STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Policemen's Benevolent Labor Committee,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-14-061
	)	
County of Kane and Sheriff of Kane County,	)	
	)	
	)	
Respondents	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On October 25, 2013, the Policemen's Benevolent Labor Committee (Charging Party or Union) filed a charge with the Illinois Labor Relations Board's State Panel (Board) alleging that the County of Kane and Sheriff of Kane County (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 (2012). The charge was investigated in accordance with Section 11 of the Act and on January 28, 2014, the Board's Executive Director issued a Complaint for Hearing. A hearing was conducted on August 25, 2014, in Chicago, Illinois, at which time the Union presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

1. 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 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 County has been subject to the Act pursuant to Section 20(b) of the Act.

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

II. ISSUES AND CONTENTIONS

The issues in this case are the following: (1) whether the Respondents violated Section 10(a)(1) of the Act when Commander Corey Hunger allegedly asked Sergeant Don Smith why the Union was filing so many grievances and stated that he could take away overtime as he pleased; (2) whether the Respondents violated Sections 10(a)(2) and (1) of the Act when they changed Smith's relative seniority within the Intake and Release Unit by transferring a more senior sergeant to the unit, allegedly to deny Smith the opportunity to bid for the day shift; and (3) whether the Respondents violated Sections 10(a)(2) and (1) of the Act when they denied Smith training to work in the Classification Unit.

Addressing the first allegation, the Union argues that Hunger's statements reasonably coerced employees in the exercise of their rights because Hunger related his authority to eliminate overtime to the volume of grievances filed by the Union.

Addressing the second allegation, the Union asserts that the Respondents foreseeably deprived Smith of the opportunity to successfully bid for the day shift, since they knew that the transferred sergeant (Russel Norris) was more senior than Smith, and that Norris preferred the day shift. The Union asserts that the Respondents effected the transfer out of union animus, pointing to the Respondents' pretextual and shifting reasons for the adverse action, statements made by the Respondents' agents, and proximity between the adverse action and Smith's protected activity.

Addressing the third allegation, the Union argues that it is suspicious that Hunger invited Smith to apply for training and then shortly thereafter denied his request. The Union rejects the Respondents' explanation for the denial and points to statements by the Respondents' agents to support its assertion that the Respondents acted out of union animus.

The Respondents counter that Hunger never linked his inquiry concerning the volume of grievances to his authority to eliminate overtime, and that Hunger's statement about grievances occurred at a different time from his statement about overtime.

Next, Respondents assert that they took no direct adverse action against Smith when they transferred Norris. They also claim that they did not know that Norris's transfer would change

Smith's shift because they did not know which shift Norris would choose. In the alternative, the Respondents argue that they transferred Norris to Intake and Release for legitimate reasons, noting that he had spent considerable time in the Classification Unit and they made the change for operational reasons. The Respondents reject the Union's assertion that there is direct evidence of union animus, claiming that the statements attributed to the Respondents' agents either lacked foundation or have no relation to Smith's protected activity. Further, the Respondents assert that their compliance with the collective bargaining agreement in effecting the transfer precludes a finding of animus. They also assert that there is no proximity between Smith's protected activity and the alleged adverse action.

Finally, the Respondents argue that their denial of Smith's training request was not adverse because Smith was not entitled to training and was not otherwise harmed by the denial. In the alternative, the Respondents assert that they legitimately followed a consistent past practice to train only those sergeants for Classification who permanently work in that unit, so as to minimize employee mistakes and resulting liability. Finally, the Respondents note that there is no pattern of discriminating against union members because the Respondent granted optional training to another member of the Union's Executive Board a couple of weeks after he filed a grievance.

The Union moved for sanctions, arguing that the Respondents made denials without reasonable cause and found to be untrue. The Respondents filed a timely response.

III. FINDINGS OF FACT

Commander Corey Hunger oversees the Corrections Bureau of Kane County (Bureau), under the direction of Sheriff Patrick Perez. The Bureau employs seven lieutenants, 12 sergeants, and approximately 100 correctional officers. It is comprised of the following three divisions or units: Housing, Intake and Release, and Classification.

The Housing Division (Housing) is responsible for securing inmates in the jail and monitoring daily activity within the cell blocks. Sergeants in Housing work one of three shifts, the morning shift (7 am to 3 pm), the afternoon shift (2 pm to 11 pm), or the midnight shift (10 pm to 6 am). Housing sergeants on the midnight shift are required to cover Intake and Release sergeants' duties during that time because Intake and Release sergeants do not work the midnight shift. For that reason, the Respondents train Housing sergeants in Intake and Release work.

The Intake and Release Division (Intake and Release) is responsible for transporting inmates to and from court to the prison, issuing bond for prisoners, and updating paperwork on the release of inmates. Sergeants in Housing work one of two shifts, the morning shift or the afternoon shift. There are four sergeants assigned to Intake and Release. Two are assigned to each shift.

The Classification Division (Classification) is responsible for categorizing inmates based on their behavior and medical issues and determining where they should be housed within the jail. Sergeants in Classification work on the morning shift or the afternoon shift.

Donald Smith is a sergeant in the Kane County Sheriff's Office. From 2006 to 2009, Smith worked in Housing on the midnight shift. Around 2006 or 2007, Smith informed Commander Corey Hunger of his preference for the day shift, stating that it allowed him to attend to his family obligations. In 2009, Smith traded shifts with another sergeant in Housing so that he could work on the Housing day shift (7 am to 3 pm). In 2011, the Respondents assigned Smith to the Intake and Release Division as a "floater." In that capacity, Smith remained assigned to Housing, but filled in for sergeants in Intake and Release when they were absent. In 2012, the Respondents transferred Smith from Housing to Intake and Release on a permanent basis.

