

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
LOCAL PANEL**

Justin Janda and Paul Bollinger,	)	
	)	
Charging Parties,	)	
	)	
and	)	Case No. L-CA-21-033
	)	
County of Cook and Sheriff of Cook County,	)	
	)	
Respondents.	)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD  
LOCAL PANEL**

On January 20, 2022, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued a Recommended Decision and Order (RDO) resolving the unfair labor practice charge filed by Charging Parties Justin Janda and Paul Bollinger by finding that Respondents County of Cook (County) and the Sheriff of Cook County (Sheriff) violated Section 10(a)(1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315, when the Sheriff filed a complaint register against Charging Parties and involuntarily transferred them to less favorable assignments because they protested against the practice of cross-watching, and also threatened them in response to their protected, concerted activity. The Charging Parties and Respondents each filed exceptions, and each responded to the other’s exceptions. Upon review of the record, the RDO, exceptions and responses thereto, we accept the ALJ’s findings and recommendations dismissing the complaint for hearing and adopt the RDO as a decision of the Board.

## I. DISCUSSION

### *Summary of RDO*

ALJ Hamburg-Gal provides detailed and comprehensive findings of fact which are summarized below for context.

During the relevant time period, Janda and Bollinger were employed by the Sheriff's Department of Corrections (Department) as correctional officers, working the 3pm to 11pm shift in Division 11, one of several inmate facilities at the Cook County Jail operated by the Department. Division 11 houses both maximum and medium security inmates in 8 maximum security units and 24 medium security units. As correctional officers, Janda and Bollinger were responsible for the supervision, security, and safety of inmates, following myriad Department policies, procedures, and practices in discharging their responsibilities.

One such practice is cross watching. Cross watching is a practice of allowing one correctional officer to simultaneously supervise two housing units from the control center of one of the units. Cross watching was commonly used by Respondents throughout the Cook County Jail until a federal court issued an Agreed Order on May 13, 2010, settling a federal lawsuit filed against the Respondents by the United States Department of Justice (DOJ) over the constitutionality of inmate conditions at the jail. Under the terms of the Agreed Order, Respondents agreed to, among other things, stop the practice of cross watching in certain areas of the jail. The Agreed Order was later terminated by the court on June 26, 2018, but Respondents continued to comply with its terms as best practices.

On December 25 and 26, 2020, Janda and Bollinger worked their usual 3pm to 11pm shift. Janda was charged with overseeing two living units on both days. Both Janda and Bollinger protested against the use of the cross watching as an unsafe practice, with both speaking out against

the practice and Janda refusing to cross watch by not releasing inmates on one of the tiers he was assigned to watch on December 26, 2020. Later that same day, Salomon Martinez, superintendent of Division 11, and Michael Miller, the Executive Director of Operations for the Department, decided to file a complaint register against Janda and Bollinger with the Office of Professional Review (OPR). Superintendent Martinez then filed the complaint register against Janda and Bollinger for refusing to take their assignments and encouraging other not to take their assignments. Director Miller also decided to transfer Janda and Bollinger out of Division 11 pending the OPR investigation pursuant to Article U of the Sheriff's Employment Action Manual and Section 14.4(b) of the collective bargaining agreement between Respondents and the International Brotherhood of Teamsters, Local 700 (Teamsters). On December 26, 2020, Director Miller ordered the transfer of Janda to Division 9 and Bollinger to Division 10 effective the next day, December 27, 2020. Divisions 9 and 10 are both maximum security divisions. Janda and Bollinger were placed in those divisions because due to staffing needs and the availability of the 3pm to 11pm shift.

Shortly after their transfers, Janda and Bollinger filed separate OPR complaints against the Respondents, claiming that the cross-watching assignments were unsafe. Janda emailed Director Miller, asking for the reasons he was transferred and the grounds for the OPR investigation. Director Miller replied, citing Janda's actions of December 26, 2020 as the reason for the investigation. After their transfers, Janda and Bollinger worked in the respective divisions until each resigned, Bollinger on August 3, 2021 and Janda on December 28, 2021. Bollinger testified that he resigned because his mental health declined from the harassment, he received due to his Article U transfer status and to care for his children to save money on childcare. Janda testified that he resigned for safety reasons and because he felt Respondents retaliated against him

ALJ Hamburg-Gal found that Respondents violated Sections 10(a)(1) of the Act when they filed a complaint register against the Charging Parties and transferred them to maximum security division. She also found that Respondents violated Section 10(a)(1) when their agents made threats in response to the Charging Parties' protests against cross watching at the jail because such threats have a chilling effect on future. The ALJ, however, found that Respondents did not also violate Section 10(a)(2) when they filed a complaint register against the Charging Parties and transferred them to maximum security divisions. Although the ALJ amended the complaint to add allegations that Janda and Bollinger were constructively discharged, she ultimately found that initiating the OPR investigation and transferring them to maximum security divisions did not impose intolerable working conditions sufficient to find that Respondents constructively discharged the Charging Parties.

In addition to cease and desist orders and the order to post the accompanying Notice to Employees, the ALJ recommended that Respondents withdraw the complaint register filed against the Charging Parties, dismiss or administratively close the OPR investigation based on Charging Parties' cross watching protests, and expunge all record of such complaint register and OPR investigation from their Department employment records as remedies.

### ***Respondents' Exceptions***

Respondents filed several exceptions to the RDO contending that the ALJ erred by: (1) finding that they violated Section 10(a)(1) of the Act by retaliating against Charging Parties for protesting against cross watching at the jail<sup>1</sup>; (2) requiring Respondents to expunge all record of

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<sup>1</sup> Respondents do not take exception to the ALJ's conclusions and recommendations that Respondents' violated Section 10(a)(1) of the Act when its agents made threats to Janda and Bollinger in response to their protected, concerted activity. Thus, we deem them waived pursuant to Section 1200.135(b)(2) of the Board's rules which provide that any exception not specifically urged shall be deemed waived. 80 Ill. Adm. Code §1200.135(b)(2).

the complaint register and OPR investigation from Charging Parties' employment records; (3) finding that Charging Parties and Lt. Robert Lucas worked the third shift; and (4) finding that Superintendent Martinez "testified that the Respondents will not promote a correctional officer while they are under investigation." Additionally, Respondents ask the Board to find that they complied with the recommended order to administratively close the OPR investigation involving the December 26, 2020 incident.

Respondents' exceptions are unavailing. As discussed further below, we accept the ALJ's recommendations.

#### Section 10(a)(1) Retaliation

The first of the Respondents' exceptions takes issue with the ALJ's determinations regarding the elements of Charging Parties' prima facie case for retaliation under Section 10(a)(1) of the Act. Respondents contend the ALJ incorrectly found that Janda engaged in protected, concerted activity because contrary to the ALJ's findings, Janda did not have a good faith belief that cross watching was unsafe. Essentially, Respondents contend the ALJ should have applied an objective standard in assessing whether Janda's belief that cross watching was unsafe and that cross watching was not, in actuality, as unsafe as Janda had claimed. Respondents point to Janda's testimony that he lacked first-hand knowledge or experience with cross watching and the Charging Parties failure to rebut witnesses' testimony that Janda would have backup when was assigned to cross watch on December 26, 2020. Respondents further note that the Charging Parties provided no testimony from other correctional officers in the face of Respondents' evidence that other correctional officers safely cross watched.

Respondents' exceptions are unavailing for their arguments and citations to witness testimony that they provide in support fail to undermine the ALJ's determinations. The ALJ

observed that Respondents “suggest[ed], through their recitation of facts, that Janda’s concern over safety was unsupported by objective conditions” but rejected viewing employee safety concerns through an objective lens based on previous Board and NLRB decisions, citing County of Cook and Sheriff of Cook County, 25 PERI ¶ 74 (ILRB-LP 2009) and Odyssey Capital Group, L.P., III., 337 NLRB 1110 (2002). See (RDO, p. 21). The ALJ further noted that whether the protested working condition was actually safe or whether Respondents disagreed with Janda’s safety assessment was immaterial to evaluating the protected nature of Janda’s activity, citing Odyssey Capital Group, L.P., III., 337 NLRB 1110 (2002). Respondents, however, fail to distinguish these cases or provide any legal authority supporting their contention that an objective standard should be applied in determining whether to employee safety concerns.

Moreover, the ALJ nevertheless evaluated Janda’s activity using an objective measure and found that Janda’s safety concerns were objectively reasonable. She noted that staffing on December 26, 2020, did not conform to post orders and that Superintendent Martinez “effectively conceded that the existing complement of correctional officers did not provide sufficient backup for Janda or other officers charged with cross watching because Martinez instructed Lt. Lucas to serve as backup for cross watching officers.” See (RDO, p. 22). She also found that Janda was not informed that Lucas would stay to provide backup. Respondents likewise fail to undermine these findings. Although Respondents point to witness testimony stating that Janda would have backup on the date in question, the cited testimony does not reveal any flaw or misstatements in the ALJ’s findings on this point. For example, Respondents point to Martinez’s testimony that he told Janda that he would have “proper backup when [Janda] goes into the living unit” to support their claim that Janda was informed that he would have backup when he cross watched and entered living units. See (Resp. Ex. Br., p. 6) (citing Tr. 537:2-13). The cited passage, however, does not

state that Janda was informed that *Lucas* would act as backup, but instead, supports the ALJ's findings that Janda was not told that Lucas would stay to provide backup for cross watching officers.

Respondents also take issue with the ALJ's finding that Bollinger's protest against cross watching remained protected despite Bollinger's use of profanity. They claim Bollinger's objections to cross watching lost the Act's protections because his use of profanity while at work on December 26, 2020, violated the Sheriff's policies and as such, was a legitimate reason to initiate the OPR investigation against Bollinger and transfer him out of Division 11.

Respondents' assertions fail to undercut the ALJ's finding that Bollinger's activity remained protected because his use of profanity was unremarkable in the context of correctional work and unexceptional in the jail. Respondents rely on a previous Board case, Chicago Transit Authority (Amalgamated Transit Union, Local 241), 2012 IL LRB LEXIS 200 (Ill. Lab. Rel. Bd. December 3, 2012) to support its claim that the use of profanity removes concerted activity from the protections of the Act if such use violates an employer's rules of conduct. But Respondents' reliance on that case is misplaced. First, the citation provided by the Respondents, 2012 IL LRB LEXIS 200 (Ill. Lab. Rel. Bd. December 3, 2012) is to the administrative law judge's recommended decision and order and not to the Board's decision. The Board in its decision in that case, Chicago Transit Authority (Amalgamated Transit Union, Local 241), 30 PERI ¶ 9 (ILRB-LP 2013), rejected the administrative law judge's finding on which Respondents rely and found the use of profanity to be an insufficient justification for allowing an employer to discipline an employee for engaging in protected, concerted activity. See id. Second, the administrative law judge's finding regarding the use of profanity was made in the context of the employer's alleged legitimate business reason rather than whether the use of profanity removed the employee's

concerted activity from the Act's protections as the administrative law judge had already found the concerted activity to be protected. See Chicago Transit Authority (Amalgamated Transit Union, Local 241), 30 PERI ¶ 9 (ILRB-LP 2013) (administrative law judge's recommended decision and order); Chicago Transit Authority (Amalgamated Transit Union, Local 241), 2012 IL LRB LEXIS 200 (Ill. Lab. Rel. Bd. December 3, 2012).

#### Record Expungement

Respondents contend the ALJ erred by recommending that the Board order Respondents to expunge all record of the complaint register and OPR investigation from the Charging Parties' employment records. They assert their expungement of these records would violate Section 4 of the Local Records Act, 50 ILCS 205/1 et seq., which provides that:

All public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency *shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law.*

50 ILCS 205/4. (emphasis added). Respondents further cite to the Illinois Supreme Court's decision in City of Chicago v. Fraternal Order of Police, 2020 IL 124831, holding that the Local Records Act barred the City of Chicago from destroying investigatory and disciplinary records, including complaint registers, or law enforcement employees. *Id.* at ¶¶ 31-32, 52.

Respondents' reliance on the Local Records Act and the Supreme Court's holding in City of Chicago v. Fraternal Order of Police, is misplaced. Although Respondents accurately note that the Local Records Act governs the preservation and disposal of public records by courts, counties, municipalities, and other political subdivisions, they incorrectly assert that the Local Records Act prohibits the Board from ordering removal of certain public records from specific employee employment records to remedy unfair labor practices under the Act. The Local Records Act governs the maintenance and disposal of public records by a public body of that body's *own*

records, providing that such records “shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, *except as provided by law.*” 50 ILCS 205/4. (emphasis added). In other words, a public body under the Local Records Act’s jurisdiction may not unilaterally remove, destroy, or otherwise dispose of, its own records, except as provided by law.

Moreover, the Supreme Court’s decision in City of Chicago v. Fraternal Order of Police not only fails to support Respondents’ contention regarding application of the Local Records Act in this case, but it supports the appropriateness of expungement as a remedy. See id. In that case, the court considered whether an arbitration award interpreting a provision of the collective bargaining agreement between the City of Chicago and the Fraternal Order of Police concerning the destruction of disciplinary records after a fixed period of time violated public policy. See id. The court did not consider whether a separate agency, authorized by law, could require removal of certain such records from a specific employee employment files. See id.

As Section 11(c) of the Act authorizes the Board to order public employers found to have committed unfair labor practices to take affirmative actions necessary to effectuate the policies of the Act, we find expungement of the complaint register and OPR investigation as recommended by the ALJ, an appropriate remedy. 5 ILCS 315/11(c).<sup>2</sup>

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<sup>2</sup> Section 11(c) states in relevant part:

If, upon a preponderance of the evidence taken, the Board is of the opinion that any person named in the charge has engaged in or is engaging in an unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served upon the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action, including reinstatement of public employees with or without back pay, as will effectuate the policies of this Act.

5 ILCS 315/11(c).

### Respondents' Remaining Exceptions and Request for a Compliance Finding

Respondents' remaining exceptions to the ALJ's findings regarding the third shift and Superintendent Martinez's testimony are without merit. The ALJ found that correctional officers "work one of three shifts, first shift (11pm to 7am), second shift (7am to 3pm), and third shift (3pm to 11pm)" and that Janda and Bollinger worked the third shift. See (RDO, p. 4). Respondents contend the ALJ incorrectly designated the three shifts, pointing to paragraph 3.2 of the collective bargaining agreement which Respondents claim states the first shift as 7am to 3pm, the second shift as 3pm to 11pm, and the third shift as 11pm to 7am. Respondents also provide several citations to the hearing transcript in support of its claim that Charging Parties worked the 3pm to 11pm shift, which was the second shift, not the third shift.<sup>3</sup>

The cited provision of the collective bargaining agreement and pages of the hearing transcript, however, do not support Respondents' claim regarding the ALJ's shift designations. Although paragraph 3.2 lists the 7am to 3pm shift first, the 3pm to 11pm shift second, and the 11pm to 7am shift third, that paragraph does not expressly describe the shifts as first, second, or third for correctional officers as Respondents claim. See (Jt. Ex. 1, pp. 12, CCSO 005035). The cited witness testimony likewise fails to expressly refer to the shifts as first, second or third. Rather, the cited transcript pages all reference the shifts by their respective timeframes, i.e., 11pm to 7am, 7am to 3pm, and 3pm to 11pm. See (Tr. 43, 2-4; 44, 17-21; 57, 3-9; 67, 7-8; 80, 16-19; 296, 10-12; 316, 15-19; 329, 13-18).

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<sup>3</sup> Respondents provide the following transcript citations:

Bollinger: (Tr. 43, 2-4; 44, 17-21; 57, 3-9; 67, 7-8; 80, 16-19)  
Janda: (Tr. 296, 10-12; 316, 15-19; 329, 13-18)

Moreover, documents submitted jointly by the parties as Joint Exhibit 5,<sup>4</sup> purporting to be daily staffing documents, supports the ALJ's findings. These daily staffing documents designate the 11pm to 7am shift as the first shift, the 7am to 3pm shift as the second shift, and the 3pm to 11pm shift as the third shift, by listing them in that order and also by matching the number of officers working overtime on each shift with the corresponding shift designation. (Jt. Ex. 5, p.2, CCSO 004830; p. 8-9, CCSO 004836-38). For example, the first page of the report states 3 Overtime Officers on the "first" shift which corresponds with "the number of officers working overtime" listed on page 8 for the 2300-0700, i.e., 11pm-3pm, shift. (Jt. Ex. 5, p.2, CCSO 004830; p. 8, CCSO 004836).

Respondents' exception to the ALJ's finding that Superintendent Martinez "testified that the Respondents will not promote a correctional officer while they are under investigation" is similarly without merit. Respondents claim that Martinez testified that a pending investigation would impact an officer's ability to be promoted because an investigation would delay the promotion and cites to page 569, lines 1-3 of the hearing transcript in support. The cited passage, however, does not contradict the ALJ's finding. Rather, a review of the cited passage reveals that the ALJ's finding is supported by Martinez's testimony. Martinez testified as follows:

Q. Okay. And in just talking about what it means for an officer to be placed under investigation, do you know if that impacts their ability to be promoted?

A. Yes, it will. It will delay that, yes.

Q. How will it delay it?

A. **Because they won't promote anyone while they are under investigation.**

(Tr. 568, 21-24; 569, 1-4) (emphasis added).

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<sup>4</sup> Although the pdf file is entitled "J5-(Joint), Daily Staffing, December 26, 2020, CCSO 004830-004868," the first page of the pdf which appears to be a cover page states the exhibit as "Joint Exhibit 6."

Finally, we decline finding that Respondents complied with the recommended order to withdraw the complaint register and dismiss or administratively close the OPR investigation initiated against the Charging Parties. Such findings are more appropriately addressed and made in conjunction with compliance proceedings.

### ***Charging Parties' Exceptions***

The Charging Parties take exception to the remedial portion of the ALJ's RDO, contending the ALJ failed to award consequential damages or other make-whole remedies as a result of the unfair labor practices committed by Respondents.<sup>5</sup> Specifically, Charging Parties contend they should be awarded consequential damages or other make-whole relief for "experiencing severe emotional distress" as a result of the violations of the ALJ determined the Respondents committed. Charging Parties urge the Board to adopt the NLRB's decision in Thryv, Inc., and the International Brotherhood of Electrical Workers, Local 1269, 372 NLRB No. 22, slip op. 19, claiming that the NLRB in that case expanded the available remedies under the NLRA to include consequential damages as part of a make-whole remedy.

We find Charging Parties' exceptions to be meritless. Contrary to the Charging Parties' assertions, the NLRB's decision in Thryv does not purport to change the law on make-whole relief as asserted by Charging Parties. Rather, the NLRB in Thryv simply established new standard remedial language that clarifies and codifies its existing practices. Thryv, Inc., 372 NLRB No. 22, slip op 21.

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<sup>5</sup> Charging Parties do not take exception to the ALJ's findings and conclusions regarding the dismissal of the constructive discharge allegations. As such we deem them waived pursuant to Section 1200.135(b)(2) of the Board's rules which provide that any exception not specifically urged shall be deemed waived. 80 Ill. Adm. Code §1200.135(b)(2).

Significantly, although we frequently look to NLRB decisions as persuasive authority, the Thryv case does not require consequential damages and/or damages for emotional distress. The NLRB in Thryv did not use the term “consequential damages” when describing its holding and expressly declined to do so, noting that “consequential damages” is a “term of art used to refer to a specific type of legal damages awarded in other areas of the law and fails to accurately describe the make-whole remedial policy.” Thryv, Inc., 372 NLRB No. 22 at slip op 13.

Furthermore, our adoption of the term “consequential damages” in the Board’s remedial framework would establish a remedy broader than the one described in Thryv. The term, consequential damages, when applied in the context of tort-like remedies, can include nonpecuniary harms including emotional distress and pain and suffering. Sellers by Sellers v. Sch. Bd. of City of Mannassas, Va., 141 F.3d 524, 527 (4th Cir. 1998) (“The touchstone of a traditional tort-like remedy is redress for a broad range of harms ‘associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages.’”). Yet, the NLRB in Thryv expressly declined to extend its make-whole remedy to include compensation for nonpecuniary harms such as emotional distress.<sup>6</sup> Thryv, Inc., 372 NLRB No. 22, n. 13.

Moreover, the imposition of tort-like damages might be viewed by the courts as exceeding the Board’s authority if they are deemed punitive. An administrative body has no power to act beyond the authority granted to it by the legislature. Ferris, Thompson & Zweig, Ltd. v. Esposito, 2015 IL 117443, ¶ 16. And there is nothing in the Act that allows for the award of punitive

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<sup>6</sup> On this point, the NLRB stated the following: “The General Counsel requests that the Board modify its make-whole relief to include compensation for “pain and suffering” or emotional distress, arguing that while these nonpecuniary harms may be difficult to quantify, they are nonetheless real, direct, and foreseeable.... We decline at this time to extend make-whole relief to the nonpecuniary harms requested by the General Counsel as well as the other forms of relief mentioned by the amici.”

damages.<sup>7</sup> 5 ILCS 315/11(c). In fact, on at least one occasion, a litigant challenged a Board compliance order on the grounds that it was punitive rather than make-whole. While the court rejected the litigant’s claim on the merits, the court’s reasoning shows that the litigant’s argument could have been viable, had it been supported by the facts. Chicago Joint Bd., Loc. 200 v. Illinois Lab. Rels. Bd. Loc. Panel, 2016 IL App (1st) 140802-U, ¶ 48 (“Local 200 also failed to demonstrate that the Board’s calculation and redistribution of the settlement proceeds was clearly erroneous as a punitive award rather than a make-whole award....”).

Finally, the imposition of consequential damages could potentially be barred by the Local Governmental and Governmental Employees Tort Immunity Act (the Tort Immunity Act), 745 ILCS 10/1-101 et seq., if the damages were deemed punitive or exemplary, as opposed to merely compensatory. The purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government. Martinez v. Cook Cnty. Sheriff’s Off., 2017 IL App (3d) 160514, ¶ 19. “By providing immunity, the legislature sought to prevent public funds from being diverted from their intended purpose to the payment of damages claims.” In re Marriage of Murray, 2014 IL App (2d) 121253, ¶ 36; see also Young v. Forgas, 308 Ill. App. 3d 553, 559 (4th Dist. 1999) (if officials faced liability for performing their duties, their performance would be hampered). To that end, Section 2–102 of the Tort Immunity Act provides that, “[n]otwithstanding any other provision of law, a local public entity is not liable to pay punitive or exemplary damages in any action brought directly or indirectly against it by the injured party or

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<sup>7</sup> Section 11(c) of the Act states that the Board may “take such affirmative action including reinstatement of public employees with or without back pay, as will effectuate the policies of this Act,” including the award of interest at 7% per annum for any backpay. 5 ILCS 315/11(c).

a third party.”<sup>8</sup> 745 ILCS 10/2–102. This bar applies even if a competing statute expressly allows for punitive damages because the language, “notwithstanding any other provision of law,” grants the Tort Immunity Act precedence over other statutes that might otherwise allow the assessment of punitive damages in certain circumstances. Paulson v. Cnty. of De Kalb, 268 Ill. App. 3d 78, 82-83 (2nd Dist. 1994).

Notably, the Act has no language that would override the Tort Immunity Act. While Section 15 of the Act gives it precedence over any other law “relating to wages, hours and conditions of employment and employment relations” in case of a conflict,<sup>9</sup> the Tort Immunity Act does not address such subjects. Accordingly, the Tort Immunity Act would bar the Board from granting a remedy that could be viewed as exemplary or punitive. Admittedly, consequential damages are not usually considered punitive; however, the effect on a local public entity could be viewed as punitive if the damages were based on harms that were too speculative and/or exceeded the sum necessary to compensate for actual losses.

In sum, the ALJ’s findings and recommendations are well supported by the record and caselaw. She thoroughly analyzed the evidence and fully considered the parties’ arguments and fashioned appropriate remedies. Nothing in either parties’ exceptions undermines the ALJ’s findings, analysis, or conclusions.

For the above reasons, we accept all of the ALJ’s findings and recommendations for the reasons articulated in the RDO and adopt the RDO as a decision of the Board.

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<sup>8</sup> By contrast, “A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages (and may pay any associated attorney's fees and costs) for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article....” 745 ILCS 10/9-102.

<sup>9</sup> The Act does not take precedence over the Section 5 of the State Employees Group Insurance Act of 1971 or certain changes to the Illinois Pension Code made by Public Act 96-889, except as provided in Section 7.5). 5 ILCS 315/15.

BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ Lynne O. Sered  
Lynne O. Sered, Chairman

/s/ Angela C. Thomas  
Angela C. Thomas, Member

Decision made at the Local Panel's public meeting in Chicago, Illinois, on June 8, 2023; written decision approved at the Local Panel's public meeting in Chicago, Illinois, on July 13, 2023, and issued on July 14, 2023.

This Decision and Order is a final order of the Illinois Labor Relations Board. Aggrieved parties may seek judicial review of this Decision and Order in accordance with the provisions of Section 11(e) of the Act and the Administrative Review Law. Petitions for review of this Decision and Order must be filed within 35 days from the date the Decision and Order is served upon the party affected by the decision. 5 ILCS 315/11(e).

# NOTICE TO EMPLOYEES

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## FROM THE ILLINOIS LABOR RELATIONS BOARD

### Case No. L-CA-21-033

The Illinois Labor Relations Board, Local Panel, has found that the County of Cook and Sheriff of Cook County have violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL cease and desist from threatening Paul Bollinger and Justin Janda in response to their protected, concerted activity of protesting cross-watching on December 26, 2020.

WE WILL cease and desist from retaliating against Paul Bollinger and Justin Janda for engaging in the protected, concerted activity of protesting cross-watching on December 26, 2020.

WE WILL withdraw the complaint register filed against Justin Janda and Paul Bollinger and dismiss or administratively close the Office of Professional Review (OPR) investigation initiated because of their protected, concerted activities of December 26, 2020.

WE WILL expunge all record of the complaint register and OPR investigation from Justin Janda's and Paul Bollinger's employment records.

DATE \_\_\_\_\_

\_\_\_\_\_  
County of Cook and Sheriff of Cook County  
(Joint Employers)

## ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor  
Springfield, Illinois 62702  
(217) 785-3155

160 North LaSalle Street, Suite S-400  
Chicago, Illinois 60601-3103  
(312) 793-6400

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**THIS IS AN OFFICIAL GOVERNMENT NOTICE  
AND MUST NOT BE DEFACED.**

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**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
LOCAL PANEL**

Justin Janda and Paul Bollinger,	)	
	)	
Charging Parties,	)	
	)	Case No. L-CA-21-033
and	)	
	)	
County of Cook and Sheriff of Cook County,	)	
	)	
Respondents.	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On February 16, 2021, Justin Janda and Paul Bollinger (Charging Parties) filed a charge with the Illinois Labor Relations Board’s Local Panel (Board) alleging that the County of Cook and Sheriff of Cook County (Respondents) engaged in unfair labor practices within the meaning of Sections 10(a)(2) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2016), as amended. The charge was investigated in accordance with Section 11 of the Act. On August 2, 2021, the Board’s Executive Director issued a Complaint for Hearing.

A hearing was conducted on June 6, 7, and 28, 2022, via WebEx video conferencing, at which time the Charging Parties presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, and to argue orally.

