

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 130271-U

Order filed December 2, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE COUNTY OF BUREAU and THE)	Petition for Review of an Order of the
BUREAU COUNTY SHERIFF,)	Illinois Labor Relations Board
)	
Petitioners,)	
)	
v.)	Appeal No. 3-13-0271
)	Board No. S-CA-11-169.
THE ILLINOIS LABOR RELATIONS)	
BOARD, STATE PANEL, and THE)	
POLICEMEN'S BENEVOLENT LABOR)	
COMMITTEE,)	
)	
Respondents.)	

JUSTICE CARTER delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held:* Upon direct administrative review of a decision of the Illinois Labor Relations Board, State Panel, the appellate court ruled that the board did not err in: (1) finding that Bureau County and its sheriff had committed an unfair labor practice in its termination of Deputy Dawn Dove, and (2) imposing sanctions against the county and the sheriff for making false responses in its answer to the board's complaint for hearing. The appellate court, therefore, confirmed the decision of the board.

¶ 2 Bureau County and its sheriff (collectively referred to at times as the employer) filed a petition with this court for direct administrative review of a decision of the Illinois Labor Relations Board, State Panel (board), which found that the employer had committed an unfair labor practice in the termination of Deputy Sheriff Dawn Dove, ordered that Dove be reinstated with backpay, and imposed sanctions against the employer for making knowingly false responses to the board's complaint for hearing. We confirm the board's decision.

¶ 3 **FACTS**

¶ 4 In January 2011, John Thompson, the sheriff of Bureau County, filed a petition for removal with the Bureau County Sheriff's Merit Commission, seeking to terminate Dove's employment with the Bureau County sheriff's department. Dove had been a deputy with the department since 1998. In the petition, Thompson alleged that Dove had: (1) engaged in the unauthorized practice of law on November 21, 2010, by providing legal advice to a prisoner regarding his fifth amendment rights (referred to as count I or the unauthorized practice of law claim); (2) been derelict in her duties on December 4, 2010, by being out of radio contact and not advising her fellow officers of her whereabouts for over 90 minutes during her work shift (referred to as count II or the dereliction of duties claim); (3) made improper use of information maintained by the Secretary of State in December 2010 by requesting that another deputy print out a confidential Illinois driver's license photograph of a female subject and by using and displaying that photograph for an improper purpose (referred to as count III or the improper use of Law Enforcement Agency Data Systems (LEADS) claim); (4) improperly engaged in personal business while on duty in late summer 2010 by soliciting a fellow deputy to "sign on" to a complaint of sexual discrimination against the sheriff's department and by showing that deputy the personnel records of other employees (referred to as count IV or the personal business

claim); and (5) actively engaged in improper political activity in January and February 2010 while she was on duty (referred to as count V or the improper political activity claim).¹

¶ 5 On February 3, 2011, the labor union that represented the members of the sheriff's department filed an unfair labor practices charge with the board.² In the charging document, the union alleged that the employer had committed an unfair labor practice by seeking to remove Deputy Dove because of her protected union activity.

¶ 6 Shortly after the unfair labor practices charge was filed, on February 9 and 10, 2011, a closed hearing was held before the merit commission on the petition to remove Dove as a deputy sheriff. Present for the hearing, at least initially, were the sheriff and his attorneys, Dove and the union attorney, union representative Kasey Groenewold, the three merit commission members, and the Bureau County State's Attorney, who acted as the attorney for the merit commission. Prior to taking testimony, the merit commission denied the union's motion to dismiss the charges and also the union's motion to exclude Dove's private cell phone records, which were subpoenaed by the merit commission at the sheriff's request. The union attorney informed the commission that he was making a special and limited appearance; that regardless of what happened in the merit commission hearing, he was going to file a grievance and proceed to arbitration on the merit commission's disciplinary decision; and that he did not want anyone

¹ In addition to the specific allegations noted, each of the charges alleged that Dove had violated the law, or the merit commission rules, or both.

² In this case, the labor union that represented the sheriff's department initially was the Illinois Fraternal Order of Police Labor Council (FOP). The FOP was later replaced by the Policeman's Benevolent Labor Committee (PBLC).

involved to think that the union was waiving its right to file a grievance by participating in the merit commission hearing.

¶ 7 As the petitioning party, the sheriff was called upon to present his evidence first at the merit commission hearing. The sheriff called Deputy Dawn Dove to the witness stand as his first main witness.³ After stating her name, Dove asserted her fifth amendment rights as to all remaining questions. A dispute arose as to whether the sheriff's attorneys could continue to question Dove, knowing that Dove was going to assert her fifth amendment rights to every question. When it appeared that the sheriff's attorneys would be allowed to continue questioning Dove, the union's attorney asked to take a break. Upon returning from the break, the union's attorney informed the commission that because of the commission's ruling on the phone records, he had concerns about the commission's fairness and impartiality, and that he and Dove were going to leave the premises and were not going to participate in the merit commission hearing any further. After Dove, the union attorney, and the union representative left the premises, the hearing continued in their absence.

¶ 8 As his second witness, the sheriff called Cindy Cromwell to the stand. Cromwell testified that she had been in law enforcement for about 33 years, the past 23 of which had been spent working for the Bureau County sheriff's department. Cromwell was a dispatcher for the sheriff's department, and as such, was involved with almost all of the other members of the department. Cromwell stated that although she and Dove were "friendly" at one time, their relationship had deteriorated, and the friction between Cromwell and Dove had made it uncomfortable for other employees.

³ Before calling Dove to the witness stand, the sheriff called two preliminary witnesses to establish the foundation for the admission of Dove's phone records.

¶ 9 In November and December 2010, after Dove was assigned to the jail, Cromwell worked with Dove at the jail on weekends. According to Cromwell, during the 12-hour jail shift, Dove was frequently on her cell phone for personal matters or was outside sitting in her van. When Dove went outside, she would not take a portable radio with her and would be out of radio contact. Cromwell or another employee would have to go outside and get Dove if they needed her to do something. When Cromwell was asked during her testimony if Dove was on break or lunch when she went outside to her vehicle, Cromwell stated, "[y]ou don't go on break every 20 minutes and stay there for 20 minutes and come back in." Because of that behavior, Cromwell complained about Dove to her supervisor. Cromwell acknowledged during her testimony, however, that the corrections officers did not have to tell anyone else when they were taking a break or a lunch and stated that during a 12-hour shift, the employees at the jail were given two 15-minute breaks, a half hour break for lunch, and a half hour break for supper.

¶ 10 As his third witness, the sheriff called Teresa Kiest to the witness stand. Kiest testified that she had been with the Bureau County sheriff's department for the past three years and had worked with Dove at the jail in November 2010. During work shifts, Kiest saw Dove on her cell phone but did not feel that Dove's cell phone use was excessive. In addition, according to Kiest, the only place that she had to go to find Dove during the shift was the radio room.

¶ 11 Kiest testified further that during the spring or summer of 2010, Dove had stopped at Kiest's residence three or four times while Dove was on duty and in uniform and driving a squad car. Dove's visits only lasted for 5 or 10 minutes, although one visit lasted longer than that. During those visits, Dove talked to Kiest about the department and about some of the bad things that Dove felt were going on in the department. Kiest did not know why Dove talked to her

about those matters, although based upon the information that Dove had acquired (personnel records), Kiest guessed that Dove was planning on suing the department.

¶ 12 Kiest also testified about an incident that occurred on November 21, 2010, while she and Dove were working at the jail. Investigator Randy Hasbrook had asked that two subjects, who were being held at the jail in connection with a burglary investigation, be brought over individually so that he could interview them separately. Shortly after Kiest and Dove brought the first subject over, Hasbrook returned the subject to them. Dove commented to the subject about the short length of the interview, and the subject responded that he had gotten a lawyer. Dove stated to the subject, "oh, that's really smart, that's good for you, that's your right." Before bringing the second subject over, Dove asked the first subject, without the second subject present, if his friend was going to "lawyer up." The first subject responded affirmatively, and Dove suggested to Kiest that maybe they should not bother getting the second subject. Kiest told Dove that it was not their job to question who the investigators wanted, when the investigators wanted them, or why the investigators wanted them. Kiest reminded Dove that Dove used to be an investigator and asked Dove how she would have felt if one of the jailers had done that with one of her suspects. Dove apologized to Kiest and stated that she only acted that way because she thought it might be a waste of time to bring the second subject back and forth when he was just going to lawyer up.

¶ 13 As his fourth witness, the sheriff called Amy Reuter to the witness stand. Reuter testified that she had been employed by the Bureau County sheriff's department since the beginning of November 2010, that she had been trained by Cindy Cromwell, and that she was a dispatcher. Reuter worked with Dove on various days in November and December 2010. When asked about the difference in the way the other jailers performed their duties as compared to Dove, Reuter

stated that the other jailers did exactly what they were supposed to do, but Dove usually had to be asked or had to be found before she would go with the other jailers. According to Reuter, a lot of the time, Dove was in the radio room or outside smoking or talking on her cell phone, rather than inside the jail with the other jailers. Reuter did not believe, however, that Dove's cell phone use at work was excessive and never saw Dove inside her vehicle during work hours.

¶ 14 During her testimony, Reuter described an incident in which Dove requested that Reuter print a driver's license photograph from the LEADS computer. According to Reuter, the situation arose when one of the deputies was conducting a welfare check at the trailer park on a female subject at the request of the subject's father. While doing so, the deputy was told by a neighbor that the female subject in question lived at that location. The neighbor indicated that she was curious why the police were trying to find the female subject when a person in law enforcement, investigator Becket of the sheriff's department, was having "relations" with the subject. As Reuter was putting down the information, Dove asked about the situation. Reuter told Dove, and Dove, who was a superior officer to Reuter, asked Reuter to print a driver's license photograph of the female subject and instructed Reuter on how to do so. Reuter did not know why Dove wanted the photograph. When Dove saw the photograph, she made fun of the female subject, stating that the subject was "trailer trash" and that the subject was "a lot lower" than Becket's previous wife. The following day, when Reuter went to work, she found that the photograph had been copied and had been put into the employee mailboxes and posted on the employee bulletin board.

¶ 15 As his fifth witness in the merit commission hearing, the sheriff called Richard Constantine to the witness stand. Constantine testified that he owned a repossession company called R & R Recovery in Sheffield, Illinois. Constantine and his business had a very friendly

relationship with law enforcement, and officers would stop by the business on occasion to relax for a few minutes and to get something to drink. Constantine did not know whether the officers were on break when they stopped by his business.

¶ 16 Constantine stated that on two occasions in 2010, Dove stopped by his business and discussed politics, while she was on duty and in uniform. The first occasion was on about January 29, 2010, prior to the primary election. Constantine, his secretary, and his stepson were present at the business when Dove stopped by for about 30 or 45 minutes. According to Constantine, Dove was "giddy" and busted out, stating "tell your friends, tell your neighbors, vote Bertetto for sheriff." Dove also made a comment to the effect that she was not going to write any more tickets in Bureau County because she did not feel that she had to do so.

¶ 17 The second occasion was after the primary election had occurred and Bertetto had lost. Bertetto and Constantine were friendly with one another because they both were former marines. Bertetto called Constantine that day and asked if he could stop by Constantine's business. A few moments after Bertetto arrived, Dove showed up in her squad car. At the time, Dove was on duty and in uniform. Dove and Bertetto were talking in Constantine's business and were discussing ways that Dove could undermine Sheriff Thompson. After several statements were made, Constantine spoke up and told Bertetto that he needed to stop what he was doing. The conversation between Bertetto and Dove that day lasted about 45 minutes.

¶ 18 As his sixth witness, the sheriff called Rebecca Gosch to the witness stand. Gosch testified that she been employed at the Bureau County sheriff's department since 1997 and that she was the LEADS agency coordinator for the department. Gosch's duties as the coordinator were to supervise and to make sure that the department was in compliance with the state regulations. According to Gosch, the sheriff's department was allowed to access driver's license

photographs from the Secretary of State's office but only for civil and criminal investigation purposes. Gosch stated that the use or access of driver's license information for an improper purpose was very serious and could jeopardize the sheriff department's authority to use LEADS.

¶ 19 As his seventh witness at the merit commission hearing, the sheriff called Randy Hasbrook to the witness stand. Hasbrook testified that he had worked for the Bureau County sheriff's department for the past 26 years and was a lieutenant investigator. Hasbrook's role at the department was to investigate crimes. On November 21, 2010, Hasbrook attempted to separately interview two individuals who were suspects in a burglary investigation. Both subjects requested an attorney and declined to speak with Hasbrook. After each interview was over, Hasbrook returned the subject to the booking room and handed the subject over to deputies Kiest and Dove. At some point later, Deputy Kiest informed Hasbrook about comments that Dove had made to the first subject following the interview. Kiest told Hasbrook that after the first subject was brought back to the booking room, Dove asked the subject if he had "lawyered up." When the subject responded that he had, Dove replied, "that's smart, that's good; is your buddy going to lawyer up, too?" Hasbrook was upset and offended by what Dove had done and felt that it was detrimental to his investigation. In his 26-year career as a police officer, Hasbrook did not remember any other officer ever acting in that manner. Based upon that incident and other incidents, Hasbrook preferred not to have any contact with Dove and chose instead to avoid her.