Smith also served as a member of the Honor Guard and the Corrections Response Team (CRT). The honor guard represents the Sheriff's office at funerals and parades. The CRT serves as a swat team that maintains the security of the jail, performing cell extractions, high risk transports, and addressing situations within the jail.

In March 2013, Smith voluntarily withdrew from both the CRT and the Honor Guard to seek secondary employment because the Respondents offered fewer opportunities to perform overtime. At the time of Smith's withdrawal from the CRT, Smith had been a member for over 16 years and served as the CRT's assistant commander.

Shortly after Smith resigned from the Honor Guard, Lieutenant Daniel Swanson told Smith that the Sheriff called him a "mother-f***er," remarked that Smith quit the Honor Guard, and stated that he (the Sheriff) did not believe that Smith had any honor. The Sheriff testified that he merely stated "it was not an honorable thing to do" for Smith to resign from the Honor Guard.

Smith filed seven grievances between March 2011 and August 2013. He filed the last of the seven grievances on April 3, 2013. Hunger stated that he was aware of the grievances filed by Smith because he denied five of them.

On May 29, 2013, Hunger sent an email to the sergeants stating the following:

> It has come to my attention that there are rumors flying around about Sergeants being moved and reassigned. At this time[,] there are no plans in the near future to move any of the Sergeants. The rumors that are going around are just that, rumors. If/When moves are made in the future, I will advise the people involved prior to any orders being posted.

Hunger testified that as of May 29, 2013, he and the lieutenants had not yet discussed the transfer of sergeants.

On June 11, 2013, Hunger sent an email to the sergeants stating that "in order for Sergeants to work overtime in other divisions, they must have worked in the division previously as a Sergeant or be trained to work in the divisions as a Sergeant." That day, Smith asked Lieutenant John Hickey if he could be trained for work in the Classification Division. Hunger became informed of Smith's interest. Hunger told Union Vice President Correctional Officer Thomas Schnitzler that Smith should make a request for training in Classification if he wanted it. Schnitzler transmitted that information to Smith.

On June 12, 2013, Smith submitted to Hickey a formal request for training in Classification and also sent him an email to that effect. Smith's formal request stated he wished to be trained in Classification so that he could perform "Fill in/OT [overtime]" in that division. By contrast, Smith's email does not explain the basis for his request.

In late June, the Union's newly-elected sergeant representative resigned from his position. Smith replaced him on the Union's Executive Board. Hunger testified that he became aware of Smith's Union position in June.

Hunger instructed Hickey to deny Smith's request for training. He told Hickey that only individuals assigned to the division in which they sought training were authorized for training in that division. Hickey relayed Hunger's comments to Smith and denied Smith's request for training based on Hunger's rationale. The denial stated that "training is only authorized for those being assigned to this area." Hunger did not personally tell Smith why he (through the chain of command) had denied Smith training to perform in the Classification division. No other sergeant had ever before asked for training outside his assigned division so that he could work overtime.

At hearing, Hunger stated that he denied Smith's request for training because it would create liability for the Respondent to train an employee in Classification when the Respondents assign the employee to work there only intermittently. Sergeants are trained on the job, while they work in the division to which they are assigned. Employees must work in Classification on a regular basis to attain sufficient knowledge of the duties required in that area. The Sheriff confirmed that individuals who perform work outside their regularly assigned divisions run a greater risk of making mistakes. Harris noted that such mistakes are particularly costly when made by sergeants in Classification because inmates housed in the wrong areas are at risk of being beaten or raped based on their gang affiliation. He explained that the Respondents would therefore be open to liability if they assigned a sergeant to perform overtime in a division in which he had not worked on a regular basis. Hunger further stated that the Respondents do not train sergeants in Housing or Intake and Release to work in Classification if there is no plan to assign them to that division.

On June 25, 2013, Hickey informed Hunger by email that he had denied Smith's request for training. Three days later, Smith requested a meeting with Hunger to discuss the denial of his request for training.

On July 2, 2013, Smith and Schnitzler met with Hunger to discuss the Respondents' denial of Smith's training request. They also discussed sergeant overtime, staffing, seniority, and a grievance that had been filed by the Union. Each witness's account of the meeting is different.

According to Hunger, Smith expressed that he had not been receiving as much overtime as he had received in the past, to which Hunger responded that he could eliminate all sergeant overtime if he wanted to. At the same time, Hunger expressed that doing so was not his objective and that there was plenty of overtime available. During that meeting, Hunger also referenced the increased number of grievances filed by the Union. Hunger testified that he stated, "I don't understand why the Union is filing all these grievances," and noted that the Respondents had not made any operational changes. Hunger asserted that his statement concerning the number of grievances was made at a different point in the conversation than his statement concerning management's right to eliminate overtime.

According to Smith, Hunger asked, "why is the Union filing so many grievances" and stated that he could eliminate all sergeant overtime if he wanted to. Smith further testified that Hunger did not explain why he asked about the number of grievances filed by the Union.

According to Schnitzler, Hunger's statement concerning overtime was shocking. However, Schnitzler did not recall that Hunger related his power to remove sergeant overtime to the Union's filing of grievances.

In July 2013, Smith had a conversation with Lieutenant Greg Flowers in the Intake and Release division. Flowers and Smith were discussing the grievances that Smith had filed in his role as sergeant representative when Flowers stated, "you know they're going to get you[,] they're vindictive[,] why don't you just stop."

