

STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

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| MELISSA JOY WARREN, | : | |
| | : | |
| Charging Party, | : | Case No. CA-2018-017 |
| | : | |
| v. | : | <u>HEARING OFFICER'S</u> |
| | : | <u>RECOMMENDED ORDER</u> |
| MARTIN COUNTY TAX COLLECTOR, | : | |
| | : | |
| Respondent. | : | |
| _____ | : | |

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

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

MORTON, Hearing Officer.

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 On May 15, the Commission's General Counsel found the charge sufficient. Subsequently, I was assigned by the Commission as hearing officer. Following proceedings that do not need to be repeated here, a telephonic hearing was held on September 27 and 28. The parties were afforded the opportunity to present evidence and argument, examine and cross-examine witnesses, and fully participate in the hearing. At hearing, Warren entered ninety-nine exhibits into evidence.² MCTC entered twenty exhibits. Eleven witnesses testified.

¹All statutory references are to the 2018 edition of the Florida Statutes. Where events mentioned herein occurred in prior years, no substantive differences exist between the statutes in place at the time that might apply and the 2018 version of the statutes, unless expressly mentioned.

²The parties requested that I redact driver license numbers and other personal information from Warren's exhibits 4, 6, and 31. I agreed to the request, noting that some of the information would still be on pre-filed exhibits. I have instructed the Commission's Clerk to make a notation on the docket regarding the exhibits.

Following three extensions of time, the parties timely filed their post-hearing pleadings on November 30. I have carefully considered these filings. A transcript of the hearing was filed.

FINDINGS OF FACT³

1. MCTC is a public employer within the meaning of section 447.203(2), Florida Statutes.

2. The Palm Beach County Police Benevolent Association (PBA) is an employee organization within the meaning of section 447.203(11), Florida Statutes. The PBA is currently registered. *See In Re Application for Renewal of Registration of Palm Beach County Police Benevolent Association, Inc., Chartered by the Florida Police Benevolent Association, Inc.*, OR-86-155 (PERC Fla. June 21, 2018) (granting the PBA's registration until June 21, 2019).

3. MCTC has four offices located in Hobe Sound, Stuart, Indiantown, and Palm City. (T. 20)

4. Warren has been employed by MCTC for over twenty-five years. She worked as a specialist, responsible for issuing driver licenses. Given her long tenure with MCTC, other employees would ask her questions about various transactions. (T. 22, 289, 352)

³Citations to the transcript are indicated as "T." followed by the page number(s) with the relevant testimony. Citations to Warren's exhibits are indicated as "CP Ex" followed by the exhibit number(s). Citations to MCTC's exhibits are indicated as "R Ex" followed by the exhibit number(s). References to the record are made to facilitate review by the Commission, but are not the only record support for any finding of fact.

5. Olga Rockwell was Warren's direct supervisor at MCTC at all times relevant to the allegations in the charge. Rockwell had been Warren's supervisor for seven years at the time both were terminated. (T. 319, 348)

6. Rockwell and Warren were friends at work, but were not close friends and did not socialize outside of work. (T. 348, 376)

7. Ruth Pietruszewski was elected Martin County Tax Collector in 2009. (T. 197) The current MCTC management team includes Ed Walker (IT Director), Donna Henderson (Chief Financial Officer), Judy Friend (Chief of HR and Personnel), Monica Velie (Chief of Motor Services), and Kim Baker (Driver Licenses Manager). (T. 197-98)

8. Warren supported Pietruszewski's opponent in the last election for tax collector. (T. 314, 394-95)

9. In 2016, Warren began organizing the employees of MCTC and organized informational meetings between MCTC employees and the PBA. Warren contacted Hal Johnson, the PBA's general counsel, to attempt to organize MCTC employees. Warren coordinated with the local Palm Beach County PBA to hold the meetings where MCTC employees were given information about the PBA. (T. 353-55; CP Ex 98)

10. By early 2017, most MCTC employees were aware that unionization efforts were being undertaken, and everyone was talking about it at work. (T. 77-78)

11. MCTC management was aware that Warren was responsible for organizing the employees and bringing in the PBA. MCTC management treated Warren differently after her unionization efforts. (T. 77-78, 137-39, 289-90, 355, 374)