¶ 20 In January 2010, Hasbrook was out on a call when he saw Dove's squad car parked at R & R Recovery. As Hasbrook was leaving town, he noticed that Dove had inadvertently left her microphone open and he could hear over the radio Dove and Constantine talking. Before the transmission had ended, Hasbrook heard Dove say, "tell your friends, tell your neighbors, vote

for Bertetto." Hasbrook was alarmed by the incident, so he documented the matter in a report and informed Sheriff Thompson.

¶ 21 Shortly after the primary election, Hasbrook was approached by Sheffield Mayor William Rosenow, who was also running as a candidate for Bureau County sheriff. Rosenow informed Hasbrook that Dove had stopped by in her squad car to speak to him for about an hour while she was on duty and in uniform. Rosenow stated that Dove told him that he needed to have Bertetto as his running mate and that he could not win the election without Bertetto.

¶ 22 Hasbrook was a member of the command staff at the sheriff's department, and, as such, supported the decision to terminate Dove. According to Hasbrook, at some point prior to Dove's 27-day suspension, possibly in November 2010, all of the members of the command staff approached Sheriff Thompson about Dove. The command staff was of the opinion that some action needed to be taken and that Dove needed to be suspended and terminated. Hasbrook testified that as a member of the command staff, if Dove was not terminated, he would recommend that she be put into a position where she would have constant supervision because of her defiance and arrogance, which had created a very hostile working environment in the sheriff's department in the past. Based upon of his years of law enforcement experience, Hasbrook did not think that Dove was salvageable as an employee.

¶ 23 As his eighth witness, the sheriff called Bret Taylor to the witness stand. Taylor testified that he had been in law enforcement for 26 years and had been with the Bureau County sheriff's department for the past 23 years. Taylor was an operations lieutenant in the department and was responsible for overseeing the day-to-day functions of the road deputies, including Deputy Dove. According to Taylor, following an injury to Dove's hand, Dove was assigned to the jail from approximately November 19, 2010, through December 5, 2010. While Dove was assigned to the

jail, Taylor received a complaint from Deputy Cindy Cromwell about Dove. Cromwell told Taylor that on December 4, 2010, Dove spent most of her time during their shift either outside of the jail or in her vehicle. Taylor reviewed the jail surveillance tapes and estimated that during her shift on that day, Dove spent approximately three hours total either outside of the jail or in her vehicle. Hasbrook prepared a memorandum to that effect, made a copy of the surveillance tape, and gave the copy to the sheriff.

¶ 24 As a member of the command staff, Taylor supported the decision to seek Dove's termination because in Taylor's opinion, Dove was a detriment to the department and had been causing problems since about the time of the election. According to Taylor, it was the command staff that approached Sheriff Thompson and asked that Dove be terminated; not the other way around. Taylor did not believe that Dove's employment at the sheriff's department was salvageable.

¶ 25 As his ninth witness, the sheriff called Larry Floyd to the witness stand. Floyd testified that he had been in law enforcement for 39 years, the past 37 of which had been with the Bureau County sheriff's department. Floyd was a lieutenant and the chief deputy of the department and was the highest level supervisor over Dove, other than the sheriff himself. Floyd had worked with Dove, was aware of the petition for removal, and fully supported the petition. Floyd stated that he had personally witnessed some of the facts that were referenced in the petition for removal, including Dove's attitude and actions. According to Floyd, the last discussion he had with Dove was about two months prior, before Dove was assigned to the jail, when Floyd was removing Dove from the radio room. Dove told Floyd that if he wanted to talk to her again, she would have to get a lawyer. Floyd responded to Dove that doing so was not necessary and that they would not bother with that. Floyd stated further in his testimony that there were other

incidents in the radio room after Dove was assigned to the jail, but that those incidents were handled by Lieutenant Taylor. Floyd did not believe that Dove's employment at the sheriff's department was salvageable.

¶ 26 As his tenth and final witness in the merit commission hearing, Sheriff Thompson himself took the witness stand. Thompson testified that he had been in law enforcement for 27 years and was most recently reelected as the sheriff of Bureau County in 2010. Thompson had worked with Dove and had filed the petition for Dove's removal. According to Thompson, the circumstances leading up to the petition for removal dated back over the past two years. Thompson and the members of the command staff had noticed that Dove's performance had deteriorated and they had made significant efforts to try to solicit improvements.

¶ 27 Thompson had conversations with Dove on more than one occasion. The most recent conversation was within the past couple of months when Dove went to meet with Thompson in an effort to try to salvage her position and her image in Thompson's eyes. Thompson and Dove had a lengthy conversation in Thompson's office, but Thompson was not swayed that Dove could be salvaged as a functioning member of the sheriff's department. When Thompson told Dove as much, she became angry. According to Thompson, every supervisor or command officer that had any interaction with Dove came back with the same opinion—that Dove was not salvageable as an employee.

¶ 28 Thompson testified briefly about the charges in the removal petition and stated that all of the charges were warranted and that Dove's conduct had violated the merit commission's rules and regulations. More specifically, as to count I (the unauthorized practice of law claim), Thompson stated that in law enforcement, they tried to balance the effort to provide for an individual's rights with an investigator's difficult task of trying to obtain information. As part of

that balance, every officer was trained and encouraged to obtain whatever information they could that supported a resolution of the investigation without serving as a deterrent to an individual's effort to obtain counsel. Regarding count II (the dereliction of duties claim), Thompson stated that it was totally unacceptable for an officer to take such exaggerated breaks from his or her assigned duties and that doing so created a burden on, and a safety hazard for, the inmates, the detainees, and the correctional staff. According to Thompson, when Dove was in her vehicle during her shift and was out of radio contact, she was out of service and out of touch with the events that were occurring within her work assignment. As for count III (the improper use of the LEADS claim), Thompson stated that by releasing the photograph for other than its intended purpose, Dove created a hazard to Thompson in his position as sheriff and to every other law enforcement officer in Bureau County because she subjected them to the possible removal of access to the Illinois Secretary of State documents, the Illinois State Police documents, and nationwide law enforcement and corrections documents. On count IV (the personal business claim), Thompson stated that at the time of those events, Dove was on duty and in uniform and was supposed to be serving a function to enhance the safety of the community. Regarding count V (the improper political activity claim), Thompson's opinion was that it was totally unacceptable for any employee to do the acts alleged in count V while on duty and in uniform and serving as a deputy sheriff, regardless of who the sheriff was at that time, because the employee was being paid to enhance the safety of the community, not to pursue his or her own self-serving, self-motivated interests. Thompson felt that Dove had violated the trust that the community had placed in her, and he did not believe that Dove's employment with the department was salvageable. When asked whether he had attempted to retrain Dove, Thompson

stated that so much time and effort had been invested into Dove's training that she had been trained to a higher degree than any other deputy in the department.

¶ 29 At the conclusion of the evidence, the meeting of the merit commission was recessed until February 21, 2011, so that the commission could consider the evidence that had been presented before making its decision. On that date, after discussing the matter, the merit commission found that all five counts of the petition had been proven and that the appropriate discipline to be imposed on Dove was termination from the sheriff's department. Neither Dove nor the union attorney was present when the merit commission made, and announced, its ruling.

¶ 30 On February 24, 2011, the union filed a grievance on Dove's behalf over the merit commission's decision to terminate Dove. The union served Sheriff Thompson with prompt notice that it intended to seek arbitration of the matter. The notice referenced section 16.8 of the collective bargaining agreement, which provided that:

"Any disciplinary action imposed by decision of the Merit Commission may be the subject of a grievance pursuant to this Article and Article 13 of this Agreement. *** *By electing to utilize the grievance procedure following disciplinary action by the Merit Commission, the Employee and/or the Lodge waives any other right of recourse of any kind.*

However, the parties agree to reserve the legality of this Section.

Specifically, the parties agree that pursuant to NALL v. INTERNATIONAL ASS'N OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 822, DISTRICT 123, 307 Ill.App.3d 1005, 719 N.E.2d 300, 241 Ill.Dec.439 (4th Dist., 1999) (Adams County) and laws of this State that this

provision may or may not be permissible and each party reserves the right to dispute the legality of this provision in a court of law." (Emphasis added.)

¶ 31 For the purposes of this appeal, the emphasized portion of section 16.8 will be referred to as the election of remedies (EOR) provision.

¶ 32 Also of relevance to this appeal were sections 16.1 and 16.2 of the collective bargaining agreement. Section 16.1 provided that:

"The purpose of the Grievance Procedure shall be to settle contractual grievances between the Employer, Employees and the Lodge as quickly as possible, in order to insure efficiency and promote members' morale."

Section 16.2 provided that:

"A grievance is hereby defined as any dispute or difference between the Employer and the Lodge or an Employee with respect to the meaning, interpretation, or application of any of the provisions of this agreement.

Grievances may be processed by the Lodge on behalf of any Employee or on behalf of a group of Employee's [*sic*] or itself."

¶ 33 After receiving the notice of the union's intent to seek arbitration over the termination decision, Thompson filed a declaratory judgment action in the trial court seeking, among other things, a judicial declaration that he was not required to arbitrate Dove's grievance over the merit commission's decision to terminate Dove. The trial court ruled against Thompson and ordered the parties to proceed to arbitration. In a postjudgment motion, Thompson requested an order staying or enjoining the proceedings before the board. The trial court denied that motion. Thompson appealed, and this court affirmed the trial court's judgment (see *Thompson v. Policemen's Benevolent Labor Committee*, 2012 IL App (3d) 110926).

¶ 34 In the meantime, the union went forward with its unfair labor practices charge before the board and amended the charge to add an allegation that the sheriff's filing of the declaratory judgment action in the trial court was a refusal to bargain. In April 2011, after the board reviewed the charges, it issued a two-count complaint for hearing as to the matter. Only the first count of the complaint is relevant to this appeal. The first count of the complaint alleged that the employer's actions (suspending Dove for 27 days and bringing charges before the merit commission for Dove's termination) were in retaliation against Dove for filing a grievance over her 3-day suspension and for being involved in the PBLC's organizing campaign and constituted an unfair labor practice in violation of sections 10(a)(1) and 10(a)(2) of the Illinois Public Labor Relations Act (Labor Act) (5 ILCS 315/10(a)(1), (a)(2) (West 2010)).

¶ 35 The employer filed an answer to the board's complaint for hearing. Of relevance to this appeal, in its answer, the employer: (1) denied the board's specific factual allegation that in or about January 2010, Dove initiated a grievance concerning her three-day suspension; and (2) denied the board's specific factual allegation that at all times material herein, Dove was active and visible in the PBLC's organizing campaign.

¶ 36 In April 2012, a hearing was held before an administrative law judge (ALJ) of the board on the unfair labor practices charge. Prior to the hearing, the employer filed a motion asking the board to dismiss the proceedings or to defer the matter to arbitration, since the union had demanded arbitration and since the trial court had ordered the parties to proceed to arbitration based upon that demand. In the alternative, the employer asked in the motion that the charges before the board be dismissed because the union's demand for arbitration acted as a waiver of recourse in any other forum. After considering the matter, the ALJ denied the motion.

¶ 37 As the charging party in the board proceeding, the union was called upon to present its evidence first. As its first witness, the union called Rebecca Gosch to the witness stand. Gosch testified that she had been a deputy with the sheriff's department since 1997. For a few days in January 2010, Gosch served as the acting union steward for the department because the actual union steward was not available. As the acting union steward, Gosch prepared a grievance that the union filed on behalf of Dove regarding a three-day suspension that Dove had received for removing Christmas presents from Deputy Chief Floyd's office without permission. When Gosch later spoke to Sheriff Thompson over the phone about the grievance, Thompson told Gosch to inform Dove that if she proceeded with the grievance, he would rescind the suspension and have criminal charges filed against her.

¶ 38 As its second witness, the union called Sergeant Walter Mack to the witness stand. Mack testified that he had worked in law enforcement for about 20 years, the past 16 of which were in Bureau County. Mack had been the jail administrator for the sheriff's department since the summer of 2011, and, prior to that time, was the sergeant for the road division. At one point in the past, Mack tried to bring in another union to replace the FOP and to represent the members of the sheriff's department. During that process, Mack was told by Lieutenant Bret Taylor that he could not have an informational meeting at the jail about the possible change in union representation and that he was not allowed to bring representatives from the other union into the facility for such a meeting because the sheriff's department was already represented by another agency. Eventually, Mack's efforts to bring in a different union were unsuccessful. Mack later learned that Commander Jim Shipp and Lieutenant Taylor, who were instrumental in bringing the FOP in to represent the members of the department, were upset with him for trying to bring in another union. Shipp and Taylor felt that Mack had gone behind their backs and that Mack

should have taken his problem directly to the FOP, rather than trying to bring in a different union. Mack acknowledged during his testimony, however, that at no time did any member of the command staff threaten him or make any comment to him that his efforts to bring in a different union would have an impact on his job.