On August 28, 2013, Hunger announced the transfer of six employees, including two sergeants, which would take effect on November 10, 2013. Hunger chose to announce the transfers before shift bidding, which begins on September 1, so that employees could plan their yearly days off in advance. The Respondents transfer employees between divisions of the jail approximately once a year. Hunger recommends the transfer of employees to the Sheriff and the Sheriff makes the final decision. Hunger has made recommendations for the transfer of sergeants and officers each year since 2011. Hunger timed the announcement of the previous years' transfers in the same manner.

As a general matter, Hunger recommends employee transfers because of operational necessity. He considers what is best for operations, employees' capabilities, their work ethic, their ability to multitask, and the length of time they have spent in a particular division. Hunger also stated that he transfers employees to give them experience in different divisions. The Sheriff testified that he considers the length of time an employee has spent in a particular division, the length of time they have spent with the agency, their performance evaluations, and their overall record in determining who to transfer. Lewis testified that when he discusses transfers with Hunger, he considers sergeants' seniority. Hunger testified that he does not consider employees' seniority in making transfer recommendations.

In this transfer, Hunger recommended that the Respondents move Sergeant Russel Norris from Classification to Intake and Release. He also recommended that the Respondents move

Sergeant Michael Houston from Intake and Release to Classification. The Sheriff accepted Hunger's recommendations.[1]

Hunger explained that he first contemplated Norris's transfer to Intake and Release and then chose a sergeant from that unit to transfer to Classification.[2] Hunger recommended Norris for transfer because it was "time for a change." Norris had spent a long time in Classification and Hunger "felt that it was time for him to come out." The Respondents "like to rotate people out" when employees have remained in one unit for too long because they become too comfortable in their positions, may start making mistakes, or begin having problems. Norris had been assigned to Classification since 2007 or 2008 and was one of the Respondents' better sergeants. Hunger stated that he tries to put the better sergeants into Intake and Release because they interact with judges, handle court paperwork, and are required to multitask. Hunger also stated that he believed transferring Norris to Intake and Release would be an easy transition because Norris had experience working in Intake and Release.

Hunger testified that he chose to move Houston from Intake and Release to Classification because he had prior experience in Classification, which would make his transition smoother. He also believed that Houston's experience as assistant CRT Commander would benefit the Classification division. CRT members become familiar with the inmates and their histories. Such knowledge is helpful to work in Classification, which involves assignment of inmates and requires knowledge of their disciplinary issues and gang affiliations.

The Sheriff testified that he chose Houston and Norris for transfer because they had experience in Classification and Intake Release, respectively, such that it would be good "to cross them over." He stated it would be an easy transition since they would not have to be retrained.

Hunger chose not to move Flowers to Classification, even though he had been assigned to in Intake and Release since 2007 or 2008. He testified that Flowers knew the work of Intake and Release inside and out. He further stated that Houston would be a better fit for a move to Classification. Hunger chose to keep Smith in Intake and Release because he does a good job there and has a lot more experience in that division than Houston.

---

[1] The Respondents did not transfer Smith, who remained in the Intake and Release division.

[2] **Q:** Now, because you were doing that [transferring Norris to Intake and Release] you needed to move somebody out of Intake and Release?
A: Correct.

Hunger always consults with others about proposed transfers. He may speak with the lieutenants, the sergeants, or the undersheriff. In this case, Hunger asserted that he discussed the transfers of Houston and Norris with CRT Commander Lieutenant James Lewis. Lewis suggested that he and Hunger discussed both transfers, but stated that they did not have "much" discussion about Norris. According to Smith, Lewis did not have any discussion about Norris with Hunger because Lewis told Smith that he had no idea Hunger planned to transfer Norris. I credit Smith's assertion based on Lewis's less than definite testimony to the contrary and his failure to remember anything Hunger stated with respect to Norris's transfer.

Lewis told Hunger it would be advantageous to transfer Houston to Classification so that he would have more "down time" for planning training for the CRT. Hunger then discussed all the transfer recommendations with the undersheriff and the Sheriff, who then accepted his recommendations.

The Respondents' transfer of Norris to Intake and Release changed Smith's relative seniority within the division. Before the transfer, Smith was the second most senior sergeant. After the transfer, Smith was third most senior because the newly-transferred Norris was more senior than Smith.

Sergeants select their shifts in order of seniority. Accordingly, the transfers changed the order in which the Intake and Release sergeants bid for shifts. Smith, as the third most senior sergeant, bid third. Norris and Flowers each bid for the day shift. Smith therefore had no choice but to select the remaining afternoon shift.

Hunger has no say in which shift sergeants select. Not all senior sergeants bid for the day shift; some bid for the afternoon and the midnight shifts. Hunger testified that, since he had been Commander, Norris had always bid for the day shift. Smith testified that Flowers also always bid for the day shift since becoming a sergeant.

The change to Smith's schedule took effect in November, 2013. It had a significant impact on his personal life because his wife, who works during the day, must take care of her ailing father in the evenings and cannot take care of the children at that time.

IV. DISCUSSION AND ANALYSIS

1. Statements Made by Hunger Concerning Overtime

The Respondents did not violate Section 10(a)(1) of the Act when Hunger stated that he could take away sergeant overtime if he wished.