The parties filed post-hearing briefs. After full consideration of the parties’ stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

**I. PRELIMINARY FINDINGS**

The parties stipulate, and I find that:

1. At all times material, the Respondents have been public employers within the meaning of Section 3(o) of the Illinois Public Relations Act, 5 ILCS 315 *et seq.* (Act).
2. At all times material, the Respondents have been subject to the jurisdiction of the Local Panel of the Illinois Labor Relations Board (Board) pursuant to Section 5(b) of the Act.

3. At all times material, the Respondents have been subject to the Act, pursuant to Section 20(b) thereof.
4. During the time period of the December 26, 2020 incident alleged in this matter, Charging Parties were public employees within the meaning of Section 3(n) of the Act.
5. The Charging Parties are no longer currently employed by the Cook County Sheriff's Office.

## **II. ISSUES AND CONTENTIONS**

The first issue is whether the Respondents violated Sections 10(a)(1) and/or 10(a)(2) of the Act when they filed a complaint register against the Charging Parties and involuntarily transferred them to less favorable assignments, allegedly because of their protected, concerted protests against the practice of cross-watching. The second issue is whether the Respondents violated Section 10(a)(1) of the Act by allegedly threatening the Charging Parties for engaging in the protected, concerted activity of objecting to cross-watching.

The Charging Parties argue that they engaged in protected concerted activity because they protested the practice of cross-watching due to safety concerns. They further contend that the Respondents' decision-makers knew of this protected conduct because they either witnessed it or were informed of it through the chain of command. Next, the Charging Parties assert that the Respondents took adverse employment actions against them by transferring them out of their bidded assignments into new assignments with harsher working conditions and by placing them under investigation, which precluded them from being considered for promotions. The Charging Parties also contend that the harsh conditions of the new assignments caused them to resign. The Charging Parties conclude that the Respondents took these adverse employment actions against them wholly because of their protected concerted activities, as demonstrated by the timing of the alleged adverse actions, the Respondents' expressed hostility toward their allegedly protected conduct, and the Respondents' summary decision to transfer the Charging Parties. As a remedy, the Charging Parties seek reinstatement and backpay with interest.

The Respondents deny that they violated Sections 10(a)(2) and/or 10(a)(1) of the Act. They assert that the Charging Parties did not engage in protected union or concerted activity because they were not acting on behalf of the union or on behalf of other correctional officers when making their protests. In the alternative, the Respondents contend that Charging Parties' conduct lost the

protections of the Act because it was insubordinate and encouraged employees to engage in a work stoppage. The Respondents deny that they subjected the Charging Parties to adverse employment actions by initiating an investigation into their conduct and transferring them to different assignments. They deny that these actions affected the Charging Parties' career prospects and also contend that the Charging Parties failed to prove that the transfer subjected them to less favorable working conditions. The Respondents contend that any claim of adversity must be rejected where the new assignments came with premium pay and the Charging Parties admitted that they benefited from the transfers. Finally, the Respondents deny that they transferred the Charging Parties and initiated an investigation in their conduct because of their alleged protected, concerted activities or due to union animus. Instead, the Respondents assert that they did so because of the Charging Parties' insubordinate conduct and attempts to encourage a work stoppage, which jeopardized the security of the jail. The Respondents further contend that the Charging Parties' conduct in this respect constituted a legitimate reason for the investigation and the transfer, and that they would have taken the same actions under other, similar circumstances.<sup>1</sup>

### **III. FINDINGS OF FACT**

#### 1. Respondents' Organizational Structure and Functions of Correctional Officers

During all times material, Michael Miller served as the Executive Director of Operations for the Cook County Department of Corrections. The chain of command within the Department of Corrections from lowest to highest is correctional officer, correctional sergeant, correctional lieutenant, and superintendent. The superintendent reports to an assistant executive director, who in turn reports to the executive director. The International Brotherhood of Teamsters, Local 700, represents the correctional officers employed by the Respondents.

The Department of Corrections is separated into divisions. Correctional officers in each division work one of three shifts, first shift (11 pm to 7 am), second shift (7 am to 3 pm), and third

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<sup>1</sup> Prior to hearing, the Respondents moved to defer this case under Collyer; however, deferral is not addressed in the body of this decision because the Respondents did not reference their earlier motion in their post-hearing briefs. In any event, deferral under Collyer would be inappropriate because contract interpretation is not at the heart of this dispute; there is clear evidence of the Respondents' enmity toward the Charging Parties' protected activities, as outlined more fully below; and deferral at this juncture would not advance the cause of administrative economy. In addition, the Respondents have not identified any case in which the Board has previously deferred a retaliation or discrimination claim under Collyer. Cf. Chicago Transit Authority, 1 PERI ¶ 3004 (IL LLRB 1985) (setting forth elements, applying Collyer in unilateral change case); Village of Oak Park, 18 PERI ¶ 2019 (declining to defer after ALJ held hearing on the merits).

shift (3 pm to 11pm). Correctional officers are also assigned a detail, which designates their regular days off.

At all times material, Paul Bollinger and Justin Janda worked as correctional officers for the Respondents. Bollinger began his employment with the Respondents as a correctional officer in 2011. He first worked in Division 1 for four years, then worked in Division 6 for four months, and then worked in Division 11 until the Respondents involuntarily transferred him to Division 10 in December 2020. Janda began his employment with the Respondents as a correctional officer in November 2014. During his probationary period, he obtained experience working in every building except for the women's division. After he completed his first year, he bid into Division 11 and remained assigned there until the Respondents involuntarily transferred him to Division 9 in December 2020.

While assigned to Division 11, Janda and Bollinger worked the third shift. They reported to correctional sergeants Bill Sweeney and Xavier Rivera. Robert Lucas served as a correctional lieutenant in Division 11 on the third shift, and Janda and Bollinger reported to him through the chain of command. Salomon Martinez was superintendent of Division 11, but he worked a Monday through Friday schedule, from 8:30 am to 5 pm.<sup>2</sup>

Division 11 houses both maximum and medium security inmates. It includes 8 maximum security units and 24 medium security units. It can house up to 1520 inmates, when at full capacity. Division 11 has four pods. Each pod has two floors. Each pod floor has four tiers or living units. There are 32 tiers in Division 11. Each tier can hold up to 48 inmates. Division 11 post orders require, at minimum, one officer to be assigned to each tier. Optimal staffing would include two movement officers or one core officer.

Correctional officers are responsible for the safety of the inmates. They count inmates prior to shift change and they are responsible for the movement of inmates to court, for medical treatment, for transfers, and for discharges. They are required to conduct pat down searches of all inmates entering and existing the living unit. The Respondents' Living Unit Policy states that correctional officers must let inmates out of their cells. It is the inmates' civil right to be let into the day room, and the Respondents have an obligation to protect the inmates' civil rights. The

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<sup>2</sup> Martinez currently serves as the Assistant Executive Director for the Cook County Sheriff's Department but is referred to as superintendent throughout this decision because he held that position during all times material to this case.

Respondents let inmates out on both second shift (7 am to 3 pm) and the third shift (3 pm to 11 pm). When correctional officers unlock the cell doors, they do so manually, and the inmates walk past the correctional officers to leave. When a correctional officer goes onto the tier, he is within fingertips distance from the inmates. The correctional officer must also be in physical contact with the inmates to transport them, handcuff them, or pat them down. Correctional officers must also conduct random physical security checks at least every 30 minutes to ensure each inmate is showing signs of life. On the third shift, correctional officers must additionally facilitate inmate movement to and from recreation, retrieve inmates from their respective appointments and escort them to their division, and monitor inmates during recreation. The correctional officers in Division 11 monitor the inmates in person and do not have the option to view them over video cameras.

Correctional officers must handle chaotic situations including inmate fights. The officers must physically separate inmates who are fighting, using their hands or pepper spray. Physical fights occur on a daily basis, though the severity and frequency of these fights varies based on the level of tension between gangs in the building and the presence of drugs or alcohol. Officers have been injured on duty as a result of inmate fights. Bollinger has been scratched, had substances thrown at him, and has been bruised while trying to separate inmates. In 2020, Janda witnessed multiple occasions on which officers were attacked by inmates and he has had to use reasonable force against inmates on over 50 occasions during his tenure as a correctional officer. On December 20, 2020, Correctional Officer Frankie Garcia was injured on duty in Division 11 on the 3 pm to 11 pm shift when he was involved in an altercation with an inmate on tier AJ.

Backup is key for safety and security. The Respondents Living Unit Officer Policy 101 states that correctional officers must ensure that proper backup is on site before they enter the living unit. If a correctional officer does not have backup, he could be severely injured or killed. Lucas instructed his officers not to go into the tier without proper backup. Superintendent Martinez similarly stated that he does not expect a correctional officer to go into the tier without backup. However, he also stated that an officer must frequently make judgment calls about whether he should wait for additional backup or try and save an inmate on his own.

## 2. Cross Watching - Federal Litigation and Relevant Collective Bargaining Agreement Provisions

Cross watching is a practice of allowing one correctional officer to simultaneously supervise two housing units from the control center of one of the units. In other words, cross watching occurs when one officer is charged with overseeing more than one living unit at a time.

Prior to 2010, cross watching was commonly used by the Respondents throughout the jail. However, the Respondents' practices regarding cross watching changed in 2010 after they entered into an Agreed Order to settle federal litigation initiated by the United States Department of Justice. The litigation arose from an investigation initiated by the Department of Justice into the conditions of confinement at the Cook County Jail ("CCDOC"), which concluded that certain conditions at the jail violated the constitutional rights of the inmates. The United States District Court for the Northern District of Illinois issued the Agreed Order on May 13, 2010, effectively settling a case between the United States of America and the Respondents.

As part of the Agreed Order, the Respondents consented to the entry of a finding that the conditions at the jail necessitated the remedial measures contained in the Agreed Order. The Agreed Order stated the following in relevant part: "Absent exigent circumstances, CCDOC shall maintain a practice that does not allow for scheduled, planned, or expected cross-watching (a CCDOC practice of allowing one correctional officer to simultaneously supervise two housing units from the control center of one of the units) at any time on all maximum security and Special Management Units, and during first and second shifts throughout the Facility."

It further provided the following: "CCDOC may permit cross-watching on third shift in housing units that are non maximum security or Special Management Units only if the Monitor does not object after consultation and review. The Monitor's review of the appropriateness of third-shift cross watching on a particular housing unit shall be guided by the sufficiency of sightlines between the units being cross-watched, the adequacy of video and/or audio technologies in place, and/or other factors that bear on the safety and security of inmates...Although cross-watching is permitted under the limited circumstances described herein, CCDOC will work to eliminate the practice at the Facility."

Following the issuance of the Agreed Order, the Respondents stopped the practice of cross watching in certain areas of the jail. On June 26, 2018, the United States District Court for the

Northern District of Illinois terminated the agreed order, but the Respondents still comply with its terms because it sets out best practices for the jail.

However, the Respondents' general orders do not prohibit cross watching. Nothing in the Sheriff's Employment Action Manual prohibits cross watching. The Teamsters collective bargaining agreement does not reference cross watching or dual assignments. Section 2.2 of the Respondents' contract with the Teamsters states that "the union recognizes that this agreement does not empower the employer to do anything that is prohibited from doing by law." The Respondents' general orders likewise state that an officer is permitted to refuse an unlawful order. However, cross watching is not unlawful.

The tiers in Division 11 are approximately 20 feet apart. There is no line of sight that allows a correctional officer to look into two tiers at the same time and Division 11 does not use video screens to monitor inmates.<sup>3</sup>

When Bollinger was in the academy studying to become a correctional officer, sometime before he assumed his position in 2011, his instructors informed him that the Respondents were under a mandate to hire a certain number of officers to maintain safe working conditions because they were trying to avoid cross watching. Bollinger testified that cross watching is "the most unsafe thing you can do in the jail." Bollinger explained that people could die if a correctional officer is cross watching and not paying attention to one of the two units because he is occupied with the other unit.

The Respondents conducted cross watching in 2020 and currently still conduct cross watching, but it is an unpopular practice among correctional officers. The union has been complaining about cross watching for the past five or six years. Peter Kramer, Special Counsel for Labor Affairs for the Cook County Sheriff's Office, testified that grievances over cross watching are frequent. In the six months prior to hearing, Kramer reviewed 2000 grievances, and half of them related to cross watching.

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<sup>3</sup> I do not credit Miller's assertion that an officer has a direct line of sight into both tiers at once because Miller contradicted himself on this point. When called as a witness for the Charging Party, he testified on direct examination that the tiers are 20 feet apart and that an officer must walk from one side to the other side to watch both tiers. Tr. P. 664. Only on cross examination by the Respondents' attorney did he state that there was a direct line of sight into both tiers and that an officer could sit in one location to watch both. Tr. P. 762-3. Miller's testimony also conflicts with that of Superintendent Martinez who testified that officers assigned to cross watch two tiers are required to walk back and forth between the two tiers. Tr. P. 505.

In the five years that Bollinger worked in Division 11 prior to December 2020, the Respondents had never required any correctional officer in that division to cross watch. Janda similarly testified that cross-watching is not a normal part of his job, and that prior to December 25, 2020, the Respondents had never required him to cross watch.

### 3. Changes Caused by the COVID-19 Pandemic

The COVID-19 pandemic began in March of 2020. Beginning in April 2020, the Respondents reduced capacity at the jail to one inmate per cell by opening every dorm and turning their mental health transition center into a housing facility. However, by December 2020, the population in Division 11 had increased to three quarters capacity, such that approximately half the inmates were two to a cell.

The pandemic also caused staffing issues at the jail. The Respondents had fewer employees coming into work because they were sick. The Respondents also had a greater number of assignments to staff because they had spread inmates to other living areas.

