

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES UNION :
LOCAL 668 :
SERVICE EMPLOYEES INTERNATIONAL UNION :
 :
v. : Case No. PERA-C-10-209-E
 : PERA-C-11-1-E
MONTGOMERY COUNTY :

PROPOSED DECISION AND ORDER

On June 14, 2010, the Pennsylvania Social Services Union (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board), at Case No. PERA-C-10-209-E, alleging that Montgomery County (County) violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA).

In the charge, the Union specifically alleged that the County retaliated against Keith Keenan for his union activity as follows: when the County investigated and suspended Mr. Keenan for two days in January 2010, under the pretext of sexual harassment; when Mr. Keenan's superiors held a meeting with him to direct him to cease placing Union flyers in employe mailboxes; and when his superiors and the EEO Officer directed Mr. Keenan to cease talking about the Union on County property during working hours. The Union further alleged that the County coerced and intimidated employes regarding their protected Article IV rights when the Director of Human Services for the County allegedly accused Union employes of soliciting on County property and escorted them out of the public cafeteria on March 11, 2010, and when the deputy director of supports coordination and other allegedly anti-union managers stared at Union employes and supporters employed by the County in the public cafeteria on March 31, 2010.

On January 5, 2011, the Union filed a charge with the Board, at Case No. PERA-C-11-1-E, alleging that the County violated Section 1201(a)(1), (3) and (4) of PERA. In that charge, the Union specifically alleged that the County retaliated against Keith Keenan for his Union activities, including the filing of prior unfair practice charges, when it terminated his employment on December 16, 2010, under the pretext of sexual harassment.

On July 16, 2010, the Secretary of the Board issued a complaint and notice of hearing in Case No. 10-209, designating a hearing date of August 25, 2010, in Harrisburg. I granted both parties' continuance requests and rescheduled the hearing for February 28, 2011. On February 1, 2011, the Secretary issued a complaint and notice of hearing in Case No. 11-1, designating a hearing date of February 28, 2011, thereby consolidating Case Nos. 10-209 and 11-1 for hearing. After several more granted continuance requests, the first day of hearing occurred on September 27, 2011, for the consolidated charges. Two subsequent days of hearing were necessary and occurred on November 3, 2011, and January 4, 2012. During those days of hearing, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties submitted post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The County is a political subdivision of the Commonwealth of Pennsylvania and a public employer within the meaning of Section 301(1) of PERA. (N.T. 4-5).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4-5).

3. The parties stipulated and agreed to incorporate the record from Case No. PERA-C-10-317-E. (N.T. 94).
4. The parties stipulated and agreed that, in Case No. 10-209, the alleged incident involving Mr. Keenan's placing of Union flyers in County employes' mailboxes is not before me for remedy. (N.T. 12-13).
5. The parties stipulated and agreed that the Union began organizing Montgomery County employes sometime in 2008, which eventually narrowed to the youth detention center, which resulted in certification. In the fall of 2009, the Union resumed an organizing campaign for the Human Services employes in the County. That campaign ran until July 2010, when the Union withdrew its petition. (N.T. 13-14).
6. Mr. Keenan was a supports coordinator in the Developmental Disabilities Department, formerly known as MH/MR or Mental Health/ Mental Retardation. He was employed by the County from August 1, 2005, until his termination on December 16, 2010. Mr. Keenan worked at the Central Office in Norristown until his transfer to the Eastern Office in Willow Grove on August 23, 2010. Mr. Keenan is an openly gay male and all of his coworkers know that he is gay. (N.T. 15, 53, 105, 121, 182; County Exhibit 9, F.F. 5).
7. A supports coordinator advocates for challenged and disabled clients. A supports coordinator locates and matches service providers that satisfy the needs of clients and their families. The supports coordinator then monitors those services and ensures that they are provided correctly. (N.T. 18-19; County Exhibit 9, F.F. 5).
8. Mr. Keenan's immediate supervisor was Karen Kenny who is supervised by the Director of Supports Services for the Central Office, Barbara Sherman. Ms. Sherman is supervised by Andrea Costello, the Deputy Administrator of Supports Coordination. Ms. Costello supervises three supports coordination locations responsible for providing services for approximately 3000 persons with mental disabilities. On July 28, 2009, Mr. Keenan received an annual performance evaluation for the period of August 2008, through August 2009. Another supervisor, by the name of Kathy Jett, gave Mr. Keenan a satisfactory evaluation. (N.T. 19-20, 54-55, 155; Union Exhibit 1; County Exhibit 9, F.F. 6-8).
9. Eric Goldstein is the Administrator for Behavioral Health and Developmental Disabilities. He is responsible for managing the finances and services of several divisions: Developmental Disabilities, early intervention, mental health, drug and alcohol and Medicaid for clients with drug and alcohol and mental health issues. Several directors report directly to Mr. Goldstein. Mr. Goldstein reports directly to the County Commissioners. Mr. Goldstein's Administrative Assistant is Judy Cirafisi. (N.T. 53-54, 560-561).
10. Beverly Jackson is the Director of the County's Equal Employment Opportunity Office and the Employe Assistance Program. She has held that position since September 2005. Since 2005, every County employe is required to receive sexual harassment training. (N.T. 169, 225-226, 229-230).
11. Joe Roynan was the Human Services Director, until he went on medical leave in August 2010. He then retired effective April 2011. (N.T. 79).
12. On March 28, 2006, Mr. Keenan attended and completed County provided sexual harassment training. The County policy specifically taught to Mr. Keenan prohibits touching and petting, it also prohibits impeding or blocking movement. (N.T. 230-232, 234; Union Exhibit 18; County Exhibit 3).

13. In August 2007, supervisors Kathy Jett and Lois Kittredge told Mr. Keenan that he was not permitted to cross boundaries with work friends. Ms. Jett also told Mr. Keenan about the Employee Assistance Program.¹
14. On December 15, 2009, Mr. Keenan received a flyer announcing a Union organizing meeting, and he began discussing the merits of a union with coworkers. On January 12, 2010, the Union held such a meeting and Mr. Keenan attended. After the January 12th organizing meeting, Mr. Keenan decided to support the Union and to convince other County employees to support the Union. (N.T. 23-26, 30; Union Exhibit 2, County Exhibit 8, F.F. 7-8; County Exhibit 9, F.F. 10).
15. Ray Martinez is a full-time organizer for and employee of the Union. He handed Mr. Keenan a Union flyer on January 12, 2011, while he was walking into work. Mr. Keenan taped the flyer to his cubicle and referred his coworkers to the flyer. The flyer advertised the January 12, 2009 Union meeting at the UFCW Union Hall in Plymouth Meeting, PA at 5:30. (N.T. 27-28, 125-126; Union Exhibit 3).
16. Mr. Keenan further demonstrated his support for the Union by wearing a Union lanyard and hanging a Union T-shirt and Union signs in his cubicle at work. (N.T. 103, 126-127; Union Exhibit 12; County Exhibit 9, F.F. 10).
17. At the January 12, 2010 Union meeting, Mr. Keenan obtained another flyer which he also hung on his cubicle. The flyer stated: "Remember Uncle Sam stands behind YOU!" and "it's your RIGHT to join the union." (N.T. 28; Union Exhibit 4).
18. The parties stipulated and agreed that the County had actual knowledge of Mr. Keenan's Union activities by January 28th and 29th, 2010. (N.T. 34-35, 357).
19. Jane Doe worked in the Central Office as a supports coordinator with Mr. Keenan.² Ms. Jane and Mr. Keenan ate lunch together almost every day. On Friday, January 22, 2010, Mr. Keenan returned from a client visit and approached Ms. Jane to have lunch. Ms. Jane declined because she already ate. She asked Mr. Keenan where he was and he replied that she could look at his Outlook Calendar and see from her own computer where he was; Mr. Keenan was not serious. When Ms. Jane was actually able to see Mr. Keenan's calendar, it upset her. Mr. Keenan was surprised that it worked. Approximately one hour later, Supervisor Kathy Jett (now Ms. Graham), Ms. Jane and an IT expert examined Keith's computer and discovered that his Outlook Calendar was properly configured like everyone else's. Mr. Keenan followed Ms. Jane outside where she accused Mr. Keenan of watching her and setting her up to look foolish. (N.T. 39-41, 428-430; Union Exhibit 6).
20. On the same day, Ms. Jane filed an Equal Employment Opportunity (EEO) complaint with the EEO Office against Mr. Keenan. On Wednesday, January 27, 2010, EEO Director Beverly Jackson summoned Mr. Keenan to her office to investigate Ms. Jane's complaint of sexual harassment against Mr. Keenan. In her anonymous complaint, Ms. Jane requested that Mr. Keenan be terminated. (N.T. 43-44, 188, 236-238, 419, 432-434; Union Exhibit 5).
21. Ms. Jackson investigated the allegations against Mr. Keenan. As a result, Ms. Jackson recommended a strong letter of reprimand and a two-day suspension because his behavior was tolerated for some time leading him to believe that it

¹ During an unfair practice hearing before Hearing Examiner Thomas P. Leonard, Esquire on December 7, 2010, Mr. Keenan admitted that he received a letter dated August 9, 2010, marked as County Exhibit 1. (County Exhibit 2 at 81). During my hearing on September 27, 2011, Mr. Keenan testified that he did not remember receiving the letter, but he did remember Supervisors Kathy Jett and Lois Kittredge telling him that he was not permitted to cross boundaries with work friends. County Exhibit 1 was not signed nor was it on County letter head. In the absence of testimony, either from Mr. Keenan that he received the letter, or from another witness that he/she wrote the letter and/or gave it to Mr. Keenan, I ruled that it was not properly authenticated and excluded it from the record. Although he previously admitted to receiving the letter, I credit his subsequent testimony that he was mistaken about receiving it.

² I have changed the names of the three women who filed sexual harassment complaints against Mr. Keenan.

was acceptable. The County followed Ms. Jackson's recommendations. (N.T. 172-175; Union Exhibit 21).

22. The County has a zero tolerance for sexual harassment. Usually the conduct engaged in by Mr. Keenan results in termination. Ms. Jackson recommended a lesser discipline because others engaged in the offensive conversations and tolerated Keith's touching and statements for some time. (N.T. 242-243).
23. Later on January 27, 2010, Keith attended a meeting in Mr. Goldstein's office with Mr. Goldstein, Ms. Cirafisi, Ms. Costello, Ms. Sherman and a security guard. Mr. Goldstein followed Ms. Jackson's recommendation for a two-day suspension and informed Mr. Keenan that he was being sent home on administrative leave. The security guard escorted Mr. Keenan out of the office and off County property. (N.T. 54-55, 568-570).
24. On January 28, 2010, Ms. Jackson wrote a memo to Mr. Goldstein and issued a report containing the findings of her investigation, her conclusion and her recommendations. Ms. Jackson verified Ms. Jane's allegations and concluded that Mr. Keenan engaged in the following behaviors: placing his head on Ms. Jane's breasts; making statements about the effects of celery on the taste of semen; making statements to Ms. Jane that he would sleep naked if he were her husband and about her sleeping/sexual behaviors with her husband. (N.T. 189-190, 240-241, 419-420, 566; Union Exhibits 19-21).
25. Mr. Keenan served a two-day unpaid suspension for Thursday, January 28, 2010, and Friday, January 29, 2010. The County has a policy requiring that the County separate the accuser from the harasser by reassigning the harasser or by sending him/her home. On February 1, 2010, Keith received a formal written warning from Mr. Goldstein indicating his conclusions that he engaged in inappropriate behavior toward Ms. Jane and that future incidents of this nature could result in termination. (N.T. 54, 57, 198, 243, 571; Union Exhibit 7).
26. The written warning provides as follows:

Beverly Jackson, Montgomery County EEO/EAP Officer, has completed an investigation of these complaints and provided me a report.

It has been determined that your actions were inappropriate and unacceptable. Therefore a two day unpaid suspension is being imposed on you effective Thursday and Friday, January 28 and 29. You are expected to return to work on Monday, February 1.

Any future incidents of this nature may result in further discipline up to and including termination.

(Union Exhibit 7).

