievance. Kruse noted that such administrative problems weighed against that course of action, though there was no rule barring it.

Next, the Union suggests that the Respondents' delay in reactivating Koty to the SOU evidences union animus. However, the Respondents' delay is reasonable under the circumstances. The Respondents allowed Koty to remain in the SOU while using his personal vehicle, as long as he submitted a plan that addressed the manner in which he would secure his weapons in that vehicle. Such a plan promoted public safety and necessarily also served to insulate the Respondents from liability. The approximately one-month gap between Koty's submission of his plan and the Respondents' reactivation of Koty in the SOU reasonably reflects the time needed by the Respondents' attorneys to review and approve of such a plan.

Finally, there is no proximity between Koty's protected activity and the Respondents' decision to permanently transfer Koty to Court Security. As noted above, decision-maker Kruse knew of only Koty's March 2013 testimony before the Board in support of the Union's unfair labor practice charge and of undated conversations between Koty, Sergeants Harris, and Sergeant Stelter, in which Koty described his support for the Union. Yet, there is no proximity between the November 2014 transfer and Koty's March 2013 testimony because the testimony occurred a year and half before the transfer. Even the Board's final decision, favorable to the Union, issued over a year before the Respondents permanently transferred Koty to Court Security. City of Lake Forest, 29 PERI ¶ 52 (no proximity where there was one year between protected activity and adverse action) (IL LRB-SP 2012); Forest Preserve Dist. of Cook 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 union animus); cf. Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007) (three weeks between protected activity and adverse action sufficient to

demonstrate employer's anti-union animus though proximity); cf. 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 proximity indicative of animus). Likewise there is insufficient evidence from which to infer that there is proximity between Koty's permanent transfer and his expressions of Union support to the sergeants because the Union did not introduce evidence as to the dates on which those conversations occurred. Indeed, they could have occurred after the Respondents implemented Koty's permanent transfer, or they could have occurred years before.

The Union correctly notes that there is at least one case in which the Board has found an unfair labor practice, despite a long time gap between the employee's protected activity and the employer's final adverse action; however, the charging party in that case also showed direct evidence of union animus and evidence of pretext, which the Union has not shown here. Cf. Grchan v. Illinois State Labor Relations Bd., 315 Ill. App. 3d 459, 468 (3d Dist. 2000)(finding unfair labor practice even where the respondents discharged employee seven months after his successful arbitration).

Thus, the Respondents did not violate Sections 10(a)(2) and (1) of the Act when they permanently assigned Koty to the Court Security Division in November, 2014.

V. CONCLUSIONS OF LAW

1. The Union's charge is timely filed with respect to the allegation that the Respondent violated Sections 10(a)(2) and (1) of the Act when they permanently transferred Koty to the Court Security Division.
2. The Union's charge is untimely filed with respect to the allegation that the Respondents violated Sections 10(a)(2) and (1) of the Act when they denied Koty's request for an SUV.
3. The Respondents did not violate Sections 10(a)(2) and (1) of the Act when permanently transferred Koty to the Court Security Division.

VI. RECOMMENDED ORDER

The Complaint is dismissed.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within seven 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 General Counsel Kathryn Zeledon Nelson 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 3rd day of November, 2015

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/S/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge