STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Antwaun Parnell,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-11-119
	)	
County of Kankakee and Sheriff of Kankakee County,	)	
	)	
Respondents	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On December 10, 2010, Antwaun Parnell (Charging Party) filed a charge in Case No. S-CA-11-119 with the State Panel of the Illinois Labor Relations Board pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), (Act) and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Adm. Code, Parts 1200 through 1240 (Rules) alleging that the County of Kankakee and Sheriff of Kankakee County (Respondents) violated Section 10(a)(2) and (1) of the Act. The charges were investigated in accordance with Section 11 of the Act and on April 28, 2011, the Executive Director of the Board issued a Complaint for Hearing.

A hearing was held on May 22, 2012, in Chicago, Illinois, at which time all parties appeared and were given a full opportunity to participate, present evidence, examine witnesses, argue orally and 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 herein, Respondents have been a public employer within the meaning of Section 3(o) of the Act.

2. At all times material herein, Respondents have been a unit of local government and subject to the jurisdiction of the Board's State Panel, pursuant to Sections 5(a) and 20(b) of the Act.[1]

3. At all times material herein, Charging Party has been a public employee within the meaning of Section 3(n) of the Act.

II. ISSUES AND CONTENTIONS

The issue in this case is whether Respondents violated Sections 10 (a) (2) and (1) of the Act when Charging Party's employment was terminated on December 3, 2010.

Charging Party asserts that he was discharged by Respondents allegedly because of his repeated tardiness and failure to produce proof of illness. However, Charging Party maintains that other employees with a similar tardiness record were not discharged nor asked to sign a Last Chance Agreement and that the only difference between his situation and those other employees is that he had filed one or more grievances. Additionally, Charging Party alleges that Respondents had two different policies regarding tardiness and applied neither of them in a consistent manner. Charging Party therefore concludes that Respondents terminated his employment because he filed grievances and in doing so violated the Act.

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[1] At hearing Respondents declined to stipulate to the Board's jurisdiction in this matter but Respondents' post-hearing brief does not contest the Board's jurisdiction.

Respondents argue that Charging Party has failed to prove that he was discharged in retaliation for having filed grievances. Instead, Respondents assert Charging Party was discharged for excessive tardiness, abuse of sick leave and failing to provide the required doctors statements as proof of his absence from work being due to illness. Respondents assert that these were valid, legitimate reasons for Charging Party's discharge constituting just cause as determined by an arbitrator. Finally, Respondents argue that there was no disparate treatment of Charging Party and that the disciplinary records of the other employees referenced by Charging Party in support of such a claim are not comparable.

III. FINDINGS OF FACT

Charging Party became a correctional officer for the Respondent Sheriff's Department (Department) in December 2006 and worked at the Jerome Combs Detention Center (Combs) from that date until his employment was terminated on December 3, 2010. While employed at Combs, Charging Party was a member of a bargaining unit represented by the Illinois Fraternal Order of Police Labor Council (FOP).

Charging Party's Job Duties

As a correctional officer on the midnight shift Charging Party worked the master control assignment where he was responsible for controlling the operation of all of the doors at Combs, including those to the residents' rooms and housing units, and monitoring the video screens of the eight security cameras placed in different areas of the facility. As to the latter, Charging Party received information at pre-shift change briefings about any problems in a specific area of the facility, such as a housing unit, so he could keep an eye on that area with the security

cameras. If Charging Party was not present at the pre-shift briefing to get that information someone, either a correctional officer or a detainee, could be placed in jeopardy

Parnell admits that it is important for a correctional officer working at Combs to show up for his or her scheduled shift and that there is a safety issue if there aren't enough guards on a given shift. As of August 2010 the minimum staffing level on Charging Party's midnight shift ranged from 11 to 13 correctional officers.

Charging Party's Health Issues

During his tenure at Combs Charging Party had a number of health conditions which his superiors were aware of including a history of migraine headaches, heart surgery in 2008, gall bladder surgery in November 2008 and a diagnosis of pseudotumor cerebri[2] in 2009. As a result of these conditions Charging Party had periodic appointments with his general physician, neurologist and cardiologist at least two of whom were on staff at the Hines medical facility of the U.S. Department of Veterans Affairs (VA). It took Charging Party from 6 to 8 weeks to get an appointment with his doctors at the VA.

