

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

MELISSA JOY WARREN,	:	
	:	
Charging Party,	:	Case No. CA-2018-017
	:	
v.	:	<u>ORDER ON MERITS OF</u>
	:	<u>UNFAIR LABOR PRACTICE</u>
MARTIN COUNTY TAX COLLECTOR,	:	<u>CHARGE</u>
	:	
Respondent.	:	Order Number: 19U-092
_____	:	Date Issued: March 28, 2019

Brennan Keeler and Angela Barbosa, West Palm Beach, attorneys for Charging Party.

Robert L. Norton and Luke C. Savage, Coral Gables, attorneys for Respondent.

On May 9, 2018, Melissa Joy Warren filed an unfair labor practice charge alleging that the Martin County Tax Collector (MCTC) violated section 447.501(1)(a) and (b), Florida Statutes (2018).¹ The charge alleged that MCTC terminated Warren for engaging in protected activity. On May 15, the Commission's General Counsel found the charge sufficient. MCTC filed its answer and denied that it committed an unfair labor practice. Subsequently, the Commission appointed a hearing officer and a hearing was scheduled. After a procedural history unnecessary to repeat here, a telephonic hearing was held on September 27 and September 28 in Tallahassee and Stuart.

The hearing officer issued his recommended order on December 28, concluding that MCTC violated section 447.501(1)(a) and (b), Florida Statutes, by dismissing Warren based on her union activities. As to a remedy, the hearing officer recommended that MCTC cease and desist from its unlawful conduct and reinstate Warren to her prior

¹All statutory references are to the 2018 edition of the Florida Statutes.

position with back pay and benefits. Also, the hearing officer awarded Warren her reasonable attorney's fees and costs associated with litigating this case. MCTC filed a motion seeking an extension of time to file exceptions, which was granted. On January 30, 2019, MCTC filed one exception challenging the hearing officer's award of attorney's fees and costs. Warren did not file exceptions to the recommended order. Rather, on February 4, Warren filed a response to MCTC's exception. A transcript of the hearing was filed with the Commission.²

Prior to addressing MCTC's exception, we will briefly review the pertinent facts. Warren was employed by MCTC for over twenty-five years. She was a specialist responsible for issuing driver licenses. In 2016, Warren began organizing MCTC employees. (T 21-22) She contacted the General Counsel for the Palm Beach County Police Benevolent Association (PBA) and organized informational meetings between MCTC employees and the PBA. (T 353-54) By early 2017, most MCTC employees were aware of the efforts towards unionization. (T 77-78, 297) MCTC management knew that Warren was responsible for organizing the employees and bringing in the PBA. (T 356-57, 374) She was the union's most visible supporter. (T 295-96) After Warren began the unionization efforts, MCTC management treated her differently. (T 295-96)

In June 2017, pursuant to an election, the PBA was certified as the bargaining agent for a unit of rank-and-file MCTC employees. (CP 8(a) and (b)) Subsequently, the

²References to the transcript are designated as "T" followed by the appropriate page number(s). Warren's exhibits are designated as "CP" with the appropriate exhibit number(s). MCTC's exhibits are designated as "R" with the appropriate exhibit number(s).

PBA was also certified as the bargaining agent for a unit of supervisory MCTC employees. (CP 9(a) and (b)) On July 25, the PBA sent MCTC a request to bargain. By August 21, MCTC management was aware that Warren was elected to serve as the PBA's representative. (T 78, 138-39) After Warren brought in the PBA, there was tension between her and management, and she was picked on because of her role as the PBA's representative. (T 289-93, 308-09, 339-41)

Warren had an exemplary disciplinary record for over two decades.³ After her involvement with the PBA and her successful efforts at unionization, which are protected activities, MCTC suspended her for three days for one incident and later terminated her for a second incident.

