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STATE OF IOWA
PUBLIC EMPLOYMENT RELATIONS BOARD

MARION POLICEMAN'S PROTECTIVE ASSOCIATION, **Complainant,** **and** **CITY OF MARION,** **Respondent.**	**CASE NO. 102649**

FINAL ORDER

This case is before the Public Employment Relations Board (PERB or Board) on the City of Marion's (City) appeal of a proposed decision and order (Proposed Decision) issued by an administrative law judge (ALJ), following an evidentiary hearing on Marion Policeman's Protective Association (MPPA)'s prohibited practice complaint (PPC). In its PPC, MPPA alleged the City committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a), (c), and (d) by involuntarily reassigning Nick Martens (Martens), a City police officer, from investigations to patrol after the officer, in his capacity as MPPA President, reported a complaint to the City on behalf of another City employee. In the proposed decision, the ALJ concluded the City committed a prohibited practice within the meaning of the aforementioned Iowa Code sections and directed the parties to meet for purposes of formulating the precise terms of an appropriate remedy.

Prior to Oral Argument, the Parties filed briefs. The Board held Oral Arguments via Google Meet on September 18, 2023. Attorney Holly Corkery appeared and presented

argument on behalf of the City. Attorney Nate Willems appeared and presented argument on behalf of MPPA.

Pursuant to Iowa Code section 17A.15(3), on an appeal from an ALJ's proposed decision, the Board "has all the power which it would have had in initially making the final decision . . . ." Iowa Code § 17A.15(3) (2023). The Board may reverse or modify any finding of fact made by the ALJ when such reversal or modification is supported by a preponderance of the evidence, and may reverse or modify any conclusion of law made by the ALJ that the Board finds to be in error. *Id.* In considering this appeal, the Board utilized the record as submitted to the ALJ.

Based on a review of the record and considering the parties' written and oral arguments, the Board adopts the ALJ's findings of fact except as modified below. With respect to the ALJ's conclusions of law, the Board concludes MPPA failed to prove a prohibited practice within the meaning of Iowa Code sections 20.10(2)(a), (c), and (d).

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the proposed decision and order, is attached as "Appendix A." The ALJ's findings of fact are included in what the ALJ identified as section 1 of the proposed decision. The ALJ subdivided section 1 into several topics, with section 1.6 identified as "Allegation of Union Animus." In the final sentence of section 1.6, the ALJ found that the new MPPA president, Nikki Hotz (Hotz), "testified she had some fear about taking on [the role of MPPA president] due to the incident with Martens as she wanted to stay out of trouble." App. A, p. 9.

The City argues this specific ALJ finding is directly contradicted by Holz's testimony and requests the Board reverse this finding. Conversely, MPPA contends the record demonstrates the City's actions caused the incoming MPPA president to have some fear that she could be disciplined for simply performing her duties as MPPA president.

Because the relevant finding of fact solely concerns Hotz's state of mind, the Board turns first to her testimony. At hearing, Hotz testified as follows:

> **Q [Nate Willems]:** How did you feel when you . . . took over as union president? Was that exciting? [D]id you feel a sense of responsibility? Can you just tell me what's your feeling at this time assuming this new role?
>
> **A [Nicole Hotz]:** Yeah. There is absolutely a lot to take on with this role that I wasn't expecting going into it. I knew that there was going to be a lot to it, not just like the paperwork and all the logistics behind it, but also the working with personnel, with administration, with the City, with Holly being a representative of the City, and then handling different complaints.
>
> So I was nervous going into it and waited to make sure that I understood the role of the union.
>
> **Q:** But was there ever any point in time where . . . you're taking on this new role and you're aware that Officer Martens had been transferred under the circumstances that we're talking about, was there ever any moment where you just kind of thought to [yourself], "My goodness, what have I gotten myself into taking on this job of union president?"
>
> **A:** Yeah, absolutely. Officer Martens had showed me the email sent to HR and we kind of discussed that. My concern, with not knowing the full picture of what had happened, and I don't think at that point he had been – or we had been advised that he was being removed from SRT or investigations, but part of that was making sure I was doing the right thing in this union role and making sure I wasn't crossing any lines or getting myself into trouble.
>
> So, yeah, there was a – **I don't want to call it fear, but, yeah, it made me absolutely nervous just based off that conversation**.