To address these issues, the Respondents invoked their authority under the civil emergency provision of the collective bargaining agreement to temporarily transfer correctional officers where they were needed. In addition, the Respondents obtained staff from court services, supplemented staff from the sheriff's police, and also tried to hire more officers.

The staffing difficulties became worse in December 2020 during the third wave of COVID-19. December 2020 represented the lowest staffing for the Respondents in comparison to the number of assignments. Call offs are a recurring problem and officers tend to call off more frequently during holidays. However, there were more officers off work in December 2020 than at any other time. In addition, more officers had refused mandated overtime in December 2020 due to COVID 19.

### 4. Events of December 25, 2020

On December 25, 2020, the Respondents had a total of 33 correctional officers and one sergeant on shift. Thirteen of the officers were working overtime. Executive Director Miller and Superintendent Martinez ordered cross watching because of COVID-19 related call offs. At roll call, command staff informed officers that Division 11 would be operating with a total of 34 officers and that cross watching would be required.

There are four living units on upper A-pod, AG, AH, AF, and AJ. Living units AJ and AF are across from each other. Living units AG and AH are also across from each other. The Respondents assigned one officer each to living units AG and AH. The Respondents assigned Janda to watch both living unit AF and AJ.

Bollinger spoke to Lieutenant Lucas to complain that the Respondents had only three officers on upper A-pod for four assignments. Janda then spoke to Sergeant Robinson and requested that Robinson assign an additional officer so that he (Janda) would not be responsible for both tiers. At hearing, Janda testified that he did not want to cross watch because tier AF recently had an incident where an officer was injured on duty, and even with full staffing, the officers barely had enough backup to adequately address the issue.

At 5:40 pm, Lieutenant Lucas assigned a fourth officer, Officer Prado, to work tier AJ. Prado was reassigned from a collapsible post to take over that living unit. While Janda was assigned to watch two tiers, all the inmates on upper A-pod remained locked in their cells. During that time, Janda performed 30-minute checks on inmates because another officer on upper A-pod was free to watch him, and provide him with backup, as all inmates were locked down and the other officer was not occupied with monitoring his assigned tier for potential altercations.

#### 5. Events of December 26, 2020

On Saturday, December 26, 2020, Lt. Lucas was serving as the watch commander and was in charge of Division 11 for his shift. Division 11 was below its regular staffing measures and was operating with half of its usual staff. Martinez and Miller testified that while there was an adequate number of correctional officers to man Division 11 and complete required tasks, there were not enough officers to man every tier with one officer. Because of the low staffing, Director Miller and Superintendent Martinez ordered one officer on every floor of every pod to cross watch two tiers.

The shift began with roll call. Present at roll call were Lieutenant Lucas, Sergeant Sweeney, Sergeant Rivera, an additional day shift sergeant, and correctional officers including Bollinger. Janda was scheduled to work that day but was not present because he was late. During roll call, Lucas issued correctional officers assignments and some of the assignments included cross watching. Lucas gave Janda the assignment to cross watch tiers AF/AJ, though Janda was

not present at the time to receive it. Lucas assigned Bollinger to tier AG; Bollinger did not receive a cross-watching assignment.

Bollinger spoke out against cross watching at roll call. Bollinger stated that the Respondents should not be directing officers to cross watch. He stated that cross watching violated the collective bargaining agreement and created unsafe working conditions. He also stated he believed cross watching was illegal and in violation of county policies and directives. He further said, “you have four assignments, and you have three officers...[t]hree officers work three assignments, not four.” Lucas recounted that Bollinger stated, “we should fight this as a union; we shouldn’t cross watch.” Bollinger admitted that he told officers not to cross watch. Lucas testified that Bollinger was addressing the entire staff, as Lucas himself would do in roll call. Bollinger cursed when expressing his objections. He used the F-word and also may have used the A-word and the word “shit.” Lucas responded by telling Bollinger that they had no other choice because there was a staffing shortage, and that if officers had a problem during their shift, they should let command staff know. At hearing, Bollinger explained that he cursed because he felt that the Respondents did not care about the safety of the officers or inmates. Bollinger further explained that while he does not normally curse at work, the word “shit” and the F-word are normal language in the workplace.

When Janda arrived to work after roll call, he obtained his assignment from Sergeant Rivera, who informed him that he would be responsible for cross watching tiers AJ and AF, performing all job duties for both tiers, and running visitation for tier AJ. During visitation, the correctional officer must remove the inmate from the tier and watch them during visitation.

Janda reported to his assigned tier on upper A-pod where he encountered fellow officers who said, “you’re not getting help again...they’re doing it to us again.” He then called Union Representative Regino Torres for guidance because he believed that cross watching was not allowed and had concerns about its safety.

Following the phone call, Janda spoke with Sergeant Rivera and told him that he was unable to perform two assignments. He stated that it was not allowed under the CBA or the DOJ’s Agreed Order. He further stated that cross watching was unsafe for him and for the inmates. Rivera replied that he would inform Lt. Lucas.

Janda and the two other officers on upper A-pod then performed laundry exchange. During this time, all the inmates on upper-A-pod were locked in their cells. Officers in the back were

able to come and watch Janda when he performed laundry exchange because there are no inmates in the dayrooms when officers are performing these functions.

Meanwhile, Lt. Lucas was checking the feed from the cameras in the dayroom shared by tiers AJ and AF. He noticed there were no inmates in the dayroom, though inmates should have been out at that time. Lt. Lucas went to investigate the situation in upper A-pod. In the interim, Janda let out the inmates on tier AF, but not on tier AJ.

Lt. Lucas asked Janda why he had not let out the inmates. Janda replied that it was a safety risk to do so. Lt. Lucas explained that Janda had to let them out pursuant to the Respondents' rules and regulations, and that it was their right to be let out. He informed Janda that he needed to watch two tiers and that if he did not, "they [would] come for [his] job." Lt. Lucas further stated that the directive to watch two tiers was coming from administration and that he did not think Janda should fight it. Lt. Lucas ordered Janda to let out the inmates. Janda refused the order. Janda stated that it was not safe for him to do so and that he wanted to be able to go home to his family. Lt. Lucas told Janda that he would inform his superiors of Janda's decision.

At hearing, Janda testified that his refusal to cross watch on December 26, 2020 was not motivated solely by his personal preferences. He asserted that his decision affected everyone in the building, including his partners on the floor and anyone responding to a situation. It also impacted the inmates. Janda specified that cross-watching posed a safety risk because he did not have appropriate backup to go onto the tier. The officers from the other tiers could not come and watch him because they could not stop watching their own tiers.

Director Miller testified that any officers involved in cross watching in December 2020 had backup. Martinez and Lucas similarly testified that the two other officers on upper-A-pod could have provided Janda with adequate backup when Janda was required to let the inmates out of their cells. Lucas denied that the cross-watching assignment put Janda in danger.

Following Lt. Lucas's exchange with Janda, Lucas approached Bollinger and asked him to persuade Janda to cross watch. Bollinger said that he could not get Janda to change his mind. Lucas also told Bollinger that he should have grieved the cross-watching issue and that "these people will come for your job."

Lt. Lucas then contacted Superintendent Martinez by phone because there can be adverse consequences for the jail if inmates are locked down and not let out. The inmates become agitated, request psychological evaluations, and throw things out of their cells. Lucas informed Martinez

that Bollinger was encouraging other officers not to take their assignments, and that Janda was refusing to let inmates out of their cells. Martinez instructed Lucas to ensure that officers had the proper backup and informed Lucas that no officer should go into the living unit alone. Martinez also instructed Lucas to walk around the building and offer himself as a backup for correction officers who needed to enter the living units while cross watching.<sup>4</sup>

Superintendent Martinez then called Director Miller to inform him of the situation. Martinez told Miller that one of the officers refused to take his assignment and another officer was trying to encourage other officers in the division not to take their assignments. Miller asked Martinez to go into work to address the situation. Martinez complied because he believed employees were causing a work stoppage, which is prohibited by the Teamsters contract.<sup>5</sup>

Around this time, Director Miller also spoke to Lt. Lucas on the phone about the incident. Lt. Lucas told Miller what Janda and Bollinger had said.

At around 4 or 5 pm, Martinez arrived at Division 11, where he met with Lt. Lucas. Superintendent Martinez, Lt. Lucas, Sergeant Rivera, and Sergeant Sweeney then went to Janda's post. Superintendent Martinez asked Janda whether he was disobeying orders and refusing his assignment. Janda denied that he was doing either and stated that he was running his assignment on tier AF. Janda said that he did not know which correctional officer was assigned to AJ and further stated that the Respondents were missing an officer for that assignment. Janda stated that he did not have a backup officer on tier AJ and that the inmates on AJ were still locked up. Janda added that according to the CBA and DOJ policy, it was not safe for him to watch two tiers at once. He further stated that Division 11 needed more officers. At hearing, Martinez seemed to concede

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<sup>4</sup> Tr. P. 536.

<sup>5</sup> Section 12.1 of the Teamsters contract prohibits work stoppages, strikes and slowdowns of any kind or for any reason: "The Union will not cause or permit its members to cause, and will not sanction in any way, any work stoppage, strike, picketing or slowdown of any kind or for any reason, or the honoring of any picket line or other curtailment, restriction or interference with any of the Employer's functions or operations; and no employee will participate in any such activities during the term of this Agreement or any extension thereof." Section 12.2 further provides that if such work stoppages, strikes, or slowdowns occur, the Union has the obligation to publicly disavow such action and instruct employees to return to work immediately: "Should any activity prescribed in Section 1 of this Article occur, which the Union has or has not sanctioned, the Union shall immediately: (a) public disavow such action by the Employees or other persons involved; (b) advise the Employer in writing that such action has not been caused or sanctioned by the Union; (c) notify the Employee stating that it disapproves or such action instructing all Employees to cease such action and return to work immediately; (d) take such other steps as are reasonably appropriate to bring about observance of the provisions of this Article, including compliance with reasonable requests of the Employer to accomplish this end."

that in making these statements, Janda was raising a group concern and that he was looking out for his fellow officers.

Martinez replied that there were no officers who could come in to help and asserted that Janda would have proper backup when going into the tier. Janda still refused to release the inmates on tier AJ. Martinez then stated, “it was nice working with you...look for trouble and check your email.” He then added, “you’ll never work in this building again.”<sup>6</sup>

Superintendent Martinez then directed Sergeant Rivera to give Director Miller the names of the officers involved in the cross-watching incident. He also instructed Lucas to reassign Janda to the lobby and reassign the lobby officer, Officer Robinson, to Janda’s post so that Robinson could start the daily process with inmates on the tier. Superintendent Martinez, Lt. Lucas, Sergeant Rivera, and Sergeant Sweeney then escorted Janda to the lobby. However, Bollinger completed his tour of duty that day.

During the shift on December 26, 2020, Union steward Torres sent an email to Correctional Officers William Jones and Piscola which included a sample cross watching grievance and a form letter addressing double tier assignments that officers could personalize with their own information. Later that day, Jones forwarded these materials to Janda, Bollinger, and other correctional officers.

Following Bollinger’s protest and Janda’s transfer to the lobby, Lt. Lucas sent an email to Superintendent Martinez and Director Miller, summarizing the incident. He did not mention that Bollinger had used profanity.

## 6. Transfer Orders

At around 6 pm on December 26, 2020, Sergeant Rivera sent an email to Executive Director Miller informing him that Janda was the officer who refused his assignment to let inmates out while cross watching and that Bollinger was the officer who, during roll call, was “saying to not let a tier out if you are cross watching from Division 11.”

Around this time, Martinez and Director Miller jointly decided to file a complaint register against Janda and Bollinger with the Office of Professional Review (OPR). The Respondent’s procedures allow a superintendent to determine whether a Disciplinary Action Form or Complaint

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<sup>6</sup> I credit Janda’s and Bollinger’s assertions that Martinez made these statements because they offered consistent testimony on this point and also testified in a forthright and credible manner on this issue.

Register is warranted to address alleged misconduct. Martinez explained that he filed the complaint register because the Charging Parties were refusing to take their assignments and were encouraging others not to take their assignments. He testified that he considers defying orders to be a major act of insubordination, which is classified as “more serious misconduct” under the Respondent’s policies.

That day, Miller also decided to transfer Bollinger and Janda out of Division 11 pending the OPR’s investigation into Martinez’s complaint register against them. When the Respondents transfer employees pending an OPR investigation, the transfer is made pursuant to Article U of the Sheriff’s Employment Action Manual and Section 14.4(b) of the Teamsters Agreement. Article U provides that a department head, executive office chief, or executive director may make a recommendation to transfer an employee due to an investigation. Such recommendations “shall be based on allegations of employee misconduct that lead or will lead to criminal or administrative investigation by the Sheriff’s Office into those allegations.” Section 14.4(b) of the Teamsters agreement states the following: “The employer may at its discretion reassign any employee while investigation of possible wrongful behavior is completed....”

Miller sent an email to his administrative assistant requesting that she complete paperwork to transfer both Janda and Bollinger out of Division 11 pending an investigation. He told his assistant that she could transfer them both to Division 9 or could transfer one of them to Division 9 and the other to Division 10. The administrative assistant drafted paperwork transferring Janda to Division 9 and Bollinger to Division 10. Miller testified that the Respondents placed Janda and Bollinger in Division 9 and 10, respectively, because there was a staffing need in these divisions and the correctional officers could keep the shifts they worked in Division 11.

On December 26, 2020, Miller issued Bollinger and Janda the transfer orders, which were effective as of December 27, 2020. The orders transferred Janda to Division 9 and Bollinger to Division 10. They maintained the same shift and detail in their new divisions.

Miller asserted that he transferred Janda and Bollinger for jeopardizing the security of the CCDOC. He further explained that he transferred Janda and Bollinger for the welfare of the staff on duty and the inmates. At hearing, he explained that any time an officer refuses to perform their duties, they put the welfare of other staff members in jeopardy. Martinez testified that Miller transferred Janda and Bollinger because they were trying to create a work stoppage in that division, and he wanted to avoid employees encouraging others to engage in a work stoppage.