¶ 39 In November 2010, after Dove had been transferred to the jail, Mack reassigned Dove's squad car to Deputy James Todd. The car was parked in a municipal lot just west of the sheriff's department building. The lot was not fenced in or locked and was surrounded by a residential area. When Todd was cleaning out the vehicle, he found Dove's holster and duty weapon on the back seat. There was no trigger lock on Dove's weapon, and the weapon was not locked down in any manner. Todd turned the weapon over to Mack. Mack secured the weapon in the vault at the jail, documented where the weapon had been found, and notified Commander Shipp of the incident. Mack testified that he had no direct knowledge of a deputy leaving his or her weapon unsecured in the back of a vehicle with only the vehicle locks protecting it but stated that he did have some hearsay knowledge of an incident in which a deputy left a pistol in the trunk of a car. Mack noted that although the officers carried shotguns in their vehicles and left those guns in the vehicles when the vehicles were parked, the shotguns were electronically locked.

¶ 40 Mack did not have a personal discussion with Thompson about the petition filed by the PBLC to replace the FOP as the union for the department but had heard that Thompson had stated that he did not care which union represented the department, as long as the union was certified; that the union would not be allowed into the facility until it was certified; and that once the new union was certified, he would welcome it with open arms.

¶ 41 In his 20 years of work in law enforcement, Mack was not aware of anyone, other than Dove, who was brought up on termination charges while he or she was serving a lengthy suspension of 20 days or more.

¶ 42 As its third witness in the hearing before the ALJ, the union called Deputy Dawn Dove to the witness stand. Dove testified that she had been in law enforcement for about 16 years, about 14 of which were as a deputy sheriff in Bureau County. The command staff at the department consisted of Sheriff John Thompson, Chief Deputy Larry Floyd, Commander Jim Shipp, Lieutenant Bret Taylor, Lieutenant Tim Trevier, and Lieutenant Randy Hasbrook.

¶ 43 Dove stated that on January 7, 2010, she removed a box of sweatpants from Chief Deputy Larry Floyd's office as a joke. As a result of that incident, Dove was disciplined in writing and received a three-day suspension. Dove was out of the state at the time the suspension was imposed, so she contacted Deputy Gosch, the acting union steward, and asked Gosch to file a grievance on her behalf. Dove was later told by Gosch that when Sheriff Thompson learned of the grievance, he told Gosch to make sure that Dove knew that if she went forward with the grievance, he would rescind the suspension and bring criminal charges against her for theft. According to Dove, in February or March 2010, when she returned back to the state, she spoke with the sheriff about her grievance over the three-day suspension.

¶ 44 In about September 2010, Dove was involved in trying to replace the FOP with the PBLC as the union that represented the members of the sheriff's department. As part of the process, Dove discussed the matter with the PBLC and with most of the members of the sheriff's department. Dove spoke to the command staff members about the possible union change during the last quarter of 2010 and spoke directly to Sheriff Thompson about the matter in December 2010. Dove created a flier with information about the union and posted it on the union board at

work, distributed interest cards to the deputy sheriffs, and answered questions about the possible change in unions. Dove also worked with PBLC representative Kasey Groenewold to organize an informational meeting at a local truck stop. The meeting was held at that location because Dove was told by Sheriff Thompson that she could not hold a union meeting at the sheriff's department. Around the time that she was passing out the interest cards, Dove also had a conversation with Lieutenant Taylor about her union activities after she learned that Taylor, Floyd, and the command officers were upset with her because they thought that she was trying to get them out of the union.

¶ 45 From about November 1-15, 2010, Dove was assigned to the patrol unit and worked on the road as a patrol deputy. About halfway through the month, her duties were changed. Dove found out about the change on the day it occurred when Sheriff Thompson told her in passing in the squad room that she was being assigned to the jail effective immediately until further notice and that she was to park her squad car. During her testimony, Dove denied that the reason she was assigned to the jail was because she had injured her wrist and stated that although she went to the hospital for an injury to her thumb in the middle of November, she was released from the hospital with no time off. According to Dove, she provided a copy of that release to the department and also notified her supervisor, Lieutenant Taylor, in person.

¶ 46 Dove acknowledged that she was familiar with the merit commission's rules and regulations and admitted that she had left her duty weapon in her locked squad car but stated that there was no policy as to whether she could, or could not, do so. Dove stated further that she put her gun in her locked squad car because she was not given any advance notice of the change in her assignment and because she knew that she could not wear her gun in the jail. Dove acknowledged, however, that there were lockboxes in the jail where she could have put her gun

but stated that during the time period that her gun was in her locked squad car, the car was not broken into and the gun did not fall into the hands of the citizenry. At some point during the first part of December 2010, Dove was placed back onto patrol.

¶ 47 Sheriff Thompson was up for, and obtained, reelection in November 2010. On about November 26, 2010, Dove received a letter from Sheriff Thompson, notifying her that she had committed a violation of the merit commission rules by leaving her duty weapon unsecured in the back of her locked squad car. Thompson informed Dove that he was considering the discipline to be imposed and that he would notify her of his decision following the upcoming merit commission meeting on December 6, 2010.

¶ 48 On about that same date, Dove received another letter from Thompson, stating that she had been unprofessional at work and that she had created a hostile work environment. Thompson never explained to Dove what he meant by the letter or what Dove was supposed to do to correct the problem to Thompson's satisfaction. Dove later discussed the matter with Thompson when she met with him in December and told Thompson that she felt that he was angry with her for being engaged in organizing activities for the union.

¶ 49 On about November 29, 2010, Dove received a third letter from Thompson, this time about her alleged improper political activities. In the letter, Thompson indicated that he had first become aware of Dove's support for another candidate for sheriff in early 2010. In addition, at the hearing before the ALJ, documents were presented which indicated that the allegations as to Dove's political activity had been investigated by Lieutenant Randy Hasbrook, who was Dove's supervisor when she was in the investigations unit. Hasbrook had taken written statements from both Constantine (the owner of R & R Recovery) and Constantine's secretary in April 2010.

Neither Thompson nor Taylor had said anything to Dove about her allegedly improper political activity prior to Dove receiving the November 29 letter.

¶ 50 At Dove's request, she had a meeting with Thompson in his office in December 2010. According to Dove, she was crying at the time and asked Thompson what she was doing wrong and what she could do to correct it. In about the third week of that same month, the vote was taken to determine whether the PBLC would replace the FOP as the union that represented the sheriff's department members. After the votes were tallied, it was determined that the PBLC had prevailed. On December 27, 2010, after the union vote had taken place, Dove was formally disciplined for leaving her gun in her squad car and a 27-day suspension was imposed upon her. According to Dove, Thompson handed her the notice of suspension in a sealed envelope and told her that she was being suspended for 27 days and that he was seeking her termination. Thompson told Dove further that she was supposed to receive the suspension notice a week earlier but something had come up and the notice had been delayed a week. The suspension was to run from December 27, 2010, through January 27, 2011. The union immediately filed a grievance over the suspension on Dove's behalf.

¶ 51 After the 27-day suspension went into effect, Dove never returned to work at the sheriff's department. On January 6, 2011, while Dove was serving the suspension, the sheriff filed the petition for removal with the merit commission and subsequently notified Dove by mail that she was being suspended indefinitely from the sheriff's department until the charges before the merit commission were resolved.

¶ 52 When asked during her testimony whether she had been admonished by the command staff prior to January 2010 regarding problems with her performance, Dove responded that in late 2009, she was removed from the investigation unit and reassigned to patrol. In addition,

prior to that time, Dove had been reprimanded by Lieutenant Hasbrook for insubordination and for disrespecting the command staff. Dove acknowledged that campaigning while on duty and in uniform was a violation of merit commission rules but disagreed that her telling someone to vote for Bertetto, while she was on duty and in uniform, constituted campaigning. According to Dove, she made that statement during a private conversation when there was only one other person present, in addition to the person to whom she was speaking. Dove noted that section 2.05 of the merit commission's rules, which addressed political activities, specifically allowed an officer to privately express his or her opinion on political questions. Dove acknowledged further, however, that the merit commission found her guilty of engaging in improper political activity while on duty. Dove also acknowledged that she had exercised her fifth amendment rights when she was called to testify as a witness in the merit commission hearing. Dove stated in her testimony before the ALJ that she did not believe that she had committed an unsafe practice by leaving her unsecured duty weapon in plain view in the back of her squad car in a public parking area because the parking lot was the department's parking lot, the car was parked in a row of squad cars, the vehicle was locked, the lot was monitored by cameras, and because, according to Dove, most of the other officers left their unsecured weapons in the trunks of their cars. Dove stated further that her concern at the time was about bringing the weapon into the jail environment, which she knew she could not do. Dove admitted, however, that there were lockboxes at the jail for general use by the sheriff's deputies.

¶ 53

As its fourth witness, the union called Kasey Groenewold to the stand. Groenewold had worked for the PBLC as a labor representative since 2008. Groenewold testified that during the union selection process (the PBLC's organizing campaign), Dove had acted as the contact person between the PBLC and the sheriff's department. Dove posted information in the department

about changing union representation, distributed signature cards, and helped setup an informational meeting for interested members of the sheriff's department to attend regarding the possibility of changing union representation. According to Groenewold, ballots for the union election were mailed out on about November 29, 2010, and were due back to the board by December 16, 2010. Although the ballots were initially supposed to be counted at the board's offices on December 17, 2010, the date was later changed to December 22, 2010. After the vote had been counted, it was determined that the PBLC had prevailed. The official certification by the board, however, was not issued until January 11, 2011.

¶ 54 Groenewold noted that although Dove had received her 27-day suspension in late December 2010 after the union vote had been counted and the PBLC had prevailed, the events leading up to the suspension had occurred prior to that time. According to Groenewold, the first contact he had with Sheriff Thompson was on December 31, 2010, when some of the employees were being interrogated by the sheriff relating to the discipline of Deputy Dove. Two of the employees who were called in contacted Groenewold because they wanted union representation. Although there were 35-40 bargaining-unit members in the department, not all of those members initially welcomed the PBLC with open arms.

¶ 55 After the union had rested its case in the hearing before the ALJ, the employer went forward with its evidence. As its first witness, the employer called former Chief Deputy Larry Floyd to the stand. Floyd testified that he had worked for the Bureau County sheriff's department for 37 years and that he had retired in December 2011. Floyd was the chief deputy of the department for the seven years leading up to his retirement and was one of Dove's field training officers when she was first hired.

¶ 56 Floyd used to be friends with Dove but that changed toward the end of 2008, when Dove's attitude and behavior took a turn for the worse. In Floyd's opinion, from that point forward, Dove was no longer a good employee. Floyd described during his testimony some of the problems that he had with Dove's attitude and behavior during that time period (prior to 2010). Floyd stated that in one incident, Dove orchestrated a plan to have three or four cars go out and make as many traffic stops as possible so that Dove could put the newly-hired dispatcher "to the test." In another incident, Dove sat in the radio room and stared at the dispatchers until they became upset. As a result, a new rule was issued, requiring the deputies to leave the radio-room area if they were told to do so by the dispatchers. Floyd tried to discuss with Dove the problems that he had observed with her performance, but Dove refused to discuss it. As a result, Dove's performance and actions were a frequent subject of the command staff meetings, which took place every two weeks.

¶ 57 As for Dove's more recent conduct, with regard to the theft incident in January 2010, Floyd testified that he came back from lunch and noticed right away that something was different in his office but could not place it. Deputy Gosch came in and told Floyd that someone had removed some items from his office while Floyd was out to lunch and had taken the items into the squad room. Floyd looked around his office and noticed that two or three boxes of jogging suits that were wrapped up as Christmas presents had been ripped open and then taped back up. An investigation was conducted, although Floyd suspected that Dove was the culprit. When Floyd spoke to Dove, she admitted that she had done it. As a result of the incident, Dove was given a three-day suspension. Floyd felt that Dove should have gotten a two-week suspension instead, but Thompson decided that a three-day suspension was appropriate. Floyd recommended to Thompson and to the state's attorney's office that criminal charges be brought

against Dove, but no charges were filed. Floyd was later presented with a grievance over the three-day suspension and he forwarded the grievance to Thompson. Floyd stated that he did not have any resentment or animosity toward Dove for filing the grievance and commented that he had suspensions of his own in the past.

¶ 58 After Dove returned from her three-day suspension, the problems with her performance as a deputy continued. Dove had a bad attitude toward command staff and was getting into arguments with people who used to be her friends to the point where those people no longer wanted anything to do with her. According to Floyd, the problems he observed with Dove had nothing to do with the union that represented the sheriff's department.

¶ 59 Regarding the gun incident, Floyd testified that a sheriff's deputy was required to secure his or her weapon in a safe manner when the weapon was not on the deputy's person. In Floyd's opinion, if a deputy came into work and was not going to be wearing his weapon on his side, he should put the weapon into a lockbox. Floyd was not aware of any other deputy who had left a service revolver unsecured in the back of a vehicle parked outside, although he acknowledged that shotguns were kept in the vehicles in an electronically locked position and that assault rifles were kept in the trunks of the vehicles. As for the 27-day suspension that Dove received for the gun incident, Floyd acknowledged that he had recommended to Thompson that Dove be suspended but stated that Dove's union-selection activity (trying to replace the FOP with the PBLC) and her prior grievance (as to the three-day suspension) had no bearing on the recommendation that he had made.