An employer violates Section 10(a)(1) of the Act when it engages in conduct that reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights protected by the Act. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012); City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); Clerk of the Circuit Court of Cook Cnty., 7 PERI ¶ 2019 (IL SLRB 1991); City of Chicago, 3 PERI ¶ 3011 (IL LLRB 1987); Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Conservation), 2 PERI ¶ 2032 (IL SLRB 1986). A violation of Section 10(a)(1) does not depend on the employer's motive. City of Mattoon, 11 PERI ¶ 2016; Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Conservation), 2 PERI ¶ 2032. Instead, the test is whether the employer's conduct, viewed objectively from the standpoint of a reasonable employee, had a tendency to interfere with, restrain or coerce the employee in the exercise of a right guaranteed by the Act. Clerk of the Circuit Court of Cook Cnty., 7 PERI ¶ 2019; Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Conservation), 2 PERI ¶ 2032. Employer statements to employees that contain threats of reprisal have been found to violate Section 10(a)(1). Vill. of Calumet Park, 22 PERI ¶ 23 (IL SLR-SP 2005). A threat does not need to be direct; indirect or implied threats have been found unlawful. Cnty. of Cook/Hektoen Institute, 30 PERI ¶ 252 (IL LRB-LP 2014); Vill. of Calumet Pk., 22 PERI ¶ 23.

Here, Hunger's statements during the meeting with Smith and Schnitzler do not constitute express or implied threats that the Respondents would eliminate overtime opportunities if the Union filed any more grievances. Rather, the weight of the evidence suggests that Hunger did not relate his power to remove sergeant overtime to grievance volume. First, Hunger credibly testified that he made two separate statements in two different parts of a single meeting: one expressed confusion at the increase in Union grievances; the other referenced his authority to eliminate overtime. Lending weight to this determination is Union Vice President Schnitzler's clear memory of Hunger's ("shocking") overtime statement juxtaposed with his failure to remember Hunger's grievance statement. Had Hunger related the two statements, Schnitzler would have likely remembered them both with equal clarity.

Second, it is facially plausible that Hunger uttered the two statements in separate and unrelated topics of conversation, given the many topics covered at the meeting. The parties did not merely discuss overtime or overtime grievances. They also discussed the Respondents' denial of Smith's training request, staffing, seniority, and a grievance whose topic was not identified. Thus, Hunger reasonably could have made the two statements in different contexts. But see Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007)(employer violated the Act by saying that he was tired of employee filing "bullshit grievances" and stated that he hoped the employee knew that discipline would be progressive).[3]

In light of this analysis, Hunger's statement concerning overtime is protected speech under Section 10(c) of the Act because it was a truthful expression of the Respondents' rights under the collective bargaining agreement and was not related to the volume of grievances. 5 ILCS 315/10(c)(protecting the expression of opinions, views and arguments regarding unionization, provided that "such expression contains no threat of reprisal or force or promise of benefit."); see also Cnty. of Cook/Hektoen Institute, 30 PERI ¶ 252 (accurate, truthful comments on performance evaluation that employee's better communication with superiors would accomplish more than her filing of grievances did not constitute an implied threat) and Chicago Transit Auth., 17 PERI ¶ 3003 (IL LRB-LP 2000).

Thus, Hunger's comment on overtime does not violate Section 10(a)(1) of the Act.

2. Shift Change

The Respondents violated Sections 10(a)(2) and (1) of the Act when they changed the order of shift bidding in Intake and Release and foreseeably caused Smith's reassignment to the afternoon shift by transferring a more senior sergeant (Norris) into that unit.

Under Section 10(a)(2), a charging party must show, by a preponderance of the evidence, that (1) the employee at issue was engaged in union or protected, concerted activity; (2) the employer knew of his conduct; and (3) the employer took the adverse action against him in

[3] ALJs have reached similar conclusions to those reached by the Board in Village of Calumet Park. See Vill. of Romeoville, 26 PERI ¶ 29 (IL LRB-SP ALJ 2010)(supervisor's statement, that he would "be put into a position that he was going to remove" a benefit if the Union advanced the grievance, violated the Act); Cnty. of Cook, 18 PERI ¶ 3023 (IL LRB-LP ALJ 2002) (employer's letter to charging party violated the Act where it implied that charging party could be charged with violating the employer's confidentiality rules if he filed another grievance); City of Evanston, 5 PERI ¶ 2041 (IL SLRB ALJ 1989) (remarks that certain employees might be demoted or laid off had a chilling or coercive effect on union's right to seek clarification of the bargaining unit).

whole or in part because of union animus or that it was motivated by his protected conduct. City of Burbank v. Ill. State Labor Rel. Bd., 128 Ill. 2d 335, 345 (1989). The Charging Party may prove the third prong of this test through direct or circumstantial evidence. City of Burbank, 128 Ill. 2d at 345. Circumstantial evidence of unlawful motive includes the timing of the employer's action in relation to the protected concerted activity, hostility toward protected concerted activities, disparate treatment, and shifting or inconsistent explanations for the adverse action. Id.

Once the charging party makes its prima facie case, the employer has the burden to advance a legitimate reason for the adverse employment action. Cnty. of Cook v. Ill. Labor Rel. Bd., 2012 IL App (1st) 111514 ¶ 25. Merely offering a legitimate business reason for the adverse action does not end the inquiry, because the reason advanced by the employer must be bona fide and not pretextual. Pace Suburban Bus Div. v. Ill. Labor Rel. Bd., 406 Ill. App. 3d 484, 500 (1st Dist. 2010); North Shore Sanitary Dist. v. State Labor Rel. Bd., 262 Ill. App. 3d 279 (2nd Dist. 1994). In other words, the employer must show that it relied on that reason to take the adverse employment action. Cnty. of Cook, 2012 IL App (1st) 111514 ¶ 25. "[W]here an employer advances legitimate business reasons for the adverse employment action and is found to have relied upon them in part, then the case is characterized as one of 'dual motive' and the employer must demonstrate, by a preponderance of the evidence," that it would have taken the adverse action notwithstanding the employee's protected activity. City of Burbank, 128 Ill. 2d at 345.