Respondent's Tardiness Policy

The Respondent has always had a policy in place at Combs concerning tardiness for reporting to work but prior to 2008 it was something Respondent neglected to enforce.[3] In 2008 Respondent put an administrative lieutenant on each shift, one reason being to better closely monitor the time and attendance of employees at Combs.

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[2] Pseudotumor cerebri describes a condition that mimics the intracranial pressure often caused by a tumor.

[3] Since it opened in February 11, 2005, the number of correctional officers and detainees at the Jerome Combs Detention Center inmates has increased and with it the need to keep better track of the attendance record of each correctional officer.

A copy of Respondent County's procedure and policy handbook was given to Charging Party when he was hired and remained in effect during his employment. That handbook provided that if an employee was tardy three times in a rolling 12 month period the supervisor would document that the employee had been counseled about being tardy. The employee was also to be informed that an additional instance of tardiness would result in disciplinary action being taken. If an employee was tardy a fourth time in a rolling 12 month period the supervisor was to document a formal reprimand having been issued to the employee along with a warning allowing him/her only one instance of tardiness in the next three months. Being tardy more than once during that three month period would result in a one-week suspension without pay. If during the three month period after serving that one week suspension that same employee was tardy more than once he or she would be suspended for two weeks without pay and subject to discharge on being tardy more than once in the next three months.

In addition to the Respondent County's policy, the Department has written policies and procedures in effect at Combs, a copy of which was given to Charging Party when he was hired.[4] One of those policies provides that being tardy seven or more times within a 12 month period is regarded as excessive tardiness and cause for discipline and that that progressive disciplinary measures shall include counseling, oral reprimand, written reprimand, suspension and discharge. Another policy is that all correctional officers are to report for duty at the assigned time beginning their shift. They are also required to attend a pre-shift briefing where they meet with

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[4] Respondent's Chief of Corrections, Michael Downey, testified that the Respondent Sheriff Department's policies and procedures superseded those of the Respondent County.

the shift supervisor of the previous shift to discuss and relate information regarding their upcoming shift any security or safety issues arising during or continuing from the previous shift.

The Department policy and procedures also provide that an employee may request and be granted an excused absence for a short time by his or her immediate superior in advance of the anticipated absence. The request must be made as soon as possible and, if granted, the period of time off will be charged to and limited by any accrued compensatory time or sick leave.

Charging Party's Attendance and Disciplinary Record

In October 2006 Charging Party was issued a written reprimand for calling in sick when he had no accrued sick leave available. In February 2007 Charging Party had exhausted all of his accumulated sick leave and as a result was put on proof status, being required to provide a note from his physician as proof of any subsequent illness. On March 2, 2007, Charging Party received a five-day suspension for insubordination as a result of his failure to follow a direct order from a superior officer to return to his assigned post.

On May 5, 2010 Charging Party was issued a written reprimand after being tardy eight times during the period from January 1, 2010, through April 30, 2010. On June 24, 2010, Charging Party was given a written reprimand for the use of sick leave. On July 12, 2010, Charging Party was put on proof status for a year due to his abuse of sick leave and ordered to provide a physicians statement for each time he called in sick. By that time he had used all his accrued sick and vacation leave.

On August 3, 2010, in light of the May 5, 2010, and a June 24, 2010, reprimands Charging Party was issued a five day suspension, two of which were held in abeyance, for tardiness on June 5 and 18, 2010, and for calling in sick on July 5, 2010, though he had no accrued sick leave and failed to provide a physicians statement as proof of his illness.

On August 3, 2010, Charging Party, while stuck in traffic on the way to work, made a phone call to Combs and informed a correctional sergeant that he would be late reporting for his assigned shift. Charging Party told the sergeant he had already been tardy seven times in the past 12 months and that if the sergeant did not excuse his tardiness on that day he was just going to take the day off. Respondent, on September 1, 2010, issued Charging Party a 10 day suspension for being tardy on August 3, 2010.

On September 6, 2010, while driving to work, Charging Party was involved in a hit-and-run accident. He called into work from the accident scene to let his superiors know he would be late. Upon arriving at work Charging Party told his superiors what had happened and also submitted a copy of accident report. On October 13, 2010, Respondent's Chief of Corrections, Downey, in consideration of Charging Party's May 5, 2010, reprimand and the prior August and September 2010 suspensions, issued Charging Party a 15 day suspension for being tardy again on September 6, 2010. The last day of that 15 day suspension was November 16, 2010. On November 20, 2010, charging party called in sick, again having no sick leave and providing no physicians statement as proof of being ill.