MCTC issues drivers' licenses, which includes issuing new licenses as well as renewing and replacing licenses. With regard to the three-day suspension, MCTC asserted that Warren violated a changed Department of Highway Safety and Motor Vehicles (DHSMV) policy⁴ for an incident where she issued replacement licenses to two

³MCTC seeks to raise a separate challenge in its footnote 3 by arguing that the hearing officer should not have found that Warren had a clean disciplinary record. Our review of the record indicates that the hearing officer's finding of fact is supported by competent substantial evidence in the record. (T 142-45, 331-2, 382; CP 73-88)

⁴Before issuing a driver's license, the clerk enters a customer's information in the Commercial Driver License Information System (CDLIS) to confirm that the driver is eligible for a replacement or renewal license and is not suspended. If the CDLIS check returns a certain negative designation, it indicates there is negative information from out-of-state that could prevent the license from being issued, renewed, or replaced. When that designation occurs, the clerk tries to determine whether the negative information matched the customer. If it did not match, the clerk could issue a replacement license and, if the customer produced a clearance letter from the other state, the clerk could issue a renewal license. (T 23, 26-27) In February 2017, the state changed the policy on issuing a replacement license when a CDLIS check returns a negative designation. The change was made in February 2017, but MCTC clerks were not made aware of it until an

customers who came in together and had the same drivers' license issues. The hearing officer found that when Warren issued the replacement licenses, she was unaware that the policy had changed. (T 62, 64-65)

After Warren issued the two replacement licenses, her coworker, Melanie Hosia, informed an assistant manager, Tara Seif Youngblood, that Warren had not followed the changed policy. Youngblood reported the incident to Manager Monica Velie. Velie did not speak with the two customers, Hosia, or any other MCTC clerk. (T 65-66) Velie asked Warren limited questions. Warren informed Velie that she did not recall seeing the one email about the changed procedure and that she had used the old procedure. Based on her limited and flawed investigation, Velie concluded that Warren intentionally issued the two licenses knowing that her actions were improper. (T 158-61) Velie and two other members of MCTC management team recommended the three-day suspension, over progressive or lesser discipline, to Martin County Tax Collector Ruth Pietruszewski. Pietruszewski decided to impose the suspension. In the memorandum informing Warren that she was being suspended, Velie conclusively announced that Warren had "obviously decided to take this action in direct defiance of the Tax Collector and DHSMV regulations," although MCTC management could not confirm that Warren ever read the email about the policy change. (CP 2; T 158-63, 336-39)

email was sent on May 4, 2017. (R 4; T 73-74) Pursuant to the change, clerks cannot issue any license unless the customer resolves the negative designation with the other state or produces a clearance letter. (T 75)

During this period, MCTC scrutinized Warren and her work. MCTC arranged for an audit of her transactions from the State/DHSMV.⁵ There was no evidence that any other clerk's transactions were individually audited during this time. MCTC management did not inform Warren's supervisor, Olga Rockwell, or Warren of the audit or the results. The audit did not recommend any discipline, but suggested additional training for Warren. (CP 15; T 117-18) Despite the suggestion, MCTC did not give Warren any additional training.

The second incident occurred on February 28, 2018, when Dr. Ahner, an internal medicine doctor located in Stuart, attempted to renew his driver's license. A check of his records resulted in negative information from Illinois. Dr. Ahner was the victim of identity theft fourteen years ago and this was the reason for the negative information. The doctor never lived in Illinois, never had an Illinois driver's license, and had successfully renewed his license in Palm Beach County since the identity theft. (T 126-29) Initially, Dr. Ahner went to one clerk, who turned him away based on the negative information. (T 126-27) He came back later and asked to speak with a manager. Rockwell briefly spoke with him and asked Warren to assist him, because Rockwell was busy with another customer. Warren ran the doctor's information through a statewide database and his social security number was not attached to the negative information. Warren asked Rockwell about

⁵In its single exception challenging the hearing officer's award of attorney's fees and costs, MCTC seeks to present a separate issue challenging the hearing officer's finding of fact that MCTC requested the audit. MCTC presents this challenge in its footnote 2. The hearing officer's finding is supported by competent substantial evidence in the record. (T 29-32, 84-89, 92-96, 208-11, 278-81, 304-07) MCTC decided to report Warren to the state entity that performs the audits, but did not report other clerks who issued licenses that violated the same DHSMV policy.