¶ 60 According to Floyd, before the petition for removal was filed, there was a discussion between the sheriff and the members of the command staff as to how they should proceed. As for his part in the discussion, Floyd recommended to Thompson that Dove be terminated because

of safety issues, noncompliance, insubordination, and several other things. Floyd did not know that Dove was the person advocating for a change in union representation from the FOP to the PBLC and stated that it had no role in his recommendation that Dove be terminated. In his 37 years of experience, Floyd did not recall any other employee of the department who had a similar range of personnel problems as those that he had observed with respect to Dove.

¶ 61 During his testimony, however, Floyd acknowledged that he never documented or put into a report most of the problems to which he testified as to Dove. Floyd stated that most of the conversations that he had with the deputies were not documented. In addition, the discussions that were had and the decisions that were made at the command staff meetings were generally not documented either. Floyd recognized that although he testified about Dove's attitude problems, the suspension letter that he sent to Dove regarding the theft incident said nothing about problems with her attitude. Floyd stated further that Dove's conduct, and not her attitude, formed the basis of the suspension in that instance. According to Floyd, Dove was not putting her "heart" into her work when she went out on a call, and Floyd had complaints about her. As an example of Dove's bad attitude, Floyd commented that when he would call Dove in to discuss the problems that he had with her performance, she would repeatedly ask if she needed to have a union representative or a lawyer to be present with her.

¶ 62 During his testimony, Floyd was also questioned about, and commented on, the discipline that others received over the years for various issues, including previous discipline that Floyd had received.

¶ 63 As its second witness, the employer called the sheriff himself, John Thompson, to the witness stand. Thompson testified that he had been in law enforcement for about 28 years, that he had been the elected sheriff of Bureau County since December 1, 2002, and that he was most

recently reelected as the sheriff in the 2010 general election. Thompson relied upon his command and supervisory staff to maintain the daily functions of the sheriff's department and had them provide first-line supervision and management up through the chief deputy, who served basically as the chief of police and ran every aspect of the office. The sheriff's command staff consisted of the chief deputy (who was a lieutenant), the other lieutenants, and the administrative command. Since Thompson had been sheriff, the command staff had all been included in the bargaining unit with everyone else.

¶ 64 When Thompson came into office, he was a friend of Dove and had previously attended high school with Dove's mother. Earlier in Dove's career, because Dove's performance was acceptable, Thompson approved Dove's assignment to the investigations unit. After that time, however, Dove's performance and behavior deteriorated. In April 2009, while the problems with Dove were ongoing, Dove was transferred from the investigations unit back to patrol. In addition, as problems were detected, Dove was assigned to specific training classes to help her improve her performance. Thompson estimated that Dove had received more training than most of the other staff members. The results of the retraining and supportive actions, unfortunately, were less than what Thompson had hoped for. Eventually, Dove's performance and behavior deteriorated to the point where termination of her employment with the sheriff's department was sought.

¶ 65 Regarding the incident where Dove took presents out of Chief Deputy Floyd's office without permission, Thompson testified that he eventually decided not to charge Dove with a crime because he did not want to ruin her career. Thompson remembered talking with deputies Gosch and Becket about the grievance that was filed over the three-day suspension that was imposed, but denied that he had ever threatened to rescind the suspension and file criminal

charges against Dove if Dove did not withdraw the grievance. Thompson stated that he merely spoke openly with Gosch that he was investigating whether the matter should be, or could be, charged criminally.

¶ 66 When asked about an oral reprimand that Dove received in April 2010 for damaging her assigned vehicle, Thompson commented that he felt that the damage was significant enough to note that Dove had not followed policy, but that he did not impose more severe discipline, even though Dove had just previously received the three-day suspension, because he was trying to give Dove the opportunity to improve her performance.

¶ 67 As for the gun incident, Thompson stated that he did not investigate the matter personally and that he relied upon his command staff to do so. Thompson stated further that he discussed the matter in great detail with his command staff toward the end of November 2010 and that he received a recommendation from the command staff members as to the appropriate discipline to be imposed. Thompson decided not to take action, however, until after an upcoming merit commission meeting that was scheduled for December 6, 2010. According to Thompson, the events in Dove's career had accumulated and were so significant that he wanted time to focus on what had occurred and to seek legal support from his attorney. In addition to the incidents mentioned, Thompson was also aware of the allegation that Dove had engaged in improper political activity (campaigning) while on duty. Thompson had been aware of that allegation since either the date of the incident or the date that he had received the investigative report from Lieutenant Hasbrook but did not do anything about that allegation earlier because he thought it would be inappropriate for him to take action against Dove for her political interest at a time prior to the general election in November 2010. As for Dove's efforts to replace the FOP with

the PBLC, Thompson stated that he did not favor one particular labor union over the other and that he only cared that the members of the sheriff's department were represented.

¶ 68 Thompson was questioned more specifically about the petition for removal, and he acknowledged that he had read the petition, that he was aware of the charges, and the he had signed the petition. According to Thompson, the petition was prepared by his attorneys at the same time as the notice of suspension. As for the unauthorized practice of law charge, Thompson indicated that although he had difficulty understanding the charge, his attorneys had explained the charge to him at the time and that he accepted and supported the charge. Thompson acknowledged that although the petition for removal set forth the reasons for seeking Dove's termination, none of the counts of the petition were for Dove's bad attitude, or for her generally poor behavior, or for a history of problems over a lengthy period of time, despite Thompson's previous testimony as to those matters. Thompson believed that while the petition focused on isolated or specific incidents, it also included those other matters. Thompson acknowledged further that the petition did not allege any conduct that occurred prior to January 2010 and stated that he and Floyd had testified about that earlier conduct because it was a significant factor in their decision to seek Dove's termination.

¶ 69 As for his knowledge of Dove's union activities, Thompson stated that he was aware that grievances had been filed on Dove's behalf over the 3-day and the 27-days suspensions and was also aware that those two grievances had been settled. The settlement occurred in September 2011, several months after the removal petition had been filed. The settlement agreement provided, among other things, that it could not be admitted for any purpose other than to prove its terms and that it would have no effect on the pending litigation. In addition, Thompson stated that he was probably told by Chief Deputy Floyd at some point that on-duty deputies had been

discussing union business instead of going out on patrol. According to Thompson, Dove would have been mentioned in that conversation. Thompson also knew by late 2010, that Dove was engaged in efforts to bring about a change in union representation.

¶ 70 In December 2010, Thompson had a meeting with Dove in his office at Dove's request. During that meeting, Dove tried to dissuade Thompson from going forward with the merit commission charges. Thompson discussed with Dove the significance of all of the problems that the department had encountered with her and had tried to manage around for a number of years and told Dove that he would not stop his actions with the merit commission. During his testimony before the ALJ, Thompson stated that he had made the decision to proceed with a petition for removal because the events leading up to that point had been excessively frequent and without correction, and it was the only outcome available to salvage the balance of the good employees in the agency. When Thompson was pressed further for the specific reason why he sought Dove's termination, Thompson responded that "[t]he totality of the events as they were continuing to occur seemed to necessitate an action of that nature," and indicated that he was not willing to be any more specific than that. According to Thompson, Dove's filing of prior grievances played no part in his decision, nor did Dove's efforts to replace the FOP with the PBLC as the labor union representing the sheriff's department. Subsequent to his meeting with Dove, on December 27, 2010, Thompson suspended Dove for 27 days. Dove never came back to work at the department after that date.

¶ 71 When asked about the declaratory judgment action that had been filed in the trial court, Thompson stated that the action was filed on the recommendation of his attorneys. The issue regarding the interpretation of section 16.8 of the collective bargaining agreement had never been raised before because Thompson's administration had never taken discharge action against

any other non-probationary employee. The trial court ruled against Thompson and ordered the parties to arbitrate the grievance that had been filed over the merit commission's decision to terminate Dove. Thompson appealed the trial court's order, and that appeal was still pending at the time of the hearing before the ALJ.

¶ 72 During his testimony, Thompson was questioned in detail by the union's attorney about other employees who had been disciplined or who were involved in incidents, but termination was not sought, or, in some instances, no discipline was imposed. In one such incident, a gun belonging to one of the deputies (not his duty weapon) was found by an employee of the Village of Sheffield after it fell out of the car of the deputy's wife. Although Thompson was made aware of the situation, no disciplinary action was taken. Another incident involved an employee who had been disrespectful and insubordinate and who had received counseling as a result of his behavior. Thompson was also questioned about certain positive feedback he had received regarding Dove's work, including a letter expressing gratitude for the work that Dove and Hasbrook had done in a particular case and an editorial that was written by Dove and was published in a local newspaper in 2010. When asked if he recalled telling people that he was proud of Dove, Thompson stated that he always said that about all of his deputies, including Dove.

¶ 73 As for Dove's attempts to correct her problematic behavior, Thompson acknowledged that after the three-day suspension for the theft issue, Dove did not commit another theft. In addition, after Dove received the oral reprimand for damaging her squad car, there were no further incidents of that nature. As for Dove's improper political activity, Thompson stated that after Dove was informed of the issue in November 2010, no similar activity occurred, although the general election was over at that time. Finally, as to the firearm issue, Thompson

acknowledged that Dove never came back to work after the 27-day suspension and that she had no chance, therefore, to correct her behavior in that regard.

¶ 74 As its third witness in the hearing before the ALJ, the employer called Gary Becket to the witness stand. Becket testified that he had been a Bureau County sheriff's deputy for the past 13 years and that he currently held the rank of sergeant. As a sergeant, Becket was not a member of the command staff. When the FOP represented the sheriff's department, Becket served as the union lodge president and as the union steward. Becket had worked with Dove since 1999 when he joined the sheriff's department and used to be very good friends with Dove, but they had a falling out in about 2008 because of an incident where Dove's improper behavior made Becket look bad to a superior officer. Because of personal issues in his life, Becket resigned as the union steward at about the time when Dove wanted to file a grievance over her three-day suspension. Although Becket resigned as the union steward, he remained the union president until the PBLC came in as the new union. When Becket advised Sheriff Thompson that a grievance might be filed as to Dove's three-day suspension, Thompson told Becket that that was fine and that he was considering criminal charges in addition to the suspension. According to Becket, Thompson did not tell him to inform Dove that criminal charges would be filed against her if she did not withdraw the grievance. As to the PBLC replacing the FOP, Becket heard Thompson on more than one occasion state that he did not care who represented the members of the department, as long as the members were represented fairly. Becket stated that he personally did not specifically know who was involved in trying to bring the PBLC in as the new union.

¶ 75 During his testimony, Becket described the incident that had occurred regarding the printing and posting of the LEADS photograph and stated that the incident had caused him to complain to the command staff about Dove creating a hostile work environment. According to

Becket, after the photograph had been up on the bulletin board for weeks, another employee informed him that the photograph was up there because of an allegation that Becket was having a sexual relationship with the woman. Becket denied the allegation and stated that he was highly offended by it because he and the woman lived in the same town and because their children went to the same school and played together. Becket did not know who was responsible for posting the photograph, so he asked Lieutenant Taylor to investigate the matter. As a result of that investigation, Becket was informed that Dove had instigated the printing and posting of the photograph.

¶ 76 As its fourth witness, the employer called Randy Hasbrook to the witness stand. Hasbrook testified that he had been in law enforcement for over 27 years and was a lieutenant investigator for the sheriff's department. Hasbrook had been in charge of the department's investigations unit since about 1998 and was Dove's supervisor when she was assigned to that unit. Dove was removed from the unit in April 2009. During that same month, a nondisciplinary personnel meeting was held with Dove and members of the command staff without the sheriff present. During that meeting, Dove was told that her ongoing attitude and disrespect to the command staff and other members of the department would not be tolerated and that her disruptive behavior needed to stop.

¶ 77 During his testimony, Hasbrook described the incident in November 2010 that Dove was involved in regarding the two burglary suspects. Hasbrook acknowledged, however, that there was no evidence that Dove had made any statement to either of the two suspects before they exercised their rights to remain silent or that Dove had even spoken to the second suspect. As far as Hasbrook knew, the two suspects acted pursuant to their own volition in deciding not to speak with the police.

¶ 78 At some point prior to or during April 2010, Hasbrook investigated the allegation that Dove had been involved in improper political activity. The investigation had to do with reports that Dove had been campaigning for a political candidate (one of the other candidates for sheriff) at the business of Richard Constantine while she was on duty and in uniform. In April 2010, as part of his investigation, Hasbrook obtained the written statements of Constantine and of Constantine's secretary, Danielle Kaiser. In the statements, Constantine and Kaiser indicated that Dove was at Constantine's business on various dates while she was on duty and in uniform and was telling Constantine and Kaiser to vote for Joe Bertetto for sheriff. At one point, while Dove did not realize that her microphone was on, Hasbrook himself had overheard Dove on the police radio making a comment to Constantine about voting for Bertetto. There was no indication, however, that Dove had ever addressed a group of people publicly about voting for Bertetto or that Dove had said anything about voting for Bertetto to anyone at a time when Bertetto was present. When Hasbrook completed his investigation into the matter, he reported the results to the command stand and to Sheriff Thompson.