## 7. Impact of a Pending OPR Investigation

Employees are not deemed qualified for promotion when there is a pending investigation into their conduct. Article B.6.3(d) of the Sheriff's Employment Action Manual (SEAM) addresses promotion to a higher rank, which involves a merit board test. It states the following: "[I]n the event that a candidate has a pending disciplinary case, the HR designee shall submit a request to the Executive Director of OPR to expedite a resolution. Candidates with open disciplinary cases may continue through the evaluation process, but no candidate will be considered 'qualified' for an employment action until a conclusion is reached by OPR." Martinez testified that the Respondents will not promote a correctional officer while they are under investigation.

An officer under Article U investigation may apply for and obtain another position covered by the Teamsters contract, which may qualify as a promotion within rank. However, if the investigation recommends a suspension of five days or more, the promotion is rescinded.

If a correctional officer is under an Article U investigation and was transferred pending that investigation, his bid out of his transferred location is not granted until after the investigation is complete.

Some officers pending article U transfer are cleared and resume their normal work assignment. Other officers receive discipline. One sergeant came back from an Article U transfer and got promoted. The Respondents' records indicate that most employees subject to an Article U transfer remain employed with the Respondents until the investigation is completed.

## 8. Charging Parties File OPR Complaints Against Respondents and Inquire into the Status of the Complaint Registers Filed By Respondents Against Them

On December 29, 2020, Bollinger and Janda filed separate OPR complaints against the Respondents. In most relevant part, their complaint registers asserted that the cross-watching assignments were unsafe and that the Respondents had retaliated against them for their protests of this unsafe working condition by transferring them out of Division 11. Bollinger and Janda filed their complaints in part because their union informed them that they could not grieve an Article U transfer and that the only way they could return to Division 11 was by filing a complaint register.

On January 20, 2021, Janda followed up with Director Miller about his transfer to Division 9. Janda asked Miller why he had been moved and also asked for the grounds for the initiation of the Article U investigation. He concluded by requesting that Miller return him to Division 11.

On January 21, 2021, Miller responded via email and also copied Bollinger. He stated that the justification for the Article U investigation was Janda's actions of December 26, 2020.

#### 9. Janda's Experience in Division 9 and Bollinger's Experience in Division 10

Division 9 and Division 10 are both maximum security divisions and are identified as such in the collective bargaining agreement. Pursuant to that agreement, correctional officers earn a dollar more per hour working in Divisions 9 and 10 than they would when working in other divisions.<sup>7</sup>

Janda testified that Division 9 was like a dungeon. He stated that his migraines increased in Division 9 because the building has poor ventilation, is noisy, has bad lighting, and is stressful. Many of the cell doors and tier doors do not lock because the building is poorly kept. In addition, Janda characterized the inmates in Division 9 as the "worst of the worst." In Division 9, Janda had approximately one use of force incident a week as compared to only one in an entire year and a half period while working in Division 11. Janda further testified that rookies usually work the Division 9 assignment, and that a correctional officer's job is more dangerous if he is working with rookies. Although Superintendent Martinez testified that Division 9 includes a mix of new and experienced officers, he did not expressly refute Janda's assertion that it is rookies who usually work there.

Janda denied that he liked working in Division 9 and he characterized his experience there as dreadful. However, on January 1, 2021, Janda wrote an email to Bollinger stating, "I think we should all bid to IX." He further stated, "X sucks. IX is good, we can watch each other[s] decks on the screen, and you get a double partner. Weekends off. Never get mandated. Good brass and own secured parking lot." He also stated, "we have a great supt [superintendent]." Janda concluded by stating, "I wouldn't steer you guys wrong. It's honestly a good thing here. Increase my time, catch some overtime and learn a new comfort zone." At hearing, Janda explained these statements as expressions of optimism about his circumstances.

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<sup>7</sup> See Jt. Exh. 1, p. 20.

In the following year, Janda made repeated, but unsuccessful attempts to move out of Division 9. On January 27, 2021, he tried to bid into the Electronic Monitoring Unit (EMU). On June 16, 2021, Janda submitted an application to become a fugitive unit investigator within the Fugitive Unit. In October 2021, Janda bid into Division 11, where there was an open spot. Janda did not receive a response from the EM Unit. It is not clear whether he received a response from the Fugitive Unit. Ultimately, Janda remained in Division 9, though he had repeatedly sought to leave.

Janda acknowledged that he earned one dollar more an hour in premium pay while working in Division 9. However, he testified that even a more significant amount of premium pay would not have persuaded him to seek employment in Division 9.

Janda's attendance-related discipline increased when he moved from Division 11 to Division 9 because he did not want to be there. He only had one attendance infraction in 2020 but had five in 2021.

Bollinger testified that his everyday life was miserable after the transfer. He explained that Division 10 is a hard building to work in. It is lower in safety standards, there is less backup, and it is easier to isolate officers. Bollinger testified that rookies work in that building because no one else wants to work there.

Initially, Bollinger expressed some positive sentiments about the transfer, noting in an email to Janda on December 31, 2020, that the superintendent had approved his days off for January, effectively expediting the transfer of his days off from the Division 11 calendar to the Division 10 calendar. However, on January 20, 2021, Bollinger updated Pisciola and Janda and stated, "I'm on 2C 2015, place sucks."

Bollinger testified that he believed that his Article U transfer meant that he was "stamped as a deviant." On his first day there, Lieutenant Williams gave him the worst assignment in the division. Sergeant Surman later informed Bollinger that Lieutenant Williams admitted to giving Bollinger bad assignments on a daily basis because he was an Article U transfer. According to Surman, Williams stated "nobody comes into my building and doesn't earn their way, especially if they're under Article U." On March 15, 2021, Bollinger took FMLA leave due to anxiety.

Bollinger did not apply for any promotions while on Article U status because it was his understanding that employees are not eligible for promotion when there is a pending investigation into their conduct.

## 10. Resignations

Bollinger resigned his employment with the Respondents on August 3, 2021. He testified that he resigned because his mental health was poor. He attributed his decline in mental health to the harassment he received from supervisory staff in Division 10 due to his Article U status. He also resigned to take care of his children, following the birth of his son, and to save money on childcare but stated that he would not have done so absent his treatment in Division 10 because his wife earned less than he earned as a correctional officer.

Janda resigned his employment with the Respondents on December 28, 2021. He explained that he resigned because he had been involved in over 15 use of force incidents after his transfer to Division 9, saw other officers injured on the job there, and did not want to be taken out of Division 9 in an ambulance. He further explained that he resigned because the Respondents retaliated against him and harassed him by transferring him to Division 9. At the time Janda resigned, he had accumulated thirteen unauthorized absences. He had executed an agreement to serve a 14-day suspension within four months of the agreement's execution but never served that suspension due to his resignation.

## IV. DISCUSSION AND ANALYSIS

### 1. Section 10(a)(1) – Retaliation Claim

The Respondents violated Section 10(a)(1) of the Act when they filed a complaint register against the Charging Parties with the Office of Professional Review and transferred the Charging Parties into maximum-security divisions.

Section 10(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in [the] Act.” 5 ILCS 315/10(a)(1). Where a charging party alleges that the employer violated Section 10(a)(1) of the Act by taking an alleged adverse employment action against an employee because of, and in retaliation for, the exercise of protected rights, the analysis tracks the one used in cases arising under Section 10(a)(2) of the Act. Pace Suburban Bus Div. of Reg'l Transp. Auth. v. Illinois Labor Relations Bd., 406 Ill. App. 3d 484, 494-5 (1st Dist. 2010); Vill. of Oak Park, 18 PERI ¶ 2019 (IL SLRB 2002); Vill. of Schiller Park, 13 PERI ¶ 2047 (IL SLRB 1997). Accordingly, to establish a prima facie case that the respondent violated Section 10(a)(1) of the Act, the charging party must

prove by a preponderance of the evidence that: (1) an employee engaged in union and/or protected, concerted activity; (2) the respondent had knowledge of such activity; (3) the respondent took an adverse action against the employee; and (4) the employee's protected, concerted activity and/or union activity was a substantial or motivating factor in the adverse action. City of Burbank v. Ill. State Labor Relations Bd., 128 Ill.2d 335, 345 (1989); Pace Suburban Bus Div. of Reg'l Transp. Auth., 406 Ill. App. 3d at 494-5.

If the charging party establishes a prima facie case, the respondent can avoid a finding that it violated the Act by demonstrating that it would have taken the adverse action for legitimate business reasons. City of Burbank, 128 Ill.2d at 346. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. Id. If the proffered reason is merely a litigation figment or was not in fact relied upon, then the employer's reason is pretextual and the inquiry ends. Id. However, when legitimate reasons for the adverse employment action are advanced and are found to be relied upon at least in part, then the case may be characterized as a “dual motive” case and the respondent must then establish, by a preponderance of the evidence, that it would have taken the action notwithstanding the employee's union activity. Id.

Here, the Charging Parties engaged in protected concerted activities when they protested cross watching on December 26, 2020. The actions of an individual employee are “concerted activity” when they are undertaken “with or on the other authority of” other employees and in furtherance of a group concern. Oak Brook Park District, 31 PERI ¶ 193 (IL LRB-SP 2015); City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997); Vill. of Bensenville, 10 PERI ¶ 2009 (IL SLRB 1993); see also Schaumburg Sch. Dist. v. Ill. Educ. Labor Relations Bd., 247 Ill. App. 3d 439, 456 (1st Dist. 1993). Employees do not need to formally select a specific employee to complain on their behalf; however, the speaker “must be actually, not impliedly, representing the views of other employees.” Oak Brook Park District, 31 PERI ¶ 193; City of Decatur, 14 PERI ¶ 2004. The actions of an individual are also concerted activity when he asserts a right grounded in a collective bargaining agreement, even if he asserts the right solely on his own behalf, because it is an extension of the concerted activity that originally gave rise to the agreement. City of Chicago, 11 PERI ¶ 3008 (IL LLRB 1995); City of Chicago, Chicago Police Department (Karson), 7 PERI ¶ 3035 (IL LLRB 1991).

Concerted activity is protected if it is engaged in for the purpose of collective bargaining,

for other mutual aid or protection, or if it is aimed at improving wages and terms and conditions of employment. Office of the Chief Judge of the Circuit Court of Cook County, 37 PERI ¶ 34 (IL LRB-SP 2020); Village of New Athens, 29 PERI ¶ 27 (IL LRB-SP 2012); County of Cook (Management Information Services), 11 PERI ¶ 3012 (IL LRB 1995). As long as the employee's conduct is lawful and not indefensible in its context, it is generally deemed to be protected. Office of the Chief Judge of the Circuit Court of Cook County, 37 PERI ¶ 34; County of Cook, 27 PERI ¶ 57 (IL LRB-LP 2011).

Here, Janda engaged in protected concerted activity when he refused an order to let inmates out on tier AJ and thereby refused to cross watch two tiers. The Board, in accordance with case law from the federal sector, has held that employees engage in protected activity when, as concerted protest, they refuse to work because they believe the conditions under which they are working to be unsafe or even uncomfortable. County of Cook/Sheriff of Cook County, 25 PERI ¶ 74 (IL LRB-LP 2009) (citing NLRB v. Washington Aluminum Company, Inc., 370 U.S. 9 (1962); Brown and Root, Inc., 246 NLRB 33 (1979), aff'd, Brown and Root, Inc. v. NLRB, 634 F.2d 815 (5th Cir. 1981) and Union Boiler Company, 213 NLRB 818 (1974)). Such conduct remains protected even if the employer finds the means or protest to be offensive and even though the employee could have chosen to protest differently, by filing a formal grievance or submitting a complaint to a safety committee. County of Cook/Sheriff of Cook County, 25 PERI ¶ 74; Village of Bensenville, 10 PERI ¶ 2009 aff'd by unpub. order, Village of Bensenville v. Illinois State Labor Relations Board, Ill. App. Ct. No. 2-94-0089 (2nd Dist. 1995). The issue is not the objective measure of safety conditions, it is whether the employees refused to perform their duties because they thought conditions were unsafe. County of Cook/Sheriff of Cook County, 25 PERI ¶ 74 (citing Union Boiler, 213 NLRB 818, 818 (1974)).

Here, Janda had a good faith belief, on December 26, 2020, that it was unsafe for him to release the inmates on tier AJ because he lacked adequate backup. Adequate backup is integral to officer safety. Officers can be severely injured or killed without adequate backup and the Respondent's living unit policy makes it clear that an officer must ensure that there is proper backup on site before entering the living unit. Furthermore, Janda maintained a good faith belief that he lacked adequate backup to enter tier AJ on December 26, 2020. Ordinarily, the officer assigned to AF serves as backup for the officer assigned to AJ, and vice versa; however, on December 26, 2020, Janda was assigned to watch both those units and therefore had no partner to back him up.

Furthermore, Janda had a good faith belief that the two other correctional officers on upper-A-pod could not serve as adequate backup for him once they had each released the inmates on their own tiers. While the other correctional officers were able to back him up during laundry exchange, this was because all the inmates were then locked in their cells, and the officers were not occupied with monitoring inmates in their day rooms. The Respondents may note that Janda managed to release inmates on tier AJ without concern, but the record is unclear as to when this occurred with respect to the release of other inmates on upper-A-pod. Accordingly, the evidence permits the inference that an officer on one of the two back tiers had not yet released the inmates on his own tier and, at that time, remained able to serve as backup when Janda inmates on tier AF. County of Cook/Sheriff of Cook County, 25 PERI ¶ 74 (correctional officers maintained good faith belief that group transport of inmate with MRSA was unsafe, even though one officer later volunteered to transport that inmate alone).