12. The Commission conducted an election and on June 1, 2017, certified a bargaining unit of rank-and-file MCTC employees. The PBA was certified as the bargaining agent. See Certification 1913. (CP Exs 8A-8B)

13. On July 14, 2017, the Commission certified a unit of supervisory MCTC employees based on election results. The PBA was the certified bargaining agent for this unit as well. See Certification 1914. (CP Ex 9A-9B)

14. On July 25, 2017, the PBA sent MCTC a request to bargain. (CP Exs 12, 22-23)

15. Warren was elected to be the PBA representative. (T. 356)

16. As of August 21, 2017, MCTC management was aware that Warren would be serving as the PBA representative. (T. 204; CP 12, 95)

17. No one from management specifically made negative statements about the union, but there was an impression that management was opposed to the union. Employees who supported the union were afraid that they might be targeted for being in favor of the union. After Warren brought in the PBA, she was treated as an outcast and there was tension between Warren and management. Warren was targeted and picked on because of her role as the PBA representative. (T. 34-36, 79, 289-91, 295-96, 308-11, 333, 340-41, 384-86)

18. Prior to her involvement with the PBA and the effort at unionization, Warren had a clean disciplinary record. (T. 382; CP Exs 73-88)

19. Warren was the most visible and apparent supporter of the PBA. MCTC management was aware that Warren was instrumental to the unionization effort prior to her receiving any discipline. (T. 21-22, 204)

Policy for Renewal or Replacement Driver Licenses

20. One of the functions that MCTC undertakes is the issuance of driver licenses, including renewing and replacing licenses. Before a driver license is issued, clerks will enter a customer's information in the Commercial Driver License Information System (CDLIS). The purpose of checking CDLIS is to confirm that the driver is eligible for a replacement or renewal license and is not suspended. If the CDLIS system returns a designation called "Not/Not," there is negative information from out-of-state that could prevent the license from being either issued, renewed, or replaced. The policies for issuing driver licenses come from the Florida Department of Highway Safety and Motor Vehicles (DHSMV). (T. 22, 71)

21. When a Not/Not record appears in CDLIS, the clerks try to make a determination regarding whether the records showing the license is suspended match the customer. (T. 23)

22. Prior to February 2017, clerks were able to issue a replacement license on a Not/Not record. The clerk would make a notation in the correspondence tab and inform the customer that they would need to clear up the issue before renewing their license. A renewal license could not be issued on a Not/Not record unless a clearance letter, known as an "it's not me letter," was produced by the customer. (T. 30, 71, 304-05, 321)

23. In February 2017, the state changed its policy on issuing replacement licenses where there was a Not/Not record. Despite the change being implemented in February, MCTC clerks were not made aware of the change until May 2017. (T. 35-37, 71, 73, 376)

24. To inform MCTC employees of the change, Rockwell wrote an email on May 4, 2017, explaining that all transactions had to be run through CDLIS and that if a Not/Not record was returned, the clerk should not issue the license. The email instructed clerks to inform customers "that they will not be able to obtain an original, renew or replace their license until the NDR is cleared, or they return with a clearance letter from the state." The email also instructed clerks to provide customers with the necessary information for the state to explain the denial "to better help them to resolve their issue." (R Ex 4)

25. Warren did not see Rockwell's May 4, 2017, email at the time and was not aware of the change in the policy until after a transaction on November 13, 2017, that led to her suspension. (T. 337, 361-64, 376; CP Exs 71-72)

26. Pietruszewski and the other members of the management team, like Velie and Friend, are not as familiar with the system, manuals, and policies because they do not use them as regularly as the clerks. (T. 28-30)

November 13, 2017, Suspension

27. On November 13, 2017, Warren was issuing driver licenses. November is a busy time in the tax collector's office. (T. 357-58)

28. Two men, Dallas Ball and Gavin Buck, came in to get replacement driver licenses. Both Ball and Buck had suspended licenses based on an incident in North Carolina. Buck initially went to clerk Melanie Hosia, and Ball went to Warren. Both Ball and Buck had Not/Not records come up through CDLIS based on the suspension. Based on the new policy, Hosia did not issue the replacement license to Buck. Buck then joined Ball at Warren's window. Warren gave both Ball and Buck replacement licenses based on the old policy and told them they would need to clear the Not/Not before they could renew their licenses. (T. 58, 100; CP Ex 3B)