¶ 79 Hasbrook stated during his testimony that he remembered attending a command staff meeting at one point in which there was a perception that Dove was creating a hostile work environment for coworkers. A discussion was had about the incident involving the printing and posting of the LEADS photograph and about the incident involving Dove's alleged intimidation of the dispatchers in the radio room. As for the photograph incident, Hasbrook acknowledged during his testimony that although there were video cameras in the area where the photograph was posted, no one checked the video to determine who had posted the photograph.

¶ 80 Regarding the petition for termination, Hasbrook testified that the command staff met a few times in late December 2010 to discuss the matter and that he made a recommendation as to

what action should be taken. According to Hasbrook, the fact that Dove had previously filed grievances or had pushed for a change in union representation had no bearing on the recommendations he made as to Dove's discipline.

¶ 81 As its fifth and final witness in the hearing before the ALJ, the employer called Bret Taylor to the witness stand. Taylor testified that he had been a Bureau County sheriff's deputy for the past 25 years and that he currently held the rank of operations lieutenant. Taylor had been part of the command staff in the department since 1999 or 2000. After Dove's transfer from investigations back to patrol, Taylor was Dove's supervisor. Taylor was involved with Deputy Chief Floyd in the investigation of the entry into Floyd's office and sat in on the interviews with the other officers involved in that incident. Taylor was also the person who received Sergeant Mack's original report regarding the unsecured weapon that Dove had left in the back seat of her squad car. After receiving the report, Taylor informed Floyd and Sheriff Thompson of the incident. Taylor felt that the weapon was left in an unsafe and unsecured place, that it was a safety issue for citizens and for other deputies, and that the situation had to be dealt with, but he did not make a recommendation as to what action should have been taken. In addition, Taylor was assigned to investigate reports that were received that Dove was absent from the jail for long periods without contact during her shift on December 4, 2010. Taylor reviewed the video footage from the jail for that date and determined that during her 12-hour shift, Dove was outside the jail and was by or in her van or talking to other deputies for a total time period, off and on, of about one hour. According to Taylor, Dove's conduct created a safety concern for the other jailers if Dove did not have a portable radio with her. Taylor acknowledged, however, that although he could not see a portable radio on Dove's person at various times in the video, he could not state with certainty that a radio was absent at those times.

¶ 82 Taylor also was asked to investigate the complaint about the posting of the LEADS photograph in the squad room. Taylor talked to several people about the incident and determined that Dove was not the person who posted the photograph; it was one of the jailers. According to Taylor, all of those involved in the incident were in the radio room having a good time and Dove, who in Taylor's opinion was the instigator, asked them to run the photograph and to post it. The radio operator who actually ran the photograph off of the LEADS system was a part-time, brand-new employee. Taylor stated that he did not know why those involved in the incident did what Dove told them to do and stated that he would not have done so. According to Taylor, Dove had seniority over the other employees involved.

¶ 83 When questioned about Dove's union activity, Taylor stated during his testimony that the fact that Dove filed a grievance over her three-day suspension or that she may have been involved in seeking to replace the FOP with the PBLC did not play any role in his recommendations as to the disciplinary actions that should have been taken against Dove. With regard to the new union, Taylor stated further that he remembered the sheriff on one occasion stating that the new union was not coming into the building until it had been certified. As an individual in the bargaining unit, Taylor was upset about the effort to replace the FOP and suggested to the sheriff and to Dove that the lieutenants and the sergeants should be allowed to stay with the FOP. Taylor had heard rumors, but did not know firsthand, that Dove was involved in bringing in the PBLC as the new union.

¶ 84 In addition to the testimony presented at the hearing, the ALJ also received numerous documents into evidence. Those documents included, among other things, the transcript from the merit commission hearing, the various notification letters that had been sent to Dove regarding disciplinary actions, the written statements of Constantine and Kaiser, the collective

bargaining agreement, the disciplinary documents as to other employees, and the merit commission rules.

¶ 85 Of relevance to this appeal, section 2.05 of the merit commission rules, entitled "Political Activities," which was referenced by Dove in her testimony, provided that:

"No person holding a position in the Sheriff's Department of Bureau County, Illinois, shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take any active part in a political campaign, or shall seek or accept nomination, election or appointment as an officer of a political club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color, or indicia favoring or opposing a candidate for election or nomination to a public office, whether Federal, State, County or Municipal. *But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attending at political meetings, from enjoying entire freedom from all interference in casting his vote, or from expressing privately his opinion on all political questions.*" (Emphasis added.)

¶ 86 At the conclusion of the hearing, the ALJ took the matter under advisement. She later issued her recommended decision and order for the board to consider. Of relevance to this appeal, the ALJ found that: (1) the union had not waived its right to bring an unfair labor practices charge before the board by filing a grievance as to the termination decision because the collective bargaining agreement did not specifically preclude the right to seek statutory relief from the board; (2) the first, second, and fourth charges made by the sheriff in the removal

petition (the unauthorized practice of law claim, the dereliction of duties claim, and the personal business claim) were not arbitrary, implausible, or unreasonable and were, therefore, legitimate; (3) the third charge in the removal petition (the improper use of LEADS claim) was not legitimate and was arbitrary and pretextual because the sheriff's own command staff (Lieutenant Taylor) investigated the matter and found that Dove did not personally access the LEADS database and that she was not the person who posted the photograph; and (4) the fifth charge in the removal petition (the improper political activity claim) was not legitimate and was arbitrary and pretextual because Dove's conduct did not violate the merit commission's rules since Dove had merely voiced her opinion privately to two individuals⁴ on political issues and since the alleged misconduct was not addressed until several months after it occurred, which was an indication that the employer was merely attempting to piece together an adequate disciplinary record so as to account for the initiation of merit commission proceedings; (5) because some of the charges against Dove in the removal petition were legitimate and other charges were not, a dual-motivation analysis applied, and it was the employer's burden to establish by a preponderance of the evidence that it would have taken the same action against Dove regardless of Dove's union activity; (6) because Sheriff Thompson had testified that the action taken against Dove (the filing of the removal petition) was based upon the "totality" of Dove's misconduct and because that "totality" was no longer present in that two of the five bases for removal were not

⁴ At one point, the ALJ stated that Dove had voiced her opinion to two other employees. Later, the ALJ stated that Dove had voiced her opinion to two other individuals. It is clear from the evidence presented that the two people to whom Dove expressed her opinion (Constantine and Kaiser) were not employees of the sheriff's department. We view this as merely a misstatement by the ALJ in her decision.

legitimate, the employer had failed in its burden to show by a preponderance of the evidence that it would have taken the same action against Dove (pursued removal) if the sheriff had considered only the demonstrably legitimate allegations of misconduct; (7) even if the sheriff was arguably engaged in petitioning activity when he filed the petition for removal, his actions were not protected under the first amendment or state statute because some of the charges before the merit commission were not reasonably based; and (8) based on the above, it had to be concluded, therefore, that the sheriff was retaliating against Dove in violation of sections 10(a)(2) and (a)(1) of the Labor Act, when the sheriff filed charges with the merit commission seeking to terminate Dove's employment because of her participation in PBLC's organizing campaign and because she had filed a grievance over her three-day suspension. As for the relief awarded, the ALJ proposed, among other things, that Dove be reinstated to her position in the sheriff's department with backpay. The ALJ also proposed that the union be awarded sanctions against the employer because in the employer's answer to the board's complaint for hearing, the employer denied that it was aware that Dove had filed a grievance over her three-day suspension and also denied that Dove was actively involved in the PBLC's organizing campaign. The ALJ found that those denials were unreasonable denials and that the employer should have known that they were false.

¶ 87 After exceptions were filed by the employer, the board later adopted the recommended decision and order of the ALJ, except in certain respects not relevant to this appeal. The employer filed a petition with this court for direct administrative review of the board's decision.

¶ 88 ANALYSIS

¶ 89 As its first contention on appeal, the employer argues that the board erred in rejecting the employer's claim of waiver and in denying the employer's motion to dismiss or defer the unfair labor practices charge on that basis. The employer asserts that the board's decision in that regard

was erroneous because under the EOR provision contained in section 16.8 of the collective bargaining agreement, the union was barred from seeking relief from the board after the union filed a grievance over the merit commission's decision to terminate Dove. According to the employer, the union made a knowing choice at that point to seek relief through the contractual grievance procedure and to waive its right to pursue relief in any other forum, as set forth clearly and unambiguously in the EOR provision. Thus, the employer contends that the EOR provision does not waive any substantive rights and that it merely dictates the forum in which a dispute over those rights will be heard. The employer notes that any claim by the union that the union could not get full relief under the grievance arbitration procedure is completely negated by the fact that the union sought the same relief, reinstatement and backpay, in both the grievance procedure and the proceeding before the board. The employer asserts further that a ruling to the contrary on this issue would subject the employer to the cost of litigating the same dispute in two different forums and to the possibility of receiving inconsistent results. The employer asks, therefore, that we reverse the board's denial of the employer's motion to dismiss or defer the unfair labor practices charge.

¶ 90 The board and the union argue that the denial of the employer's motion was proper and should be confirmed. The board asserts first that when section 16.8 is read in conjunction with section 16.1 of the agreement, it is clear that the EOR provision only applies to the parties' contractual disputes and not to collateral statutory disputes, such as an unfair labor practices charge. In the alternative, the board asserts that even if section 16.8 is ambiguous, it must be construed contrary to the employer's argument here because section 16.8 does not make a clear and specific waiver of the union's (Dove's) right to file an unfair labor practices charge before the board, as would be necessary for a valid waiver of that statutory right.

¶ 91 The union, on the other hand, asserts that: (1) the employer's waiver argument is barred by *res judicata* because it was asserted in the last appeal and was rejected by this court; (2) the EOR provision would not bar the proceedings before the board because the unfair labor practices charge was filed before the grievance was filed as to the merit commission's termination decision; (3) the EOR provision applies only to the manner of challenging the merit commission's decision—the union must elect to either file a grievance or to file for administrative review of the decision in court—and does not preclude the union from seeking to proceed before the board; and (4) section 16.8 of the collective bargaining agreement does not waive the union's rights to seek relief from the board because it does not contain a clear and explicit waiver of that right, as would be necessary for a waiver of a statutory right to be valid. In making those assertions, the union notes that although there are similarities between the grievance over the termination decision and the unfair labor practices charge, the two proceedings are not the same.

¶ 92 We will address only the question of whether the EOR provision constitutes a valid waiver of the union's statutory right to file an unfair labor practices charge because the answer to that question resolves this issue. In making that determination, we are called upon to interpret section 16.8 of the collective bargaining agreement. Because the interpretation of a contract presents a question of law (*Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007)), our standard of review as to the board's decision on this issue is *de novo* (see *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 532 (2006) (upon administrative review, the appellate court reviews *de novo* the agency's decision on questions of law)).

¶ 93 The rules of contract interpretation are well established. The primary goal in interpreting a contract is to give effect to the intent of the parties. *Virginia Surety Co. v. Northern Insurance*

Co. of New York, 224 Ill. 2d 550, 556 (2007). In determining the intent of the parties, a court must consider the contract document as a whole and not focus on isolated portions of the document. *Gallagher*, 226 Ill. 2d at 233; *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164 (2002). If the language of a contract is clear and unambiguous, the intent of the parties must be determined solely from the language of the contract document itself, which should be given its plain and ordinary meaning, and the contract should be enforced as written. *Virginia Surety Co.*, 224 Ill. 2d at 556; *J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd.*, 194 Ill. App. 3d 744, 748 (1990); *Reaver v. Rubloff-Sterling, L.P.*, 303 Ill. App. 3d 578, 581 (1999). However, if the contract language is ambiguous, the meaning of the contract language must be ascertained through a consideration of extrinsic evidence. See *Gallagher*, 226 Ill. 2d at 233.

¶ 94

In addition to the rules of contract interpretation, we must also consider the established law on the waiver of statutory rights, since the right to seek relief from the board, such as in the present case, is purely a statutory right (see 5 ILCS 315/2, 10 (West 2010)). As the board and the union correctly point out, a statutory right may not be waived unless it is done in a clear, express, and unmistakable manner. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-09 (1983). The waiver of a statutory right, therefore, will never be inferred or presumed. *Id.* (the court will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the waiver of that right is clearly, unmistakably, and explicitly stated); *American Federation of State, County and Municipal Employees, AFL-CIO v. State Labor Relations Board*, 190 Ill. App. 3d 259, 269 (1989) (same) (AFSCME); *State, Department of Central Management Services (Department of Corrections) v. State, Labor Relations Board, State Panel*, 373 Ill. App. 3d 242, 256 (2007) (waiver of a statutory right will never be presumed and must be clear and unmistakable) (Department of Corrections).