Dr. Ahner's records. Both Rockwell and Warren reviewed the records, and then Rockwell instructed Warren to issue the license. (T 325-27) Warren added a note to the transaction that briefly explained the situation and stated that her supervisor, Rockwell, directed her to proceed with the renewal.

As with the first incident, Youngblood informed Velie that the license had been issued. Velie did not ask Warren or Rockwell about the circumstances. Instead, Velie went to Pietruszewski to tell her that Warren issued a license in violation of the changed policy. Velie, Pietruszewski, and Judy Friend (Chief of HR and Personnel), had no first-hand knowledge of the transaction with the doctor. They did not ask Warren to provide a written statement and did not offer her an opportunity to demonstrate that the doctor's statements about the identity theft were accurate. Warren's desk was packed before her pre-disciplinary hearing had occurred. Velie and three other members of MCTC management team recommended that Warren be terminated. Pietruszewski approved the recommendation.

After deciding to terminate Warren, Friend asked a DHSMV quality assurance program manager whether issuing the license to the doctor was contrary to DHSMV policy. The DHSMV manager responded, in an email dated March 5, 2018, that policy and procedures dictated that the license should not have been issued. However, because of Warren's notation that she was directed to issue the license by her supervisor, the DHSMV manager also wrote that "due diligence should be conducted to determine if extenuating circumstances existed." (T 169) Despite this advice, MCTC terminated Warren on March 13, two days before the final negotiation session between

MCTC and the PBA. (R 19) Although a contract was ratified, Warren's termination had a chilling effect on union activity and caused MCTC employees to fear they would be targeted because of their union membership. (T 34, 291-92, 311-12)

In its exception, MCTC argues that Warren should not be awarded attorney's fees because MCTC neither knew nor should have known that it was prohibited from progressively disciplining Warren for her repeated violations of the State of Florida's established policy regarding not issuing licenses when the negative designation appears in CDLIS. This argument is without merit because the hearing officer's recommendation for an award of attorney's fees and costs was based on his determination that MCTC disciplined Warren in retaliation for her having engaged in protected concerted activity. The hearing officer correctly applied the standard of proof in determining whether an adverse employment action constitutes an unfair labor practice in violation of section 447.501(1)(a) and (b), Florida Statutes. See *Pasco County School Board v. Public Employees Relations Commission*, 353 So. 2d 108 (Fla. 1st DCA 1978) (*Pasco*).

Under *Pasco*, Warren was required to initially prove by a preponderance of the evidence that she engaged in protected concerted activity and her conduct was a substantial or motivating factor in the adverse action taken against her by MCTC. If it is determined that MCTC's decisions regarding Warren were motivated by non-permissible reasons, MCTC is required to prove by a preponderance of the evidence that, notwithstanding the existence of factors relating to protected activity, it would have made the same decisions affecting Warren. See *Pasco*, 353 So. 2d at 117; see also *Koren v. School Board of Miami-Dade County*, 97 So. 3d 215 (Fla. 2012).

There is ample record evidence demonstrating that Warren engaged in protected concerted activity. Warren was responsible for organizing MCTC's employees and bringing in the PBA as the bargaining agent, and she was the PBA's most visible supporter. (T 21-22, 295-96, 353-54) The record evidence also shows that most of MCTC's employees as well as MCTC management were aware of Warren's organizational efforts on behalf of MCTC's employees. (T 77-78, 297, 356-57, 374)

