STATE OF MICHIGAN

COURT OF APPEALS

GENESEE COUNTY SHERIFF'S DEPARTMENT,

Respondent-Appellee,

v

MICHAEL S. CHERRY,

Charging Party-Appellant,

and

AMERICAN FEDERATION OF STATE COUNTY MUNICIPAL EMPLOYEES COUNCIL 25 LOCAL 2259 AFL-CIO,

Charging Party.

UNPUBLISHED
December 14, 2006

No. 260833
MERC
LC No. 00-000052

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Charging Party Michael Cherry appeals a decision and order issued by the Michigan Employment Relations Commission (MERC) on his unfair labor practice charges against his employer, the Genesee County Sheriff's Department.

I. Standards of Review

As this Court explained in *Branch Co Bd of Comm'rs v Int'l Union, UAW*, 260 Mich App 189, 192-193; 677 NW2d 333 (2004):

> We review MERC decisions "pursuant to Const 1963, art 6, § 28, and MCL 423.216(e)." *Grandville Muni Exec Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). MERC's "findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Id.* MERC's "legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Id.*, citing MCL 24.306(1)(a), (f). "In contrast to [ ] MERC's factual findings, its legal rulings 'are afforded a lesser

> degree of deference' because review of legal questions remains de novo, even in MERC cases." *St Clair Co Ed Ass'n v St Clair Co Intermediate School Dist*, 245 Mich App 498, 513; 630 NW2d 909 (2001), quoting *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 403; 597 NW2d 284 (1999), and citing *Kent Cty Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 357 n 8; 616 NW2d 677 (2000).

"The party asserting a claim under the PERA has the burden of establishing an unfair labor practice." *Org of School Administrators and Supervisors v Detroit Bd of Ed*, 229 Mich App 54, 64; 580 NW2d 905 (1998). Many of the claims raised in this matter fall under MCL 423.210. Section 10(1)(a) provides that "[i]t shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9 . . . ." Section 9, MCL 423.209, states that "[i]t shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice."

"The elements of a prima facie case of discrimination under Sections 10(1)(a) . . . of PERA include: (1) employee, union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions." *University of Michigan*, 2001 MERC Lab Op 40, 43.[1]

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[1] As this Court opined in *Mich Ed Support Personnel Ass'n v Evart Pub Schools*, 125 Mich App 71, 74; 336 NW2d 235 (1983):

> [T]he burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the decision of the employer . . . . Once this showing is established, the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The burden of the employer is one of going forward to meet the prima facie case established by the employee. It is not a burden of persuasion on the ultimate issue of the existence or non-existence of a violation. It is a balancing of the evidence. If the employer, by credible evidence, balances the employee's prima facie case, the employer's burden of proof is met and the duty of producing further evidence shifts back to the employee. The burden of the employer referred to is a burden of production of evidence to meet the prima facie case of the employee. If the burden of the employer is met, the burden is then once again on the employee. As the court in [*NLRB v Wright Line*, 662 F2d 899 (CA 1, 1981)] pointed out, however, burdens of "persuasion" and "production" are not, as a practical matter, likely to be very important in most cases as decisions will usually turn on a weighing of the evidence.

II. Analysis

A. Cherry's Three-Day Suspension

Cherry is a deputy sheriff assigned to the courts division of the sheriff's department. He contends that the sheriff's department violated the Public Employment Relations Act (PERA) when it suspended him for three days after he repeated a comment allegedly made by Undersheriff James Gage. Specifically, Cherry asserts that, in September or October 1999, Undersheriff Gage called the promotion of an African-American woman, Tina Fielder, a "token appointment." Cherry admits that he told three or four other employees about the comment, including the chief steward of Local 2259, Michael Potoczny, who was suspended for thirty days after he repeated the comment during a later grievance proceeding. After Potoczny made the statement, Captain Michael Compeau conducted an investigation of the incident and Cherry was suspended on June 20, 2000. According to the notice of disciplinary action form:

> You made untruthful statements during an investigation by the sheriff's department that Undersheriff Gage had made remark to you that Tina Fielder was a token. This is in violation of general order 1 section 4.25 – truthfulness which states in part . . . Dishonesty is to be eliminated as it is totally unacceptable and will not be tolerated . . . Any further violations will subject you to discipline up to an [sic-and] including discharge. You are suspended for three working days. [Emphasis deleted.]