¶ 95 Having reviewed the language of the collective bargaining agreement in the present case, we find that the EOR provision contained in section 16.8 did not constitute a waiver of the union's statutory right to seek relief from the board for an unfair labor practice. The EOR provision does not mention or even reference an unfair labor practices claim and does not, therefore, constitute a clear, explicit, and unmistakable waiver of the right to file such a claim. Thus, the EOR provision did not preclude the union from filing or proceeding on an unfair labor practices charge before the board after a grievance over the merit commission's termination decision had been filed. See *Metropolitan Edison Co.*, 460 U.S. at 709-08; *AFSCME*, 190 Ill. App. 3d at 269; *Department of Corrections*, 373 Ill. App. 3d at 256. The board properly denied the employer's motion to dismiss or defer the unfair labor practices charge.

¶ 96 In reaching that conclusion, we note that we are not persuaded to the contrary by the supreme court's decision in *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135 (2006), a case which is relied upon heavily by the employer in support of its argument on this issue. In *Melena*, the supreme court recognized that the right to pursue a statutory claim in another forum may be waived in a valid arbitration clause. *Id.* at 142-50. Unlike in the present case, however, the contract in *Melena* specifically listed the claims that were covered by the arbitration clause. *Id.* at 145, n.2. There was no question in *Melena*, therefore, that the waiver of the statutory claim involved was clear and unmistakable. *Id.* That is not the situation before this court.

¶ 97 As its second point of contention on appeal, the employer argues that the board erred as a matter of law in finding that the sheriff's decision to file charges with the merit commission could serve as the basis of a retaliation claim (that the employer retaliated against Dove because of her protected activity and because of her involvement in bringing in the new union) in violation of the Labor Act. In support of that argument, the employer asserts first that the board

was precluded from finding that any of the removal petition's charges lacked legitimacy since the merit commission, an independent administrative agency, had already determined that all of the charges had been proven and that Dove was guilty of misconduct. According to the employer, after the merit commission made its finding of misconduct as to all five charges, any personal motivations that Sheriff Thompson may have had for bringing the petition for removal were irrelevant. Second, the employer asserts that the sheriff had a constitutionally and statutorily protected right to file the petition with the merit commission for the discharge of Dove (the right to petition the government) and could not be held liable for an unfair labor practices charge, as long as the petition was reasonably based, even if the filing of the petition was motivated by antiunion animus. Third, the employer asserts that the board erred when it found that the petition for removal was not reasonably based. For all of those reasons, the employer asks that we reverse the board's decision on this issue.

¶ 98 The board and the union argue that the board's ruling on this issue was correct and should be upheld. In response to the employer's first assertion, the board and the union contend that under established Illinois case law, the merit commission's determination of misconduct in this case had no preclusive effect on the board's ability to determine later that an unfair labor practice had occurred. As to the employer's second assertion, the board and the union contend that since the sheriff was "the government" in this case, he had no constitutionally or statutorily protected right regarding the filing of charges with the merit commission and was not immune from an unfair labor practices claim.

¶ 99 The question in this case of whether filing a petition for removal with the merit commission can serve as the basis of unfair labor practices charge is a question of law. As such, our standard of review on this issue is *de novo*. See *Marconi*, 225 Ill. 2d at 532.

¶ 100 As to the employer's first assertion in support of its argument on this issue, we note that under a very similar factual situation, we previously determined that a decision of the merit commission as to whether a police officer was guilty of misconduct (whether there was "cause" for discipline) had no preclusive effect on a subsequent proceeding before the board for an alleged unfair labor practice. See *Grchan v. Illinois State Labor Relations Board*, 315 Ill. App. 3d 459, 466 (2000). We see no reason to depart from that ruling in the instant case. As we noted in *Grchan*, although the merit commission proceeding and the board proceeding may be similar, they are distinctly different actions. See *id.* at 465-66. Before the merit commission, the sheriff's motivations for filing the charges were irrelevant and would not have constituted a defense, since the merit commission had no power to determine whether an unfair labor practice had occurred. See *id.* The board, on the other hand, had no power to determine whether Dove was guilty of misconduct under the merit commission's rules but, rather, was empowered to determine whether, considering the sheriff's motives for filing the charges, the sheriff had committed an unfair labor practice in violation of the Labor Act. See *id.* Thus, following the decision in *Grchan*, we reject the employer's assertion that the merit commission's decision had a preclusive effect on the board. See *id.*

¶ 101 As for the employer's second assertion on this issue, we find no support for the employer's claim that the sheriff has a protected right regarding the filing of charges with the merit commission. First and foremost, the sheriff's right to file merit-commission charges in this case is not protected by the first amendment right of the people to petition the government for the redress of grievances because the sheriff, in his official capacity as the agent of the county, is the government. See *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (the first amendment protects, among other things, the right of the people to petition the government for a redress of their

grievances); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973) (the protection afforded by the first amendment is a restraint on government action, not a restraint on the action of private persons). Nor is the sheriff's filing of the merit-commission charges immune under state law (735 ILCS 110/1 *et seq.* (West 2010); 745 ILCS 10/1-101 *et seq.* (West 2010)) from an unfair labor practices claim. The Labor Act clearly indicates that it takes precedence over any other state statute that conflicts with its provisions. See 5 ILCS 315/15(a) (West 2010). Finally, public policy also does not provide the employer with immunity in this particular case. In enacting the Labor Act, the legislature clearly spelled out which public policy concerns it was seeking to promote, and those concerns do not include the right of the sheriff to file charges with the merit commission. See 5 ILCS 315/2 (West 2010).

¶ 102 The employer's reliance upon the cases of *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002) (BE & K) and *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (Bill Johnson's) in support of its conclusion to the contrary is misplaced. Both cases dealt with the filing of a lawsuit against a union or employees by a private employer. See *BE & K*, 536 U.S. at 519; *Bill Johnson's*, 461 U.S. at 734-37. That is not the situation before this court in the present case.

¶ 103 As its third point of contention on appeal, the employer argues that the board erred in finding that the employer had committed an unfair labor practice in violation of sections 10(a)(2) and 10(a)(1) of the Act. The employer asserts first that the board's ruling that the union had established a *prima facie* case of an unfair labor practice was erroneous because the union had failed to show: (1) that Dove was a "public employee" under the Act; and (2) a causal link between Dove's protected union activities and the sheriff's decision to seek Dove's termination. The employer asserts further that even if the union established a *prima facie* case, that case

would still ultimately fail because the sheriff's reasons for seeking Dove's termination were legitimate and the board's ruling to the contrary was clearly erroneous.

¶ 104 The board and the union argue that the board's ruling was proper and should be upheld. As to the employer's claim that the union failed to establish that Dove was a "public employee" under the Act, the board and the union assert that: (1) the employer has forfeited that claim by failing to raise it before the board; (2) the burden was on the employer to raise the matter in an appropriate fashion, such as by raising and showing in a unit clarification proceeding that Dove was not a "public employee"; (3) the evidence was sufficient to establish that Dove was a public employee; and (4) the employer's actual or implied assertion that all deputies are managerial employees as a matter of law would render superfluous section 3(r) of the Labor Act (5 ILCS 315/3(r) (2010)), which addresses the factors to be considered in determining if a police officer is a "supervisor." As to the employer's claim that the union failed to establish a causal link between Dove's protected union activities and the sheriff's decision to seek Dove's termination, the union and board assert that the evidence was sufficient to establish that link. Finally as to employer's claim that the board's determination regarding the legitimacy of the removal petition charges was clearly erroneous, the board and the union assert that the direct and circumstantial evidence presented was more than sufficient to establish that the two charges in question were not legitimate and were pretextual.

¶ 105 The issue of whether an unfair labor practice has occurred presents a mixed question of fact and law. See *Grchan*, 315 Ill. App. 3d at 467-68. An administrative agency's decision on such a question will not be reversed on appeal unless it is clearly erroneous. *Id.*; *Marconi*, 225 Ill. 2d at 532. A decision is clearly erroneous only if, after reviewing the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed.

AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 380, 395 (2001).

¶ 106 Sections 10(a)(1) and 10(a)(2) of the Labor Act provide that it is an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by the Labor Act (5 ILCS 315/10(a)(1) (West 2010)) or to discriminate as to any term or condition of employment due to an employee's protected union activity (5 ILCS 315/10(a)(2) (West 2010)). *Moehring v. Illinois Labor Relations Board*, 2013 IL App (2d) 120342, ¶ 10. In a proceeding before the board based upon a violation of sections 10(a)(2) and 10(a)(1) of the Labor Act, the charging party has the burden of presenting its evidence first and must establish a *prima facie* case of an unfair labor practice by showing that: (1) the employee in question was engaged in protected union activity; (2) the employer had knowledge of that activity; (3) the employer harbored an antiunion animus; and (4) the adverse employment action was taken under suspicious circumstances. *North Shore Sanitary District v. Illinois State Labor Relations Board*, 262 Ill. App. 3d 279, 287-88 (1994). Causation may be established by showing by a preponderance of the evidence that the adverse employment action was based in whole or in part on antiunion animus or that the employee's protected activity was a substantial or motivating factor in the employer's decision to take adverse action against the employee. See *City of Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 345 (1989) (Burbank); *Grchan*, 315 Ill. App. 3d at 465. The motive of the employer is a fact question, the proof of which may be inferred from direct or circumstantial evidence. *Grchan*, 315 Ill. App. 3d at 467. Among other factors, the board may reasonably infer an employer's antiunion motivation from: (1) the employer's expressions of hostility toward union activity or unionization combined with knowledge of the employee's union activity; (2) the proximity in time between the employee's

union activity and the employer's adverse action; (3) disparate treatment of employees or a pattern of conduct that targets union supporters for adverse employment action; (4) inconsistencies between the employer's proffered reason for taking the adverse action and other actions of the employer; and (5) shifting explanations by the employer for the adverse action. *Id.*; *Burbank*, 128 Ill. 2d at 346.

¶ 107 If the charging party satisfies its burden and establishes a *prima facie* case of an unfair labor practice, the burden then shifts to the employer to show that the adverse employment action was based upon *bona fide*, nonpretextual, legitimate business reasons. *Moehring*, 2013 IL App (2d) 120342, ¶ 10. That the employer proffers legitimate business reasons for the adverse employment action, however, does not end the inquiry. *Burbank*, 128 Ill. 2d at 346. The board must still determine whether those reasons are *bona fide* or pretextual. *Id.* If the board determines that the proffered reasons were a mere litigation figment or that the reasons were not relied upon by the employer, the inquiry will end, a finding of pretext will be made, and the employer will be found to have committed an unfair labor practice. See *id.* On the other hand, if the board finds that the reasons for the adverse action were legitimate, a ruling will be made in favor of the employer. See *Moehring*, 2013 IL App (2d) 120342, ¶ 10. If, however, the board finds that some of the reasons offered by the employer were legitimate and that other reasons offered were not legitimate, the case is classified as one of dual motive, and to prevail, the employer must show by a preponderance of the evidence that it would have taken the adverse action despite the employee's union involvement. *Burbank*, 128 Ill. 2d at 346-47; *Grchan*, 315 Ill. App. 3d at 467; *Moehring*, 2013 IL App (2d) 120342, ¶ 10.

¶ 108 In the present case, as for the employer's claim that the union failed to show that Dove was a public employee under the Labor Act, we agree with the union and the board that the claim

has been forfeited because the employer did not raise that claim before the board. See 80 Ill. Admin. Code. § 1200.135(b)(2) (2010); *Metropolitan Alliance of Police v. State Labor Relations Board, Local Panel*, 345 Ill. App. 3d 579, 593 (2003). Thus, we will not address the remaining assertions of the board and the union as to that particular claim.

¶ 109 Regarding the employer's claim that the union failed to establish a causal link between Dove's protected activity and the sheriff's decision to seek termination, we find that claim to be related to the employer's claim that the board's determination regarding the legitimacy of the merit commission charges was clearly erroneous. We will, therefore, consider the two claims together.

¶ 110 Having done so and after reviewing the record in this case, we are compelled to conclude that under the applicable standard of review, the board's (ALJ's)⁵ finding of an unfair labor practice was sufficiently supported by the evidence and must be upheld. First, regardless of how we would have decided the case if we had been the trier of fact, sitting in review, we find that there was sufficient evidence for the board to conclude that two of the charges in the removal petition lacked legitimacy. Although the removal petition alleged that Dove had used and displayed a driver's license photograph for an improper purpose (the improper use of LEADS claim), the investigation conducted by Deputy Taylor, a member of the sheriff's own command staff, showed that Dove had not personally done so, although Dove had encouraged or directed another deputy to print the photograph as was also alleged in the removal petition. Furthermore, while the removal petition alleged that Dove was involved in improper political activity in violation of the merit commission rules, the evidence showed that Dove had not publicly

⁵ Because the board adopted the findings of the ALJ, we will treat the board and the ALJ's determination as one and the same.

endorsed or supported the other candidate and was not publicly or officially involved in campaigning for the other candidate. Rather, Dove had merely expressed her political opinion in a private conversation with one or two individuals at a private business, as she was allowed to do under the merit commission rules. Although Dove may have discussed in a private conversation ways that she could undermine Sheriff Thompson—behavior that was indeed problematic—her involvement in that behavior was not in the nature of publicly or officially endorsing or campaigning for the other candidate.