The Respondents have notably failed to argue that Janda lacked a good faith belief that it was unsafe for him to release inmates on tier AJ. At best, the Respondents suggest, through their recitation of facts, that Janda's concern over safety was unsupported by objective conditions. However, the Board has previously found that the protected nature of an employee's refusal of work on safety grounds does not depend on the objective measure of safety conditions. Cnty. of Cook/sheriff of Cook Cnty., 25 PERI ¶ 74; see also Odyssey Capital Group, L.P., III, 337 NLRB 1110, 1111 (2002) ("inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected.") Indeed, "[w]hether the protested working condition was actually as objectionable as the employees believed it to be ... is irrelevant to whether their concerted activity is protected by the Act." Odyssey Capital Group, L.P., III, 337 NLRB at 1111. Furthermore, it is immaterial that command staff disagreed with Janda's safety assessment and believed that the two other officers on upper A-pod could have served as adequate backup for Janda. Id. at 1110-11 (employees' refusal to work in apartment due to concern over asbestos exposure was protected concerted activity despite their supervisor's assertion that there was no asbestos in the apartment complex).

Even if an objective inquiry were relevant, Janda's safety concerns had a reasonable and objective basis. It is clear that upper-A-pod was understaffed because the staffing did not conform to post orders. The post orders required one correctional officer per tier, for a total of four on upper-A-pod, and on December 26, 2020, the Respondents had only three officers on upper-A-

pod. The two other officers on upper-A-pod were occupied because they were serving as backup for each other, after having released the inmates on their own tiers. Furthermore, Martinez effectively conceded that the existing complement of correctional officers did not provide sufficient back up for Janda, or any other officers assigned to cross-watch because he instructed Lieutenant Lucas to serve as backup for cross-watching officers. Finally, although Lucas and Martinez reassured Janda on December 26, 2020, that he had sufficient backup to go onto tier AJ and release the inmates, neither one of them informed Janda that Lucas would stay to provide such back up. Thus, Janda had an objectively reasonable concern that it was unsafe for him to release inmates on tier AJ because he lacked backup.

Furthermore, Janda's refusal to release inmates from tier AJ and his concomitant refusal to cross watch was also concerted activity. Janda's protest of cross watching was in furtherance of a group concern over workplace safety. Although no one designated him as a spokesperson, that is not required where he was clearly expressing concerns held by the group. Indeed, Janda and Bollinger both objected to the practice the day before, and the Respondents remedied the situation by collapsing a post and assigning an additional officer to upper A-pod. The following day, Bollinger again expressed his objection to cross watching at roll call, and while Janda was absent from roll call, other employees conveyed to him their complaints about cross watching as he approached his work assignment. They said, "you're not getting help again...they're doing it to us again." Furthermore, when Janda voiced his protest, he indicated that he did so not just for his own benefit but for the safety of the group, stating generally that Division 11 needed more officers. At hearing, Superintendent Martinez acknowledged that he viewed Janda's statements as raising a group concern and that Janda was looking out for his fellow officers.

Similarly, Bollinger engaged in protected concerted activity when he spoke up during roll call on December 26, 2026, to protest cross watching. Bollinger's statements were concerted activity because he thereby sought to initiate group action. Bd. of Educ. of Schaumburg Comm. Consolidated School Dist. 54, 247 Ill. App. 3d 439, 457 (1st Dist. 1993). He told officers not to cross watch because it was unsafe and informed his fellow employees that they should "fight this as a union." Bollinger's statements were concerted in an additional respect because he made a good faith assertion of a right contained in the parties' collective bargaining agreement by informing his fellow officers and four supervisors that he believed cross watching violated the agreement. City of Chicago, 11 PERI ¶ 3008; City of Chicago, Chicago Police Department (Karson), 7 PERI

¶ 3035. Bollinger’s statements were also protected because they were job-related and made for the purpose of mutual aid or protection, to ensure a safe working environment for correctional officers. See Chicago Transit Authority, 34 PERI ¶ 160 (IL LRB-LP 2018); County of Cook/Sheriff of Cook County, 25 PERI ¶ 74; City of Chicago (Mulligan), 11 PERI ¶ 3008.

Next, neither Bollinger’s nor Janda’s protests lost the protections of the Act. Employees’ rights are not absolute, and they must be balanced against the employer’s right to maintain order and respect. Vill. of Bensenville, 10 PERI ¶ 2009. The Board has further noted that the “rights of employees to engage in protected activity should prevail unless the employer can demonstrate special circumstances indicating a restriction on activity is necessary for the maintenance of safety, efficiency or discipline.” Vill. of Bensenville, 10 PERI ¶ 2009; see also Chicago Transit Authority, 30 PERI ¶ 9 (IL LRB-LP 2013); Dep’t of Cent. Mgmt. Servs. (State Police), 30 PERI ¶ 70 (IL LRB-SP 2013). Where an “employer contends that the employee has engaged in unprotected misconduct in the course of otherwise protected activity an employee does not lose the protection of the Act unless his misconduct is so violent or of such character as to render the employee unfit for further service.” Vill. of Bensenville, 10 PERI ¶ 2009; see also, Dep’t of Cent. Mgmt. Servs. (State Police), 30 PERI ¶ 70; Chicago Transit Authority, 30 PERI ¶ 9.

Although Bollinger used some profanity, his protest remains protected because his statements arose in the context of an ongoing labor dispute and the use of profanity is unremarkable in the context of correctional work. Bollinger was expressing frustration at his supervisors’ failure to mitigate the safety risk inherent in cross-watching, a concern he had already raised the day before and had reason to believe had been resolved.<sup>8</sup> In addition, his language was unexceptional in the jail workplace. Bollinger testified that the use of curse words is common at the jail, and Lt. Lucas did not even mention Bollinger’s profanity when he drafted the incident report documenting the event. See Chicago Transit Authority, 30 PERI ¶ 9 (employee protest of unilateral change to parking privileges remained protected though he was angry and used profanity in speaking with his supervisor); City of Chicago, 11 PERI ¶ 3008 n. 12 (employee’s conduct in raising safety concern to management’s attention remained protected even though he called his supervisor a “nothing.”); Burle Indus., Inc., 300 NLRB 498, 498 n.1 & 503 (1990) (employee who used profanity in protesting supervisor’s directive to return to work in the face of perceived safety hazard

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<sup>8</sup>The Respondents provided an additional correctional officer for Upper-A-pod when Bollinger last complained about under-staffing on December 25, 2020.

did not lose protections of the NLRA).

The Respondents contend that Bollinger's conduct was additionally unprotected because it encouraged the insubordination of his coworkers. However, the Respondents cite no authority supporting the proposition that an employee loses the protections of the Act where he encourages employees to decline an assignment that he believes in good faith to be unsafe. And authority from other jurisdictions supports a finding that such conduct remains protected. See infra. Moreover, the Respondents have pointed to nothing that would impugn Bollinger's good faith belief that cross watching was unsafe. Indeed, when Bollinger was in training for this position, his instructors informed him that the Respondents were under a mandate to hire officers so that they could avoid cross watching and maintain safe working conditions. Burle Indus., Inc., 300 NLRB at 498 n.1 & 503 (employee who urged coworkers to leave work area if they felt ill due to chemical fumes was engaged in protected concerted activity).

Similarly, Janda's refusal to release inmates on tier AJ does not lose the protections of the Act merely because he refused an order. Rather, Janda's refusal to perform this task on safety grounds, when he believed in good faith that he had inadequate backup, is analogous to other safety-related refusals to perform discrete assignments that the Board has deemed protected. Janda held a good faith belief that he would be placed in immediate danger if he were required to go into tier AJ to release inmates in a medium/maximum security division, where he would be in close physical contact with inmates without backup. County of Cook/Sheriff of Cook County, 25 PERI ¶ 74 (correctional officers were engaged in protected concerted activity when refusing transport arrestee with MRSA because they believed it would be unsafe). Furthermore, Janda's conduct is distinguishable from non-safety-related refusals to comply with directives, which the Board has found to be unprotected, such as the refusal to sign background check authorization forms. Cf. Cnty. of Cook, 27 PERI ¶ 57 (noting that there is an exception to the principle of "obey now, grieve later" for safety concerns, but finding that charging parties would not have been placed in immediate danger had they signed the forms).

Contrary to the Respondents' suggestion, the Respondent's use of cross watching in some other divisions of the jail or its subsequent use of cross-watching in Division 11, does not undermine a finding that Bollinger and Janda had a good faith belief that it was an unsafe practice. Indeed, neither Janda nor Bollinger appear to have had any personal experience with cross-watching which would lead them to believe that it was comparable in risk to their regular duties. In

fact, Janda testified that cross watching was not a normal part of his job, and that the Respondents had never required him to cross watch before December 25, 2020, when he first declined to cross watch. Bollinger offered even broader testimony, stating that the Respondents had never required anyone in Division 11 to cross watch in the five years that he worked there. The fact that some correctional officers tolerated the heightened safety risk of cross watching, does not refute the finding that Janda refused the assignment because he thought conditions were unsafe and that Bollinger protested against cross watching for the same reason. See Union Boiler Co., 213 NLRB 818 (1974) .

The Respondents emphasize that cross-watching does not violate the law, but they have cited no authority to support their claim that an employee's safety-related protests lack legal protections unless the protested working conditions are also expressly unlawful. Indeed, the Board imposed no such requirement in the case most factually analogous to this one where the charging parties engaged in concerted protests against transporting an arrestee with methicillin-resistant *Staphylococcus aureus* (MRSA). County of Cook/Sheriff of Cook County, 25 PERI ¶ 74.

There is also no merit to the Respondents' suggestion that the Charging Parties' protests were unprotected because they violated the collective bargaining agreement's no-strike provision. Of the two charging parties, only Janda refused to perform an assigned tasks, i.e., refused to let inmates out on tier AJ, and his refusal was based on a good faith, reasonable belief that this assignment would require him to enter that unit without backup. Furthermore, while Janda may have refused to perform an isolated assignment on safety grounds, the Board does not appear to equate such conduct with a strike or work stoppage. County of Cook/Sheriff of Cook County, 25 PERI ¶ 74. This is consistent with the approach taken by another public sector jurisdiction. See Local 252, Transport Workers Union of America, AFL-CIO, 14 PERB ¶ 3062 n.5 (1981) ("We recognize that a refusal to perform a task because of a *bona fide* fear of personal injury does not constitute participation in a strike") reversed 89 A.D.2d 551, 15 PERB ¶ 7017 (1st Dep't 1982) reinstated, 58 N.Y.2d 354, 16 PERB ¶ 7011 (1983).

There is also insufficient support for the Respondents' suggestion that a restriction on the Charging Parties' protected activities was necessary to maintain the safety and security of the jail. The Respondents resolved any potential concerns presented on December 26, 2020, by assigning another officer to perform the tier AF/AJ cross-watching assignment and moving Janda to an assignment that did not require cross-watching. In this respect, the Respondents handled Janda's

protest in a routine manner, in materially the same way they had handled it the day before, by assigning another officer to upper-A-pod and obviating Janda's need to cross-watch. Notably, both Janda and Bollinger finished their shifts on December 26, 2020, and the jail operated without incident.

Next, the Respondents' agents knew that the Charging Parties protested cross-watching on December 26, 2020. Knowledge of an employee's protected activity must be specifically imputed to an appropriate agent of the employer who is in some manner responsible for the alleged adverse employment action. Macon Cnty. Bd. and Macon Cnty. Hwy. Dep't, 4 PERI ¶ 2018 (IL SLRB 1988). A manager's or a supervisor's knowledge of an employee's union activities will ordinarily be imputed to the employer, but a fact-finder may not do so in light of affirmative evidence to the contrary. Macon Cnty. Bd. and Macon Cnty. Hwy. Dep't, 4 PERI ¶ 2018. An employer can be found to have knowledge of an employee's protected activity through direct or circumstantial evidence. Rockford Twp. Hwy. Dep't v. State Labor Rel. Bd., 153 Ill. App. 3d 863, 881 (2d Dist. 1987). Here, the relevant decision makers are Director Miller and Superintendent Martinez because they were each, in some manner, responsible for the alleged adverse employment actions. Director Miller and Martinez jointly decided to initiate complaint registers with OPR against Janda and Bollinger. Miller additionally decided to transfer Janda and Bollinger from Division 11 to Divisions 9 and 10, respectively.

In addition, the Respondents took adverse employment actions against the Charging Parties when they transferred them away from Division 11 and initiated an OPR complaint register against them. While an action does not need to have an adverse tangible result or adverse financial consequence to constitute an adverse employment action under the Act, there must be some qualitative change in or actual harm to an employee's terms or conditions of employment. City of Chicago v. Ill. Local Labor Relations Bd., 182 Ill. App. 3d 588, 594-95 (1st Dist. 1988); City of Chicago, Respondent, 31 PERI ¶ 129 (IL LRB-LP 2015); County of Cook/Hektoen Institute, 30 PERI ¶ 252 (IL LRB-LP 2014). Examples of adverse employment actions include, but are not limited to, "discharge, discipline, assignment to more onerous duties or working conditions, layoff, reduction in pay, hours or benefits, imposition of new working conditions or denial of advancement." Ill. Dep't of Central Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶ 2022 n. 3 (IL SLRB 1995).

The Respondent's transfer of Janda to Division 9 is an adverse employment action because Division 9 is more dangerous than Division 11 and therefore more onerous. Division 9 is a maximum-security division that houses the "worst of the worst" inmates, as Janda described them. Consistent with this characterization, Janda was required to use force with significantly greater frequency against the inmates Division 9 than in Division 11. While Janda had only one use-of-force incident over a year and a half period in Division 11, he had a use-of-force incident every week on Division 9. In addition, Division 9 has a greater number of rookies than Division 11, which likewise increases the danger of working in Division 9 because a correctional officer's job is more dangerous when he is working with inexperienced officers.

