COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DEPUTY SHERIFFS ASSOCIATION OF CHESTER COUNTY	:	
v.	:	Case No. PERA-C-12-68-E
CHESTER COUNTY	:	

FINAL ORDER

Chester County (County) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on December 31, 2013 to a Proposed Decision and Order (PDO) of the Hearing Examiner issued on December 11, 2013.[1] In the PDO, the Hearing Examiner concluded that the County violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) by terminating the employment of Patrick Miller, the President of the Deputy Sheriffs Association of Chester County (Association). The Secretary of the Board granted the County an extension of time for filing a brief, and the County's brief in support of the exceptions was filed on January 31, 2014. The Association filed a brief in response to the exceptions on February 19, 2014. The facts of this case, as found by the Hearing Examiner, are summarized as follows.

Patrick Miller was a deputy sheriff and president of the Association. (FF 5 and 6). Sheriff Carolyn Welsh was aware of Miller's role with the Association, and initially allowed Miller to use a second floor office to perform Association business such as drafting by-laws. (FF 3, 15).

On January 26, 2012, the Association, through counsel, faxed and mailed the request for a "joint" representation petition to Chester County Chief Administrative Officer Mark J. Rupsis. (FF 7). Five days later, on January 31, 2012, Miller took time off from work for a dentist's appointment. (FF 8). At 10:02 that morning, Corporal Suzanne Campos sent an e-mail to Miller indicating that he was a "no call/no show" and that while a request for leave had been found, it had not been approved. Campos directed Miller to submit a "to/from" as to "why [he] did not follow policy in regards to time off." Miller replied that he did have approval and indicated that he "will never fill out a 'to/from' for anything …" (FF 9). Upon investigation, Corporal Campos determined that Miller was correct in stating that the leave had been approved. (FF 10). Even though she considered Miller's "I will never" remark to be insubordinate and "harsh", Campos made no attempt to address Miller's refusal to follow her order to submit the "to/from" memo. (FF 11).

On February 3, 2012, the Association filed a petition with the Board at Case No. PERA-R-12-33-E, seeking certification as the exclusive representative for all deputy sheriffs employed by the County. (FF 13 and 14). After the petition was filed, Miller was approached by Sergeant Jason Suydam and presented with a petition from corporals and supervisors, asking that they be excluded from the unit and withdrawing their support for the Association. (FF 16). Also around that time, Association Vice President Brad DeSando reported to Miller that several supervisors told him that they had felt pressured by Sergeant Suydam to rescind their support and sign the petition. (FF 17).

On February 2, 2012, to address the issues raised by Suydam and DeSando, Miller distributed a letter on behalf of the Association to all supervisors, stating as follows:

> The Association is in receipt of your request to revoke your names from any support for the [Association]. It appears your request is based on your belief that you are supervisors. However, your exact status is a matter of law that will soon be decided by the Pennsylvania Labor Relations Board as part of our petition. Our petition specifically excludes first-level

[1] The County also requested oral argument. The request is denied because the County's exceptions present no novel issues of fact or law, and the parties' positions may readily be ascertained from the briefs.

> supervisors and supervisors from the bargaining unit. Accordingly, if the PLRB determines that corporals and/or sergeants are supervisors, then you will not be part of the bargaining unit the Association seeks to represent. More important, and in connection with your request, any prior statements of support by you will effectively be revoked. If on the other hand, you are not supervisors, then you will be included in the bargaining unit. At that point, whether you choose to support the Association is entirely up to you, and can be expressed during the secret ballot election process the PLRB will conduct.
>
> Finally, you should know that, if you are not supervisors as a matter of law, then any attempts by management to have you withdraw your support from the Association and sign the petition you presented to me is *illegal* (sic), as employees in Pennsylvania have the right to organize and join and assist unions. If you are not supervisors, and the Association learns that management coerced you in any way concerning your request, the Association intends to vigorously defend your rights before the Board.

(FF 18) (emphasis in original).

On February 6, 2012, Miller was called into the Sheriff's office. Already there were Association board members DeSando and Anthony Schuibbeo, and joining the Sheriff were Chief Deputy Sheriff James Moyer, Captain Joseph Carbo and Lieutenant John Freas. (FF 19). According to Miller, the meeting was "angry". The Sheriff was not happy about Miller's February 2 letter, and raised concerns about "lies" being spread throughout the department, particularly Miller's statement insinuating that management coerced employes. (FF 20). Sheriff Welsh also raised concern that a lawyer had been hired by the Association. (FF 20). During the meeting, Captain Carbo indicated that he thought the Association's role would be to simply express ideas to the Sheriff who would then advocate on employes' behalf concerning wages and pensions. (FF 21). Sheriff Welsh mentioned the recently-filed representation petition, and indicated that she did not know the direction in which the Association was now going, and that "things change now." (FF 20).[2]

On February 14, 2012, Miller reported to work, and attended roll call. Corporal Suzanne Campos conducted the roll call that day at 8:00 a.m. Afterwards, she was advised that several deputy sheriffs, including Miller, were late to roll call. (FF 23). At around 9:00 a.m., Corporal Campos met with Miller in a secured hallway outside the squad room, and asked Miller to submit a "to/from" report regarding his being late to roll call. Miller refused and advised Campos that he did not believe in "to/from" reports and, as he was not late, he could not submit something that was not true. (FF 24).