29. Hosia reported the fact that Warren had issued the license on a Not/Not record to her assistant manager, Tara Seif Youngblood, who in turn reported it to Velie, who was a manager of tax and titles at the time. (T. 58-59)

30. Velie had no experience in administrative investigations and this was the first time she acted as an investigator. Velie did not speak with Ball, Buck, Hosia, or any of the other clerks. She asked limited questions of Warren. Warren told Velie that she did not recall seeing Rockwell's email and that she used an old procedure. She also told Velie that she did not know Buck, Ball, or either of their families. (T. 60-62, 65-66; CP Exs 3A, 3B)

31. Velie had no first-hand information about the transaction with Ball and Buck. Neither Hosia nor Youngblood testified at hearing.

32. Based on her limited and flawed investigation, Velie concluded that Warren had intentionally issued the licenses to Ball and Buck knowing that it was improper to do so. (CP Ex 2; R Ex 3)

33. The ultimate decision to impose the suspension was Pietruszewski's, but the recommendation for the suspension, over progressive or lesser discipline, came from Velie, Friend, and Henderson. (T. 154, 211)

34. In a memorandum to Warren informing her that she was being given a three-day unpaid suspension, Velie stated that Warren had been trained "and received a clear memorandum from Olga Rockwell advising that you were not to issue a replacement driver license for an individual with a suspended license" and that Warren had "obviously decided to take this action in direct defiance of the Tax Collector and DHSMV regulations." (CP Ex 2; R Ex 3)

35. There was no credible evidence provided that Warren knew Ball, who was the customer who initially came to her window. During the course of Velie's investigation and following the suspension, Kim Baker provided information that attempted to link Warren to Buck. Baker is not a union member and joining the union was not something she would consider. (T. 67-69, 247)

36. Warren worked with Buck's mother and her partner, Julie Carreiro, on the fair committee. Warren had liked a picture of Buck's mother and her partner on Facebook. Warren credibly denied knowing Buck and Ball. Warren did not give Buck special treatment. (T. 67-69, 71, 369-71)⁴

⁴The evidence provided by MCTC that Warren knew Buck and Ball was marginal at best. I specifically credit Warren's testimony over the testimony of Baker, who went so far as to claim that Warren knows everybody in the county. (T. 259-60) I also reject the implication that Warren was aware of the revised policy and simply ignored it as a personal favor based on a relationship with either Buck's mother or her partner, Carreiro. Notably, MCTC did not call Buck, Ball, Buck's mother, or Carreiro. The testimony and evidence, which consisted mostly of pages printed out from Facebook that purportedly

37. After the incident with Ball and Buck, MCTC continued to scrutinize Warren by requesting an audit of Warren's transactions from the State/DHSMV. There was no evidence or testimony that any other clerk's transactions were individually audited in the same time period. Moreover, MCTC management did not inform Warren or her supervisor, Rockwell, of the audit and did not share the results with them either. The audit did not recommend any discipline, but suggested additional training for Warren. Despite the suggestion, MCTC did not give Warren any additional training. (T. 154-57, 175-76, 324-26, 374-75; R Ex 6; CP Ex 15)

February 28, 2018, Incident

38. Dr. Charles Ahner is an internal medicine doctor located in Stuart, Florida. (T. 126)

39. On February 28, 2018, Dr. Ahner was attempting to renew his license, but he had a Not/Not record tied to information from the State of Illinois. The negative information was related to identity theft that occurred fourteen years ago. Dr. Ahner has never lived in Illinois and has never had an Illinois driver license. Since he was the victim of identity theft, Dr. Ahner has successfully renewed his license in Palm Beach County at least once. (T. 126-28, 325-26, 377)

showed the connection, were not conclusive. In fact, the testimony and amount of investigatory effort that went into trying to make this connection tended to demonstrate the disdain that management had for Warren. Nevertheless, even if MCTC had proven intentional wrongdoing on Warren's part with regard to this incident, the fact remains that there was no cause for discipline in the second incident when Warren followed Rockwell's instructions to issue a driver license, which was cited as the basis for her termination.