Tr. pp. 87-88 (emphasis added).

Read as a whole, Hotz's testimony reveals she is well-spoken and articulate. More importantly, in reflecting on her feelings about assuming the role of MPPA president, Hotz unequivocally stated that while she was nervous, she was not fearful. The ALJ's finding to the contrary is not supported by Holz's testimony, and therefore, the Board will not adopt the final sentence of section 1.6 of the ALJ's proposed decision.

The City also requests the Board reverse an additional finding of fact in section 1.6 of the proposed decision relating to City police chief Michael Kitsmiller (Kitsmiller); however, the Board declines to do so. The finding in question provides: "The chief also expressed that the [MPPA] represents officers, but is not adversarial." App. A, p. 9. The City contends that Kitsmiller's testimony is clear in expressing his belief that he views his relationship with MPPA as being not adversarial; however, the City contends that Kitsmiller did not testify that the MPPA is not an adversarial organization over all. Opposing the City's request, MPPA contends the record fully supports the finding of fact disputed by the City.

Once again, we turn to the testimony. During cross-examination, MPPA asked Kitsmiller whether there is an adversarial component within the relationship between a public employer and an employee organization. Kitsmiller responded in the negative, stating "in the context of me talking about my belief, about my relationship as the chief with the MPPA, is not adversarial." Tr. p. 160. Similarly, when asked during direct questioning to describe his view of MPPA, Kitsmiller testified that MPPA is "not adversarial." Tr. pp. 150-51, 160. The ALJ's finding at issue is fairly supported by Kitsmiller's testimony, and the Board declines to reverse.

Based on its review, other than the final sentence of section 1.6 discussed above, the Board finds the ALJ's findings of fact to be supported by the record.

CONCLUSIONS OF LAW

Pursuant to PERB rule 621—9.5(2) and Iowa Code section 17A.15(3), the Board may reverse or modify any proposed conclusion of law the Board finds to be in error. Iowa Code § 17A.15(3); Iowa Admin. Code R. 621-9.5(2)(2023). Finding one of the ALJ's conclusions of law to be erroneous, the Board reverses for the reasons to follow.

The parties jointly contend this matter is governed by the dual-motive test established in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1053, *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982); *see Ross v. Publ. Emp't Relations Bd.*, 417 N.W.2d 475, 477 (Iowa Ct. App. 1987) (applying *Wright Line* framework in determining whether an employer took adverse employment action against an employee because of employee's union activities or for another reason). Likewise, the ALJ utilized the *Wright Line* analysis to guide the review. App. A, pp. 12-13.

As described by the Iowa Court of Appeals, under the *Wright Line* burden-shifting analysis:

> The employee must establish a prima facie case that the employee's protected conduct (i.e., union activity) was a "substantial or motivating factor in the [adverse employment action]." The burden then shifts to the employer to demonstrate by a preponderance of the evidence that the [adverse employment action] would have taken place even in the absence of the protected conduct. The shifting burden requires the employer to make out what is actually an affirmative defense: [the adverse employment action] would have occurred in any event and was a lawful discharge for valid reasons.

Cerro Gordo Cnty. v. Pub. Emp't Relations Bd., 395 N.W.2d 672, 676 (Iowa Ct. App. 1986) (citations omitted).

To set forth a prima facie case under *Wright Line*, the complainant must establish the following elements: (1) the existence of protected activity, (2) knowledge of that activity by the public employer, and (3) union animus. *Cedar Rapids Firefighters Ass'n Local 1366 and City of Cedar Falls*, 2022 PERB 102426 at *3; s*ee also Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (Nov. 22, 2019) (holding "that *Wright Line* is inherently a causation test" and the "evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee"). The City concedes that MPPA established the first two elements: existence of protected activity and knowledge of the activity by the public employer). However, the City argues the ALJ erred in the following two respects: (1) by concluding that MPPA proved the union animus required under the *Wright Line* analysis, and (2) by concluding that MPPA proved the adverse employment action necessary to support a claim of retaliation for engaging in a protected activity under Iowa Code section 20.10(2). The Board will address each in turn.