27. Ms. Jane wrote a letter to Mr. Goldstein, upon his request, on January 31, 2010, outlining the same complaints against Mr. Keenan as she had previously provided to Ms. Jackson. (N.T. 45-46; Union Exhibit 6; County Exhibit 9, F.F. 20).
28. That letter provides in part as follows:

Based on what I have written, you will hopefully be able to understand why I do not want to speak with Keith or have any other contact with him. It was difficult for me to come forward in the first place. I was embarrassed that I had

allowed myself to be treated in this manner without standing up for myself.

. . . .

Summer, 2009; Keith put his face in my breasts while we were having lunch in the cafeteria. . . .We were discussing the inappropriate behavior of one of my difficult clients. The client was infatuated with me and tried to touch my breasts almost every time I visited him. In the past, I had asked for advice from my coworkers on how to deal with him. At lunch I was telling my coworkers that the client finally understood "no touching" with his hands, but that he had then put his face in my breasts. Keith said, "this is what he did." Then Keith physically demonstrated the action. I was embarrassed. I did not tell Keith that it was inappropriate, but others at the table told him. Keith said that it was OK because I would know he doesn't mean anything by it because he is gay. After the incident my coworkers urged me to report Keith.

December 2009

I had just come in to work and stopped at Jay Valente's cubicle to say good morning. Dave Johnson was also in Jay's cubicle. Keith came up behind me, put his hands on my shoulders and pressed his full body against me. He rubbed my shoulders and put his face close to my ear and asked if I wanted to go for coffee. I said that this is the type of thing my husband would do to show romantic interest.

December 2009 (this incident was not told to Beverly Jackson)

I was outside with Marie Liples, Keith and others. Marie complimented my blouse. I said that I like it as well, but that I did not like the way it tended to ride up. After saying this I adjusted the blouse. Keith said, "that's because you have big boobs." He then put his hands on me and started rearranging my shirt. I told him that I had already fixed it. Marie told him it was inappropriate.

January 2010

In the cafeteria with [coworkers]. We were talking about the movie "the Postman Rings Twice." Those of us who had seen the movie mentioned the kitchen table seen. Keith went on to tell us that he has had sex in the kitchen and likes to have sex in the kitchen.

Unsure of time;

Walking to get coffee with Keith and [another coworker]. Keith told us that he used to talk to people and imagine what they did sexually. He said to both of us that if he were talking to us "I would imagine what you and your husband did together when you were having sex."

Unsure of time, but he said it on more than one occasion; Keith told me that he thought [supervisor] Karen Kenny had a great butt.

On multiple occasions Keith told me, "I love boobs." He has said, "I can still like boobs if I'm gay."

He told the lunch group that eating celery makes semen taste good. (per [two other coworkers]).

Also per [two other coworkers]; at lunch they were discussing how much laundry they have to do and Holly said that she particularly has to wash a lot of pajamas for her husband. Keith said that if he was sleeping with her he would always go to bed naked.

Almost daily Keith would rub his hand across my cheek. He frequently takes my hand and pats/rubs it.

He startles me by coming up behind me in my cubicle and touches/rubs my shoulders.

(Union Exhibit 6; County Exhibit 4, F.F. 12-17).

29. Mr. Keenan admitted that, during the summer of 2009, he demonstrated Ms. Jane's client's behavior by placing his head on Ms. Jane's chest. (N.T. 46-47).
30. Keith also admitted that, during a conversation at work, a coworker stated: "do you know that different things could affect the taste of semen?" Keith responded that he knew that celery could. Ms. Jackson understood that other coworkers were involved in the conversation. (N.T. 47, 147, 185).
31. Keith also admitted that, while speaking with a coworker, he stated: "if I was sleeping with you, I wouldn't wear pajamas," or that he would sleep naked. (N.T. 48, 146, 186).
32. The lunch conversation among coworkers who ate with Keith became raunchy at times and the coworkers participated in the conversation, including Ms. Jane, who continued to eat lunch with Keith after he placed his forehead on her chest. (N.T. 50-51, 147, 424).
33. Mr. Keenan told Ms. Jane and another coworker that if he were talking to them he would think about what they did sexually with their husbands. A third coworker notified Mr. Keenan that the comment was inappropriate. He also told Ms. Jane, several times, that Supervisor Karen Kenny has a nice butt. (N.T. 425; County Exhibit 4, F.F. 12-14).
34. Mr. Keenan also told Ms. Jane details about his prostate biopsies and told her that he was used to having things up his butt. (County Exhibit 4, F.F. 16).
35. Ms. Jane credibly testified that, in December 2009, Keith came from behind Ms. Jane while in her cubicle and pressed his entire body against her, held her shoulders and whispered in her ear asking if she wanted to get coffee. Keith's entire pelvic area and front of his body was touching Ms. Jane's rear end. (N.T. 422-423).
36. Ms. Jane also credibly testified that, while telling a coworker that her blouse rides up, Keith stated "that's because you have such big boobs." He then began rubbing over Ms. Jane's shirt touching her collar bone area trying to fix it. (N.T. 423-424).
37. Ms. Jane also credibly verified the conversation about the kitchen scene in the movie "The Postman Always Rings Twice." Mr. Keenan often patted and rubbed Ms. Jane's hand and waived his hand across her face in a sexual manner. (N.T. 424, 426).