During the year prior to December 3, 2010, Charging Party and Chief of Corrections Downey had several conversations concerning Charging Party's failure to provide a physicians statement when on proof status. Charging Party told Downey that because of the way things worked at the VA hospital he couldn't just go in on the day he was sick to see a physician and get a physicians note nor could VA physicians provide a note prior to or at a scheduled appointment. Charging Party told Downey that at his next appointment at the VA, usually more than 30 days later, he could obtain a physicians note for the previous appointment. Charging Party attempted to do this but each time Downey would tell him that presenting a physicians note so long after a

sick day was taken would not work because the collective bargaining agreement stipulated that Charging Party could be asked for and was required to produce a physicians note upon his return to work.[5] Since Charging Party could not produce a physicians note in accord with the terms of the collective bargaining agreement and Downey had said a note offered otherwise was not acceptable, Charging Party stopped providing a physicians note to validate his use of sick leave when on proof status.

By April 3, 2010, Charging Party had used all his available sick leave for the year and by mid-June all of his accrued vacation leave. Though having exhausted his sick leave, Charging Party called off sick on 16 occasions after April 3, 2010. In year prior to December 2010 Charging Party had been served 27 or 28 suspension days.[6]

On December 3, 2010, Downey gave Charging Party a copy of a document titled Last Chance Agreement. The agreement stated that Charging Party understood that because of his violations of Respondent's tardiness policy and failure to provide required physician statements each time he used sick leave that he had to meet three conditions to continue being employed by Respondent: 1) serve a three day suspension for failing to provide a physicians statement as ordered on September 5, 11, 15, and 16 in addition to October 16, 2010; 2) provide a physicians statement each and every time he took sick leave and; 3) arrive at least 5 minutes prior to the scheduled start of his shift. Charging Party was informed that if he did not sign the Last Chance

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[5] Downey testified that he could not accept a physicians statement more than 30 days after Charging Party had taken sick leave because the collective bargaining agreement provided that Respondent could not take disciplinary action against an employee if more than 30 business days had elapsed from the date Respondent knew or should have known of the incident for which the employee was being disciplined.

[6] The collective bargaining agreement only allows the Chief of Corrections to suspend an employee a total of 30 days a year after which discharge is the only remaining disciplinary option.

Agreement he would be discharged.[7] Charging Party declined to sign the agreement. There is no record of another employee having been given a Last Chance Agreement.

On or about December 3, 2010, an Order of Discharge was issued to Charging Party stating as the basis for that action Charging Party's failure, on several occasions, to provide a physicians statement when he called in sick after having exhausted his sick leave, failing to obey a direct order to provide such a statement and being tardy in reporting for duty on eleven different occasions in spite of having been disciplined several times earlier for tardiness.[8]

Charging Party Grievances

Charging Party filed a grievance on the 10 day suspension he was issued on September 1, 2010, for being tardy on August 3, 2010. That suspension was eventually overturned in an arbitration award issued a year later on August 25, 2011, wherein the arbitrator found that the correctional sergeant Charging Party had spoken to on August 3, 2010, had excused his tardiness for that day.[9] On December 10, 2010, a grievance was filed contesting Charging Party's discharge and an award finding just cause for his discharge was issued on March 30, 2012. There is no record evidence of when Chief of Corrections Downey or any other of Charging Party's superior officers knew that either of the two grievances had been filed except upon the

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[7] The collective bargaining agreement does not provide for a Last Chance Agreement. Downey testified that since Charging Party had already been suspended close to 30 days Downey presented Charging Party the Last Chance Agreement in lieu of having to terminate Charging Party's employment.

[8] Charging Party testified that he did not receive the discharge order until February 2011 after he had already filed his discharge grievance.

[9] There is no credible record evidence of a grievance having been filed on the 15 day suspension issued to Charging Party on September 6, 2010. Though Charging Party claims a grievance was filed no evidence was offered in support of that claim and the uncontradicted testimony of Downey is that he was never presented with or signed a grievance on that suspension.

issuance of the arbitration award. There is also no record of any other employee having filed a grievance.