Corporal Campos then reported the incident to her sergeant, Sergeant John McCray. At about 9:15, Corporal Campos and Sergeant McCray met with Miller outside the sergeant's cubicle area. Sergeant McCray asked Miller to submit a "to/from" report, and Miller again refused. (FF 25). Miller explained that he was not late for roll call and, if the "to/from" required him to lie by saying he was, he would refuse to submit a report that he viewed as unlawful. (FF 26). Campos and McCray then brought the matter to the attention of Lieutenant John Freas. Campos, McCray and Freas then met with Miller at around 1:00 p.m. in the conference room of the training office. Lieutenant Freas asked Miller whether he understood the rules and consequences of disobeying a direct order, and Miller indicated that he did. (FF 27).

[2] Miller prepared notes less than an hour after the meeting revealing that Captain Carbo indicated that supervisors had been previously told by the Sheriff to watch the direction of the Association, and may have been instructed to "keep an eye on it." In addition, Miller's notes reflect that the Sheriff stated during the meeting that she didn't want any side agendas getting through, and that there are "some bad apples here and we don't want someone who has an ulterior motive to start pushing their agenda." (FF 22).On exceptions the County asserts that Miller's notes should be afforded little weight.

Following the meeting with Lieutenant Freas, Freas reported Miller's insubordination to the Sheriff with a recommendation that he be terminated. (FF 34).[3] The Sheriff did not question Miller, and her investigation consisted of Freas' account and reviewing statements submitted by Campos and McCray. (FF 36). After hearing Freas' recommendation, Sheriff Welsh contacted the County's Human Relations Office and advised them that she planned to terminate Miller's employment as a deputy sheriff. (FF 35).

Towards the end of the day on February 14, 2012, at about 3:14 p.m., Miller sent an e-mail to Campos, with copies to McCray and Freas, stating:

> Throughout the day I have thought about our interaction this morning, and the more I think about it the more I return to the conclusion that I overreacted to your request. I apologize for coming across that way and not being more open minded to your suggestions. I am human like everyone else, and I mistakes too – that was a mistake. I knew that I did not violate any rules and that roll call was started early, but that is where my innocence ended. Ironically, once I refused the "To/From", I believe that I was at least borderline insubordinate and I apologize for that.

(FF 28). About twenty minutes later, Miller submitted a "to/from" memo to Campos by way of e-mail. (FF 30). Miller also approached Campos and apologized for previously refusing to submit a "to/from" report. (FF 31). In addition, Miller also met with Freas, again apologizing for his actions and indicating that he had submitted the "to/from" memo to Campos. (FF 32).

On February 14, 2012, the Secretary of the Board administratively dismissed the Association's representation petition at PERA-R-12-33-E. On February 15, the Sheriff learned that Miller had apologized, but she did not change the conclusion that she reached the day earlier that Miller had to be terminated. (FF 39). On February 16, 2012, Miller was called into the Sheriff's office and was terminated. (FF 37).

On exceptions, the County argues that the Hearing Examiner erred in finding that the Association established a *prima facie* case of discrimination under Section 1201(a)(3) of PERA. Alternatively, the County argues that the Hearing Examiner erred in determining that the County did not rebut the Association's *prima facie* case by establishing a nondiscriminatory reason for its action. The County also contends that the Hearing Examiner erred in concluding that the County violated 1201(a)(3) of PERA because its action against Miller was inherently destructive of employe rights. In addition, the County contests the Hearing Examiner's alternative theory that the County's termination of Miller interfered with or coerced employes in the exercise of protected rights in violation of Section 1201(a)(1) of PERA.

Generally, to establish a prima facie case of discrimination under Section 1201(a)(3) of PERA, the complainant must show 1) that the employe was engaged in protected activity, 2) that the employer knew of the protected activity, and 3) that the employer was motivated by anti-union animus in taking action against the employe. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). There is no dispute in this case that Miller was engaged in protected activity of which the Sherriff was aware. The issue in this case turns on motive, and it is the employer's motive that creates the offense under Section 1201(a)(3) of PERA. **PLRB v. Ficon**, 434 Pa. 383, 254 A.2d 3 (1969).