38. Ms. Jackson counseled Mr. Keenan on acceptable behavior, invading coworkers' privacy zones and touching. Mr. Keenan appeared to understand. (N.T. 234-244).
39. On March 11, 2010, Ray Martinez and other Union organizers were eating in the public cafeteria in the County's Human Services Building. Mr. Roynan entered the cafeteria for lunch and noticed that two tables were out of position and realigned. The tables were by the front door. One could not enter or leave the cafeteria without passing the tables containing Union information. Mr. Roynan stared at the County employes and Union workers at the table and asked them what they were doing. Mr. Martinez responded that they were available for anyone who wanted to talk. Mr. Roynan indicated that County employes are treated well and that they do not need the Union. Mr. Keenan was also present and stated: "you really don't want to be talking to him." Mr. Roynan bought a sandwich and left the cafeteria. The workers at the table became anxious. That same day, Mr. Martinez emailed Commissioner Hoeffel. (N.T. 65-69, 80-81, 86-87, 363-368, 385; Union Exhibit 9).
40. When Mr. Roynan returned to his office, he received a message from County CEO Bob Graf who informed him that someone had complained about being solicited in the cafeteria by the Union. Mr. Graf directed Mr. Roynan to bring security to the cafeteria and ask Mr. Martinez and his organizers to leave the cafeteria. Mr. Roynan did not wait for security. He was visibly angry, and he asked Mr. Martinez and the Union to leave. While escorting Mr. Martinez out of the cafeteria, he physically held Mr. Martinez's arm. (N.T. 81-85, 367-368, 387-388, 390).
41. The County enforces its no-solicitation rules against all groups including girl scouts and political groups. (N.T. 82-85; Union Exhibit 9).
42. Commissioner Hoeffel informed his staff that Mr. Martinez was permitted to leaflet outside on sidewalks and that the Union is free to speak to people in the public cafeteria but not interfere with or interrupt people.
43. Ms. Susan Doe was a Union supporter and organizing committee member working at the County's Western Office in Pottstown. On March 29, 2010, at a Union meeting at the Best Western in Pottstown, Mr. Keenan arrived late and hugged, kissed and nuzzled Ms. Susan from behind. He sat to her left and continued rubbing her arm for a half hour. (N.T. 393, 482-485, 509).³
44. On March 31, 2010, Mr. Keenan had lunch in the County's Human Services Center cafeteria with Ray Martinez, Commissioner Hoeffel, Karen Arms and approximately 20 coworkers. During this meeting, Commissioner Hoeffel told the Union and the employes that they had a right to be in the public cafeteria and he addressed the Union's concerns. That same day, Andrea Costello was in the cafeteria walking back and forth checking out the Union table and giving Union employes and supporters "the evil eye." (N.T. 94-98, 370).
45. Also on March 31, 2010, at 2:00 p.m., Mr. Keenan was summoned to Ms. Jackson's office. Ms. Jackson informed Mr. Keenan that he could not talk about the Union at his cubicle during work time, but he was permitted to discuss the Union on County property during breaks. Ms. Jackson also reviewed the mailbox use policy with him. She also stated that she was tired of employes complaining about Mr. Keenan encouraging them to join the Union and attend Union meetings. The Union concedes that insufficient evidence exists to establish that Ms. Jackson harbored any anti-union animus. (N.T. 101-102, 129; Union Brief at 28 & 47).
46. Later in July, Keenan was called to a meeting with Costello, Barbara Sherman and Anetta McHale. Ms. Costello informed Mr. Keenan that he was not to talk

³ I credit the testimony of Ms. Susan Doe over the testimony of Karen Arms regarding the events at the Union meeting at the Best Western in Pottstown.

about the Union during work time and that he was not to harass people who were not in favor of the Union. (County Exhibit 9, F.F. 27).

47. On or about July 13, 2010, the Union withdrew its representation petition. Mr. Keenan received notice of the withdrawal. (N.T. 150, 380, 467).
48. On July 29, 2010, Ms. Susan filed a grievance pursuant to a procedure contained in the County's employe handbook, rather than an EEO complaint, alleging sexual harassment against Keith Keenan. (N.T. 156-157, 250-251, 257, 393, 466, 469; County Exhibit 5).
49. The grievance alleges three separate incidents of misconduct and provides, in part, as follows:

12/28/09- Keith began touching my hand and discussing Barb Sherman using profanity. He continued to touch my hand while being verbally abusive to Barbara Sherman in an unprofessional manner. When the meeting started he grabbed my hand twice. . . .

3/29/10- I was invited to a SEIU meeting at the [B]est [W]estern in Pottstown after 5:00 p.m. . . . Keith came shortly after. He entered the room. I was sitting at the table when Keith grabbed me from behind and kissed me and hugged me. He sat next to me on the left side and continued to touch me throughout the meeting I felt intimidated. Then the SEIU workers began laughing about Keith hugging me. It was very uncomfortable. . . .

7/29/10-Mandatory training and meeting: I attended the mandatory training held at the central office. We were all dismissed for lunch and I had walked back to see if the MAC machine was working. While I was looking for the MAC Machine I met with my Supervisor Maria. I told her I would have to go out to get lunch. While I was speaking with Maria Keith interrupted our conversation. I continued to walk to the front door with Keith following me. He followed me to the front door before the guard station and asked if I would like to go to lunch. I told him no. He acted hurt. He stated that Barbara and Andy were harassing him and using colorful wor[d]s to describe them. After the Early Intervention left the meeting Keith knelt down and got within inches of my face and touched my hand and placed his hand on my shoulder and began talking about the union. I told him there was not going to be any UNION. I felt as if he was harassing me. I told him I did not want him to touch me or have any further discussion. I went to my old supervisor Barbara Sherman and went to Andy Costello after the meeting. I explained what had happened and that Keith continues to act inappropriately towards me through hugging, hand touching, and touching my shoulder. I felt that it was three times in a row that he had sexually harassed me and I could not take it anymore. He had progressed from touching my hand. . . to hugging and kissing me... to asking me out to lunch and continuous inappropriate touching. He made me feel uncomfortable.

. . . .

Remedy Requested: Dismissal of Keith Keenan due to Sexual Harassment.

(County Exhibit 5).

50. Ms. Jackson attended a second level grievance meeting with Ms. Susan Doe, Mr. Goldstein, Ms. Cirafisi and Eleanor Schneider concerning Ms. Susan's complaints against Mr. Keenan. Ms. Susan reported being very intimidated and harassed by Mr. Keenan's conduct and referred to him as a predator. (N.T. 253-254; County Exhibit 6).
51. Ms. Susan credibly verified that Keith kept touching her, kissing her and hugging her. At a Residential Support Services meeting, Keith kept touching Ms. Susan's hand. He called Barbara Sherman a "bitch" and a "c...t;" he stated that he hated his job and that he was going to shoot Barbara Sherman. Keith was nuzzling her and his body was very close. After that meeting, Mr. Keenan referred to Barbara Sherman as that "fucking Barbara Sherman," and he told Ms. Susan that he would like to get a gun and go to Ms. Sherman's house and shoot her. (N.T. 470, 472-479, 481).⁴
52. After the July 29, 2010 meeting, Ms. Jackson recommended that Keith be transferred to the Eastern Office in Willow Grove because they had openings there and it was away from Ms. Jane (in the Central Office) and Ms. Susan (in the Western Office). Ms. Jackson was unaware that anyone in the Eastern Office had any knowledge of Keith's prior discipline for sexual harassment or his prior Union activity. The transfer to the Eastern Office was meant to be a new start in a safe zone. Mr. Goldstein concluded that Ms. Susan's allegations were founded. (N.T. 255-256, 269, 580).
53. On August 26, 2010, Administrator Goldstein issued a memo to Mr. Keenan entitled "Last Chance Agreement." (N.T. 255, 257-259, 581-582; County Exhibit 7).
54. The Last Chance Agreement provides, in part, as follows:

Montgomery County specifically prohibits sexual harassment in the workplace. It is County policy that such behavior will result in discipline, including termination of employment.