Record of Tardiness and Related Discipline of Other Employees

In 2009 two correctional officers (Tyson Nolan and Lester Ringo) had 7 instances of tardiness, with one of them being issued a one-day suspension and the other a written reprimand. In 2009 three correctional officers (Nicholas Brais, Andrea Carruthers, and Dave Settle) had eight tardies with one receiving no discipline while the other two received a written reprimand In 2009 two officers (D'Juan Mallette, John Juergens).were tardy 10 times and each was suspended for 10 days.. In 2009 one officer (Donald Sessions) had 13 tardies but received no discipline.[10]

In 2010 Correctional Officer Amanda Voss, had 12 tardies and was given a 2 and a 10 day suspension. Officer Angelique Ahreens was tardy 12 times and no disciplinary action was taken. Herbert Pope had 12 tardies in 2010 and was given a 2 day suspension. Correctional officer Andrea Carruthers was tardy 13 times and issued a 2 day, 10 day and 15 day suspension. Andrew Clem was tardy 9 times resulting in a written reprimand while officer David Settle had 10 tardies and received a 2 day and a 10 day suspension. In 2010 Matthew Meehan had 7 instances of being tardy with no disciplinary action taken against him. Correctional Officer Tyler Fox had 11 tardies and was given a 2 day suspension while officer Chad Ruckman, being tardy 11 times, was given a written reprimand.

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[10] When asked why Sessions was not disciplined Downey testified that Joint Exhibit #5, the record evidence of employee tardiness and related discipline, is not necessarily the discipline record for tardiness that would be found in an employee's personnel file. Rather, that exhibit is a tracking record maintained by the administrative lieutenants on each shift some, but not all, of whom indicate the level of discipline given an employee for tardiness. In short, Joint Exhibit #5 does not necessarily reflect the discipline issued to each employee for being tardy in a given year.

In 2008 Correctional Officer Lisa Taylor was late 55 times in a rolling 12 month period and no disciplinary action was taken in 2008. In January 2009 Taylor was counseled about her habitual tardiness and issued a written reprimand for being tardy 55 times in 2008.[11] She also received a one-day suspension for two times she was tardy in January 2009. That suspension was held in abeyance to become effective if Taylor was tardy again which she was not. Taylor never filed grievance.

In 2010 Correctional Officer Miguel Ayala, had 17 tardies for which he received a 2, 10 and 15 day suspension. Ayala was also placed on proof status and provided the required physician statement as proof of illness after he called in sick. After serving his 15 day suspension in October 2010 Ayala had a total of 27 suspension days within a year's time. Ayala was not tardy again and resigned on February 28, 2011.[12] Respondent never offered Ayala a Last Chance Agreement. Ayala never filed a grievance.

In 2010 Correctional Officer Mallette was tardy 16 times and given a 2, a 10 and a 15 day suspension for total of 27 suspension days within a year. Respondent did not offer her a Last Chance Agreement. Mallette never filed a grievance.[13]

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[11] Taylor was disciplined after Respondent's newly created administrative lieutenants discovered that among correctional officers there was a general disregard of Respondent's policies on attendance and tardiness and that Taylor was probably the worst offender.

[12] Downey testified that Ayala told him he was having continued difficulty getting to work on time and that he would resign rather than being tardy again and subject to additional discipline and or discharge.

[13] No evidence was introduced at hearing relating to the disciplinary records of other officers except to the extent of discipline for tardiness. Charging Party admitted he did not know if other employees disciplined for tardiness had exhausted all their sick leave and were on proof status but then called in sick and failed to submit the required physicians statement.

V. DISCUSSION AND ANALYSIS

The issue in this case is whether the Respondent violated Section 10(a)(2) and (1) of the Act by discharging Charging Party for union or protected and concerted activity activities.

A violation of Section 10(a)(2) and (1) occurs when a charging party establishes by a preponderance of the evidence that (1) public employees were engaged in union or protected, concerted, activity, (2) that the respondent had knowledge of that activity, (3) that the respondent took an adverse employment action against those employees and; (4) that such action was substantially motivated in whole or in part by the respondent's animus towards the employees' union activity. City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 538 N.E.2d 1146, 5 PERI ¶4013 (1989); State of Illinois, Department of Central Management Services (Department of Human Services), 25 PERI 90 (IL LRB-SP 2009). The Board may infer the requisite discriminatory motivation from either direct or circumstantial evidence including the timing of the adverse action in relation to the occurrence of the union activity; a pattern of the respondent's conduct directed at those engaging in union activity; disparate treatment of employees; shifting explanations for a respondent's actions; and inconsistency in the reasons given for its actions against the charging party as compared to other actions of the respondent. City of Burbank, 128 Ill. 2nd 335; Circuit Court of Winnebago County, 17 PERI ¶2038 (IL LRB-SP 2001); North Main Fire Protection District, 16 PERI ¶2037 (IL SLRB 2000).