In most cases, whether the employer harbored union animus must be based on inferences drawn from the facts of record. **St. Joseph's Hospital**, *supra*.; **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). In determining whether union animus

[3] The County's Employee Policies Handbook lists "insubordinate acts or statements" as subject to discipline "up to and including termination." (FF 41). The Sheriff's Policy and Procedures Manual states that discipline is to be progressive (Order 5.18), and used as a corrective tool (Order 5.17). It also states, "Only after it has been firmly established that positive discipline has failed to resolve an issue may negative discipline be considered."(Order 5.16). (FF 43).

was a motivating factor in the employer's decision, the Hearing Examiner may look to the totality of circumstances, including the timing of the adverse action in relation to protected activities, any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employe, and the effect of the employer's adverse action on other employes and protected activities. **PLRB v. Berks County**, 13 PPER ¶ 13277 (Final Order, 1982); **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978).

Based on the totality of circumstances, the Hearing Examiner determined that the Association established a *prima facie* case of discrimination. The County argues that the Hearing Examiner could not have inferred union animus for Miller's termination from Corporal Campos' January 31, 2012 request that Miller explain his absence on that day. The Hearing Examiner factored this circumstance into his analysis on the basis that Campos' request for Miller to explain his **approved** leave on January 31, 2012, was made only five days after the Association requested the County join in its representation petition.

The County also contends that union animus cannot be inferred from the February 6, 2013 meeting in the Sheriff's office. However, there is ample competent evidence from the testimony of record concerning this meeting upon which the Hearing Examiner could rely to infer union animus. Miller testified that Sheriff Welsh, Captain Carbo and Lieutenant Freas were angry during the meeting, and accused Miller of spreading lies that employes were being coerced. (N.T. 17-18). Miller testified that the Sheriff was not happy about his February 2, 2012 letter, and expressed that she did not want letter passing going on in the Sheriff's department. (N.T. 18). Miller further testified that the Sheriff raised concern about the Association hiring a lawyer, and stated that she did not know in which direction the Association was going, and that "things change now." (N.T. 18).

The County also asserts that the fact that Miller was the lead organizer and visible head of the Association does not create an inference of union animus. While standing alone this fact may not support a conclusion of union animus, the Hearing Examiner did not err in including Miller's active and visible role in the Association as one of the many factors to consider under the totality of circumstances.

The County also argues that the Hearing Examiner erred in determining that the County's termination of Miller, rather than a lesser form of discipline was indicative of union animus for purposes of the *prima facie* case. However, it is well-established that a finding that the employer could have chosen to impose a lesser form of discipline is a factor to be considered under the totality of circumstances for establishing a *prima facie* case of discrimination under Section 1201(a)(3) of PERA. **Lehighton Area School District v. PLRB**, 682 A.2d 439 (Pa. Cmwlth. 1996). Record evidence supports the Hearing Examiner's finding that the County's disciplinary policies state that discipline is to be used as a "corrective tool" and that "[o]nly after it has been firmly established that positive discipline has failed to resolve an issue may negative discipline be considered." (FF 43). The County's discipline policy also allows for discipline of "up to and including termination". (FF 41). Thus, the Hearing Examiner did not err in including these facts in his deliberations.

Upon review of the totality of circumstances, including the Hearing Examiner's Findings of Fact and the record as a whole, there is a preponderance of substantial evidence from which to infer union animus. Accordingly, the Hearing Examiner did not err in determining that the Association satisfied its initial burden of proving a *prima facie* case of discrimination under Section 1201(a)(3) of PERA.

However, this does not end the inquiry. Once the burden of a *prima facie* case has been met, the employer may rebut a charge of unfair practices under Section 1201(a)(3) of PERA, by proffering a credible nondiscriminatory reason for its actions. *See* **Perry County v. PLRB**, 634 A.2d 808 (Pa. Cmwlth. 1993). In this regard, the Hearing Examiner determined

that the County's evidence of the Sheriff's conciliatory attitude toward the Association did not rebut the Association's *prima facie* case of discrimination. However, the County's proffered nondiscriminatory reason was not the conciliatory attitude of the Sheriff, but Miller's acts of insubordination in refusing to comply with the order of his supervisors to submit a "to/from" memo. Miller himself admits that his refusal to submit the "to/from" was "borderline" insubordinate. Accordingly, there is irrefutable substantial evidence of record that there exists an alleged nondiscriminatory reason, in this case insubordination, for the County's termination of Miller's employment.

Once the employer establishes a nondiscriminatory reason for its actions, the burden shifts back to the complainant to prove that the employer's asserted reasons were a mere pretext for the discipline imposed. **Teamsters Local #429 v. Lebanon County and Lebanon County Sheriff**, 32 PPER ¶32006 (Final Order, 2000). The complainant's burden to establish pretext is to prove, through evidence of record, that the employer's asserted reasons for its actions are actually a false pretense.