40. Dr. Ahner initially went to a clerk named Theresa Avrett, who turned him away based on the Not/Not record. Dr. Ahner came back later and requested that he speak to a manager. Rockwell spoke with him briefly, but initially asked Warren to assist him because she was busy with another customer. Warren ran Dr. Ahner's information through the statewide database and no social security number was attached to the Not/Not record. (T. 105, 126-27, 326, 377-78)

41. Warren was aware that her transactions were being scrutinized by management at MCTC. She asked Rockwell about Dr. Ahner's records. Both Rockwell and Warren reviewed the records and afterwards, Rockwell specifically instructed Warren to issue the license. Warren added a note to the transaction in the system that said "IN NELTS SHOWED NOTHING WHEN RAN THRU CDLIS IT SHOWED SIMILAR NAME NO SOCIAL ATTACHED. PER OLGA YES I CAN PROCEED WITH RENEWAL." (T. 326-27, 378-79; CP Ex 17; R Ex 9)⁵

42. Clerks are not able to add notes or comments to transactions after the transaction occurs. (T. 25, 327, 379)

43. As with the earlier transactions involving Ball and Bell, Youngblood brought the information that the license had been issued to Velie. Rather than ask Warren or

⁵To the extent that conflicting testimony and evidence were given about whether and when this note was entered by Warren, I conclude that it was entered contemporaneously with Dr. Ahner's renewal transaction. Velie's testimony that there was no note when she looked at the record can be attributed to the fact that she was not looking in the place in the system where the notation was made. I also credit the testimony of Warren, Rockwell, and Dr. Ahner over the speculation of other witnesses who were not present and claimed, without proof, that Rockwell was lying to protect Warren.

Rockwell about the circumstances, Velie went to Pietruszewski to tell her that Warren processed another Not/Not. Pietruszewski told her to get a screenshot and time stamp it. Velie was unsure how to do that and asked Friend to show her. (T. 82, 105; R Ex 8)

44. Velie, Pietruszewski, and Friend had no first-hand knowledge of the transaction with Dr. Ahner. Neither Avrett nor Youngblood testified at hearing.

45. Warren was not asked to provide a written statement and was not provided any of the documents or evidence related to the transaction. Warren was not offered an opportunity to correct the perceived deficiencies in the transaction, call the state of Florida or Illinois, or seek out the documentation that would have demonstrated that Dr. Ahner's claims about the identity theft were correct. (T. 381)

46. Warren did inform Friend and Velie that Rockwell had approved issuing Dr. Ahner's license. Rockwell was called into the office and immediately upon arriving, Friend informed her, "Well, [Warren] sure threw you under the bus." Rockwell confirmed that she told Warren to issue the license to Dr. Ahner. Rockwell was terminated for her role in issuing the license to Dr. Ahner. (T. 329-31, 349-50)

47. Warren's desk was packed up before her pre-disciplinary hearing had occurred. (T. 386)

48. The decision to terminate Warren was made by Friend, Velie, Walker, and Henderson. It was approved by Pietruszewski. It was based primarily on the investigation and information supplied by Friend and Velie. (T. 177)

49. In Friend's March 2 memorandum advising Warren of her pending termination, she accuses Warren of "issuing fraudulent documents" and of jeopardizing MCTC's

“relationship with the DHSMV once again.” The memo informs Warren that she is not allowed on any premises operated by MCTC and that she was required to come in the front door, obtain a visitor badge, and escort. (CP Ex 16)

50. After the decision to terminate Warren had already been made, Friend asked Doane Rohr, a quality assurance program manager with DHSMV, whether issuing the license to Dr. Ahner was contrary to policy. In an email dated March 5, 2018, Rohr stated that policy and procedures dictated that the license should not have been issued. However, because of Warren’s notation and the remark accompanying the transaction “due diligence should be conducted to determine if extenuating circumstances existed.” (R Ex 9)

51. Warren was terminated by MCTC on March 13, 2018, two days prior to the final negotiation session between the PBA and MCTC, which was held on March 15. Warren was unaware of her termination and showed up for the bargaining session as the representative of the PBA. When Friend saw Warren, she acted like she had seen a ghost. (T. 380-81; CP Ex 18)

52. The contract that was ratified required just cause for discipline and allowed for arbitration. (CP Ex 10)

53. Warren’s termination had a chilling effect on union activity and caused other MCTC employees to fear that they would be targeted because of their union membership. (T. 34, 290-92, 387)