1. Union Animus.

Union animus may be established through direct or circumstantial evidence. *Public Prof'l & Maint. Emps., Local 2003 and Black Hawk Cnty.*, 2012 PERB 8216 at *8. In most *Wright Line* cases before the Board, there is no direct evidence of union animus, and the inquiry becomes whether there is sufficient circumstantial evidence from which union animus may be inferred. *AFSCME, Iowa Council 61 and State*, 2021 PERB 102340 at 12.

The Board has identified a variety of factors from which union animus may be inferred, such as the public employer's "expressed hostility towards unionization combined with knowledge of the employees' union activities," inconsistency in the asserted reason for the adverse employment action, disparate treatment of similarly situated employees, a public employer's deviation from past practices in imposing the adverse employment action, and the proximity of time between the employee's union activities and the adverse employment action. *Id.*

The record is devoid of any direct evidence establishing Kitsmiller possessed anti-union animus. Kitzmiller testified he harbored no animus towards unions, that he did not treat union employees differently than non-union employees, that he previously was a member of a union, that he previously served in a union leadership role, and that union animus did not play a role in his decision to reassign Martens. Tr. pp. 120-21. Further, at hearing, when asked whether he had any evidence that Kitsmiller harbored anti-union animus, Martens responded in the negative. Tr. pp. 51. Current MPPA president likewise testified that during her tenure as president and, previously as a union member, she never observed Kitsmiller display anti-union animus or say anything negative about the union. Simply put, there is no direct evidence that Kitsmiller opposed unions in general or MPPA specifically.

Turning to the circumstantial evidence and application of the factors from which union animus may be inferred, in the proposed decision the ALJ found union animus, in part—if not primarily—based on the timing of the alleged adverse employment action. As noted by the ALJ, Kitzmiller's decision to reassign Martens occurred the day after Martens

sent the email. App. A, p. 18. In its appeal brief, the City concedes the existence of this factor, stating the "only factor [MPPA] has shown is the timing of Officer Martens's reassignment related to his protected activity." City Brief, p. 15. The City argues, however, that timing alone is not sufficient to establish union animus. *See United Elec., Radio and Mach. Workers of Am., Local 1145 and Western Iowa Tech Cmty. College*, 2008 PERB 7252 at *8 (holding with supporting authority that even if the timing of the employer's actions is probative of union animus, timing alone, "without other evidence of hostility" is insufficient to establish union animus).

The problem with using the timing of the alleged adverse employment action as a reason for inferring union animus (*e.g.*, because the alleged discipline occurred close in time to the union activity, it can be inferred that the employer's motivation to discipline is due to the union activity) is that the alleged discipline also occurred in temporal proximity to the City's asserted reasons for imposing discipline. In fact, both the City and MPPA essentially agree as to the overarching reason for the discipline—Martens's November 30, 2021 email. MPPA asserts, and the ALJ found, that the email is protected union activity. The City contends the assertions contained within the email were factually inaccurate and, consequently, the email's contents demonstrate a lack of good judgment and decision-making skills by Martens. However, as he explained at hearing, Kitsmiller made the decision to reassign Martens not because Martens raised a serious complaint about employment conditions (*i.e.*, not because he engaged in protected conduct), but because Martens failed to ensure the allegations contained in the email were factually accurate. Therefore, because the City's asserted reasons for the discipline (*i.e.*, the factual

inaccuracies in the email) occurred at the same time as the activity that MPPA argued, and the ALJ found, to be protected, the timing of the discipline, standing alone, does not make it more or less likely that the City acted with union animus.