Cherry filed a grievance to challenge his suspension and specifically complained that the sheriff's department lacked just cause to suspend him and that "[t]he offense was [m]inor in [n]ature." The matter was arbitrated, but Cherry declined to testify during the hearing. However, Gage testified and was cross-examined during the hearing and he denied that he referred to Fielder as a "token." Because Cherry did not respond with any competent evidence, and because the arbitrator was persuaded by Gage's testimony, the arbitrator concluded that Gage did not make the comment about Fielder. However, because the sheriff's department did not establish that the incident amounted to a "major infraction" under the union contract, the arbitrator reduced Cherry's punishment to a written reprimand.

Cherry argues that he was engaged in a protected activity when he told Potoczny about Gage's comment because Potoczny was a union steward. We agree with the sheriff's department that Cherry mischaracterizes the reason for his discipline. While the department conducted an investigation after Potoczny repeated the comment, the issue was not whether Cherry made the comment to anyone in particular, but whether he lied during the investigation that was conducted about the alleged comment. Captain Compeau concluded that Cherry lied during the investigation, he disciplined Cherry, and the arbitrator agreed with Compeau's conclusion.

Nothing in the record indicates that Cherry's participation in the investigation was a protected activity or in any way related to his union affiliation. Further, were we to conclude that Cherry's disclosure to Potoczny was sufficient to raise a question about whether he was engaged in a protected activity, it is nonetheless true that "[m]isconduct in the course of concerted activity, including insubordination, is not beyond an employer's right to discipline." *AFSCME, Michigan Council, Local 574-A v City of Troy*, 185 Mich App 739, 744; 462 NW2d 847 (1990). Accordingly, the sheriff's department's conclusion that Cherry lied about an

offensive statement he attributed to a superior officer would be a punishable offense regardless whether Cherry was involved in a union activity at the time.

For these reasons, MERC did not err when it ruled that the sheriff's department did not violate PERA when it suspended Cherry. Though we need not address the issue further, we also observe that Cherry has failed to establish that he was suspended because of any hostility toward his rights or that some anti-union animus was the motivating factor in his suspension.

B. Cherry's Performance Points

Cherry further claims that MERC erred when it found no PERA violation after the sheriff's department assigned Cherry five performance points on a 2001 promotion eligibility list. The parties agree that it is within the sheriff's discretion to award performance points to candidates who seek a promotion. Undersheriff Gage testified that, in 2001, he recommended to Sheriff Robert Pickell that Cherry be given zero performance points. In Gage's opinion, Cherry was disloyal, untruthful, could not be trusted and could not handle a supervisory position. Instead, Sheriff Pickell gave Cherry five performance points in 2001. Cherry complained that this assessment was discriminatory because, in 1999, Cherry received 17 performance points. The parties stipulated that an outside evaluator also recommended scores for performance points. In 1999, the outside evaluator gave Cherry 13.5 points and in 2001, he gave Cherry 7.5 points. Nonetheless, Cherry contends that he received the lower score because of Sheriff Pickell's animus toward Cherry's union activity.

The hearing referee ruled that the sheriff's department violated PERA by lowering Cherry's performance points. He noted that, because Sheriff Pickell did not testify at the hearing, the sheriff's department failed to explain Cherry's lower score. Accordingly, he drew an adverse inference from Sheriff Pickell's absence and ruled that Sheriff Pickell must have given Cherry a lower score because of Cherry's protected activity. The MERC panel disagreed and ruled that Cherry failed to establish a prima facie PERA violation because (1) he failed to show a nexus between his union activity and his performance points and (2) he failed to establish that the sheriff's department had an anti-union animus. The MERC panel further explained that, because Cherry failed to meet his burden of proof, the burden did not shift to the sheriff's department to explain the score. The MERC panel also observed that other factors supported the lowered score because Cherry was disciplined between 1999 and 2001 and even the outside evaluator significantly lowered his score.