Comparator Evidence/Continued Confusion on the NOT/NOT Policy

54. MCTC has a progressive discipline policy. The MCTC policy manual states that in disciplining employees it will consider “the frequency of the violations, the length and quality of service, the level of responsibility, and policy making authority, and overall performance.” While the severity of the offense can dictate a serious discipline even on the first occurrence, the general discipline policies start with verbal warnings for first occurrences. (T. 31, 142, 144-45; CP Ex 11)

55. Prior to her three-day suspension, Warren had no disciplinary history in her long tenure with the MCTC. Despite her exemplary record and there being no disciplinary record in her file, Friend tellingly testified, “At the time the decision was made to suspend [Warren], her prior discipline had been included, I just think maybe there were opportunities for discipline that existed before but they either were not enacted or they weren’t acted upon.” (T. 145)

56. Kimberly Baker received four verbal warnings/counselings about speaking properly and treating customers with respect. In 2015, she was placed on a performance improvement plan and was transferred to a different office. (CP Exs 26-30)

57. After Rockwell and Warren were terminated, Baker was given Rockwell’s supervisory position. (T. 67-69, 247) In a March 28, 2018, email, Baker provided another attempt to clarify the policy on Not/Not records. The email stated, in relevant part:

Under NO circumstance are we to issue a DL, if there is a NOT/NOT on the record. Regardless if [sic] there is a Social Security # attached or not. The customer must contact that state,

verify if it is them or not. If it is NOT the customer they have to get a letter on that state letterhead and bring it in to us, to be scanned into their record.

(CP Ex 24)

58. Baker asked managers to have the clerks read and initial her March 28 email. (CP Ex 24)

59. Heather Caccavale is a non-union member. Caccavale was surprised by the policy on Not/Not records when she came to Martin County, because the state policy was that you can issue a replacement license on a Not/Not record, just not issue a renewal. (T. 279-80, 283)

60. In July 2018, Caccavale issued a driver license after receiving a Not/Not record. After running the customer through the system, she discovered that there was no social security number attached to the Not/Not record. The customer's names were different. Instead of turning the customer away, Caccavale called Arizona, which was the state that had generated the Not/Not record, and Florida. She was told by officials in both states that she could issue the license in question. (T. 24, 91-93, 280-83)

61. Velie learned about Caccavale issuing the license after the fact. She did not initiate an investigation or discipline Caccavale. Instead, Velie initially provided the opportunity to correct the transaction and told Caccavale's manager that the customer would have to come back in to void everything out or the customer would have to provide an "it's not me letter." Ultimately, these steps were not taken and the confirmation phone calls to the states were used in lieu of a clearance letter. Caccavale was not placed on

administrative leave, was not formally investigated, and did not receive any discipline. (T. 93-94, 184-85)

62. Even after Rockwell and Warren were dismissed, there are gray areas around the issuance of driver licenses involving Not/Not records. (T. 27-29, 45-46; CP Ex 1)

63. The clerk's role in assisting customers with Not/Not records was also ambiguous. Talisa Sandow testified that when a customer has a Not/Not record it is "almost like a detective game, you have to ask them questions" and there are "extenuating circumstances on each case," while Tracy Taylor testified that you would give the customer the information that they need to contact the state to have it removed and clerks do not contact the state to have it removed. (T. 26, 41, 132)

64. Ronnie Berrios, a clerk with MCTC who issues driver licenses, testified that clerks could not reject an application unless everything in the record is the same and that you go off what is in front of you. She has issued licenses on a Not/Not record when the person applying was not the same person reflected in the record. (T. 287-88)

65. Diana Blackard, a clerk with MCTC who issues driver licenses, testified that she had issued licenses where there were exceptions to the rule. On one recent occasion she called the state, who authorized issuance after they were able to verify the applicant was not the same person listed in the Not/Not record. She did not need to get a clearance letter. (T. 305)

66. There was also conflicting evidence from management as to what lengths clerks should go to help customers clear up Not/Not records. For example, Pietrewski

testified that if the customer states that the records are incorrect, they can call the state and then the state can clear the Not/Not for them. What can be done depends on the situation. (T. 216-17) On the other hand, Friend testified that MCTC does not want clerks to investigate these situations. (T. 188)