¶ 111 In addition to the lack of legitimacy of two of the charges, the board had before it both direct and circumstantial evidence of the antiunion animus of the sheriff and his command staff. From a direct evidence standpoint, the board was presented with statements by both Sheriff Thompson and Chief Deputy Floyd that were indicative of an antiunion motivation. Deputy Gosch testified that when she told Thompson that a grievance was going to be filed as to Dove's three-day suspension, Thompson told her to instruct Dove that he was going to rescind the suspension and charge her criminally if she did not withdraw her grievance. Although Thompson denied that he had made the statement, the board specifically found that Gosch's testimony was more credible than Thompson's on that issue. In addition, when Chief Deputy Floyd was questioned about Dove's bad attitude, he specifically described how Dove would repeatedly ask him if she needed to have a union representative or an attorney present when Floyd would try to discuss with Dove problems with her performance.

¶ 112 Turning to the circumstantial evidence, the board had before it evidence as to the problematic timing of the disciplinary activity—that the 27-day suspension and the petition for removal were imposed or filed shortly after the election was held to determine if the PBLC would replace the FOP as the union representing the members of the sheriff's department. In

addition, despite the sheriff's knowledge of certain allegedly improper activities by Dove that dated all the way back to January 2010, the sheriff waited several months to almost a year to file the removal petition and made no mention to Dove of the allegedly improper conduct prior to that time. The board felt that by waiting so long, the sheriff was trying to accumulate an adequate disciplinary record against Dove to try to justify his decision to seek Dove's removal.

¶ 113 With the board's legitimacy determination intact and the evidence of antiunion motivation, this case indeed was one of dual motive, and the burden shifted to the employer to show that it would have taken the same action, notwithstanding the employee's union involvement. See *Burbank*, 128 Ill. 2d at 346-47; *Grchan*, 315 Ill. App. 3d at 467; *Moehring*, 2013 IL App (2d) 120342, ¶ 10. The employer, however, could not satisfy that burden because the only evidence that was presented on that issue was the sheriff's testimony that he sought Dove's removal based upon the "totality" of the circumstances. In fact, even when Thompson was pressed during testimony to be more specific, he maintained that it was the "totality" of the circumstances that led him to seek removal and that he was unwilling or unable to be any more specific than that. Thus, Thompson persisted in his testimony to claim that the rationale for the removal was based on the aggregate and the entirety of the claims. With the "totality" of the circumstances no longer present because of the lack of legitimacy of some of the removal charges, there was insufficient evidence from the employer to suggest that Sheriff Thompson would have still made the same decision to seek Dove's termination for fewer reasons. Thompson was given ample opportunity during his testimony to say as much, if that were case, but he never testified to that effect. Thus, in the present case, the record does not give us a clear and definite conviction that the board's determination of an unfair labor practice was a mistake, and we are compelled, therefore, under the statutory and case law, to find that the board's

determination in that regard was not clearly erroneous. See *Marconi*, 225 Ill. 2d at 532; *AFM Messenger Service, Inc.*, 198 Ill. 2d at 395.

¶ 114 As its fourth and final point of contention on appeal, the employer asserts that the board erred in imposing sanctions on the employer for allegedly making knowingly false or unreasonable responses to the board's unfair labor practices complaint. The board and the union argue that the board's ruling was proper and should be confirmed.

¶ 115 Section 11(c) of the Labor Act allows the board to impose sanctions against a party for making allegations or denials without reasonable cause, which are later found to be untrue and for engaging in frivolous litigation for the purpose of causing delay or needless increase in the cost of litigation. 5 ILCS 315/11(c) (West 2010). The board's decision to impose sanctions on a party will not be reversed on appeal absent an abuse of discretion. *City of Bloomington v. Illinois Labor Relations Board, State Panel*, 2011 IL App (4th) 100778, ¶ 17.

¶ 116 Having reviewed the record in the present case, we find that the board's decision to impose sanctions on the employer did not constitute an abuse of discretion. See *id.* The record indicates that the employer was well aware during the material times in question that Dove had initiated a grievance over her three day suspension and that Dove had been actively and openly involved in the PBLC's organizing campaign. However, despite that knowledge, the employer denied those same specific factual allegations in its response to the labor board complaint. Under the present circumstances, the board's decision to impose sanctions upon the employer for making false responses to the complaint was proper.

¶ 117 CONCLUSION

¶ 118 For the foregoing reasons, we confirm the decision of the Illinois Labor Relations Board, State Panel.

¶ 119 Confirmed.

¶ 120 JUSTICE McDADE, dissenting.

¶ 121 The majority has determined that the Illinois Labor Relations Board (Board) did not err in finding that petitioners, Bureau County and its sheriff, had committed an unfair labor practice in its employment termination of Deputy Dawn Dove and in imposing sanctions against the petitioners for making false responses in their answer to the board's complaint for hearing. For the reasons that follow, I dissent from the first finding and do not, therefore, find it appropriate to reach any of the other issues addressed by the majority.

¶ 122 My dissent is based solely on my belief that the conclusion that the Police Benevolent Labor Council (PBLC) has established a *prima facie* case that the employment action was motivated by anti-union animus or that this was a dual motive termination was clearly erroneous because it is blatantly against the manifest weight of the evidence. It, therefore, challenges certain critical factual findings and conclusions.

¶ 123 My burden for this challenge is not easy or light. On questions of fact, the administrative agency's findings of fact are considered to be *prima facie* true and correct and will not be disturbed unless they are against the manifest weight of the evidence. *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008). The issue of whether an unfair labor practice has occurred presents a mixed question of fact and law. *Grchan v. Illinois State Labor Relations Board*, 315 Ill. App. 3d 459, 467-68 (2000). An administrative agency's decision on such a question will not be reversed on appeal unless it is clearly erroneous, that is, whether the "reviewing court is left with the definite and firm conviction that a mistake has been committed." *Cinkus*, 228 Ill. 2d at 210.

¶ 124 I acknowledge and respect all of the case law that gives the Board great latitude in interpreting the conduct of the parties in its quest to protect employees from retribution for protected union activity. I believe, however, that its ultimate factual conclusions are both unreasonable and against the manifest weight of the evidence.

¶ 125 Because I am a strong believer in the critical importance of unions in protecting workers from arbitrary workplace practices, securing and maintaining fair compensation and ensuring safe and healthy working environments and because I am a strong supporter of the labor relations laws and the agency created and armed to implement and enforce those laws, I do not dissent lightly. I cannot, however, even with the guidance of the ALJ and the example of the majority, agree that there is anti-union motivation in the actions taken by the sheriff and his staff related to Deputy Dove.

¶ 126 The ALJ's factual findings show that Deputy Dove was flagrantly insubordinate, openly disrespectful of her superiors, disruptive, overbearing and intimidating toward other staff in the sheriff's department and had been exhibiting such behavior with increasing intensity for at least three years. She openly flouted rules and on at least one occasion solicited/directed a subordinate to violate rules to enable her own wrongdoing. Dove worked for the department for 14 years, but the many violations documented and discussed by the ALJ occurred predominately during the four-year span from 2007 through 2010.

¶ 127 In 2007, Dove was verbally reprimanded for a bad attitude and advised that she needed to treat members of the department with respect and professionalism.

¶ 128 In late 2008 and early 2009, "Dove's attitude and the manner in which she handled herself with respect to other department personnel, changed." The ALJ cited examples of her disruptive behavior, including causing other deputies to write an inordinate number of tickets to

put three radio operators "to the test," staring down a dispatcher until she reduced her to tears, verbal altercations with persons who had been her friends and disrespect toward command staff. Over that period, her supervisors attempted to work with her on correcting her behavior but she refused to discuss it. Her supervisors also tried with what I would characterize as soft discipline--reprimands, warnings and assignment transfers--to make her conform her conduct and performance to acceptable departmental standards. Because of all the work they had done with her, the sheriff described her as the most trained deputy they had ever had. Still, they were unsuccessful.

¶ 129 In 2010, the problems with disrespect and disruption escalated further. In January, when Deputy Chief Floyd was away from his office, Dove entered it without his knowledge or permission. She ripped open two or three boxes of Christmas-wrapped sweatpants, removed some of them and re-taped the boxes, and took some of the sweatpants from the office without his knowledge or permission. When confronted, she dismissed her actions as a "joke." The ALJ accepted that characterization and the Board described her conduct as a "prank." Although her misconduct could easily have been viewed and pursued as theft, and Floyd pushed the sheriff and the state's attorney for criminal charges to be filed, but Thompson imposed only a three-day suspension, which she grieved.

¶ 130 Between January and March, she engaged in political activity while on duty and in uniform, specifically openly supporting Joe Bertetto, a man who, if he won his primary, would be Sheriff Thompson's opponent in the general election, disparaging the sheriff and voicing her support for Bertetto while her dispatch radio was open, and proclaiming that she would refuse to write any tickets while Thompson was sheriff. Two of her co-workers, Lt. Hasbrook (a member of command staff) and two citizens were witnesses to her statements. After the primary, she

discussed ways with Bertetto to undermine Sheriff Thompson until the civilian witness to the conversation urged Bertetto to stop what he was doing.

¶ 131 In April, she damaged her police vehicle and was verbally reprimanded, with a follow-up in writing.

¶ 132 Also in April, command staff transferred Dove from investigations to patrol. Although different reasons for the move were articulated by members of the command staff, the reasons were not mutually-exclusive, most likely reflecting different priorities of the individual respondents. There appeared to be agreement that the move was, generically, “necessary for the operational needs of the department.”

¶ 133 In early to mid November, Dove pulled four on-duty officers in from patrol without advising anyone in command that she was doing so, for purposes of conducting a union discussion.

¶ 134 In mid-November, Dove left an unlocked gun in a locked car in an unsecured parking lot. It remained there for roughly two weeks until it was discovered near the end of the month by another deputy to whom the car had been reassigned. Dove left the gun there even though a lockbox was available inside the jail where it could and should have been safely secured. Even though anyone, adult or child, could have accessed the gun and injured or killed him/herself or another or used it for a criminal purpose, Dove did not see why what she had done was dangerous. Beyond the potential human anguish, if someone *had* been injured or killed by a person using that gun, the sheriff and the county, not Dove, could have been legally and/or financially accountable.

¶ 135 On November 21, Dove was bringing two suspects from the jail to the interview room when she asked one if he was going to “lawyer up.” Telling him it was smart and asking if his friend was going to “lawyer up too.”

¶ 136 On November 26, a day or two after the gun had been found, the sheriff sent Dove a letter informing her that the incident was under investigation. In a second letter dated the same day, he also advised Dove that command staff had discussed that she was causing problems and creating an undesirable working environment.

¶ 137 On November 29, 2010, the sheriff sent Dove a letter advising her that he political activities in the first quarter of the year had violated department and commission rules.

¶ 138 In December, co-workers at the jail complained that Dove was absent from the jail for long periods of time while on duty and was out of radio contact. She was, therefore, unavailable if an emergency arose or she was needed in the jail for some other reason.

¶ 139 Also in December, Dove directed a newly-hired subordinate to access the Law Enforcement Agencies Data System (LEADS) database for photos which were used to disparage a citizen and embarrass a fellow officer. In doing so, she jeopardized the ability of the department to continue to use this critical law enforcement tool.

¶ 140 On December 27, Dove was given a 27-day suspension for the gun incident.

¶ 141 Considering just these facts, it is hard to imagine that any reasonable person would argue that the sheriff was not fully justified in asking the county’s merit commission to terminate her employment with the department. After a hearing in which several witnesses were called to testify and Dove elected to assert her Fifth Amendment right against self-incrimination and not answer any of the charges, the merit commission terminated her employment.

¶ 142 Despite overwhelming evidence of Dove’s unfitness to retain her position and of her disruptive, disrespectful and even dangerous derelictions of duty, the ALJ found and the Board agreed that the real reason for the termination request was “anti-union animus” within the sheriff’s department – or more specifically that Dove was fired in retaliation for her protected union activity. For reasons that follow, I believe that finding is against the manifest weight of the evidence and is clearly erroneous.

¶ 143 The Sheriff and the Department's Union Representation

¶ 144 John Thompson was elected sheriff of Bureau County in 2002 and had been serving in that capacity for eight years at the time of the incidents pertinent to this appeal. In January 2010, he announced that he was seeking another term in November. He was successful in that effort and was re-elected to another term in the November 9 general election.

¶ 145 It is unclear from the record how long employees of the sheriff’s department had been represented by a union, but the ALJ stated that since at least 2004, the Illinois Fraternal Order of Police Labor Council (FOP) had represented deputy patrol officers, sergeants, investigators, lieutenants, radio dispatchers, and jailers. All of the members of the sheriff’s command staff are part of the collective bargaining unit and are represented by the union. There is no indication that prior to the incidents in this case the sheriff or his command staff had any history of harboring antagonism against union representation or any history of acting to retaliate against anyone involved in union activities.