Cherry attempted to show an anti-union animus by pointing out that Captain Compeau referred to him as a "shit stirrer," Sheriff Pickell referred to Cherry and other active union members as "malcontents," and Gage referred to Cherry as disloyal. Notably, Cherry cites no case law to establish that these statements satisfy the animus element of his prima facie case, except to cite an NLRB decision in which the panel observed that "'there is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will.'" *Monongahela Power Co*, 324 NLRB 214 (1997), quoting *Marcus Management*, 292 NLRB 251 (1989). Other than merely citing the evidence, Cherry also fails to explain how the alleged incidents prove that his union activity or the sheriff's department's alleged anti-union animus were a motivating factor in his performance points.

As the MERC panel observed in its decision and order:

> While the record indicates that Cherry was active in the Union, held Union office, and filed grievances, Charging Parties have not established a nexus between this activity and the Sheriff's allotment of Cherry's performance points. The ALJ dismissed most of Cherry's other allegations against the Employer, including Cherry's being bypassed for promotion, because Charging Parties failed to establish that the Employer's actions were based on Cherry's concerted activity or motivated by anti-union animus. We reach the same conclusion here.

The panel went on to find that the "shit stirrer" accusation is simply insufficient to establish anti-union animus: "Employment relationships are often filled with turmoil, and mere negative opinions expressed about unions or union members during a private conversation without additional threats or coercive actions do not establish anti-union animus." As a MERC panel noted in another case, *Lake Huron Water Treatment Plant*, 1999 MERC Lab Op 211, "[e]mployer discipline or adverse action involving union officers and agents are often problematical, especially if the individual involved has been militant in his/her activities, but such difficulties do not relieve a charging party from the burden of showing that the specific employer action in question was motivated by union animus or hostility." The panel further opined that "[t]he expressed unhappiness" of management about the filing of grievances alone is not enough to establish that a particular action was motivated by protected activity. "Employers are not expected to be welcoming or enamored at the filing of grievances or complaints with State agencies, and expressions of dismay over such matters are part of the give and take of labor relations, unless such expressions are accompanied by threats or direct action against the offending steward or complainant sufficient for a finding of union animus or hostility." *Id*.

For the above reasons, Cherry's reliance on the "shit stirrer" and "malcontent" comments is misplaced because they were mere expressions of dismay about complaints and grievances and were not "accompanied by threats or direct action" against Cherry. With regard to his cited examples of disciplinary action, Cherry's argument is, again, unavailing, because he has failed to show that any of the punishments for misconduct were related to his union activity. Rather, the incidents of discipline, including the "token" reference discussed above, were related to Cherry's own misconduct and he makes no showing that any punishment was imposed because of any protected activity. Moreover, notwithstanding his list of examples of problems he had within the department, Cherry failed to show how one or more of those incidents or comments were in any way related to his performance points. In other words, Cherry presented no evidence that "but for" his union activities, he would have been awarded more performance points. See *UAW v Sterling Heights*, 176 Mich App 123, 130; 439 NW2d 310 (1989). Accordingly, the MERC panel correctly ruled that Cherry failed to establish a prima facie case.[2]

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[2] Were we to find that Cherry established a prima facie case, we would nonetheless dismiss Cherry's claims because the sheriff's department presented sufficient evidence to show that, in the absence of a protected activity, Cherry's performance points would have been the same. See *MESPA v Evart Pub Schools*, *supra* at 75. Not only did the outside evaluator give Cherry 7.5 points, the sheriff's department was permitted to consider Cherry's history of disciplinary action when it assessed his performances points and Cherry clearly had a number of problems dealing
(continued…)

C. Lynda Germaine's Suspension

Cherry further asserts that the MERC panel erred when it ruled that his wife, Lynda Germaine, failed to establish a prima facie PERA violation for the suspension she received for using profanity. We agree with the sheriff's department that the charging party mischaracterizes the basis for Germaine's discipline. Her Notice of Disciplinary Action states:

> On January 4, 2000, while working District E-4, you were directed by Sgt. Jacobi to exchange vehicles at the motor pool. You failed to do this in a timely matter [sic-manner]. You also left your patrol district during this time for two hours without prior approval. On January 5, 2000 when Sgt. Jacobi discussed these issues with you, you used profane and vulgar language on several occasions. You are in violation of Genesee County Sheriff General Order #1 Sec.4.18 (Obedience to Authority), Sec. 4.7 (Unsatisfactory Performance – Incompetence) and Sec 4.27 (Verbal abuse). Future violations of these orders will result in further violation [sic-disciplinary action?].

On the basis of these infractions, Germaine was suspended for one day. According to Germaine, she filed a grievance and her punishment was reduced to a written reprimand.

It is undisputed that Germaine left her district during work hours in order to attend a union meeting. Contrary to the assertions in the charging party's brief, Captain Michael Rau testified that it was not permissible for department personnel to attend union meetings during working hours. In contrast, Germaine testified that she was never told about that rule and that, after her incident, the department orally changed the rule to allow officers to attend union meetings, but only with permission.[3]

However, the MERC panel was clearly correct. Germaine was not engaged in a protected activity when she used profanity in reaction to her supervisor's request that she write a report. Nothing in the record indicates that Germaine was discussing her potential punishment for attending a union meeting at the time she uttered the remark. Moreover, were we to find that she was protecting her rights, again, "[m]isconduct in the course of concerted activity, including

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with the public, medical staff at a local hospital, and his superior officers. Moreover, Cherry was demoted at least twice for discipline problems while he was a paramedic on patrol, so he had an established history of a failure to adequately perform in this position. Accordingly, and because the basis for Cherry's performance was established by substantial, material and competent evidence, we must affirm the MERC panel's decision. *Branch Cty Bd of Comm'rs, supra* at 192-193.

[3] The hearing referee apparently found Compeau and Rau's testimony to be more credible because, notwithstanding Germaine's lack of knowledge about the rule, it found that the evidence established that deputies were not permitted to attend union meetings while on duty and without permission. The MERC is required to "give due deference to the review conducted by the referee, in particular with respect to the findings of credibility." *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 554; 517 NW2d 240 (1994). Further, the hearing referee's conclusion was clearly supported by the record, so there was no error in this regard.

insubordination, is not beyond an employer's right to discipline." *AFSCME, Michigan Council, Local 574-A, supra* at 744. Germaine's comment, along with her other misconduct, clearly warranted discipline by the department and, therefore, even if she could show that her suspension was motivated by some anti-union animus, which she does not attempt to do, MERC correctly ruled that her claim is without merit.

D. Wayne McIntyre's Performance Evaluation

Cherry also challenges the MERC panel's decision with regard to an addendum attached to the 2001 performance evaluation of Deputy Wayne McIntyre. McIntyre testified that, after his testimony at the hearing in this case, he received his performance evaluation and Captain Compeau had attached an amendment to it. In addition to several general criticisms, the attachment states that, during the unfair labor practice hearing, "McIntyre perjured his testimony on a number of issues." McIntyre asserted that Compeau attached the memo to his evaluation in direct retaliation for his testimony at the MERC hearing. The MERC panel ruled that the portion of the memo that referred to McIntyre's allegedly perjurious testimony violated PERA and that the reference to his testimony should be removed from his personnel record.[4] Cherry maintains that the MERC should have ruled that the entire addendum must be removed from McIntyre's personnel file because it violates PERA.

As a preliminary matter, we note that the charging party once again fails to cite any legal authority to support the assertions in the appeal brief. Further he gives only cursory treatment to this issue and appears to take the position that, simply because the attachment contains a reference to McIntyre's interpretation of department rules and contract language, it is sufficient to establish a prima facie case of a PERA violation.