A simple showing that the employer lacked "just cause" to discipline does not satisfy the complainant's heightened burden of proving pretext. **Lakeland Educational Support Professionals v. Lakeland School District**, 40 PPER 120 (Final Order, 2009). "An employer's sincerely held, but incorrect (under a "just cause" standard) belief that an employe has committed a dischargeable offense is not an unfair practice." **Matthew J. Wadas, Jr. v. Bucks County Community College**, 36 PPER 84 at 248 (Final Order, 2005). To establish pretext, the complainant must show, by a preponderance of the evidence, that the employer would not have taken the same action against the employe in the absence of protected activity.

Upon review of the record as a whole, we find that there is insufficient evidence to support a finding that the County's assertion that Miller was terminated from employment for insubordination was pretextual. *See* **Shive v. Bellefonte Area Board of School Directors**, 317 A.2d 311 (Pa. Cmwlth. 1974) (suspicion alone will not support an inference of motive); **Teamsters Local Union No. 500 and Eve Carter v. Southeastern Pennsylvania Transportation Authority**, 28 PPER ¶28025 (Final Order, 1996) (same). The timing between Miller's protected activity and his termination, with his admitted intervening acts of insubordination, does not establish the falsity of the employer's reasons for its actions. Similarly, just because Miller was the President of the Association does not establish that the County fabricated his insubordination or reasons for his termination.

Further, on this record, the level of discipline meted out does not compel a finding of pretext. While an employer's discretionary decision to terminate an employe as opposed to a lesser form of discipline may factor into the *prima facie* case, that consideration is different than proving that the employer's decision to terminate the employe for an alleged rule infraction was pretextual. Contrary to the record here, evidence of pretext may exist, for instance, where the employer terminates an employe despite a progressive discipline policy, or past practice, that commands a lesser form of discipline for the alleged infraction. However, simply because the employer could have chosen a lesser disciple or lacked "just cause to terminate" under the disciplinary policy, while suspicious, does not establish pretext.

Here, the County's disciplinary policies did provide that progressive discipline should be utilized, and that insubordination was punishable "up to and including termination." However, the policies also listed "insubordination" as a "critical offense," and identified termination as the discipline for a first offense of insubordination. (County Exhibit 2, Employee Policies Handbook at 40229). The fact that the County could have chosen a lesser discipline does not compel the conclusion that its permissible exercise of discretion under the discipline policy to terminate Miller for insubordination was pretext.

Further, the Association has not established any disparate treatment, or disparate application of the discipline policies. While the Hearing Examiner found that no employe was ever disciplined for insubordination, the County witnesses testified, unrebutted, that the Sherriff's office has not had previous instances of insubordination. Thus, no disparate treatment can be found on this record. **Pittston Area School District**, 27 PPER ¶27066 (Final Order, 1996).

Further, the facts of this case do not fit squarely within the holding of **Foster Township**, 21 PPER ¶ 21159, (Final Order, 1990). In **Foster Township** the employer allowed the employe's failure to serve a bench warrant to pass without discipline, but after a Board certification election, used that same incident in terminating the employe. Here, on the other hand, Miller's act of refusing to submit a "to/from" to Campos on January 31, 2012 was a single offense which, once the underlying issue of the leave was resolved, was not addressed further, and did not subsequently form the basis for his termination. Thereafter, on February 14, 2012, Miller engaged in arguably three more separate instances of insubordination with Corporal Campos at 9:00 a.m.; Sergeant McCray at 9:15 a.m.; and then Lieutenant Freas at 1:00 p.m.. It is these instances of insubordination, not the January 31, 2012 incident, which formed the basis for the employer's decision to terminate Miller's employment for acts of insubordination.

Moreover, the statements made during the February 6, 2012 meeting do not support a finding that the termination of Miller for his subsequent act of insubordination was pretext. At best the statements of Captain Carbo to keep an eye of the Association, and the Sherriff's comments about "bad apples" and "ulterior agendas" raise some suspicion of union animus, but are not substantial evidence establishing the falsity of the County's decision to terminate Miller for his act of insubordination.

Upon review of the record as a whole, under the totality of circumstances, the Association has failed to carry its burden of proving, by a preponderance of evidence, that the County's decision to terminate Miller for insubordination was pretextual. Accordingly, the County's unrebutted justification for its decision to terminate Miller's employment compels the Board to conclude that the County has not violated Section 1201(a)(3) of PERA. *See* **Wright Line**, 251 NLRB 1083, 105 LRRM 1169 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612 (1982).