There is also ample record evidence demonstrating that MCTC's disciplinary decisions regarding Warren were motivated by non-permissible reasons. Warren did not receive any discipline in over twenty years. MCTC has a progressive discipline policy (T 57, 142-45), and the policy manual states that in disciplining employees MCTC will consider "the frequency of the violations, the length and quality of service, the level of responsibility, and policy making authority, and overall performance." Despite Warren having a clean disciplinary record for over twenty years, the first and second disciplinary actions imposed on her were suspension and termination. The disciplines were unusually harsh considering that: (a) in the first incident, the policy had changed with Warren and other employees unaware of the change and (b) in the second incident, Warren issued the license pursuant to her supervisor's direction. The record demonstrates that other MCTC employees who engaged in comparable or even more serious actions were not disciplined as harshly. (CP 20-21; T 87-95, 167-68, 305-07) Further, the evidence shows that MCTC policies are still unclear regarding clerks issuing driver's licenses involving the negative designations. (T 24-30, 41-47, 168-69, 184-89, 214-19, 278-81, 287-89, 293, 300, 304-07) Before and after Warren's suspension

and termination, no clerk at MCTC has been disciplined for issuing a driver's license involving this negative designation. (T 30-31, 112, 182, 306-07, 320-22, 331-33, 335)

We agree with the hearing officer that Warren engaged in protected activities, she was targeted for her union activities, and the reasons MCTC gave for disciplining Warren were pretextual. MCTC failed to demonstrate by a preponderance of the evidence that notwithstanding the existence of factors relating to her protected activity, it would have made the same decision to terminate her. We agree with the hearing officer's legal conclusion that MCTC retaliated against Warren for engaging in protected activities. See *e.g., Alachua County Police Benevolent Association v. City of Starke*, 15 FPER ¶ 20020 (1988) (city committed unfair labor practice by terminating an employee for engaging in protected activities).

MCTC's exception also argues that if the Commission determines that a violation occurred, an award of attorney's fees and costs is inappropriate because this case raises unique issues that are not addressed by Commission precedent. MCTC's argument is without merit. Whether an employer can retaliate against an employee for her having engaged in protected concerted activity is not a unique and novel question. It is well settled that a disciplinary action motivated by an employee's protected concerted activity can constitute a violation of law. See *Latey v. Florida Department of Health and Rehabilitative Services*, 20 FPER ¶ 25163 (1994) (agency committed unfair labor practice by terminating an employee in retaliation for her participation in protected activity; attorney's fees and costs awarded to employee); *Alachua County Police Benevolent Association v. City of Starke*, 15 FPER ¶ 20020 (1988) (city committed unfair labor

practice by terminating an employee for engaging in protected activities; attorney's fees and costs awarded to union). MCTC knew or should have known that its actions against Warren violated section 447.501(1)(a) and (b), Florida Statutes. As the prevailing charging party in this matter, Warren is entitled to an award of attorney's fees and costs. *See generally Leon County Police Benevolent Association, Inc. v. City of Tallahassee*, 8 FPER ¶ 13400 (1982), *aff'd*, 445 So. 2d 604 (Fla. 1st DCA 1984) (commission precedent supports an award of attorney's fees and costs to a successful charging party upon a showing that the respondent knew or should have known that its conduct was unlawful). MCTC's exception is DENIED.

Upon review of the complete record, including the transcript, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in a proceeding which satisfied the essential requirements of law. Thus, we adopt the hearing officer's findings of fact. § 120.57(1)(l), Fla. Stat. In addition, upon review of the record, we agree with the hearing officer's analysis, conclusions of law, and recommendation. The hearing officer's recommended order is incorporated herein and Warren's unfair labor practice charge is SUSTAINED.

Having concluded that MCTC engaged in an unfair labor practice in violation of section 447.501(1)(a) and (b), Florida Statutes, the Commission orders that MCTC shall reinstate Warren to her former position with back pay and benefits, less any compensation and earnings which she would not have received had she not been terminated. The back pay award shall include interest at the lawful rate.

MCTC is also ordered to pay to Warren her reasonable attorney's fees and costs incurred in litigating this case. Warren is directed to file her attorney's fees and costs proposal within fifteen days from the date of this order.

The Clerk of the Commission is directed to open back pay and attorney's fees cases and schedule hearings.