On January 29, 2010, you were warned and suspended for extremely inappropriate sexual behavior. We have documentation of several incidents involving several people. The behavior included dialogue of a sexual nature and conversations with one fellow employee also of a sexual nature. On July 29, 2010 we were informed via a grievance by another staff member of inappropriate behaviors involving touching, hugging and kissing. These behaviors happened on three different occasions. The occurrences were listed as having taken place in January, March and July of this year. Therefore two of these incidents took place after you were warned and suspended in January.

This kind of inappropriate behavior cannot be tolerated. Violating personal space, inappropriate touching and graphic sexual content in conversation are not acceptable behaviors. Any further occurrences will lead to

⁴ On rebuttal, Mr. Keenan denied making these statements. However, based on Ms. Susan's appearance, general bearing, conduct on the stand, demeanor, manner of testifying, candor, frankness and certainty with respect to the facts, **Mid Valley Education Ass'n v. Mid Valley School District**, 25 PPER ¶ 25138 (Final Order, 1994) (citing **Kiskiminetas Township**, 25 PPER ¶ 25007 (Proposed Decision and Order, 1993)), I credit the testimony of Ms. Susan over the testimony of Mr. Keenan.

disciplinary action including suspension and/or termination.

(County Exhibit 7).

55. In the fall of 2010, Ms. Mary worked in the Willow Grove Office. She had been involved in the Union organizing campaign in that office. (N.T. 518-520).
56. When Mr. Keenan initially arrived at the Willow Grove Office, he caressed Ms. Mary's arm and immediately pulled back stating: "I'm not supposed to be touching anybody." (N.T. 526).
57. Within a month of Keith's transfer to the Willow Grove Office, he began hugging Ms. Mary and touching her breasts, hair, hands and back. Mr. Keenan told Ms. Mary that she was well-supported. Ms. Mary was unaware of Mr. Keenan's prior sexual misconduct or discipline for sexual misconduct. Ms. Mary told Mr. Keenan that she needed her personal space and that she did not like to be touched. Ms. Mary was very uncomfortable when Keith appeared at her cubicle. She projected body language, such as crossing her legs and hands and leaning back, to display a do-not-enter zone. She did not go to lunch and began to schedule herself out of the office more often to avoid interaction with Mr. Keenan. Mr. Keenan invaded Ms. Mary's personal space and touched her on a daily basis. Mr. Keenan frequently commented on Ms. Mary's weight. In December, 2010, a supervisor discovered Ms. Mary in the restroom crying. (N.T. 111-112, 136, 263, 266, 272, 527, 536; County Exhibit 8, F.F. 26-38).
58. Mr. Keenan would caress Ms. Mary's arm from her shoulder down. He would stroke and run his fingers through her hair. Ms. Mary felt that this type of touching was intimate. She expressed her personal space issues with Mr. Keenan but his behavior escalated to coming up from behind and rubbing her back; he would put his arms around her; his hands would graze her breasts; his comments became more sexual. Keith's touching would cause Ms. Mary to shut down. (N.T. 528-532).
59. Mr. Keenan told Ms. Mary that no harm could come to him because the Union would protect him. He said that he was safe because he had had dirt on Mr. Goldstein and Ms. Costello. (N.T. 525).
60. Supervisor Dave Kanicky at the Willow Grove Office contacted Administrator Goldstein's office which directed him to Beverly Jackson. He told Ms. Jackson that an employe came to him crying and upset. On or about December 15, 2010, one of the supervisors drove Ms. Mary to Ms. Jackson's office, and she was still upset when she arrived. Ms. Jackson waited until the next day when Ms. Mary was calm to listen to her complaints. (N.T. 261-262; County Exhibit 8, F.F. 36-42).
61. Mr. Keenan admitted to making comments about Ms. Mary Doe's weight after another coworker made a comment about "fat" people. He told her that "underneath that weight, there's a pretty skinny little girl inside." Ms. Mary was openly insecure and uncomfortable about her weight. (N.T. 108, 136, 530-532, 624).
62. Ms. Mary had a reputation for exaggeration; for wearing dirty, food-stained clothing; and for wearing inappropriate and revealing attire. She was seen wearing visibly dirty sweatpants. On another occasion, she came to work with her nipples exposed. She had dirty fingernails. (N.T. 296-297, 316-320, 326-327, 340, 343-344, 617-619).
63. Ms. Mary's coworkers and supervisors engaged in sexually inappropriate conversation. Ms. Mary also made sexual remarks and once told a sexually

explicit story at a Christmas party in the presence of supervisors and no one complained. (N.T. 306-310, 325, 341-342, 344).

64. While Mr. Keenan ate lunch with coworkers at the Human Services Building cafeteria, other coworkers engaged in racy, sexual lunch conversations in which everyone present participated without complaint. (N.T. 351-354).
65. On December 15, 2010, Keith was summoned to Ms. Jackson's office. Judy Cirafisi was also present. Ms. Jackson asked Keith whether he made comments about a coworker being "well-supported," and whether he touched a coworker's hair or hand or breast and whether he made comments about a coworker's weight. (N.T. 106-108, 205-206).
66. After investigating Ms. Mary's complaints, Ms. Jackson recommended termination of Keith Keenan because of his prior sexual harassment behaviors, his prior two-day suspension and the Last Chance Agreement letter. Mr. Goldstein consulted with Human Resources, the EEO Officer and the Solicitor; all agreed that Keith Keenan should be terminated for sexual harassment. (N.T. 267-268, 583; Union Exhibit 22).