As an alternative, the Hearing Examiner determined that the County's actions were so inherently destructive of employe rights that the only inference to be drawn was that the County's termination of Miller was done for an unlawful discriminatory motive. *See* **NLRB v. Great Dane Trailers, Inc.**, 388 U.S. 26 (1967). However, in **SEPTA**, *supra.*, the Board recognized as follows:

> When an action has unavoidable consequences which are severely destructive to employe interests, the impact is reasonably foreseeable and therefore must have been intended by the employer which took the action. [**NLRB v. Erie Resistor Corp.**, 373 U.S. 221, 315 (1963)]. Such actions carry their own indicia of intent and no further showing of discriminatory motive is required. *Id.* at 316. The Supreme Court characterized this rationale as "but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct." **NLRB v. Brown**, 380 U.S. 278, 287 (1965).
>
> * * *
>
> SEPTA argues that the hearing examiner erred in determining that its discharge of Carter and subsequent handling of Carter's discharge rose to the level of "inherently destructive" action. We agree. The discharge of an employe, even a union steward, is not, without examination of the employer's motive, inherently destructive of employe rights under the factual circumstances as found by the hearing examiner. The discharge of an employe

> is an action which employers are permitted to take for any reason, except one that is proscribed by PERA. Though the act of discharging a union steward may raise suspicion, it does not, in and of itself, unequivocably show any definite discriminatory motivation. To determine whether the motive was in fact discriminatory, it is necessary to examine all of the facts and circumstances surrounding the discharge. Thus, unlike the super-seniority in **Erie Resistor**, *supra*, the discharge of an employe is not an action which can be said to carry its own indicia of intent. Neither is the handling by SEPTA of Carter's discharge an action which speaks for itself through its impact on the employe or the union. It is necessary to examine the surrounding circumstances to ascertain SEPTA's motivation for this action as well, because mishandling of a discharge is not something which generally occurs but for anti-union animus.
>
> Accordingly, it will be necessary to analyze these actions under the Board's traditional discrimination analysis, articulated by our Supreme Court in **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977).

SEPTA, 28 PPER at 58. Similarly here, on this record, with competing discriminatory and legitimate reasons, the County's action in terminating Miller for insubordination is not an act which, on its face and by its very nature, must have been borne from an unlawful discriminatory motive. Accordingly, the County's motive for terminating Miller's employment must be analyzed, as above, under the framework of **St. Joseph's Hospital** and **Wright Line**, and not under the rubric of **Great Dane**. *See* **SEPTA**, *supra.*

The County also contends on exceptions that the Hearing Examiner erred in concluding that it committed an independent violation of Section 1201(a)(1) of PERA. An independent violation of Section 1201(a)(1) may arise where the actions of the employer, in view of the circumstances in which they occur, tend to be coercive, or interfere with employes' exercise of protected rights. **SEPTA**, *supra.;* **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). An improper motive need not be established, and even an inadvertent act may constitute an independent violation of Section 1201(a)(1). **Woodland Hills School District**, 13 PPER ¶ 13298 (Final Order, 1982).

However, the Board has repeatedly recognized that "[discipline], directly related to acts in defiance of the employer's instructions, does not have a tendency to coerce the exercise of protected employe rights…. [N]o policy of PERA would be served if the acts of insubordination were sheltered under the protection of the right of employes to engage in lawful union activity." **Pittston**, 27 PPER at 145. Accordingly, the County's termination of Miller for insubordination would not have a tendency to interfere or coerce employes from engaging in statutorily protected activities.

After a thorough review of the exceptions and all matters of record, we find that the County has rebutted the Association's *prima facie* case of discrimination by showing that Miller's insubordination was a nondiscriminatory reason to terminate his employment, which was not proven by the Association to be a mere pretext for the unlawful motive. Neither is the termination of Miller for insubordination inherently destructive of employe rights establishing its own indicia of an unlawful motive, nor does it coerce or interfere with employes' rights to engage in lawful protected concerted activity. Accordingly, on this record, and as a matter of law, we are compelled to sustain the County's exceptions in part, and conclude that the Association has failed to sustain its burden of proving a violation of Section 1201(a)(1) and (3) of PERA.

CONCLUSIONS

CONCLUSIONS 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside.

5. That Chester County has not committed unfair practices in violation of Sections 1201(a)(1) and 1201(a)(3) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Chester County are hereby sustained in part and denied in part, and the Order on page 12 of the December 11, 2013 PDO is vacated. It is further Ordered that the Charge of Unfair Practices in the above captioned case be and hereby is dismissed, and the Complaint issued thereon rescinded.

CHAIRMAN L. DENNIS MARTIRE DISSENTS.