We fail to find reference in the record provided to this Court to support or rebut the charging party's assertion that Compeau has never made comments on any other performance evaluations. However, the MERC panel's decision to merely delete the reference to McIntyre's testimony was appropriate. As the sheriff's department points out, none of the remaining issues have anything to do with McIntyre's testimony before the hearing referee and are otherwise supported by the record. And, simply because there is a reference to McIntyre's self-serving interpretation of rules or contract language does not, without more, indicate that an anti-union animus motivated Compeau to add his comments. Accordingly, we reject this claim.

E. Additional Exceptions

Cherry complains that the MERC panel ignored several of the exceptions he raised when it merely stated that it reviewed the arguments and found them to be without merit. He maintains

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[4] MCL 423.210(1)(d) provides that, "[i]t shall be unlawful for a public employer or an officer or agent of a public employer . . . (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act . . . ." For that reason, the MERC agreed with the hearing referee that the sheriff's department must delete Compeau's assertion that, during the MERC hearing, "McIntyre perjured his testimony on a number of issues."

that this matter should be remanded for the MERC panel to make specific rulings on those issues. As Cherry correctly asserts, the panel did not analyze some of the issues he raised in his exceptions and, instead, agreed with the analysis set forth by the hearing referee. This Court has ruled that a final agency determination "must include findings of fact and conclusions of law." *Mecosta Co Bd of Comm'rs v Council 25, AFSCME, AFL-CIO*, 166 Mich App 374, 378; 420 NW2d 210 (1988). However, Cherry cites no case law to suggest that the MERC is prohibited from adopting or incorporating the findings or legal analysis of a hearing referee's opinion. Here, the MERC panel set forth its findings of fact and stated that it thoroughly reviewed and agreed with the analysis of the hearing referee on Cherry's other issues. In our opinion, this was clearly sufficient. The hearing referee thoroughly analyzed the issues and the basis for many of his conclusions and MERC's conclusions were the same—that Cherry failed to present sufficient evidence of the sheriff's department's alleged anti-union animus or show that such animus motivated its conduct.

We also find no merit to Cherry's claims. While he correctly asserts that the hearing referee misstated the date on which McIntyre was transferred to the courts division, he offered no evidence to show any anti-union animus by the sheriff's department or a nexus between such animus and McIntyre's union activity. Accordingly, the error was clearly harmless.

Further, while Cherry asserts that Sheriff Pickell violated PERA when he failed to promote him, he does not refute the hearing referee's conclusion that it was within the sheriff's discretion to choose among the top three candidates on the eligibility list for promotions and evidence showed that Sheriff Pickell bypassed other top candidates for promotions, not just Cherry. Cherry also failed to establish that a complaint by Lynda Germaine to the American Civil Liberties Union had any nexus with a failure to promote Cherry and, to the contrary, the sheriff's department investigated her claims and took corrective action.

Clearly, the MERC panel disagreed with the hearing referee's finding of anti-union animus by the sheriff's department. Specifically, as discussed above, the MERC panel rejected the hearing referee's finding that the "shit stirrer" comment constituted evidence of discriminatory animus and MERC rejected Cherry's other claims that he was unfairly disciplined. Accordingly, a fair reading of the MERC decision shows that it found that Cherry failed to establish a prima facie case because he failed to show discriminatory animus by the sheriff's department. As the MERC observed in *City of Grand Rapids Fire Department*, 1998 MERC Lab Op 703:

> Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the party making the claim must present substantial evidence from which a reasonable inference of discrimination may be drawn.

Cherry failed to present substantial evidence to suggest an inference of discrimination.

Regardless, it is clear that the MERC panel explicitly agreed with the hearing referee that Cherry failed to show that the failure to promote him to sergeant was *motivated* by anti-union animus. It is also clear that the hearing referee and the MERC panel were correct on this point. Again, while Cherry was actively involved in the union and he repeatedly filed grievances against department management, he did not present any evidence that links the promotional

decisions to any bias against union members. Cherry's main argument was that the sheriff historically promoted the highest ranking officer on the eligibility list but that he was repeatedly bypassed notwithstanding that he received the highest or near the highest ranking. However, Captain Rau rebutted Cherry's assertion and testified that, on numerous, specific occasions not involving Cherry, Sheriff Pickell used the "rule of three" to promote someone other than the top candidate for promotion.[5]