DISCUSSION

1. PERA-C-10-209-E

As an initial matter, the Union's charge alleging that the County engaged in unfair practices by investigating and suspending Mr. Keenan for sexual harassment in January 2010 for two days is untimely filed. Section 1501 of PERA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge." 43 P.S. § 1101.1505. The charge was filed on June 14, 2010, more than four months after Mr. Keenan was placed on actual notice of his investigation and suspension, in violation of Section 1505 of PERA. Accordingly, the Board is without subject matter jurisdiction to entertain these claims. **Fraternal Order of Transit Police v. Southeastern Pennsylvania Transportation Authority**, 36 PPER 14 (Final Order, 2005).

Moreover, Mr. Keenan's following claims were already litigated before this Board and dismissed by Hearing Examiner Thomas P. Leonard, Esquire: The investigation and suspension for sexual harassment in January 2010 and the meeting, during which he was questioned about the Union and directed to cease placing Union flyers in employee mailboxes and was instructed when and where he could engage in union discussions with employees. The County argues that the doctrine of collateral estoppel precludes the Board from entertaining and ruling on these allegations again.

In **Pennsylvania Board of Probation and Parole v. Pennsylvania Human Relations Commission**, 66 A.3d 390 (Pa. Cmwlth. 2013), *appeal denied*, __ Pa. __, 79 A.3d 1100 (2013), the Court stated that "[t]he doctrine of collateral estoppel is based on the policy that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise." *Id.* at 395. The Court recited the elements of collateral estoppel as follows:

Generally, collateral estoppel forecloses re-litigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication was identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in a prior action; and (5) the determination in the prior proceeding was essential to the judgment.

Id.

In his Proposed Decision and Order, Hearing Examiner Leonard concluded as follows:

The Union's first allegation is that the County violated PERA when it disciplined Keenan for sexual harassment. The Union argues that the discipline was without proper cause and/or adequate investigation. The Union argues that the County would not have disciplined Keenan if he had not been an active union supporter.

. . . .

Because of Goldstein's credible testimony, I am accepting the County's defense that it was not motivated by Keenan's union activities in disciplining Keenan. Accordingly, the element of anti-union motivation is absent from this case. In light of this the Union has not met its burden of proving a Section 1201(a)(3) charge under **St. Joseph's Hospital, supra**. Similarly, there is no basis for finding a Section 1201(a)(4) violation. Furthermore, Goldstein's testimony supports the County's defense to the Section 1201(a)(1) charge that it had a legitimate reason for the discipline. **Ringgold Educ. Ass'n v. Ringgold Sch. Dist. supra**.

PSSU, Local 668 v. Montgomery County, 43 PPER 62 at 227-228 (Proposed Decision and Order, 2011). Hearing Examiner Leonard further concluded the following:

The Union's second allegation is that the County violated PERA by warning Keenan to refrain from soliciting support for the union during work time. The Union contends that the County did not have a valid non-discriminatory no-solicitation rule but rather that it singled Keenan out for warning while allowing other employees to speak against the union.

The Board has recognized that a no solicitation rule must be developed and applied in a way that is neutral with regards to a union campaign. **South Park School District**, 10 PPER ¶ 10262 (Final Order, 1979).

There is no evidence that the County was restricting solicitation so as to restrict Keenan's legal right to promote the union. Rather, the evidence shows that the County was warning Keenan not to solicit support for the Union during work time. The County acted within the legal parameters of PERA and Board precedent on solicitation during work time. "There is no question that a rule prohibiting employee distribution on employer property during working time is presumptively valid." **SEPTA**, 7 PPER 305C (Nisi Decision and Order, 1976), citing NLRB v. Stoddard Quirk Mfg. Co., 51 LRRM 1110 (1962). See also, **AFSCME v. City of Philadelphia**, 32 PPER ¶ 32009 (Final Order, 2000).

Similarly, the County also acted properly in notifying Keenan that he could not use county mailboxes to distribute union material. Public employers may restrict the use of employee mailboxes to business purposes, as long as the restriction is neutrally applied. See **Reynolds Education Association v. Reynolds School District**, 26 PPER ¶ 26039 (Proposed Decision and Order, 1995) (Citations to PLRB and NLRB cases omitted.) The evidence shows that that the County applied a neutral policy that its employee mailboxes were for business purposes only. Costello reacted in the same manner when she became informed that employees' internal mailboxes were being used for propaganda in favor of and opposed to the unionization effort.

Accordingly, this allegation will not serve as the basis to find that the County violated any sections of PERA.

PSSU, Local 668 v. Montgomery County, 43 PPER 62 at 228 (Proposed Decision and Order, 2011).

The parties were both represented by high quality experts in the field of public sector labor law and litigation. Mr. Keenan's claims were actually litigated to a final disposition. Examiner Leonard's Order was not appealed and is, therefore, a final and binding adjudication on the merits. Accordingly, the elements of collateral estoppel are satisfied and the following claims by Mr. Keenan against the County are barred by collateral estoppel: the County's alleged discriminatory sexual harassment investigation and two-day suspension of Mr. Keenan; The County's questioning of Mr. Keenan about the Union and directing him to cease placing Union flyers in employe mailboxes; the County's instruction and direction to Mr. Keenan about when and where he could engage in union discussions with employes.

Additionally, the parties stipulated and agreed that the allegations pertaining to using County employe mailboxes for Union flyers was litigated as part of the Union's unfair practice charges before Hearing Examiner Thomas P. Leonard, Esquire in Case No. PERA-C-10-317, and is not before me in terms of remedy. (F.F. 4).