Further, application of the other factors from which union animus may be inferred does not support the finding and conclusion that Kitsmiller harbored anti-union animus. First and foremost, Martens testified that other than the reassignment at issue in this matter, he has no evidence that the City or Kitsmiller treated him differently because of his union membership. Tr. p. 52. The record further establishes that Martens previously complained about the terms and conditions of his employment and represented other union covered employees without the City or Kitsmiller taking adverse employment action against him. Tr. p. 151-53; *see e.g., Fraternal Ord. of Police, Lodge No. 1 and City of Council Bluffs*, 1997 ALJ 5633 at *5 (finding the union failed to demonstrate union animus where adverse employment action at issue was the first disciplinary action taken against the employee who served eight years as union president, vice-president, or member of the bargaining team). The current MPPA president similarly testified she had raised union concerns and complaints with Kitzmiller without suffering an adverse employment action. Tr. p. 85. Likewise, the record is devoid of any evidence suggesting a history of a strained or difficult relationship between MPPA and the City and Kitsmiller. *See e.g., Cedar Falls Firefighters Ass'n Local 1366 and City of Cedar Falls*, 2022 PERB 102426 at *20 (finding union animus where, in part, the evidence demonstrated that historically, the public employer and the union had a difficult and strained relationship, and that the public employer leadership expressed hostility towards the union and union leadership).

The record also does not support a finding that the City and Kitsmiller treated Martens differently than similarly situated employees. *See id.* at *17 (finding disparate treatment to be evidence of union animus). On this point, the City presented evidence showing Kitsmiller reassigned a non-union employee who demonstrated poor judgment and decision-making from investigation to patrol. Ex. 2; Tr. pp. 147-48.

For these reasons, the Board finds that MPPA failed to establish Kitsmiller acted with anti-union animus when disciplining Martens, and the ALJ erred in finding and concluding otherwise.

2. Adverse Employment Action.

In addressing the adverse employment action element, the ALJ relied, in part, on prior Board precedent providing a complaint letter could constitute adverse employment action relying in part on federal authority describing the parameters of "adverse employment action" in the context of discrimination claims under Title VII. *See Scott Cnty. Sheriff's Ass'n.nd Scott Cnty. Bd. of Supervisors*, 1982 H.O. 2163. Finding that Martens's reassignment could affect his future career opportunities and could negatively impact Martens financially, the ALJ concluded the reassignment was an adverse employment action. The City argues the ALJ's conclusion was erroneous, and MPPA contends the ALJ correctly resolved the issue.

In *Scott County*, a consolidated case involving two prohibited practice complaints, the Association asserted a county agent interfered with protected activity by writing a letter to the Sheriff concerning an employee, and the letter was subsequently placed in the

employee's civil service and personnel files. *Id.* at *2. In addressing whether placing the letter in the employee's personnel file constituted discipline, the Hearing Officer stated:

> there is no doubt that the presence of the letter in Benson's file can have negative implications for him. Written by a management representative, the letter is akin to a letter of reprimand, and [the employee] is justifiably concerned that the letter could be subject to review by those making future personnel decisions, such as transfer or promotion decisions, or by potential employers, should [the employee] seek other employment. Since the subject matter of the letter is a complaint by management regarding [the employee's] protected concerted activity, the placing of the letter in [the employee's] file constitutes interference, restraint and coercion of [the employee] . . . .

Id. at *9–10.

As correctly pointed out by the City, the action taken by Kitzmiller against Martens is dissimilar to what occurred in *Scott County*. The record is devoid of evidence showing the City issued Martens any written documentation akin to a written reprimand that would be placed in his personnel file. Further, there is no evidence showing that Martens, justifiably or otherwise, was concerned that the reassignment could negatively affect future personnel decisions. For these reasons, the Board finds the persuasive value of *Scott County* to be minimal.

MPPA also asserts PERB previously determined a denial of a transfer could constitute an adverse employment action and cites *Sioux City Policemen's Association and City of Sioux City*, 1979 PERB 1215, for this proposition. In *Sioux City*, the union asserted a covered employee was denied a requested transfer due to his union activities. *Id.* at *2. However, PERB did not engage in a substantive analysis as to whether the denial of the transfer constituted an adverse employment action; rather, the Board's analysis centered on the employer's motivation in transferring another employee into the position. *Id.* at *6.