MCTC is ORDERED to:

1. Cease and desist from:
 - (a) Discouraging membership in any employee organization by discrimination with regard to hiring, tenure, or other conditions of employment, or by disciplining employees for having engaged in protected concerted activities; and
 - (b) In any like or related matter, interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them under Chapter 447, Part II, Florida Statutes (2018).
2. Take the following affirmative action:
 - (a) Reinstate Warren to her prior position with back pay and benefits;
 - (b) Post for sixty days in conspicuous places where notices to bargaining unit employees are customarily posted,⁶ copies of a notice to employees stating that MCTC will cease and desist from the actions set forth in paragraph one above and will take the affirmative action set forth in paragraph two; and
 - (c) Pay Warren her reasonable attorney's fees and costs associated with litigating this case.

⁶See *School District of Orange County v. Orange County Classroom Teachers Association*, 146 So. 3d 1203 (Fla. 5th DCA 2014) (questioning the practicality of requiring the actual posting of notices given the advancement in modern technology).

This is not an appealable final order because the amount of back pay remains to be determined. See *Department of Corrections v. Schwarz, et al.*, 134 So. 3d 1002 (Fla. 1st DCA 2012). When back pay is resolved, the Commission will issue a final order that will allow either party to appeal the merits of the unfair labor practice charge, the amount of back pay, and any other remedies included in the Commission's final order.

It is so ordered.

POOLE, Chair, BAX and KISER, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on March 28, 2019.

BY: Barry Edmund
Clerk

/ltg



NOTICE TO EMPLOYEES



CASE NO. CA-2018-017

POSTED PURSUANT TO AN ORDER OF THE
PUBLIC EMPLOYEES RELATIONS COMMISSION

AN AGENCY OF THE STATE OF FLORIDA

AFTER A HEARING IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION AND ABIDE BY THE FOLLOWING:

WE WILL NOT discourage membership in any employee organization by discrimination with regard to hiring, tenure, or other conditions of employment, or by disciplining employees for having engaged in protected concerted activities.

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them under Chapter 447, Part II, Florida Statutes.

WE WILL reinstate Melissa Joy Warren to her prior position with back pay and benefits.

WE WILL post for sixty days in conspicuous places where notices to bargaining unit employees are customarily posted, copies of a notice to employees stating that MCTC will cease and desist from the actions set forth in paragraph one above and will take the affirmative action set forth in paragraph two.

WE WILL pay Melissa Joy Warren her reasonable attorney's fees and costs associated with litigating this case.

Martin County Tax Collector

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for **60** consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission.

(ULP)

**** Transmit Conf. Report ****

P.1

Mar 28 2019 02:30pm

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4708 Capital Circle Northwest, Suite 300 Tallahassee, Florida 32303 850.488.8641 Fax: 850.488.9704 www.perc.myflorida.com	
To: Brennan Keeler Angela Barbosa Palm Beach County PBA	From: Office of the Clerk Public Employees Relations Commission
Fax: (561) 687-0154	Pages: 14
Phone: (561) 689-3745	Date: 03/28/2019
Case: CA-2018-017	Re: Order on Merits of Unfair Labor Practice Charge
Comments: <p style="text-align: center;">NOTICE:</p> <p style="text-align: center;">If you have received this facsimile communication in error, please contact the Public Employees Relations Commission, Office of the Clerk, 850.488.8641.</p>	
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Mar 28 2019 02:43pm

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613054421578	Normal	28:02:43pm	0'51"	14	* O K	

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4708 Capital Circle Northwest, Suite 300 Tallahassee, Florida 32303 850.488.8641 Fax: 850.488.9704 www.perc.myflorida.com	
To: Robert L. Norton Luke C. Savage Allen, Norton & Blue, P.A.	From: Office of the Clerk Public Employees Relations Commission
Fax: (305) 442-1578	Pages: 14
Phone: (305) 445-7801	Date: 03/28/2019
Case: CA-2018-017	Re: Order on Merits of Unfair Labor Practice Charge
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