Here, Smith engaged in protected activity when he filed seven grievances on behalf of his coworkers and represented employees in his capacity as Union Executive Board Member. Chicago Transit Authority, 30 PERI ¶ 9 (IL LRB-LP 2013).

Further, the Respondents knew of Smith's protected activity because Hunger became aware of the grievances when he denied five of them. Further, he stated that he knew of Smith's participation on the Union's Executive Board sometime in June.

Next, the Union demonstrated that Smith's terms and conditions of employment changed for the worse as a consequence of the Respondents' decision to transfer Norris to Intake and Release. The definition of an adverse employment action is generous; the union need only show some qualitative change in the at-issue employees' terms or conditions of employment or some sort of real harm. City of Lake Forest, 29 PERI ¶ 52 (employee suffered no adverse employment action from negative comments made by management). An action does not need to have an

adverse tangible result or adverse financial consequences to constitute adverse employment action sufficient to satisfy the third prong of the 10(a)(2)-type analysis. City of Chicago v. Ill. Local Labor Rel. Bd., 182 Ill. App. 3d 588, 594-95 (1st Dist. 1988). A change to an employee's work schedule constitutes an adverse employment action. Vill. of Lisle, 24 PERI ¶ 53 (IL LRB-SP 2008); Station Casinos, 358 NLRB No. 153 (2012); Flagstaff Medical Center, Inc., 357 NLRB No. 65 n.21 (2011).

Here, the Respondents' transfer of Norris altered Smith's hours of work, albeit indirectly, and made Smith's schedule less compatible with his family obligations. Before the transfer, Smith was guaranteed the opportunity to select ("bid for") one of the two day shifts slots because he enjoyed the position of second most senior sergeant in the unit. After the transfer, Norris became the second most senior sergeant because he was more senior than Smith. As a result, Smith was no longer guaranteed the opportunity to select the day shift because he was third in line to bid, rather than second. When the two most senior sergeants bid for the day shift, Smith had no choice but to select the remaining afternoon shift (2 pm to 11 pm). This change in Smith's schedule created difficulties for Smith in securing child care because his wife tended to her ailing father in the evenings and could not take care of the children during that time. Indeed, the Respondents were aware that such a change would cause hardship for Smith because Smith previously told Hunger of his reasons for selecting the day shift. Cnty. of DuPage and DuPage Cnty. Sheriff, Case No. S-CA-12-085 (IL LRB-SP ALJ 2014), aff'd, __ PERI ¶ __ (IL LRB-SP 2014)(collecting cases; transfer of employee that changed his shift from day to afternoon constituted an adverse employment action); Vill. of Lisle, 24 PERI ¶ 53 (finding Respondent's change of employee's shift constituted an adverse employment action where it had a negative impact on the employee's non-duty activities).

The remaining analysis requires a discussion of two related matters: (1) whether the Respondents' transfer of Norris to Intake and Release foreseeably caused Smith's assignment to the afternoon shift and (2) if it did, whether the Respondents undertook the transfer because of animus towards Smith's protected activity.

Addressing the first question, the Respondents reasonably knew that the two most senior sergeants in Intake and Release, following the transfer, would choose the only available day shifts and that Smith would therefore be relegated to the afternoon shift. As a preliminary matter, Hunger should be deemed to know the relative seniority of the Respondents' sergeants

because he has access to the sergeants' personnel files as their Commander. Moreover, he was reasonably aware of their relative seniority at the time he made the transfer recommendation because both Lewis and the Sheriff testified that seniority is a factor in considering transfers.[4] Further, Hunger reasonably knew the shift preferences of the two most senior sergeants in Intake and Release following the transfer (Norris and Flowers). Hunger knew that Norris preferred the day shift. Hunger also reasonably knew that Flowers preferred the day shift because Flowers had bid for it each year, for at least as long as Hunger had served as Commander. Indeed, Flowers's presence on, and preference for, the day shift would have been open and obvious to all who worked with him because there were only two day shift sergeants in his unit and only 12 sergeants in total. City of Chicago, 6 PERI ¶ 3020 (IL LLRB 1990)(inferring superior's knowledge of charging party's union activity under the small plant doctrine when the activity was open and obvious); see also City of Sycamore, 11 PERI ¶ 2002 (IL SLRB 1994); Vill. of Frankfort, 15 PERI ¶ 2012 (IL SLRB 1999)(applying small plant doctrine even where employees numbered over 100). Thus, the Respondents knew that their transfers would change the order of shift bidding within the unit and that Smith's shift would change to afternoons as a result.

Addressing the second question, the Respondents made the transfers out of animus towards Smith's protected activity because they gave inconsistent, shifting, and pretextual reasons for the transfers, and made the transfer decisions under suspicious circumstances.