67. In filling out her application to work at MCTC, Velie inadvertently answered certain questions incorrectly. She was not disciplined for this inadvertent mistake.⁶ Velie did receive verbal counselings, a written warning, and a suspension. (T. 89-90, 92; CP Exs 5A-D, 6B)

68. Tracy Taylor has been employed by MCTC since 2001. Taylor is not a member of the union and did not have anything to do with supporting the union coming in. During the time she has been employed, Taylor has received multiple verbal counselings, written reprimands, and other discipline for attendance, insubordination, performance, customer service, and other matters. Taylor continues to be employed by MCTC. (T. 131-33; CP Exs 32-35, 38-43, 45-46, 50-67)

69. Mary Ramirez was an employee with MCTC. She was convicted of a number of felonies after embezzling money from MCTC. She was given the option of resigning in lieu of being terminated. (T. 87, 167-68; CP Exs 20-21)

70. Before and after Warren's suspension and termination, no clerk at MCTC has been disciplined for issuing a driver license on a Not/Not record. (T. 30, 32-33, 56, 94-95, 112, 182, 288, 293, 306-07, 330, 332-33)

⁶MCTC's counsel objected to the relevance of this line of questioning at hearing. I agree that the nature of the alleged wrongdoing is not comparable.

ISSUES

1. Whether MCTC terminated Warren for engaging in protected activity in violation of section 447.501(1)(a) and (b), Florida Statutes.
2. Whether either party is entitled to an award of attorney's fees and costs.

ANALYSIS

Warren asserts that the MCTC violated section 447.501(1)(a) and (b), Florida Statutes, when it terminated her. In *Pasco County School Board v. Public Employees Relations Commission*, 353 So. 2d 108 (Fla. 1st DCA 1978), the court established 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. In announcing the *Pasco* test, the court stated:

In order to determine whether the evidence sustains a charge alleging an unfair labor practice, when it is grounded upon an asserted violation of protected activity, the following general principles should be considered by the hearing officer and by PERC:

- (1) In any such proceeding the burden is upon the claimant to present proof by a preponderance of the evidence that (a) his conduct was protected and (b) his conduct was a substantial or motivating factor in the decision taken against him by the employer.
- (2) If the hearing officer determines the decision of the employer was motivated by a non-permissible reason, the burden shifts to the employer to show by a preponderance of the evidence that notwithstanding the existence of factors relating to protected activity, it would have made the same decision affecting the employee anyway.

Id. at 117 (footnotes omitted).

Warren's actions with organizing MCTC employees and being the most visible member of the PBA leading up to her termination constituted protected conduct. It was Warren who took the initiative to organize MCTC workers. She contacted Hal Johnson, the PBA's general counsel, and coordinated with the local Palm Beach PBA. She helped organize informational meetings and following the certification of the PBA, Warren was elected to be the PBA representative. Consequently, Warren's activities clearly satisfy part (a) of the first prong of the *Pasco* test.

Part (b) of the first prong of the *Pasco* test requires examining whether Warren's protected concerted activity was a substantial or motivating factor in MCTC's decision to terminate her from employment. As reflected in my findings of fact, and based on the totality of the testimony and evidence submitted at the hearing, I am compelled to conclude that the decision to terminate Warren was directly related to Warren's protected concerted activity and her efforts at bringing in the PBA.

I recognize the Commission has consistently held that timing alone is insufficient to establish an employer's unlawful motivation. See, e.g., *Florida PBA v. Department of Corrections*, 15 FPER ¶ 20378 (1989). However, the chronology of events should not be ignored either, particularly in a case like the instant one where both the timing of the discipline and the severity are highly suspect. Prior to Warren being the most visible union supporter starting in the summer/fall of 2017, she had an unblemished disciplinary record in her employment with MCTC over two decades. Immediately after she became the union representative, and management was aware of her role, she was suspended and terminated in short order.