I respectfully dissent. A complainant establishes a case of discrimination under Section 1201(a)(3) of PERA by showing 1) that the employe was engaged in protected activity, 2) that the employer knew of the protected activity, and 3) that the employer was motivated by anti-union animus in taking action against the employe. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). Whether the employer's actions in a particular case stem from an unlawful union animus is properly assessed by the Hearing Examiner based on inferences drawn from the evidence. **St. Joseph's Hospital**, *supra.*; **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). Those inferences necessarily involve credibility determinations and weighing the employer's true motives for its actions. **PLRB v. Ficon**, 434 Pa. 383, 254 A.2d 3 (1969). It is the function of the Hearing Examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and to weigh the probative value of the evidence presented. **Mt. Lebanon Education Association v. Mt. Lebanon School District**, 35 PPER 98 (Final Order, 2004); **Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania (Department of Corrections Pittsburgh SCI)**, 34 PPER 134 (Final Order, 2003). The Board has a long-standing and consistent policy of not disturbing the Hearing Examiner's credibility determinations absent the most compelling of circumstances, **Hand v. Falls Township**, 19 PPER ¶19012 (Final Order, 1987); **AFSCME District Council 84 v. Department of Public Welfare**, 18 PPER ¶18028 (Final Order, 1986). I see no basis, let alone compelling reasons, warranting reversal of the Hearing Examiner's rejection of the County's claim that Miller had to be fired, as opposed to progressively disciplined, for insubordination.

The Board has consistently recognized that the defense discussed in **Teamsters Local 776 v. Perry County**, 23 PPER ¶23201 (Final Order, 1992), *affirmed*, **Perry County v. PLRB**, 634 A.2d 808 (Pa. Cmwlth. 1993), that is relied upon in the Majority Opinion, does not apply in situations, as here, where the Hearing Examiner rejects the employer's proffered non-discriminatory reason for its actions as not credible. **Teamsters Local 312 v. Upland Borough**, 25 PPER ¶25195 (Final Order, 1994); **Pennsylvania State Troopers Association v. Pennsylvania State Police**, 41 PPER 33 (Final Order, 2010), *affirmed sub nom.* **Pennsylvania State Police v. PLRB**, 2011 Pa. Commw. Unpub. LEXIS 36, 41 PPER ¶ 183 (Pa. Cmwlth. 2011); *see* **Wright Line**, 251 NLRB 1083, 105 LRRM 1169 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612 (1982). Where the employer fails to establish, through credible testimony, that its chosen course of action was motivated by a nondiscriminatory reason, there is, as a matter of record, fact and law, only one motive left standing, that of the *prima facie* case of discrimination. **St. Joseph's Hospital**, *supra.*; **Perry County**, *supra*; **Lehighton Area School District**, *supra.*; **Teamsters Local Union No. 764 v. Berwick Area Joint Sewer Authority**, 39 PPER 22 (Final Order, 2008), *affirmed sub nom.* **Berwick Area Joint Sewer Authority v. PLRB**, 39 PPER 115 (Columbia County Court of Common Pleas, 2008). The County simply has failed to carry its burden of persuading the Hearing Examiner, through credible evidence, that even in the

absence of union animus, it would have terminated Miller's employment, as opposed to lesser discipline, for his alleged insubordination.

The totality of the circumstances fully support the Hearing Examiner's credibility determination and inference that union animus was, in fact, the motivation for the County's action in terminating Miller's employment. *See* **PLRB v. Berks County**, 13 PPER ¶ 13277 (Final Order, 1982); **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). The Sheriff was more than willing to provide assistance to the Deputy Sheriff's Association and Miller so long as the Association would be a social organization that merely made suggestions, not bargaining demands. Although Miller had a spotless record for over two and a half years, after the Association sought legal counsel and made a formal request that the Sheriff enter into a joint request for certification by the Board to name the Association as the deputies' collective bargaining representative, her conciliatory attitude toward Miller and the Association changed.

On January 31, 2012, after the Association sent the joint request to the County, Corporal Campos discovered a leave slip for Miller's absence that day. Without investigating whether the leave had been approved, Campos sent an email to Miller accusing him of an unexcused absence and demanded he submit a written explanation as to why he failed to follow leave policy. Faced with these false allegations, Miller understandably became defensive in explaining that he had gotten approval for leave, and would not complete a "to/from" memo explaining why he failed to follow policy when he did not. Only after this exchange did Campos conduct any investigation into the leave, only to find that Miller had indeed followed policy and had approval for the leave.

The treatment of Miller, the lead organizer and visible head of the Association, continued to deteriorate. Initially, Deputy Sheriff "supervisors" had expressed their interest in joining the Association through signing the showing of interest submitted by Miller. However, after the County became aware that the Association was seeking a bargaining unit through the Board, one of those supervisors presented Miller with a petition purportedly signed by other supervisors declaring that they no longer wished to be included in the Association. Another supervisor advised Miller that they felt coerced into signing that petition. As President of the Association, Miller did the only reasonable thing to attempt to resolve the shifting views of the supervisors, if indeed there were any. On February 2, 2013 he drafted a letter to those supervisors, advising them, correctly, that their status as supervisors and their inclusion or exclusion on the voter eligibility list for the bargaining unit, would be determined by the Board, *i.e.*, the decision of their inclusion in the unit was not theirs, or the County's, to make. Secondly, Miller advised that employer coercion is unlawful under Pennsylvania labor statutes and the Association, as the deputies' representative, would protect their rights, if necessary. Consistent with the statement in his letter that the Board would decide the appropriate bargaining unit, Miller filed the Association's petition for representation on February 3, 2013.