Here, Hunger asserted that he recommended Norris for transfer because it was "time for a change," yet admitted that Norris met none of the criteria he uses for making that determination. According to Hunger, complacency and poor performance customarily justify a finding that it is "time for a change." Hunger explained that the Respondents like to "rotate people out" in such cases and confirmed that it was "time for Norris to come out." However, Norris's work did not have any of the earmarks of poor performance that Hunger testified would attract scrutiny. The Respondents presented no evidence that Norris had become comfortable in his position, was making mistakes, or that he had started having problems. To the contrary, Norris was a good sergeant by all accounts. Mun. Employees, Council 31, AFL-CIO v. Ill. State Labor Rel. Bd., 175 Ill. App. 3d 191, 197 (1st Dist. 1988)(an employer's animus toward protected concerted activity may be inferred from evidence which shows that the "employer's asserted justification

[4] Although Hunger stated that he did not consider seniority in choosing transfer candidates in this case, the combined weight of the testimony provided by Lewis and the Sheriff suggests otherwise.

for the [adverse action] is a mere pretext"); see also Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Human Servs., Ann Kiley Developmental Center)., 20 PERI ¶ 73 (IL LRB-SP 2004); City of Decatur, 15 PERI ¶ 4006 (IL SLRB 1999).

In fact, Hunger's subsequent reliance on Norris's good performance to justify the transfer demonstrates that his proffered reasons for that decision are also shifting. As discussed above, Hunger initially stated that complacency and poor performance justify a finding that it is "time for a change"; however, Hunger later suggested that he recommended Norris's transfer because he wished to move the better sergeants to Intake and Release. Cnty. of Bureau and Bureau Cnty. Sheriff, 29 PERI ¶ 163 (IL LRB-SP 2013) (finding that sheriff offered shifting reasons for discharge where he provided additional instances of misconduct as the basis for the adverse action apart from the allegations set forth in the Merit Commission complaint); Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (IL SLRB 1998) (shifting and contradictory testimony undermines declarant's credibility and also supports a finding of unlawful motive); see also Chicago Transit Auth., 21 PERI ¶ 38 (IL LRB-SP ALJ 2005) (contradictory explanations for an adverse action support a finding of pretext).[5]

Even Norris's indisputably long tenure in Classification and good performance do not withstand examination as the true reasons for the transfer because it is evident that the Respondents did not rely on them. It is difficult to credit Hunger's claim that he recommended the transfer to the Sheriff based on Norris's performance and length of service where the Sheriff himself did not reference them as the grounds for accepting Hunger's recommendations. Indeed, when the Sheriff was asked to explain the transfers, he markedly did not rely on the length of time spent by Norris in Classification or his qualities as a sergeant. He simply stated, in general terms, that it would be "a good move to cross [Norris and Houston] over...since they wouldn't have to be retrained."[6] Notably, the Sheriff did not elaborate on that proffered basis, even when prodded by counsel about the length of Norris's service. Vill. of Glenwood, 3 PERI ¶ 2056 (IL

[5] The Respondents' decision to transfer Norris and Houston is likewise inconsistent with the more general justifications that the Respondents offered for transferring employees. Here, Respondents claim that they sometimes transfer employees to give them experience in other units. Yet it is clear that, in this case, both employees chosen for transfer already had experience in the units to which they were transferred. Moreover, it was precisely their prior experience that purportedly rendered them suitable for the transfers at issue in this case.

[6] The Sheriff testified as follows: "We felt that each one of them had had experience in classification and in intake, and we just felt that it would be a good move to cross them over. They were both trained in both of those so they wouldn't have to be retrained. It would be an easy transition."

SLRB 1987) (finding proffered reason for adverse action pretextual where there was insufficient evidence that it was the true basis for the recommendation).

Contrary to the Respondents' assertion, their basis for transferring Houston has little impact on this analysis because Houston's transfer out of Intake and Release, standing alone, would have had no effect on Smith's relative seniority within the unit. In light of this observation, Hunger's discussion with Lewis of only Houston's transfer provides additional evidence of suspicious circumstances because it begs the question of why Hunger would solicit input only where the transfer would have no effect on Smith. Even assuming, as the Respondents contend, that the two transfers were part of a single operational "switch," there is insufficient evidence that Lewis could have recommended the transfer of a more senior sergeant, in lieu of Houston, whose move would have obviated any adverse effect on Smith's schedule. Indeed, Lewis stated, "I discussed the ones that he asked my opinion on...the ones he doesn't ask my opinion on, we don't talk about."

Moreover, the ease of the transfers, so consistently emphasized by all of the Respondents' witnesses, does not reveal the impetus for initiating them. It is undisputed that the transition of Norris and Houston to their respective new units would be least disruptive to operations because they had already been trained in their prospective work. Yet, the Respondents' unwavering reliance on the transfers' convenience underscores a finding of unlawful motive where the Respondents have provided no compelling basis for instituting them in the first place.

The suspicious circumstances surrounding the transfers further support the conclusion that they were unlawfully motivated. First, it is suspect that Lewis had no knowledge of Norris's transfer before it occurred, even though he was to be Norris's future commanding officer and even though Hunger asserted that he consulted Lewis about Norris's transfer in advance. City of Burbank, 128 Ill. 2d at 349-50 (finding it suspicious that department's director did not have advance notice of the reorganization where the treasurer claimed he had recommended it to him months earlier).

Second, there is proximity between Smith's protected activity and the transfers. Smith consistently and continuously filed grievances on behalf of bargaining unit members in the year preceding the transfers and joined the Union's Executive Board just two months before the Respondents announced the changes. State of Ill., Secretary of State, 31 PERI ¶ 7 (IL LRB-SP 2014) (continuous filing of grievances and service as union steward throughout employee's

employment created proximity between the adverse action and her protected activity); Vill. Homewood, 7 PERI ¶ 2022 (IL SLRB 1991) (two months between protected activity and adverse action is evidence of suspicious timing).