The remaining issue, therefore, in case No. PERA-C-10-209-E is whether the County coerced and intimidated Mr. Keenan and other County employes regarding the exercising of their Article IV rights when the Deputy Director of Supports Coordination for the County allegedly accused Union employes and supporters of soliciting on County property and escorted them out of the public cafeteria on March 11, 2010, and when another County manager allegedly stared at Union supporters in the public cafeteria on March 31, 2010.⁵

In **International Union of Operating Engineers, Local 66 v. Franklin Township**, 43 PPER 139 (Final Order 2012), the Board provided the analysis for an independent 1201(a)(1) as follows:

An independent violation of Section 1201(a)(1) arises where, in light of the totality of the circumstances, the employer's actions would have a tendency to coerce a reasonable employe in the exercise of protected rights. **Fink v. Clarion County**, 32 PPER ¶ 32165 (Final Order, 2001). Under the totality of circumstances, the employer's credible, legitimate, non-discriminatory reason for taking the challenged action may militate against the finding of coercion. **Pennsylvania State Troopers Association v. Pennsylvania State Police**, PF-C-09-83-E (Final Order, May 17, 2011), *affirmed sub nom.*, **Pennsylvania State Troopers Association v. PLRB**, 39 A.3d 616 (Pa. Cmwlth. 2012) (disciplinary investigation for violation of work rules does not coerce employes from exercising protected rights); **Pennsylvania Social Services Union Local 668 v. Commonwealth, Office of Vocational Rehabilitation**, 31 PPER ¶ 31127 (Final Order, 2000) (disciplinary action related to acts in defiance of the employer's instructions does not have a tendency to coerce the exercise of protected employe rights).

However, because motive is not an element of an independent claim of interference or coercion, **E.B. Jermyrn Lodge No. 2 v. City of Scranton**, 38 PPER 104 (Final Order, 2007), the existence of a stated business reason for the employer's actions is not a dispositive bar to the finding of an unfair practice under Section 1201(a)(1). **PLRB v. Commonwealth, Office of Employment Security**, 16 PPER ¶ 16091 (Final Order, 1985). . . Thus, the pertinent inquiry, for an independent

⁵ The Union properly preserved an independent cause of action under Section 1201(a)(1) of PERA in Paragraph 39 of its Specification of Charges.

violation of Section 1201(a)(1), is whether the employer's actions, when viewed within the totality of the circumstances, would tend to influence a reasonable employe in deciding whether to assist or seek assistance from the union, or to pursue some other statutorily-protected activity. **City of Scranton, supra; Northwestern Education Association v. Northwestern School District**, 24 PPER ¶ 24141 (Final Order, 1993).

Franklin Township, 43 PPER at 511.

The County has and enforces a neutral no-solicitation rule. On March 11, 2010, Ray Martinez and other Union organizers were eating in the public cafeteria in the County's Human Services Building. Mr. Roynan entered the cafeteria for lunch and noticed that two tables were out of position and realigned. The tables were by the front door. One could not enter or leave the cafeteria without passing the tables containing Union information. Mr. Roynan stared at the County employes and Union workers at the table and asked them what they were doing. Mr. Martinez responded that they were available for anyone who wanted to talk. Mr. Roynan indicated that County employes are treated well and that they do not need the Union. Mr. Roynan bought a sandwich and left the cafeteria.

When Mr. Roynan returned to his office, he received a message from County CEO Bob Graf who informed him that employees had complained about being solicited in the cafeteria by the Union. Mr. Graf directed Mr. Roynan to bring security to the cafeteria and ask Mr. Martinez and his organizers to leave the cafeteria for violating the County's no-solicitation rule. Mr. Roynan did not wait for security. He returned to the cafeteria and asked Mr. Martinez and the Union to leave. While escorting Mr. Martinez out of the cafeteria, he physically held Mr. Martinez's arm at the elbow. Subsequently, Commissioner Hoeffel informed his staff that Mr. Martinez was permitted to leaflet outside on sidewalks and that the Union is free to speak to people in the public cafeteria, but it may not interfere with or interrupt people.

On March 31, 2010, Mr. Keenan had lunch in the County's Human Services Center cafeteria with Ray Martinez, Commissioner Hoeffel, Karen Arms and approximately 20 coworkers. During this meeting, Commissioner Hoeffel told the Union and the employes that they had a right to be in the public cafeteria and he addressed the Union's concerns. That same day, Andrea Costello was in the cafeteria walking back and forth checking out the Union table and giving Union employes and supporters "the evil eye."

Under the totality of the circumstances, Mr. Roynan had a reasonable belief that the Union was soliciting in the cafeteria based on employe complaints. At this point, Mr. Roynan, at the direction of Mr. Graf, was justified in enforcing its no-solicitation rule. However, the manner by which Mr. Roynan enforced the rule violated PERA. When Mr. Roynan physically grabbed Mr. Martinez by the elbow and physically walked him out of the cafeteria in front of County employes interested in the Union, he intimidated and coerced the reasonable County employes seated at the table with the Union organizers. Indeed, the evidence shows that those employes were in fact actually intimidated.

Moreover, when Ms. Costello, a management level employe, paced back and forth with a targeted angry expression on her face, she clearly meant to deliver the message of disapproval to Union supporters. A reasonable employe at the Union table in the cafeteria on March 31, 2010, would have been coerced and intimidated by the disapproving message contained in her facial expressions.

2. PERA-C-11-1-E

In this charge, the Union claims that the County terminated Mr. Keenan on December 16, 2010 because of his Union organizing activities and for filing unfair practice claims with the Board rather than for numerous accounts of sexual harassment as the County contends. The County placed in the record the State Civil Service Commission adjudication which demonstrates that the identical claims and issues of law and fact were finally adjudicated before the Civil Service Commission. The County's evidentiary submission of

the prior agency adjudication raises the issue of whether the doctrine of collateral estoppel prevents this Board from adjudicating these claims where the State Civil Service Commission has already properly exercised its subject matter jurisdiction and disposed of the exact same claims.

In **Ruth F. v. Robert B., Jr.**, 456 Pa. super. 398, 690 A.2d 1171 (Pa. Super Ct. 1997), the Superior Court raised the issue of *res judicata sua sponte* and stated that "[w]hile this issue [i.e., *res judicata*] was neither briefed on appeal nor raised in the court below, since **it effects the jurisdiction of this Court** to dispose of the matter, we may determine the issue *sua sponte*." **Id.** at 407 n.1, 690 A.2d at 1175 n. 1. Accordingly, the issue of whether the Board is precluded from entertaining Mr. Keenan's previously adjudicated claims is a question of jurisdiction that must be resolved before addressing the merits. On January 2, 2014, I faxed a letter to the parties' attorneys requesting the submission of supplemental briefs by January 17, 2014, discussing the issue of collateral estoppel across Commonwealth agencies and the Commonwealth Court's decision in **Board of Probation and Parole, supra**. Both parties timely filed supplemental briefs.⁶

In **Board of Probation and Parole, supra**, the Commonwealth Court held that the Pennsylvania Human Relations Commission (PHRC) was estopped from investigating an employee's claim that she was discharged from the Board of Probation and Parole (Parole Board) because of sex discrimination where the State Civil Service Commission (CSC) had already issued a final adjudication concluding that the employee failed to prove her discrimination claim against the Parole Board. After the CSC's decision, the Parole Board moved for dismissal of the employee's claims before the PHRC asserting that the PHRC was collaterally estopped from relitigating the sex discrimination claim. The PHRC rejected the Parole Board's arguments "explaining that the public policies of the CSC and the PHRC are substantially dissimilar and that the PHRC has exclusive jurisdiction over the question of whether [the employee's] termination was the result of sex discrimination." **Probation and Parole**, 66 A.3d at 394.