On this point, the Board held the transfer decision was not motivated by anti-union animus, but by a commitment to both the interview process and another employee who had interviewed for the position. *Id.* Because the Board in *Sioux City* did not engage in an adverse employment action analysis, that decision provides little guidance to the present dispute.

Finally, the City contends the present dispute is similar to one of the alleged adverse employment actions discussed in *NLRB v. Wix Corp.*, 336 F.2d 824, 827 (4th Cir. 1964). The *Wix* decision involved a number of employees with the Court addressing each employee's claims separately. Based on its discussion of the *Wix* opinion, it is clear the City believes the Court's following discussion should guide the Board's review:

> [employee] had been continually employed on a particular punch press for over a year. The day after he displayed union buttons, he was assigned to another press. Following his protest that he was being "persecuted" and that he would not quit, [the employee] was returned to his regular press on the next day. The Company asserted that the shift was designed to train a replacement. The Examiner determined that the one day transfer was designed to penalize [the employee]. Certain remarks and conversations between [the employee] and Company officials, in particular a suggestion that he post on the bulletin board a repudiation of the union, were also treated as offensive to the Act in that they constituted an 'interference, restraint and coercion of employees'.

!
Id.

Even assuming solely for the sake of argument that the above-quoted passage stood for the proposition that the transfer did not constitute an adverse employment action (although it does not), the Board does not find the one-day transfer to be as similar to the present matter as suggested by the City. Perhaps the *Wix* opinion would have some value

had the City transferred Martens back from patrol to investigations after one day; however, that did not occur.

Recognizing that PERB has not directly addressed the range of action that could constitute an adverse employment action for purposes of a retaliation complaint under Iowa Code chapter 20, the ALJ relied upon *Martin v. Champion Ford, Inc.*, for the proposition that "adverse employment action" in the context of Title VII discrimination claims is understood to mean "a tangible change in working conditions that produces a material employment disadvantage, including but not limited to, termination, cuts in pay or benefits, and changes that affect an employee's future career prospects, as well as circumstances amounting to a constructive discharge" and that insignificant "changes in working duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, are not adverse employment actions." 41 F. Supp. 3d 747, 761 (N.D. Iowa 2014). The City argues the ALJ's reliance on such authority is an error, and the Board should only rely on NLRB and federal decisions interpreting the NLRA as persuasive authority.

PERB has previously relied on cases interpreting Title VII and the Iowa Civil Rights Act. *See e.g., Flippin v. State*, 14-MA-13 (in a merit-covered disciplinary case, PERB relied on a number of federal and state civil rights cases in deciding whether just cause existed to support a termination). Perhaps it makes some sense in finding that the "adverse employment action" element necessary to support a prohibited practice complaint under Iowa Code chapter 20 is provided the same or similar meaning as the "adverse employment action" element necessary to support an employment-related claim under the Iowa Civil

Rights Act, Iowa Code chapter 216. However, given the scope of the arguments raised by the parties, this is not the appropriate case to delve into this issue.

Based on the unique facts implicated in this case and the record created, the Board concludes that MPAA established that Kitzmiller's involuntary reassignment of Martens constituted an adverse employment action. While it is true that the reassignment did not result in a lower hourly rate of pay, Martens testified that the reassignment caused him to lose out on opportunities to earn compensatory time and caused a change in his work hours. Martens further testified that the reassignment resulted in fewer training opportunities. The Board concludes these changes are not so inconsequential as to find no adverse employment action occurred. Consequently, the Board finds that the ALJ's findings on this issue was not erroneous and concludes that MPPA established that Martens suffered an adverse employment action.

For these reasons, the Board reverses in part, the proposed decision of the ALJ and finds, due to a lack of union animus, MPPA failed to prove the City committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a), (c), and (d) by involuntarily reassigning Martens.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the decision of the Administrative Law Judge's Proposed Decision is reversed in part, no prohibited practice is found and fees are assessed to the Complainant, Marion Policeman's Protective Association.

DATED this 11th day of December, 2023.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: */s/ Matthew Oetker*
Matthew Oetker, Board Chair

/s/ Catherine Lucas
Catherine Lucas, Board Member