Thereafter, on February 6, 2013, Miller, along with the other officers of the Association, were called to a meeting in the Sheriff's office. It was evident at the meeting that Sheriff Welsh, Captain Carbo and Lieutenant Freas were angry with the Association's concerted protected activities – Miller's February 2, 2013 letter to the supervisors and the February 3, 2013 representation petition. Indeed, Sheriff Welsh advised the Association leadership that she did not want letter passing going on in the Sheriff's department. (N.T. 18). Additionally, Sheriff Welsh, Captain Carbo and Lieutenant Freas each accused Miller of spreading lies by insinuating in the letter that employes were being coerced by the Sherriff's office. (N.T. 17-18).

However, Miller's letter, although perhaps not artfully worded, was protected concerted activity, and notably only advised the supervisors of their rights and the Association's interest in protecting those rights. The Sheriff's directive to the

Association to cease such letter writing is clearly evidence of her efforts to hamper the Association's organizing drive and her obvious union animus.

Moreover, the County's accusations that Miller was somehow lying in the letter is troubling and evidence of unlawful motives. It should be self-evident that where, as here, the employer, who would be the party doing the alleged coercing, intimidates and threatens with discipline those subordinates who dare accuse it of such conduct, should be, and is, unlawful. 43 P.S. §1101.1201(a)(1). As noted above, Miller's letter, even if he accused the Sheriff of coercion, would still have been protected concerted activity under Pennsylvania labor statutes. **Pennsylvania State Police v. PLRB**, 2011 Pa. Commw. Unpub. LEXIS 36, 626 C.D. 2010 (Pa. Cmwlth. 2011). The Sheriff's displeasure with the letter's suggestion that the Association could protect the interests of the deputy sheriffs vis-à-vis the Sherriff, only further supports her true unlawful motives for the termination of Miller's employment.

The Sheriff's union animus is evidenced by her own words. During the meeting on February 6, 2013, the Sheriff verbally expressed her union animus toward the Association. Miller's notes of the meeting reflect that the Sheriff stated that she didn't want any side agendas getting through, and that there are "some bad apples here and we don't want someone who has an ulterior motive to start pushing their agenda." (FF 22). The Sheriff stated that she did not know in which direction the Association was going, and raised concern about the Association having hired a lawyer. She advised the Association that "things change now" (N.T. 18), and Captain Carbo revealed that supervisors were instructed by the Sheriff to "keep an eye on [the Association]".

Indeed, consistent with the Sheriff's directive to surveil the Association, the County spotted its opportunity only eight days later. On February 14, 2012, Corporal Campos conducted the roll call at 8:00 a.m. where she took attendance of the Deputy Sheriffs. Although she did not notice Miller's absence at roll call, after roll call was complete she was advised by another supervisor that Miller was late to the roll call. (FF 23). At around 9:00 a.m. that morning, Corporal Campos met with Miller in a hallway outside the squad room concerning his late arrival to roll call. Even though Miller stated to her that he did not believe he was late, and with her knowledge that Miller had previously told her that he would not complete a "to/from" memo when he believed he did nothing wrong, Campos directed him to submit a "to/from" report explaining why he was late to roll call. (FF 24). When Miller refused to submit a "to/from" admitting he was late, it took Campos less than fifteen minutes to report this alleged "insubordinate" response to her supervisor. At about 9:15, Corporal Campos and Sergeant McCray met with Miller outside the sergeant's cubicle area, where Sergeant McCray directed Miller to submit a "to/from" report, and Miller again refused noting that he was not late and declined to submit a "to/from" memo that required him to lie. (FF 25 and 26).

I believe the County's repeated demands of Miller to complete the "to/from" was not merely some gratuitous opportunity for Miller to comply, but an attempt to obtain ammunition against an active and visible player in the Association's organizational effort. Indeed, Campos and McCray did not try to further convince Miller to explain his side of the story in a "to/from" memo, or even accept his verbal explanation, but instead immediately went to the Lieutenant, John Freas. Campos, McCray and Freas then met with Miller at around 1:00 p.m. Lieutenant Freas yet again directed Miller to submit the "to/from" and without advising him of the need for the "to/from" or the consequences of failing to submit it, merely asked Miller if he understood the rules and consequences of disobeying a direct order. (FF 27). With the discussion between Miller and Freas, the set up was complete, as Freas then immediately went to the Sheriff and recommended nothing less than termination of employment for the President of the Association. Indeed, the alleged "insubordination" that Freas believed only warranted the most severe of industrial capital punishment was not any safety issue or even disruptive of the Sheriff's office, but was notably for failing to complete a "to/from" memo admitting that he was late to roll call when Miller verbally advised them several times that he was not late and therefore would not admit to being late in a written memo.