The grounds provided for Warren's discipline also demonstrate that she was targeted for her role in bringing in the PBA. Despite MCTC's attempts to characterize the policy surrounding how to handle Not/Not records as a black-and-white issue, the truth was considerably more gray, particularly before Warren was disciplined. There was clear testimony that before February 2017, clerks could issue replacement licenses on a Not/Not record. While the state changed that policy in February, MCTC did not implement that change until May when Rockwell sent out her email. Therefore, there was a period of several months when the entire MCTC office was not following the policy. Moreover, while Rockwell's email to employees provided clarification, there was no record of the clerks signing that they acknowledged this change of policy or that what was a previously acceptable way of processing licenses, would now cause clerks to be subject to discipline. I credit Warren's testimony and the evidence that demonstrated that she was not aware of the new policy and had not seen Rockwell's email until after she was suspended.

Even assuming that Warren's first suspension was warranted, the second incident that led to her termination followed her acting on Rockwell's instructions to issue the license. I credit the testimony and evidence, particularly from Dr. Ahner who had no reason to lie, that Rockwell and Warren examined his record together. Having just been unfairly disciplined, Warren was concerned about the transaction and sought Rockwell's instructions. After Rockwell instructed Warren to issue the license, Warren documented the reasons for issuing the license including Rockwell's instruction in the system. The MCTC management's witnesses, both leading up to Warren's termination and continuing

through the hearing, labored under the incorrect conspiratorial notion that Warren had somehow edited her comment after the fact or had the power to get Rockwell to lie on her behalf. This notion was not only unpersuasive, but it served as further evidence of their bias against Warren.

Even after Rockwell and Warren were terminated, MCTC apparently felt that the policy on Not/Not records was still somewhat ambiguous. After being promoted as Rockwell's replacement, Taylor sent out an email that attempted to codify a bright line policy that no licenses should be issued if a Not/Not record appeared in CDLIS. However, even this bright line was subject to interpretation and was not clear, because Caccavale subsequently issued a license on a Not/Not record and a number of clerks testified that they could issue a license where it was possible to determine that the applicant was not the same person in the Not/Not record.

MCTC attempted to distinguish Caccavale's transaction and other exceptions to its "bright line rule" on the basis that the clerks sought approval from the state to support the decision. While this is distinguishable from the license Warren and Rockwell issued to Dr. Ahner, it shows undeniably that there are exceptions to the "bright line rule." Where other non-union members were treated differently and given the benefit of the doubt, the worst was assumed about Warren, and the penalty was made more severe based on aggravating circumstances that did not exist.

The nature of the investigations that led to both Warren's suspension and termination provides further evidence of MCTC's improper motive. With regard to the suspension, Warren's defense that she had been following an older policy and had

missed Rockwell's memo was rejected out of hand, despite records that suggested that she had not read the email and her credible testimony that she had not. Even though there was no definitive proof that Warren knew Buck or Ball, Velie's letter insinuated that Warren was lying. Based on scant evidence, MCTC concluded that Warren knew about the policy and was intentionally violating the policy for improper purposes.

I also find that MCTC's attempts to find social media linkages between Warren and family members of Ball and Buck cut more toward demonstrating bias against Warren than any improper motive in issuing the licenses. As Florida courts have explained, the term "friend" on Facebook is a term of art and "[a] number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger." *Chace v. Loisel*, 170 So. 3d 802, 803 (Fla. 5th DCA 2014). "Facebook friendship does not necessarily signify the existence of a close relationship." *Id.*; see also *Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association*, 229 So. 3d 408 (Fla. 3d DCA 2017), *aff'd*, 43 Fla. L. Weekly S565 (Fla. Nov. 15, 2018). Warren credibly testified that she did not know Ball or Buck, and did not have a close relationship with their relatives despite any social media connection or working with people who knew them as part of the fair association. MCTC did not provide sufficient evidence to rebut Warren's credible testimony.

Following her three-day suspension, MCTC continued to scrutinize Warren's performance and ordered a state audit of her work. There was no evidence that any other clerk's performance was subject to an individualized audit. Tellingly, MCTC did not share the results of this audit with Warren or her supervisor, Rockwell. Moreover, they

did not implement the recommendation of additional training. Instead, MCTC attempted to use the results to bolster a narrative that Warren was a bad employee, even though her overall performance had not been criticized and was not the stated reason for her suspension or termination.