Cherry takes the position that, because he was bypassed for promotion while he was engaged in union activity, this Court should draw an inference that his protected activities motivated the sheriff's decisions. However, once again, Cherry's union activities alone cannot establish that the sheriff's department discriminated against him for that activity, even if his managers expressed dismay over his conduct. *Lake Huron Water Treatment Plant*, 1999 MERC Lab Op 211. And, again, such evidence does "not relieve a charging party from the burden of showing that the specific employer action in question was motivated by union animus or hostility." *Id*. "To hold otherwise would mean that an employer would be prohibited from objecting, however remotely, to any action taken by a union official." *City of Grand Rapids Fire Department*, 1998 MERC Lab Op 703.

Cherry also maintains that, in the December 1999 meeting about his promotion, at least two superior officers questioned his loyalty to the department and his ability to be a team player. However, considerations such as loyalty and whether a candidate agrees with the sheriff's policies are proper considerations when considering promotions to supervisory ranks. *City of Battle Creek Police Department*, 1998 MERC Lab Op 727. For that reason, the loyalty comments cannot establish that an anti-union animus motivated the sheriff's decision not to promote Cherry. Indeed, it would amount to impermissible speculation to conclude that the above evidence establishes an anti-union animus or that Cherry's union activities motivated the sheriff's department to deny him promotions. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 125-126; 223 NW2d 283 (1974).

Because Cherry failed to establish a prima facie case, the burden did not shift to the sheriff's department to show a legitimate reason for its failure to promote Cherry. However, we also note that the department presented ample evidence that Cherry had numerous discipline problems that clearly justified the decision not to return him to patrol or paramedic duty. Cherry had a confrontation with a member of the public and an ongoing dispute with an emergency room physician, as well as problems obeying the lawful orders of his superiors. Clearly, even if Cherry could show some anti-union motivation on the part of the sheriff's department, the department satisfied any burden to "meet" Cherry's prima facie case and Cherry presented no

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[5] Cherry takes issue with the fact that Sheriff Pickell never explained *why* Cherry was bypassed for promotion, other than his citation to the rule of three, a method that is clearly permitted under the union contract. However, Cherry points to no requirement that the sheriff explain his reasoning in making any promotional decisions and Cherry himself testified that the sheriff is not required to do so. Accordingly, a failure to explain why Cherry was bypassed does not raise any inference that the decision was motivated by anti-union animus.

further evidence to rebut the department's evidence. *Mich Ed Support Personnel Ass'n, supra* at 74. Accordingly, we affirm MERC's decision on this issue.[6]

Cherry asserts that the MERC panel wrongly affirmed the hearing referee's ruling that he failed to establish a prima facie PERA violation with regard to the number of performance points McIntyre received in 2001. Like Cherry, McIntyre received five performance points for the 2001 promotion eligibility list. The hearing referee ruled that Cherry presented no evidence that McIntyre engaged in protected activity that was related to his score in 2001. Cherry asserts that he presented numerous examples of McIntyre's protected activity including that (1) McIntyre joined the union's executive board in November 1999 and was demoted in January 2000, (2) he was criticized in his next evaluation for an adverse relationship with his supervisors, (3) Sheriff Pickell asked if certain grievances were filed by McIntyre, Cherry or Germaine, (4) he was called a "malcontent" and a "rabble rouser," (5) he was lectured about his loyalty to the department after Undersheriff Gage learned that he was criticizing the sheriff and the department, (6) he participated in this MERC proceeding, and (7) he supported Chuck Melki for sheriff since March 2000.

Cherry appears to be conflating his arguments with regard to alleged anti-union animus and whether McIntyre was engaged in a protected activity. In any case, while McIntyre was clearly an active member of Local 2259 at the time the performance points were awarded, the above evidence does not link any of his union activities to his performance points in 2001. Not only are some of his examples remote in time, there is simply no nexus between the above incidents and McIntyre's performance points or evidence that the sheriff relied on McIntyre's union activity when he assessed him five points.