Third, this suspicious timing is rendered even more suspect here because Hunger quelled rumors of impending, yearly changes by reassuring sergeants that he had no plans to transfer them "in the near future." In fact, the only intervening event between the Respondents' reassurances (May 29, 2013) and the transfers a short three months later (August 28, 2013) was Smith's decision to step up his protected activities by joining the Union's Executive Board (late June, 2013). Significantly, the Respondents have identified no emergent operational need that would warrant this change of heart and it is therefore immaterial that the timing of the transfers otherwise conformed to past practice.[7] See Vill. of Barrington Hills, 29 PERI ¶ 15 (IL LRB-SP 2012)(suspicious timing supported finding of unlawful motive where the Respondents approved grant of benefit to employee and then revoked it without reasonable explanation within five weeks after his participating in the Board's representation processes); Cnty. of DuPage and DuPage Cnty. Sheriff, 30 PERI ¶ 115 (IL LRB-SP 2013)(respondent acted unlawfully where the only intervening event between employee's identified misconduct and his removal from special unit was his protected activity); Food Cart Market, 286 NLRB 1016, 1018 (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"); but see Vill. of Lisle, 24 PERI ¶ 53 (adverse change of employee's shift and duties deemed legitimate, despite suspicious timing, when "explicable reasons dictated review of all personnel assignments").

Contrary to the Respondents' contention, their concurrent transfer of correctional officers does not legitimize the transfers of sergeants in this case because the Respondents' only switch of sergeants was the one that modified the shift bidding order to Smith's detriment. But see Vill. of Lisle, 24 PERI ¶ 53 (finding no unlawful motive where the Respondent transferred many

[7] It is likewise immaterial that the Respondents effected the transfers pursuant to their authority under the collective bargaining agreement. Cnty. of Jersey, 7 PERI ¶ 2023 (IL SLRB 1991) (the fact that respondent properly followed the procedure outlined in the parties' contract regarding layoff and discharge did not affect the respondent's motive for taking the adverse action at issue); See also Bd. of Trustees of Southern Ill. University-Carbondale, 21 PERI ¶ 57 (IL ELRB 2005) (employer can still be found to have an unlawful motive even where the employer adhered to the collective bargaining agreement).

employees holding the same position as the Charging Party who had not engaged in protected activity).

In sum, the Union satisfied its prima facie burden and the Respondents presented no legitimate basis for the adverse action that would warrant a dual-motive analysis. Thus, the Respondents violated Sections 10(a)(2) and (1) of the Act when they transferred Norris to Intake and Release because they did so to adversely change Smith's shift assignment in retaliation for his protected activity.

3. Denial of training

The Respondents did not violate Sections 10(a)(2) and (1) of the Act when they denied Smith training in Classification because they demonstrated that they would have taken the same action, even absent union animus.

As noted above, Smith engaged in protected activity when he filed grievances on behalf of fellow bargaining unit members and when he assumed the position of Union Executive Board Member.

Further, Smith suffered an adverse employment action when the Respondents denied him the opportunity to train in Classification. The National Labor Relations Board has held that an employee suffers an adverse employment action when his employer denies him training, even where that training is optional. SKC Electric Inc., 350 NLRB at 872 (employer's denial of optional training, for which employee volunteered, constituted an adverse employment action); Scott-New Madrid-Mississippi Electric Cooperative, 323 NLRB at 423 (1997) (employer's denial of employees request for training in another employee's job constituted an adverse employment action). Contrary to the Respondents' contention, the Illinois Labor Relations Board has not expressly adopted a different approach. City of Highland Park, 18 PERI 2012 (IL LRB-SP 2002) (noting that one employee did not require the requested training as a part of his duties, but failing to explain which prong of the 10(a)(2) analysis that comment addressed); but see Rock Island School Dist. 41, 19 PERI ¶ 2012 (IELRB ED 2003).

In addition, there is sufficient evidence that the Respondents denied Smith training at least in part because of union animus. First, there is compelling evidence of suspicious timing because the Respondents' decision to deny Smith training occurred concurrently with Smith's decision to join the Executive Board. Vill. of Barrington Hills, 29 PERI ¶ 15. Further, the

Respondents' unlawful transfers, described above, taint their decision to deny Smith training in Classification because the Respondents made the two decisions only a month apart. Id. (Respondent's unlawful and disparate denial of wage increases to union members tainted the Respondent's concurrent decision to deny Union president's request for educational reimbursements).

However, the Respondents provided a legitimate and non-shifting reason for the decision to deny Smith training, on which they demonstrably relied: They did not wish to train a sergeant in work that he would perform only intermittently because it would expose them to liability. As Hunger explained, much of the Respondents' training is performed on the job. Insufficient training from mere intermittent work on a unit leads to costly mistakes, particularly in Classification, where housing an inmate in the wrong area might subject him to assault from rival gang members. Thus, the Respondents' denial of Smith's training request legitimately furthered the Respondents' security and fiscal interests.

Contrary to the Union's contention, the Respondents' earlier practice of using Smith for intermittent ("floater") work in Intake and Release is consistent with their proffered reason for denying Smith's training request. Unlike Smith's training request, that practice did not expose the Respondents to liability because Smith had been fully trained in Intake and Release work when previously assigned to the Housing night shift.

In addition, the Union has not demonstrated that the Respondents treated Smith differently from other employees in denying his request for training. Indeed, the Respondents never granted similar requests made by other sergeants because no other sergeant had ever requested training for the purposes of performing filling-in or overtime work in a unit outside his regular assignment. Am. Fed. of State, Cnty. and Mun. Empl., Council 31, 175 Ill. App. 3d at 198; Vill. of Oak Park, 28 PERI ¶ 111 (IL LRB-SP 2012)(employee could not demonstrate disparate treatment where he had "comparatively unique circumstances and background"); City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997)(charging party bears the burden of demonstrating employees who engaged in protected activity received disparate treatment). Notably, the Respondents' practice of training Housing unit employees for Intake and Release duties does not undermine this finding. Housing unit sergeants do not request training outside their unit, as Smith did here; that training is mandated. Moreover, Housing unit sergeants receive such

training to perform daily work in Intake and Release, rather than the intermittent work contemplated by Smith's request.