If a charging party establishes a prima facie case that a violation of Section 10(a)(2) and (1) has occurred, the burden then shifts to the respondent to prove by a preponderance of the evidence that it had a legitimate business reason for the adverse action and that that action would have taken place absent the employee's union activity. City of Burbank, 128 Ill. 2nd 335; County of Rock Island, 14 PERI ¶2029 (IL SLRB 1998), aff'd, Grchan v. Illinois State Labor

Relations Board, 315 Ill. App. 3d 459, 734 N.E.2d 33, 16 PERI ¶4008 (3rd Dist. 2000), appeal denied, 192 Ill. 2d 687 (2000); City of Decatur, 14 PERI ¶2004 (IL SLRB 1997).

There is no issue that Charging Party was engaged in protected and concerted activity when he filed a grievance on the 10 day suspension he was issued on September 1, 2010.[14] However, there is no record evidence that Correctional Chief Downey or any of his subordinate officers were aware on the date Charging Party was discharged of that grievance having been filed. Absent such evidence, one cannot conclude that Respondent in general, or Downey in particular, was motivated by Charging Party's grievance filing to terminate his employment. Even assuming Respondent and/or Downey were aware of Charging Party's grievance at the time he was discharged, Charging Party has not proven that the discharge decision was motivated by his grievance activity.

Charging Party's primary argument that Respondent's discharge decision was unlawfully motivated is based on a comparison of his disciplinary record for tardiness with that of correctional officers Ayala and Mallette as of December 2010. It is true that they, like Charging Party, had almost 30 suspension days in the 12 month period ending in December 2010. But Ayala and Mallette had no further disciplinary infractions for tardiness and, furthermore, there is no record of them being disciplined for failing to submit a physicians statement as proof of sick leave or calling in sick after exhausting ones sick leave. As a result, Ayala and Mallete's circumstances are not comparable to that of Charging Party who, after having served or been issued almost 30 suspension days, was subject to further disciplinary action for calling in sick

[14] I previously found no credible evidence of a grievance having been filed on the 15 day suspension issued to Charging Party on September 6, 2010.

without having available sick leave, failing to provide a physicians statement as ordered on September 5, 11, 15 and 16 2010 and October 16, 2010, and for additional instances of tardiness. In short, while Mallette and Ayala stood at the brink of being discharged they, unlike Charging Party, committed no further infractions that would have left Downey with no alternative but to discharge them as he had no authority to issue more than 30 suspension days. Charging Party further argues that only he was given the option of signing a Last Chance Agreement. That fact has no significance given that the Last Chance Agreement was an attempt to forestall the otherwise inevitable termination of Charging Party's employment. Ayala and Mallette, having as yet committed no further violations of the Department's rules, were not at the point of being subject to discharge or being provided the option of signing a Last Chance Agreement.

Finding no evidence of disparate treatment as compared to other employees, Charging Party's remaining evidence of Respondents' unlawful motivation for his discharge is the timing of the discharge in relation to his filing of a grievance.[15] A relevant consideration in addressing this argument is the record of Charging Party's discipline for tardiness and failure to follow Respondent's sick leave policy that predated his filing a grievance. Moreover, the Board has often stated timing alone is insufficient proof of a respondent's unlawful motive. Village of Hazel Crest, 30 PERI 72 (IL LRB-SP 2013); Village of Oak Park, 30 PERI 51 (IL LRB-SP 2013); Village of McCook; 25 PERI 75 (IL LRB-SP 2006). There being insufficient evidence that Charging Party's discharge was related to his filing of a grievance or that Respondent had the requisite knowledge of Charging Party's grievance filing, Charging Party has not proven the alleged violation of the Act.

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[15] it must be noted here that the evidence clearly shows a record Of Respondents

V. CONCLUSIONS OF LAW

1. Respondents County of Kankakee and Sheriff of Kankakee County have not violated 10(a)(2) and (1) of the Act by terminating the employment of Charging Party Antwaun Parnell.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the instant complaint be dismissed.

VII. EXCEPTIONS

Pursuant Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions have been provided to them. The exceptions and 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 on this 13th day of December 2013.

STATE OF ILLINOIS
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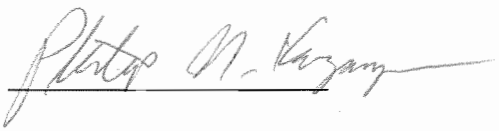

Philip M. Kazanjian
Administrative Law Judge