MCTC's investigation into the transaction involving Dr. Ahner and the discipline meted out to Warren based on it also was flawed. Friend's rush to judgment clearly consisted of an attempt to find fault with Warren. The exculpatory evidence that Warren had been told to issue the license by Rockwell was rejected based on a bias against Warren. Although Dr. Ahner should not have been issued the license under the policy in place, there was no testimony or suggestion that the information in CDLIS from Illinois was not related to identity theft or that Dr. Ahner was lying. Unlike Caccavale, neither Warren nor Rockwell were offered the opportunity to seek additional information to support the decision that the license was properly issued.

Warren also provided evidence of disparate treatment. Velie, Baker, and Taylor are all non-union members and did not support the union. While the character of their prior discipline differs from what Warren was accused of doing, both Velie and Baker were given promotions to management. Taylor had a significant disciplinary history, yet it is clear that MCTC followed progressive discipline with her violations and did not immediately escalate to suspension and termination. At hearing, the HR director, Judy Friend, went to great lengths to downplay the negative disciplinary history that appeared in Baker and Taylor's personnel files, while at the same time suggesting that the lack of such history in Warren's file was somehow a mistake and that there were things she

should have received discipline for but did not. (T. 142-45; 182-84) In fact, Friend suggested, "I just think there were opportunities for discipline that existed before but they either were not enacted or they weren't acted upon." (T. 145)

Most on point, however, is the treatment of Caccavale, who is a non-union member who issued a license on a Not/Not record. Caccavale was neither investigated nor disciplined in any way. Despite the attempts to characterize Caccavale's transaction as different and distinguish it from the ones that Warren was disciplined for, the slight distinction in the facts does not erase the gross difference in the way the two employees were treated. Again, it was Friend's testimony in particular that demonstrated that while MCTC applied a "black and white," no exceptions policy to Warren, when it came to Caccavale, she was given the opportunity to explain what happened and given every benefit of the doubt. (T. 185-89)

Having examined all of the evidence and testimony, I can only conclude that Warren was treated more severely based on her affiliation with the PBA and in an effort to discourage other employees from supporting the PBA. Having rejected MCTC's rationale for why it terminated Warren, I conclude that the reasons given were pretextual. Warren was targeted for her union activities, and her union activities were a substantial and motivating factor in the decision to terminate her.

The second prong of the *Pasco* test must also be resolved against MCTC. Because MCTC did not have legitimate grounds to terminate Warren, it did not 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.

Therefore, MCTC committed an unfair labor practice in violation of section 447.501(1)(a) and (b), Florida Statutes, when it terminated Warren. I recommend that the Commission order MCTC to reinstate Warren to her previous position and provide back pay and any other benefits to which she would be entitled if she had not been terminated.

Attorney's Fees and Costs

Warren has requested an award of attorney's fees and costs. As the prevailing charging party in this matter, Warren is entitled to an award of attorney's fees and costs if MCTC knew or should have known that its conduct was violative of Chapter 447, Part II, Florida Statutes. See *Leon County Police Benevolent Association v. City of Tallahassee*, 8 FPER ¶ 13400, *aff'd*, 445 So. 2d 605 (Fla. 1st DCA 1984). Based on the discussion above, Warren was clearly engaged in protected activity, and MCTC unlawfully retaliated against her for this activity when it terminated her employment. MCTC either knew or should have known that this conduct violated section 447.501(1)(a) and (b), Florida Statutes. Therefore, Warren is entitled to an award of attorney's fees and costs for having to litigate this case.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this case pursuant to section 447.501, Florida Statutes.
2. MCTC violated section 447.501(1)(a) and (b), Florida Statutes, when it dismissed Warren based on her union activities.
3. Warren is entitled to an award of attorney's fees and costs of litigation for this case.

RECOMMENDATION

I recommend that the Commission adopt the foregoing findings of fact, analysis, and conclusions of law and require MCTC 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; 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, 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.

Any party may file exceptions to my recommended order, but exceptions must be received by the Commission within **fifteen** days from the date of this order. See Fla. Admin. Code R. 28-106.217(1). An extension of time for filing exceptions will not be granted unless good cause is shown.

ISSUED and SUBMITTED to the Public Employees Relations Commission in accordance with Florida Administrative Code Rule 28-106.216 and SERVED on all parties this 28th day of December, 2018.



GREGG RILEY MORTON
Hearing Officer

GRM/ltg

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