Likewise, there is no merit to the Union's suggestion that Smith sought training in Classification so that he could transfer to that division. Smith's request for training explicitly states otherwise, noting that he wanted the training to perform "fill-in/OT [overtime]." In light of this specific language, Smith more generally-worded email request for training does not permit any alternate inference.

Next, Hunger's solicitation of Smith's application for training does not undermine the legitimacy of the Respondents' reasons for later denying Smith's request. There is insufficient evidence that Hunger knew, at the time of Smith's initial inquiry into training opportunities, that Smith intended to request training to perform intermittent work in Classification. The evidence suggests that Smith only made that clear upon making his formal written request for training. Accordingly, Hunger invited Smith to request training before Hunger knew the basis on which he would deny that request.

Finally, there is insufficient direct evidence of union animus to suggest that the Respondents would have granted Smith's request, but for his protected activity. Lieutenant Flowers's comment, that certain individuals were "vindictive" and would "get" Smith for repeatedly filing grievances, fails to evidence union animus. There is no indication that Flowers's statement reflected the decision makers' feelings, sentiments or perspectives. Indeed, Flowers did not even name the particular individuals he believed possessed such a vindictive nature. Vill. of Stickney, 31 PERI ¶ 77 (IL LRB-SP 2014); Macon Cnty. Hwy. Dep't, 4 PERI ¶ 2018 (IL SLRB 1988). Further, the Sheriff's statement that Smith "had no honor," is an express response to Smith's decision to quit the Honor Guard rather than a comment on Smith's protected activity.

Thus, the Respondents did not violate the Act when they denied Smith training in Classification because they would have taken the same action even absent union animus.

4. Sanctions

The Union's motion for sanctions is denied because the Respondents' denials were reasonable and found to be true.

The Board's order may include sanctions if one party has made "allegations or denials without reasonable cause found to be untrue or has engaged in frivolous litigation for the purpose of delay or needless increase in the cost of litigation." 5 ILCS 315/11(c) (2012).

In determining whether a party has made sanctionable false allegations or denials, the Board uses an objective test to ascertain whether the denials or allegations were made without "reasonable cause under the circumstances." Cnty. of Rock Island and Sheriff of Rock Island Cnty., 14 PERI ¶ 2029 (imposing sanctions where respondent argued grievances were untimely filed though respondents were fully equipped with and in possession of all of the necessary factual information to know that the grievances were in fact timely) (citing, Fremarek v. John Hancock Mutual Life Ins. Co., 272 Ill. App. 3d 1067 (1st Dist. 1995)). However, the Board has recognized that there are limits on information available to parties and their attorneys at pleading, at the early stage of the adjudicative process. Thus, while the Board has reaffirmed respondents' obligation to answer the allegations of complaints truthfully, it has denied sanctions based on such limitations even when the respondent supplied demonstrably false answers that, after full factual development, were not even debatable. City of Bloomington, 26 PERI ¶ 99 (IL LRB-SP 2010) (declining to impose sanctions based on false pleadings, but imposing sanctions for other reasons). In addition, the Board has been less willing to impose sanctions based on a respondent's allegedly false denial where a respondent's denials concern a critical element of the charging party's prima facie burden of proof. City of Harvey, 18 PERI ¶ 2032 (IL LRB-SP 2002) (denying motion for sanctions on the basis that respondent denied union animus, even though respondent could have admitted the existence of that animus, based on evidence presented at hearing; granting sanctions on other grounds).

At issue here is the Respondents' denial of paragraph 12 of the complaint, which states the following: "On or about August 1, 2013, Hunger asked Smith why the Union was filing so many grievances and stated that he could take away overtime as he pleases."

The Respondents reasonably denied this allegation for two reasons. First, Hunger did not ask why the Union was filing so many grievances, as the Complaint alleges; he merely commented on their number. Second, Hunger did not draw a connection between that comment and the grievance statement, as the Complaint reasonably suggests; rather, he made two distinct and unrelated statements.

Thus, the Union's motion for sanction is denied.

V. CONCLUSIONS OF LAW

1. Commander Hunger's statements concerning overtime did not violate Section 10(a)(1) of the Act.
2. The Respondents violated Sections 10(a)(2) and (1) of the Act when they changed Smith's relative seniority within the Intake and Release Unit and foreseeably deprived him of the opportunity to bid for the day shift.
3. The Respondents did not violate Sections 10(a)(2) and (1) of the Act when they denied Smith the opportunity for training in the Classification Unit.

VI. RECOMMENDED ORDER

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

1) Cease and desist from:
   a) Retaliating against Don Smith, 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 transfer Sergeant Norris to the Intake and Release Unit and then redo shift bidding in the Intake and Release Unit.
   b) Transfer Don Smith to the day shift.
   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 5th day of January, 2015

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-14-061

The Illinois Labor Relations Board, State Panel, has found that the County of Kane and Sheriff of Kane County 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 Don Smith, 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 transfer Sergeant Russel Norris to the Intake and Release Unit and then redo shift bidding in the Intake and Release Unit.

WE WILL transfer Sergeant Don Smith to the day shift.

DATE _____

_____
County of Kane and Sheriff of Kane County
(Employers)

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.