Despite Freas' recommendation that termination of Miller's employment was the Sheriff's only recourse, the County's disciplinary policies state that discipline is to be used as a "corrective tool" and that "[o]nly after it has been firmly established that positive discipline has failed to resolve an issue may negative discipline be considered." (FF 43). There is no evidence of record that Campos, McCray or Freas even attempted to impose any form of "positive discipline" prior to recommending that Miller be discharged.

To the extent the County argues that Miller's alleged insubordination was incompatible with continued employment, it is strikingly noticeable that none of the supervisors with authority to discipline short of termination took any immediate action to remove Miller from the workplace before the end of the day on February 14, 2013. Indeed, by the end of the day on February 14, 2014, Miller complied with the directive to submit the "to/from" memo, and apologized to Campos and McRay and Freas for the tenor of his earlier response. Miller reported to work on February 15, 2014, without incident or anything being said to him concerning the events of the previous day. The next day, two days after the alleged incident that purportedly required Miller's immediate termination from employment, and despite Miller's intervening compliance with the submission of the "to/from" memo and apology, the Sheriff without even hearing Miller's side of the story, fired Miller. On these facts, it can hardly be said that "positive discipline", as required by the County's disciplinary policy, was even considered, let alone followed. It is firmly founded in Board law that an employer's failure to follow the directives of its own progressive discipline policy is indicative of a discriminatory motive under Section 1201(a)(3) of PERA. **Lehighton Area School District v. PLRB**, 682 A.2d 439 (Pa. Cmwlth. 1996).

Further, the Secretary of the Board mailed an administrative dismissal of the Association's representation petition to the parties on February 14, 2014. Thereafter, rubbing the proverbial salt in the wound, the Sheriff attended roll call, and with Miller visibly absent, advised the Deputy Sheriffs that the issue of union representation was now over. The Sheriff's subsequent actions at roll call sent the message to the deputy sheriffs of her union animus and that protected concerted activities, such as that engaged in by Miller, would not be tolerated. The Sheriff's actions at roll call that day are clearly indicative of her discriminatory motive in terminating Miller's employment.

Upon review of the totality of circumstances as found credible by the Hearing Examiner, there is substantial evidence supporting the Hearing Examiner's rejection of the County's alleged non-discriminatory reason, and from which the Hearing Examiner could infer that the Sheriff's true motive in terminating Miller's employment was out of an unlawful union animus. Accordingly, I would hold that the Hearing Examiner did not err in determining that the County unlawfully discriminated against Miller in terminating his employment in violation of Section 1201(a)(3) of PERA.

Furthermore, I would also adopt the Hearing Examiner's conclusion that on the totality of the circumstances, the Sheriff's actions in terminating Miller, the Association President, were so inherently destructive of employe rights that the only inference to be drawn was that it was done for an unlawful discriminatory motive. *See* **NLRB v. Great Dane Trailers, Inc.**, 388 U.S. 26 (1967). In that same regard, I agree that the County committed an independent violation of Section 1201(a)(1) of PERA, which requires no showing of motive. **Woodland Hills School District**, 13 PPER ¶ 13298 (Final Order, 1982); **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). Under both **Great Dane** and Section 1201(a)(1), the offense is based on a reasonable employe's perception of the employer's actions. For a **Great Dane** Section 1201(a)(3) violation, the employer's actions are so inherently destructive of employes' prospective exercise of rights that by their very nature must have been borne from an unlawful discriminatory motive. For Section 1201(a)(1), the employer's actions merely have a tendency to coerce, or interfere with employes' exercise of protected rights without regard to the employer's motives. Terminating the employment of the Association President in the midst of an

organizing drive, and then announcing to a captive audience of employes, where their president is visibly absent due to a termination, that the employer was victorious in the dismissal of the representation petition, is beyond merely intimidating or coercing, but inherently destructive, of the prospective exercise of employe rights in violation of both Section 1201(a)(3) and (1) of PERA.

After a thorough review of the exceptions and all matters of record, I would affirm the Hearing Examiner's credibility determinations and hold that the Association has established an unrebutted showing of a *prima facie* case of discrimination by establishing, by substantial evidence of record, that the County's decision to terminate Miller's employment was motivated **not** by Miller's alleged acts of insubordination, but by union animus toward his protected concerted activities. Accordingly, I would hold that the Hearing Examiner did not err in concluding that the County violated Section 1201(a)(1) and (3) of PERA, dismiss the County's exceptions and make the PDO final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this nineteenth day of August, 2014. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.