¶ 146 In September 2010, Dove contacted the chief legal counsel/director of the Police Benevolent Labor Council (PBLC) about changing the union representative in the department, and she agreed to distribute interest cards and post flyers in support of the proposed change. She enlisted employees from corrections, dispatch and patrol to meet with the PBLC representative to

learn how to effect the change. On September 17, PBLC filed a certification petition to replace FOP as representative. On November 17, the sheriff was notified by the Board that a consent election agreement had been approved and he fully cooperated in the certification process. The sheriff posted the notice provided by the Board indicating that ballots would be mailed on November 29, completed ballots were due to the Board by December 16 and would be counted on December 17. On November 22, he sent a certification of the posting and a list of employees eligible to vote in the election to the Board. Votes were actually counted on December 22 and PBLC won the right to represent the department's covered employees. There is, again, no indication that the sheriff or command staff members were antagonistic to or attempted to impede any potential change in representation. Indeed, based on testimony that the ALJ expressly credited, the sheriff, while unwilling to have PBLC personnel in the department prior to its certification--which would authorize its takeover from the FOP--would welcome whichever union won the election "with open arms." It is worth noting that there is also no indication that anyone else integrally involved in the concerted activities to change the representative with Dove was subjected to any discipline or other negative employment action.

¶ 147 The ALJ's Recommendation and the Board's Decision

¶ 148 There are twin bases for the ALJ's recommendation and the Board's finding that the sheriff and the county, through its merit commission, had committed an unfair labor practice in seeking to terminate and in terminating Dove's employment. The first was the conclusion that the PBLC had proven a *prima facie* case of anti-union animus and the second was that two of the five claims of Dove's wrongdoing presented by the sheriff to the merit commission were pretextual and that the sheriff/county acted against Dove on the basis of dual motivation—that is,

partially for legitimate reasons and partly out of anti-union animus. I believe both conclusions are against the manifest weight of the evidence, and are clearly erroneous.

¶ 149 1. *Prima facie* Case

¶ 150 In order to prove a *prima facie* case for an unfair labor practice, a union must establish: (1) the employee engaged in protected activity, (2) the employer knew of the protected activity, (3) the employer took adverse action against the employee, and (4) the union has shown a causal connection between the employee's protected activity and the employer's adverse action.

¶ 151 There is no real dispute that the first three requirements have been met. In January 2010, Dove grieved her three-day suspension and in September she initiated efforts to change the certified union representative; the sheriff knew about both of those actions; and the sheriff filed charges with the merit commission seeking Dove's discharge. In finding the fourth requirement had been satisfied as well, the ALJ stated:

“The Union has demonstrated a causal connection between Dove's protected activity and Respondents' adverse action through direct and circumstantial evidence including the Sheriff's and command staff's hostile comments concerning Dove's union activity, Respondents' shifting reasons for Dove's discharge, the proximity of Dove's organizing activities to the adverse action, and Respondents' dubious assertion that they employed progressive discipline.”

¶ 152 Looking first at the “hostile comments concerning Dove's union activity,” the ALJ identified two. The first concerned her grieving of the three-day suspension for the unauthorized removal of property from the deputy chief's office, which she characterized as a joke. Dove's

action clearly demonstrated the kind of behavior the department had been trying to curb since the reprimand issued to her in November 2007—a failure to treat members of the department, including command staff, with respect and professionalism. Floyd had been frustrated with her attitude and her conduct since 2008, and it is highly unlikely that theirs was a joking relationship. Saying later that it was a joke does not change the fact that Dove stole the sweatpants. To law enforcement officers, taking property from the personal space and possession of another without their authorization or knowledge is theft. To *me*, it is theft. Floyd pushed hard for the filing of criminal charges. Failing that, he urged that she should receive at least a two-week suspension. But the sheriff imposed a mere three-day suspension—a punishment that was a gift.

¶ 153 Accepting the ALJ’s finding as to what the sheriff actually said, Thompson said, on being informed that Dove was going to grieve the suspension, that if she proceeded with the grievance, he would bring criminal charges for theft. He had resisted his chief deputy in assessing the discipline and she was throwing it back in his face. His is not anti-*union* animus. It was pure and very understandable frustration with *Dove*.

¶ 154 The second allegedly hostile comment was made by deputy chief Floyd in elaborating on his statement that Dove had a bad attitude. He explained that one reason for his characterization was her “repeated inquiries” as to whether she needed union representation when she was called in for discussions about her conduct. I acknowledge the precedent that finds that sometimes the term “bad attitude” can be a euphemism for exercising protected activity. But Floyd had been complaining in a variety of terms about Dove’s bad attitude for nearly three years *before* the occurrence of either of the protected activities identified by the ALJ. With regard to the specific example cited by the ALJ, protected activity can be used as a club as well as a shield. The *tone* with which the inquiry is made is the only way to gauge Dove’s attitude, and the only one who

heard that tone was Floyd. In the absence of any other evidence that Floyd has an anti-union bias, it is unreasonable to ascribe animus to him for this one comment, and such a conclusion is against the manifest weight of the evidence.

¶ 155 Turning next to “Respondents’ shifting reasons for Dove’s discharge,” the ALJ points out that the sheriff testified that Dove’s conduct in 2008-09 was significant to his decision to seek her discharge and Floyd testified that Dove’s bad attitude was a “contributing factor.” Yet, she notes, neither of those things is mentioned in the complaint to the merit commission.

¶ 156 There is nothing inconsistent in the statements and the complaint. The actual charges were current in time, serious in nature, and sufficient to justify Dove’s discharge. If she had previously been an exemplary employee, the sheriff and command staff might have considered some alternative to discharge, even in the face of the seriousness of the conduct, but she was not. Her prior unsatisfactory performance and bad attitude would have been highly significant in determining which course to choose. Once having chosen that course, the respondents relied on recent, serious, previously undisciplined conduct to seek the discharge.

¶ 157 Next in support of her finding that PBLC had established a *prima facie* case of animus or retaliation, the ALJ notes “the proximity of Dove’s organizing activities to the adverse action.” What is every bit as proximate to the adverse action is Dove’s recent misconduct beginning with taking the sweatpants in January 2010, engaging in political activity while on duty and in uniform between January and March, and again in April following the primary election, and escalating through the fall/winter of 2010, to culminate in the incidents involving the violation of LEADS, the derelictions of her duties at the jail, the unauthorized practice of law and the irresponsible conduct with the unlocked gun, all of which indisputably occurred in November and December of 2010. The charges were filed on January 6, 2011.

¶ 158 Finally, the ALJ cites “Respondents’ dubious assertion that they employed progressive discipline.” It is true that the discharge complaint chronologically followed the 27-day suspension for the gun incident. That fact, however, does not negate the sheriff’s claim. Since at least late 2007, the recurring complaints about Dove’s behavior and performance have related to the lack of respect and professionalism *vis a vis* her co-workers and the department’s command staff, and disruptive behavior. While there has been a variety of misconduct up to and including the charges in the merit commission complaint, the hallmark of all of them is an absence of respect for the people with whom she works, lack of professionalism in dealing with her co-workers and supervisors, and behavior that is disruptive of the cohesiveness and effectiveness of the department. At the time the merit commission complaint was filed, the sheriff and command staff had been trying to remedy this behavior for more than three years, but Dove’s disregard for those with whom she worked continued unabated and is manifested in her conduct in 2010 and the five “charges.”

¶ 159 By contrast, the gun incident is completely anomalous. It did not involve interrelationships with others in the sheriff’s department or disruptions in the department’s efficiency or morale. It was, instead, a flagrant violation of rules and common sense, putting members of the public at risk of death or bodily harm and the department and the county at possible financial risk. It was out of the chain of Dove’s prior misconduct and should not undermine the otherwise progressive nature of Dove’s discipline.

¶ 160 The ALJ stated that the incidents in the complaint “had gone unremarked and unpunished for many months.” That statement is true only with regard to the charge of political activity in conjunction with the sheriff’s re-election bid. The ALJ appears to accept the sheriff’s explanation for waiting until after the election, but notes that he waited yet another two months

after the election before bringing the charge. While it is true it was another two months before the charge was filed, the ALJ's factual findings show that on November 29, only 20 days after the election, the sheriff informed Dove, in writing, that her actions violated departmental and commission rules.

¶ 161 There comes a point where an employer is entitled to throw in the towel and accept that some behaviors cannot be corrected. All of the members of command staff, including Floyd and Lt. Hasbrook, were at that point and had been urging the sheriff to seek Dove's discharge. The damage from the five incidents had already been done and there was nothing to be gained by further attempts at remediation.

¶ 162 2. Dual Motive Analysis

¶ 163 The five claims of Dove's misconduct were: (1) an allegation of unauthorized practice of law when she asked a suspect if he had "lawyered up," (2) dereliction of duty spending, according to investigations, between 1-1/2 and 3 hours out of contact and conducting private business, (3) used and disseminated unauthorized LEADS photos, (4) engaged in private business while on duty and creating a hostile work environment, and (5) actively engaging in political activity while on duty and in uniform. The ALJ found the first, second and fourth claims were legitimate complaints, but rejected the third and fifth, finding them to be pretextual.

¶ 164 She found the LEADS claim to be arbitrary and illegitimate because it was not Dove herself who accessed the database. Law enforcement officers frequently deal with the concept of accountability. If you are in a position of superiority and you order or direct a subordinate to do something, you are responsible or "accountable" for their wrongdoing. Clearly the ALJ understands this concept since she has no problem attributing to the sheriff her interpretation of comments made by others in the department. Suborning the improper accessing of the LEADS

database with its potential for impeding the department's access to its critical information should be sufficient, *without more*, for significant discipline. We send people to prison for decades on less evidence of accountability than this. Similarly to require a subordinate to "front" the illegal activity constitutes an abuse of authority, an exercise of exceedingly poor judgment, and a serious injustice to a fellow officer. And, at bottom, the responsibility for the misconduct is Dove's. Within this framework, holding Dove accountable for *ordering* an incursion into the LEADS system that was not only improper but potentially damaging to the department's ability to effectively and efficiently carry out its basic function is perfectly legitimate, is not pretextual, and certainly is not indicative of anti-union animus.

¶ 165 The ALJ also concluded that the charge of engaging in political activity was not legitimate and was pretextual because the conduct was not addressed for months and it did not violate Respondents' rules. It does not appear that the sheriff learned of the charged misconduct, which occurred between January and March, until April 15, after Dove's preferred candidate had been defeated in the primary. At that point, any disciplinary action he would take would look like political retaliation and he was still running in the general election.

¶ 166 Moreover, the ALJ's conclusion that Dove's conduct does not violate the department's rules because she "merely voiced her political views privately to two individuals and 'express[ed] privately [her] opinion[s] on all political questions' within the confines of Respondents' rules," ignores her own factual finding that Lt. Hasbrook heard one of the conversations on the dispatch radio. That is hardly private. In addition, her statement that she would not write any tickets because she did not like the sheriff is flagrant insubordination even when voiced in the context of an allegedly private conversation disparaging her employer.

¶ 167 It is also not clear to me that urging your co-workers, while you are on duty and in uniform, to vote against their employer is mere private expression of political views. It certainly shows the disrespect for and disparagement of the employer and the unprofessional disregard for the feelings and concerns of your co-workers that command staff had been trying to address and remediate since at least November 2007.

¶ 168 For the foregoing reasons, I believe the finding that the discharge of Deputy Dove by the sheriff and the county, through its merit commission, was motivated in whole or in part by anti-union animus or by retaliation for her participation in protected union activity adds to an appearance that discipline *with* union activity is tantamount to discipline *caused* by union activity and is clearly erroneous.⁶

¶ 169 And its impact is mind-boggling. Efforts were begun in 2007 to change Dove's deteriorating attitude and behavior and to develop her into an effective law enforcement officer and a positive rather than negative force within the department and to discharge her when those efforts failed. All of this was rendered meaningless by her acts of grieving a three-day suspension and driving the change to a new certified representative for the department. Her *choice* to take those actions foreclosed any further evaluation and correction of her misconduct

⁶ Beyond, and of far less import than the reasons I have already discussed, there is no apparent *purpose* to the claimed animus or retaliation. The ALJ reported that the covered employees have been represented by a union—the FOP—since 2004. The only signs of animus the ALJ could cite were the two allegedly hostile comments discussed in her analysis in the *prima facie* case. Significantly all that Dove's activities would do is substitute one certified representative for another. There is testimony credited by the ALJ that the sheriff had no preference between the two unions.

by converting discipline into retaliation/anti-union animus and a complaint for discharge into an unfair labor practice.

¶ 170 Dove's conduct, as documented by the ALJ, *merited* discharge. Instead, by order of the Illinois Labor Relations Board, the sheriff and county were ordered to reinstate her, without prejudice to her seniority or other rights and privileges, and to pay all of the wages she lost from the beginning of the 27-day suspension. This outcome represents, in my view, a triumph of special interest over reason, and a decision against the manifest weight of the evidence and one which is clearly erroneous.