Cherry repeatedly cites McIntyre's transfer in January 2000 as suspiciously timed because McIntyre joined the union's executive board in November 1999. Not only is there a lack of evidence that the sheriff's department was motivated by McIntyre's union activities, Captain Compeau testified that the transfer occurred because the department received funding to train another officer in the paramedics division, but they needed an open spot in the division to make that possible. According to Compeau, there were two other paramedics in training, but McIntyre was the next full paramedic in the division with the lowest seniority. Captain Rau's testimony was consistent with Compeau's.

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[6] Cherry further complains that he was wrongfully denied training by the sheriff's department. Cherry admits that he received training while in the department but, even if Cherry could show that he was wrongfully denied training opportunities, he failed to establish any nexus between those decisions and anti-union animus. Moreover, Cherry did not rebut the testimony of Captain Compeau on this issue. Compeau testified that he denied Cherry's training requests because (1) Cherry would submit five or ten at one time, (2) he would submit the requests very late, (3) the requests had no relevance to Cherry's job, and (4) if Cherry attended the training sessions, Compeau would have to fill Cherry's position with someone working overtime. Accordingly, Cherry's claim on this issue is without merit.

Cherry states, without specificity, that another officer applied for the transfer to the courts division, but was turned down in favor of McIntyre. The record reflects that Compeau and Lieutenant Gregg Fotenakes testified that Deputy Laurie Ninnis talked about voluntarily transferring to the courts division, but she specified that she only wanted to work in a district court and not the circuit court. Compeau did not choose Ninnis for the transfer because she was limiting where she would be willing to work and he needed someone to work wherever he or she was assigned. Further, Captain Rau testified that Mark Goupil withdrew his stated interest in the position after he learned that it might be a long-term transfer. Cherry did not present evidence contrary to this testimony or otherwise establish that McIntyre's transfer was the result of any anti-union animus. Cherry nonetheless complains that, despite openings in the paramedic division, McIntyre has not been transferred back. Again, however, for the reasons stated, Cherry presented no evidence of anti-union animus or that such animus prompted the sheriff's department's to deny him a transfer request.

Cherry also takes issue with a memo Captain Compeau issued on October 7, 1999, which stated:

> Employees are not to change their clothes at the Vienna Township Precinct. The area is being utilized as a locker room, and will be used for storage of employee's equipment.

Cherry asserts that the memo was a discriminatory reaction to an ACLU complaint filed by Germaine about a move of a female locker room at the main police station. Compeau admitted that he issued the memo because of Germaine's concerns, and he noted that, at that time, the Vienna substation did not have separate male or female locker rooms. We reject Cherry's argument on this issue because the memo itself is not retaliatory. To the contrary, it reflects Compeau's acknowledgement of Germaine's concern and assures that the changing room issues would not arise at her new location. Moreover, as Compeau explains in the memo, the purpose of the room was for equipment storage, not for changing clothes. There is nothing in the memo that suggests that it was intended to harm Germaine and, therefore, Cherry's claim is without merit.[7]

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[7] We reject Cherry's argument that McIntyre was wrongfully disciplined for taking bereavement leave following the death of his great-aunt. Specifically, McIntyre was suspended for stating on his leave form that his aunt died, not his great-aunt. It is undisputed that a deputy is not entitled to bereavement leave for a relative as distant as a great-aunt. Though Cherry claims that others were not punished for the same conduct, as the sheriff's department correctly points out, while others may have been granted bereavement leave for a distant relative, Cherry presented no evidence that the others falsified their leave requests. Moreover, Cherry once again fails to show how McIntyre's union activity had any bearing on his discipline for untruthfulness, other than his assertion that McIntyre was actively involved in the union. This is insufficient to establish a prima facie case under PERA.

Further, to the extent Cherry asserts that McIntyre was wrongfully disciplined for reporting to work in a mentally and physically unfit manner, it appears that Cherry points to this

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Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette

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as an example of anti-union animus by the sheriff's department. However, he again fails to establish any connection between McIntyre's discipline and his union activities. Moreover, McIntyre testified that he grieved this discipline and it has been erased from his record.