The Respondent's transfer of Bollinger to Division 10 is similarly an adverse action because it too is more dangerous than Division 11 and is therefore a more onerous assignment. Division 10 is a maximum-security division, whereas Division 11 is a medium/maximum security division. In addition, Division 10 is lower in safety standards than Division 11, officers in Division 10 have less backup, and it is easier for inmates to isolate officers there.

Any claim by the Respondents that Divisions 9 and 10 are qualitatively comparable to Division 11 in terms of the inmates they house must be rejected where the collective bargaining agreement expressly identifies Divisions 9 and 10 as maximum-security divisions. By contrast, the agreement does not identify Division 11 as a maximum-security division, and it in fact contains a mix of medium and maximum-security inmates.

As to both transfers, the nominal one dollar increase per hour in pay does not undermine a finding that the transfers qualify as adverse employment actions when viewed on the whole. The Board has not previously considered the impact of a nominal pay increase when assessing the impact of transfer on a charging party's terms and conditions of employment in the context of a retaliation claim. However, it is clear that adverse financial consequences are not required for a finding of adversity and that other factors are also relevant. City of Chicago, 182 Ill. App. 3d at 594-95. Furthermore, in the employment law context, the accompaniment of nominal pay increase does not foreclose a finding that an involuntary transfer is adverse. Melendez-Arroyo, 273 F.3d 30, 36 (1st Cir. 2001) (reasonable jury could find that the plaintiff suffered an adverse action from a transfer despite a small pay increase). Here, the nominal pay increase does not counterbalance the more dangerous nature of the assignments in Divisions 9 and 10. Indeed, other employees likewise viewed the assignments to those maximum-security divisions as less favorable, despite

the small pay increase, as these divisions are populated by low-seniority employees who have least preference in selecting their assignments.

Similarly, Janda's initially positive impression of Division 9 does not undermine a finding that it was, overall, a more onerous assignment. The Respondents correctly observe that Janda touted the benefits of Division 9 within the first week of his arrival there and encouraged his colleagues to bid into that unit. He noted that employees had weekends off, no mandated overtime, good supervisors, a double partner, and electronic monitoring of the decks. However, in those early days, Janda would not have appreciated the increased dangers of Division 9 because his consistent need to use force against inmates in that division would have been apparent only after more time had passed. Accordingly, Janda's initial impressions of Division 9 represent an incomplete picture of his working conditions there and do not undermine a finding of adversity.<sup>9</sup>

Likewise, the Respondent's decision to transfer Janda to Division 9 remains an adverse employment action despite Janda's expressed interest in expanding his skill set. While Janda may have been granted the opportunity to acquire new skills in Division 9, the involuntary nature of the transfer precluded him from leaving Division 9 and further broadening his experience while the OPR investigation remained pending.

The cases cited by the Respondents fail to support their claim that the transfers were neutral in their impact on the Charging Parties' conditions of employment. For example, the Respondents' transfer of the Charging Parties to more dangerous assignments is not comparable to the inconsequential, albeit negative, comments in a performance evaluation, complained of in City of Lake Forest. Cf. City of Lake Forest, 29 PERI ¶ 52 (IL LRB-SP 2012). Similarly, the Respondents removal of the Charging Parties from their contractually obtained, bid positions is not comparable to the removal of office space, complained of in Slater, to which Slater had no claim. Cf. Slater v. Illinois Lab. Rels. Bd., Loc. Panel, 2019 IL App (1st) 181007, ¶ 18 (employee's use of office space for union matters was not a term and condition of employment where use of the office was non-exclusive, temporary, permissive, and subject to the employer's need for the space). The fact that there exists a contractual mechanism by which to remove employees from their

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<sup>9</sup> However, in reaching the conclusion that Janda's transfer to Division 9 qualified as an adverse action, I do not rely on Janda's physical description of Division 9—allegedly poor ventilation, bad lighting, and noise--and its claimed adverse impact on his health. Janda never mentioned these issues to his colleagues when touting the benefits of Division 9 though they purport to describe his day-to-day surroundings and would have been apparent to him within his first week there.

bidded positions pending investigation does not insulate such transfers from scrutiny or show that they lack any adverse impact. County of Cook and Sheriff of Cook County (Timothy Parker), 37 PERI ¶ 43 (II LRB-LP 2020) (analyzing change in assignment and duties arising from transfer in determining that transfer was an adverse action).

Furthermore, the Respondent's initiation of an OPR investigation into Janda and Bollinger was itself an adverse employment action, separate and apart from the transfers discussed above. Employer actions that render an employee ineligible for promotion qualify as adverse employment actions. State of Illinois, Secretary of State, 31 PERI ¶ 7 (IL LRB-SP 2014) (oral warning rendered employee ineligible for promotion; employee was denied promotion because of oral warning); cf. Whittaker v. N. Illinois Univ., 424 F.3d 640, 648 (7th Cir. 2005) (noting that if employer action had led to "ineligibility for job benefits like promotion, transfer to a favorable location, or an advantageous increase in responsibilities," court might find it adverse). This ineligibility remains adverse regardless of whether the employee would have actually received a promotion during that period. Chattman v. Toho Tenax Am., Inc., 686 F.3d 339, 348 (6th Cir. 2012) (written warning was adverse where it rendered employee ineligible for promotion or raises for one-year period).<sup>10</sup> Here, both Janda and Bollinger became ineligible for promotion to a higher rank while the OPR complaint remained pending because the Sheriff's Employment Action Manual states that "no candidate will be considered 'qualified' for an employment action until a conclusion is reached by OPR" on the investigation. Superintendent Martinez confirmed that the Respondents will not promote a correctional officer while they are under investigation by OPR. Thus, Bollinger remained ineligible for promotion to a higher rank for eight months and Janda for a year, because of the pending OPR investigation, and Bollinger specifically testified that he did not apply for a promotion during that time because he was aware of this restriction.

The initiation of the OPR investigation was additionally adverse, to the extent that it precluded the Charging Parties from transferring out of the assignments into which the Respondents transferred them, while the investigation was pending. Correctional officers have a contractual right to bid for, and move into, a new assignment each year. However, employees who

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<sup>10</sup> ALJ Kazanjian, in a non-precedential decision, recognized that an employer's action is adverse when it reduces the opportunity for promotion, even where there is no assurance that a higher-level job opening will become available. Village of Franklin Park, 19 PERI ¶ 68 (IL LRB-SP ALJ 2003) (employer reduced number of police sergeant positions from 11 to 9, reducing employees' chance of obtaining a promotion into one of those positions, should it be vacated).

have been transferred subject to investigation are ineligible to leave the positions into which they have been transferred until the investigation is complete, which can take up to 18 months. The Respondent's OPR investigation into Janda and Bollinger therefore denied them a material employment opportunity that would otherwise have been available to them in the absence of an investigation. The fact that the investigations effectively trapped the Charging Parties in more dangerous, maximum-security divisions further highlights the adverse nature of this restriction on their ability to leave.<sup>11</sup>

The initiation of the OPR investigation was additionally adverse, to the extent that it prevented Janda and Bollinger from bidding out of the positions into which the Respondents had transferred them. Employees who have been transferred subject to investigation are ineligible to move out of the positions into which they have been transferred until the investigation is complete, which can take up to 18 months. Here, Janda made three separate attempts to bid out of Division 9 but was unsuccessful in his attempts to leave and therefore remained in Division 11 until his resignation.<sup>12</sup>

Bollinger additionally suffered an adverse employment action when his new lieutenant in Division 10 consistently gave him bad assignments, admitting that he did so because Bollinger was an Article U transfer, i.e., an employee transferred there pending an OPR investigation. Ill. his Dep't of Central Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶ 2022 n. 3 (adverse actions include assignment to more onerous duties).

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<sup>11</sup> Contrary to the Respondents' suggestion, the Charging Parties need not additionally show that they would have obtained their preferred assignment had they been allowed to leave the maximum-security divisions. Yet, the fact that the Charging Parties had successfully bid into a different division (Division 11) for several years, previously, weighs in favor of finding that any potential bids into that division would again have been successful.

<sup>12</sup> Although the transfers and OPR investigation both qualify as adverse employment actions, there is no merit to the Charging Parties' assertion that Janda additionally suffered an adverse action because he felt harassed by his exchange with Martinez on December 26, 2020. The Board and the courts have acknowledged that harassment can qualify as an adverse employment action, but they have so held in the context of an employer's heightened scrutiny of an employee's work or a pattern of conduct by the employer. City of Chicago, 4 PERI ¶ 3001 (Interrogating employee about frivolous or nonexistent discrepancies in her work and reopen a case she had closed) aff'd City of Chicago v. Ill. Local Labor Relations Bd., 182 Ill. App. 3d 588, 594-95; County of Dekalb & State's Attorney of Dekalb County, 6 PERI ¶ 2053 (IL SLRB 1990) (respondent harassed employee by piling on charges, making unfounded accusations, and requiring employee to reveal details of her private affairs and to pledge allegiance to the office). Martinez admittedly threatened Janda by telling him to "look for trouble," and escorted Janda to the lobby, where Janda completed his shift. However, Janda's isolated interaction with Martinez does not rise to the level of harassment, and Janda has not separately alleged that the lobby assignment was adverse.

Next, there is a causal connection between the Charging Parties' protected activities and the Respondents' decisions to open an OPR investigation into their conduct and to transfer them out of their bidded assignments to Divisions 10 and 9, respectively. The impetus for both actions was the Charging Parties' safety-related protests on December 26, 2020. Indeed, the Respondents do not expressly dispute this causal connection on brief. They simply characterize the Charging Parties' activities as unprotected work stoppage or attempted work stoppage that allegedly jeopardized the security of the jail. However, as discussed above, this characterization is unavailing and, in any event, does little to undermine the clear causal connection between the Charging Parties' protected activities of December 26, 2020, and the adverse actions.

Finally, there is no need to proceed to a dual motive analysis in this case. Where, as here, the Respondents take adverse action against employees for the very activity that the Act protects, the Board will find that the Respondents violated the Act. Cnty. of Cook and Sheriff of Cook Cnty., 37 PERI ¶ 56 (IL LRB-LP 2020); Cnty. of Cook and Sheriff of Cook Cnty., 25 PERI ¶ 74; Village of Bensenville, 10 PERI ¶ 2009. A respondent's defense in such cases rests on demonstrating that the employee's conduct lost the protections of the Act or, in other words, that the restriction on the employee's otherwise protected activity is necessary for the maintenance of safety, efficiency or discipline. Village of Bensenville, 10 PERI ¶ 2009. However, as discussed above, the Respondents have not made that showing here.

Moreover, the Respondents have not identified any unprotected activity that would have warranted the alleged adverse actions. Chicago Transit Authority, 30 PERI ¶ 9 n. 3 (finding employee's conduct remained protected and noting that there was "no unprotected activity that would have warranted the discipline imposed").

Thus, the Respondents violated Section 10(a)(1) of the Act when they initiated an investigation into the Charging Parties and transferred them to more dangerous divisions because they engaged in the protected, concerted activity of protesting unsafe working conditions.

## 2. Amending the Complaint

The complaint is amended to add the allegation that the Respondents constructively discharged the Charging Parties. The Act gives the administrative law judge discretion to amend the complaint. Section 11(a) of the Act provides, in relevant part: "Any such complaint may be amended by the member or hearing officer conducting the hearing for the Board in his discretion

at any time prior to the issuance of an order based thereon.” 5 ILCS 315/11(a) (2018). Section 1220.50(f) of the Board's Rules likewise provides that “[t]he Administrative Law Judge, on the judge's own motion or on the motion of a party, may amend a complaint to conform it to the evidence presented in the hearing or to include uncharged allegations at any time prior to the issuance of the Judge's recommended decision and order.” 80 Ill. Admin. Code § 1220.50(f). In interpreting these provisions, the Board has held that it is appropriate to amend a complaint in the following circumstances: (1) where, after the conclusion of the hearing, the amendment would conform the pleadings to the evidence and would not unfairly prejudice any party; and (2) to add allegations not listed in the underlying charge, so long as the added allegations are closely related to the original allegations in the charge, or grew out of the same subject matter during the pendency of the case. Forest Preserve Dist. of Cook Cnty. v. Ill. Labor Relations Bd., 369 Ill. App. 3d 733, 746 (1st Dist. 2006); Chi. Park Dist., 15 PERI ¶ 3017 (IL LLRB 1999); City of Chi. (Police Dep't), 14 PERI ¶ 3010 (IL LLRB 1998); Cnty. of Cook and Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB 1990); Cnty. of Cook, 5 PERI ¶ 3002 (IL LLRB 1988). The Board may properly decide allegations which have been litigated by the parties, even if those allegations were never specifically pleaded, as long as the respondent has had notice and an adequate opportunity to prepare and present a defense. County of Cook and Sheriff of Cook County, 37 PERI ¶ 43; Forest Preserve Dist. of Cook Cnty., 5 PERI ¶ 3002.

Here, the alleged constructive discharges arose during the pendency of the case and grew out of the same subject matter as the underlying charge. The underlying charge concerned the Respondents' decision to investigate and transfer the Charging Parties allegedly because of their protected activities. The Charging Parties, who later resigned, now suggest that the Respondents' decisions to transfer them effectively compelled them to resign, rendering their resignations de facto discharges. Accordingly, the new constructive discharge allegation grew directly from the allegedly unlawful transfers at issue in the original charge.

Furthermore, the Respondents had an adequate opportunity to prepare a defense, such that no prejudice would result from the amendment. The Respondents received notice on the first day of hearing that evidence of constructive discharge would be considered. They therefore had the opportunity to examine witnesses and raise relevant arguments in their briefs on this issue. County of Cook and Sheriff of Cook County, 37 PERI ¶ 43; Chicago Park Dist., 15 PERI ¶ 3017.

### 3. Constructive Discharge

The Respondents did not constructively discharge the Charging Parties in violation of Section 10(a)(1) of the Act.

To establish a constructive discharge, a charging party must prove the following: (1) that the burden imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign and (2) that the employer imposed the conditions because of the employee's union activity or other protected concerted activity. Village of Glenwood, 3 PERI ¶ 2056 (IL SLRB 1987) (citing Crystal Princeton Ref. Co., 222 NLRB 1068, 1069 (1976)); Mercy Hosp., 366 NLRB No. 165 (2018) (noting that Crystal Princeton Refining test covers burdens imposed because of union activity and “other protected concerted” activities); see also Illinois Departments of Central Management Services and Corrections, 3 PERI ¶ 2034 (IL SLRB 1987). The test as to whether working conditions were so difficult or unpleasant so as to force an employee to resign is an objective one. Algreco Sportwear Co., 271 NLRB 499, 500 (1984). Each Charging Party’s circumstances are considered separately below; however, both Charging Parties constructive discharge claims fail as to the first element.

Here, the Respondent’s initiation of an OPR investigation into Janda did not impose intolerable working conditions that compelled him to resign. As a threshold matter, Janda never attributed his resignation to the OPR investigation, as distinguished from the conditions imposed on him by the transfer, discussed separately below. Furthermore, the initiation of an OPR investigation would not cause a reasonable employee to resign. Although a pending OPR investigation temporarily limits an employee’s promotional and transfer opportunities, the majority of employees subject to OPR investigation nevertheless remain employed by the Respondents until the investigation has concluded.

The Respondents’ transfer of Janda to Division 9 also did not impose intolerable working conditions that compelled him to resign. The proper standard for constructive discharge requires not only that the change in working conditions be difficult and unpleasant but that the change be so difficult and unpleasant that it forces resignation. Village of Glenwood, 3 PERI ¶ 2056; Algreco Sportwear Co., 271 NLRB at 500. Here, the work in Division 9 was more dangerous and therefore more unpleasant than the work in Division 11, but it was no different from the work required of every other correctional officer assigned to that division; Janda himself had worked there before with no apparent complaints. Furthermore, the Respondents took no action to

exacerbate the inherent risks of his job in Division 9 and did not require him to perform his work there in an unreasonable manner. For example, Janda made no claim that the Respondents required him to cross-watch in Division 9. To the contrary, the Respondents gave him a “double partner,” and he enjoyed the added benefit of being able to watch his colleagues’ decks on a screen. Janda’s endorsement of Division 9 to his colleagues and his identification of its objective benefits—weekends off, lack of mandated overtime, a secured parking lot, good supervisors—further weighs against a finding that a transfer to Division 9 would have caused a reasonable employee to resign. Panscape Corp., 231 NLRB 693, 697 (1977) (although ditch-digging work assigned to employee was more arduous than other types, it was not uncommon for employees to have to dig ditches, and employee had performed that work in the past; no constructive discharge).

The Respondents likewise did not constructively discharge Bollinger by initiating an OPR investigation into his conduct or transferring him to Division 10. Bollinger did not expressly attribute his resignation to either of these actions and, indeed, did not identify any conditions inherent to Division 10 as the reason for his resignation. Instead, Bollinger asserted that he resigned because his supervisors in Division 10 gave him consistently bad assignments.

Turning to that final issue, Bollinger’s assertion that he received consistently bad assignments in Division 10 does not support a finding of constructive discharge because his testimony on this point was exceedingly vague. To prevail on a claim of constructive discharge the charging party must show by an objective standard that the change in working conditions was so difficult and unpleasant that it forced him to resign. Algreco Sportswear Co., 271 NLRB at 500. Here, an objective assessment of Bollinger’s allegedly bad assignments is impossible because Bollinger did not describe any of his assignments or what they entailed. The mere fact that Bollinger received worse or discriminatory treatment because of his protected concerted activity does demonstrate that the Respondents constructively discharged him. Franklin Iron & Metal Corp., 315 NLRB 819, 826 (1994) (rejecting claim of constructive discharge where charging party’s testimony that he was given more dangerous and difficult assignments was “too vague and lacking in detail”); Algreco Sportswear Co., 271 NLRB at 500 (even where discriminatorily-motivated unfair labor practices have occurred, the “mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge.”)

Thus, the Respondents did not constructively discharge the Charging Parties.

#### 4. Section 10(a)(2) claim – Alleged Discrimination

The Respondents did not violate Section 10(a)(2) of the Act when they filed a complaint register against the Charging Parties with the Office of Professional Review and transferred the Charging Parties into maximum-security divisions.

Section 10(a)(2) of the Act makes it an unfair labor practice for an employer “to discriminate in regard to hire or tenure of employment...in order to encourage or discourage membership in or other support for any labor organization.” 5 ILCS 315/10(a)(2).

To establish a prima facie case that the employer violated Section 10(a)(2) of the Act, the charging party must prove by a preponderance of the evidence that: (1) an employee engaged in union and/or protected, concerted activity; (2) the respondent had knowledge of such activity; (3) the respondent took an adverse action against the employee; and (4) the employee's protected, concerted activity and/or union activity was a substantial or motivating factor in the adverse action. City of Burbank, 128 Ill.2d at 345. While these are generally the same elements required to establish a prima facie case under Section 10(a)(1) of the Act, the critical focus under Section 10(a)(2) of the Act, specific to the last element, is whether the respondent was motivated by union animus. Compare Village of University Park (Police Department), 35 PERI ¶ 52 (IL LRB-SP 2018) (dismissing 10(a)(2) claim absent evidence of union animus); Cnty. of Cook, 21 PERI ¶ 53 (IL LRB-LP 2005)(same); Clerk of the Circuit Court of Champaign County, 8 PERI ¶ 2025 (IL SLRB 1992)(same); and Vill. of Bensenville, 10 PERI ¶ 2009 (same) with Pace Suburban Bus Div. of Reg'l Transp. Auth., 406 Ill. App. 3d at 494-6 (noting distinctions between 10(a)(2) and 10(a)(1) claims, finding that no showing of union animus is required under Section 10(a)(1)).

Once the charging party establishes a prima facie case, the respondent can avoid a finding that it violated the Act by demonstrating that it would have taken the adverse action for a legitimate business reason, notwithstanding the respondent's union animus. City of Burbank, 128 Ill. 2d at 346. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. Id. If the proffered reasons are merely litigation figments or were not in fact relied upon, then the employer's reasons are pretextual and the inquiry ends. Id. However, when legitimate reasons for the adverse employment action are advanced and are found to be relied upon at least in part, then the case may be characterized as a “dual motive” case, and the respondent must establish, by a

preponderance of the evidence, that it would have taken the action notwithstanding the employee's union activity. Id. at 346-7.

Here, the first three elements of the Charging Parties' prima facie case are satisfied, because they are the same elements required to prove a Section 10(a)(1) violation, discussed above.

However, the Charging Parties have not demonstrated that the Respondents took adverse action against them because of their union activities, because of union animus, or to otherwise discourage support for the union, as required under a Section 10(a)(2) analysis. The Charging Parties have made no express claim on brief that they engaged in union activity, and they have pointed to no specific evidence in support of the allegation that the Respondents harbored union animus. Such animus cannot be inferred from the Respondents' decision to take adverse action against the Charging Parties because of their protected, concerted activities because this activity does not also qualify as union activity. The Charging Parties were not union stewards and never informed the Respondents that they were acting on the Union's behalf when they protested cross watching. They did not even disclose that they had sought the Union's guidance before making their protests. While Bollinger encouraged his colleagues to "fight [cross-watching] as a union," this statement must be viewed as merely concerted initiation of group action rather than as union activity where there is no indication that Bollinger was speaking for the Union. In short, the record is entirely devoid of overt animus toward any union activities and there is nothing in the record to suggest that the Respondents harbored any ill feelings toward the union sufficient to support a violation of Section 10(a)(2) of the Act. See Vill. of Bensenville, 10 PERI ¶ 2009 (discipline of union president did not violate Section 10(a)(2) absent evidence of union animus, but nevertheless finding violation of Section 10(a)(1)).

In sum, the Charging Parties failed to demonstrate that the Respondents violated Section 10(a)(2) of the Act by initiating an investigation in their conduct and transferring them to Divisions 9 and 10.

##### 5. Section 10(a)(1) – Alleged Threats

The Respondents violated 10(a)(1) of the Act when their agents threatened Janda and Bollinger in response to their protected, concerted activity.

A respondent violates Section 10(a)(1) of the Act when it engages in conduct which reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights protected

by the Act. City of Lake Forest, 29 PERI ¶ 52; City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); Clerk of the Circuit Court of Cook Cnty., 7 PERI ¶ 2019 (IL SLRB 1991); City of Chi., 3 PERI ¶ 3011 (IL LLRB 1987); Ill., Dep't. of Cent. Mgmt. Servs. (Dept. of Conservation), 2 PERI ¶ 2032 (IL SLRB 1986). A violation of Section 10(a)(1) does not depend on the employer's motive. City of Mattoon, 11 PERI ¶ 2016; Vill. of Calumet Park, 23 PERI ¶ 108 (IL LRB-SP 2007) (no requirement that employer intended to coerce employees). Instead, the test is whether the employer's conduct, viewed objectively from the standpoint of a reasonable employee, had a tendency to interfere with, restrain or coerce the employee in the exercise of a right guaranteed by the Act. Clerk of the Circuit Court, 7 PERI ¶ 2019; Dep't of Conservation, 2 PERI ¶ 2032.

There is no requirement of proof that the employees were actually coerced or that the employer intended to coerce the employees. Vill. of Calumet Park, 23 PERI ¶ 108. Employer statements to employees which contain threats of reprisal have been found to violate Section 10(a)(1). Vill. of Calumet Park, 23 PERI ¶ 108; Vill. of Calumet Park, 22 PERI ¶ 23 (IL SLRB 2005) (addressing implied threat); City of Highland Park, 18 PERI ¶ 2012 (IL SLRB 2002); City of Chi. (Chi. Police Dep't), 3 PERI ¶ 3028 (IL LLRB 1987). A threat violates Section 10(a)(1) of the Act if a reasonable employee would anticipate adverse consequences if he continued participating in protected concerted activities, regardless of whether any specific employee actually reached that conclusion. Clerk of the Court of Cook County, 7 PERI ¶ 2019.

Here, the Respondents' agents made threats in response to the Charging Parties' protected activities that would deter a reasonable employee from engaging in such activities in the future. As discussed above, the Charging Parties engaged in protected, concerted activity when they protested the practice of cross-watching at the jail. See discussion supra. Immediately following the Charging Parties' protests and in clear response to them, Lieutenant Lucas told Bollinger that the administration would "come for his job" and that he should have filed a grievance instead.<sup>13</sup> In addition, Superintendent Martinez informed Janda that he should "look for trouble" in his email

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<sup>13</sup> The complaint is amended *sua sponte* to add the allegation that Lieutenant Lucas made this statement and that his statement independently violated Section 10(a)(1) of the Act. Such an amendment is permissible under the standards set forth in Section 2 of this decision. See cases *supra*. The amendment is closely related to the original allegations, which similarly alleged that the Respondents threatened the Charging Parties for engaging in a protected, concerted activities related to cross-watching. Furthermore, no prejudice would result from the amendment because evidence related to the amended allegation was presented at hearing such that the Respondents had the chance to defend against it. See Chi. Park Dist., 15 PERI ¶ 3017.

and that he would “never work in [Division 11] again.” Such threats of termination and permanent removal from Division 11 would cause a reasonable employee to refrain from engaging in protected, concerted activity in the future. Vill. of Calumet Park, 22 PERI ¶ 23.

Thus, the Respondents’ threats violate Section 10(a)(1) of the Act because they have a chilling effect on future protected, concerted activity.

**V. CONCLUSIONS OF LAW**

1. The Respondents violated Section 10(a)(1) of the Act when they filed a complaint register against the Charging Parties with the Office of Professional Review and transferred the Charging Parties into maximum-security divisions.
2. The complaint is amended to add the allegation that the Respondents constructively discharged the Charging Parties.
3. The Respondents did not constructively discharge the Charging Parties in violation of Section 10(a)(1) of the Act.
4. The Respondents did not violate Section 10(a)(2) of the Act when they filed a complaint register against the Charging Parties with the Office of Professional Review and transferred the Charging Parties into maximum-security divisions.
5. The Respondents violated 10(a)(1) of the Act when their agents threatened Janda and Bollinger in response to their protected, concerted activity.

**VI. RECOMMENDED ORDER**

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

1. Cease and desist from:
  - a. Interfering with, restraining or coercing their employees in the exercise of the rights guaranteed them in the Act.
  - b. Retaliating against Paul Bollinger and Justin Janda for engaging in the protected, concerted activity of protesting cross-watching on December 26, 2020.
  - c. Threatening Paul Bollinger and Justin Janda in response to their protected, concerted activity of protesting cross-watching on December 26, 2020.
2. Take the following affirmative action necessary to effectuate the policies of the Act:

- a. Withdraw the complaint register filed against Justin Janda and Paul Bollinger and dismiss or administratively close the Office of Professional Review (OPR) investigation initiated because of their protected, concerted activities of December 26, 2020.
- b. Expunge all record of the complaint register and OPR investigation from Justin Janda's and Paul Bollinger's employment records.
- a. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondents will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.
- a. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondents have taken to comply with this order.

## **VII. EXCEPTIONS**

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within seven days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the Board's General Counsel, at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email address for electronic filings, at [ILRB.Filing@Illinois.gov](mailto:ILRB.Filing@Illinois.gov). All filing must be served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-

exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

**Issued at Chicago, Illinois this 4th day of January, 2023**

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
LOCAL PANEL**

*/S/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**