In reviewing the law in this area, the Court stated that "[t]he doctrine of collateral estoppel is based on the policy that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise." **Id.** at 395. The Court further provided the elements of collateral estoppel as recited **supra**.⁷

In opposing the application of collateral estoppel, the PHRC argued that two of the elements cannot be met, i.e. that the legal issues were not identical and that the employee did not have a full and fair opportunity to litigate the claim before the CSC. In rejecting both those arguments, the Court relied on the following two prior decisions both upholding the application of administrative agency collateral estoppel: **Irizarry v. Office of General Counsel**, 934 A.2d 143 (Pa. Cmwlth 2007) and **Department of Corrections v. Workers' Compensation Appeal Board (Wagner-Stover)**, 6 A.3d 603 (Pa. Cmwlth 2010). The Court noted that, "[i]n **Irizarry**, our Court held that collateral estoppel did apply and that the findings of an arbitrator in an employee's grievance proceeding had a preclusive effect in subsequent proceedings before the Office of General Counsel." **Id.** at 396. The **Board of Probation and Parole** Court quoted with approval from **Irizarry** as follows:

If the parties to an action have had an opportunity to appear and be heard in a prior proceeding involving the same subject matter, all issues of fact, which were actually adjudicated in the former action and essential to the judgment therein are concluded as between the parties even though the causes of action in the two proceedings are not identical.

⁶ The County faxed its brief to the Board on January 15, 2014, and the Union faxed its brief to the Board on January 17, 2014.

⁷ (1) the issue in the prior adjudication was identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in a prior action; and (5) the determination in the prior proceeding was essential to the judgment.

Board of Probation and Parole, 66 A.3d at 396 (quoting **Irizarry**, 934 A.2d at 151). Consequently, the requirement that there be an identity of issues is satisfied *if the same set of facts that are adjudicated are essential to the judgment of the two agencies*. The exact same cause of action is not necessary to satisfy the requirement for an identity of issues. In **Ruth F.**, *supra*, the Superior Court reiterated the following:

Where parties have been afforded an opportunity to litigate a claim before a court of competent jurisdiction, and where the court has finally decided the controversy, the interests of the state and of the parties require that the validity of the claim and any issue actually litigated in the action not be litigated again.

Ruth F., 690 A.2d at 1174 (quoting **Ham v. Sulek**, 422 Pa. Super. 615, 621-622, 620 A.2d 5, 8 (1993)). The Superior Court further stated that "[r]egardless of whether the plaintiff effects a recovery in the first action, he [or she] may not relitigate an action which has once been adjudicated. **Id.** at 1175 (citing 46 AmJur. 2d, Judgments § [524]).

The **Board of Probation and Parole** Court further evaluated its decision in **Wagner-Stover**, where a prior adjudication by the Department of Corrections under the former Act 632 (Act of December 8, 1959, P.L. 1718, No. 632, as amended, formerly 61 P.S. §§ 951-952, repealed by 61 P.S. § 1101), concluding that a claimant was fully recovered from a work-related post-traumatic stress disorder, collaterally estopped a workers compensation judge from revisiting that issue. The Court noted that the **Wagner-Stover** Court concluded that the issues presented by workers compensation and Act 632 proceedings were identical because in both proceedings, the employer, i.e., the DOC, had the burden of proving that the claimant's injury no longer prevented him from returning to work. The Court emphasized that a fact is a fact regardless of the different policies of the different statutes enforced by the different agencies. **Board of Probation and Parole**, 66 A.3d at 397 (citing **Rue v. K-Mart Corp.**, 552 Pa. 13, 19, 713 A.2d 82, 85 (1998)).

The Court further noted that, in **Wagner-Stover**, it compared the proceedings provided by the two statutes. The Court concluded that, although workers' compensation proceedings are governed by special rules adopted by the Department of Labor and Industry and Act 632 proceedings are governed by the General Rules of Administrative Practice and Procedure, a different set of rules, "both involved comparable procedures that were sufficiently formal to allow each litigant to develop a complete record on a disputed fact." **Id.** at 398. Noting the broad spectrum of identity of issues and comparable proceedings, the **Board of Probation and Parole** Court concluded that the employee's sexual harassment allegations were fully and fairly litigated by the CSC and its judgment collaterally estopped the PHRC from investigating or adjudicating those claims.

In its supplemental brief in this case, the County argues that "all five elements required to apply collateral estoppel have been met." (County's Supplemental Brief at 5). The County further specifically contends as follows:

The issue in Keenan's CSC and PERA-C-11-1-E, whether Keenan was terminated from employment because of his union participation, are identical. Keenan was [] a party in the CSC proceeding and had a full and fair opportunity to redress his allegation of termination due to union activities and affiliation in that proceeding and the CSC rendered a final judgment on that specific issue. As a result, consistent with the Commonwealth Court's decision in *Pennsylvania Bd. of Probation and Parole v. Pennsylvania Human Relations Comm.*, the Petitioner and the PLRB should be barred from relitigating Keenan's claim of union affiliation discrimination against Montgomery County.

(County's Supplemental Brief at 5).

In its supplemental brief, the Union essentially argues that prior cases, where collateral estoppel has applied, involved one singular event contrary to the present case

where the factual issues are more complex. The Union contends that "a clear composite of the pervasive Anti-Union animus in Montgomery County wasn't fully available until Mr. Keenan's termination. (Union's Supplemental Brief at 3). The Union further maintains that "the first and fourth prong of collateral estoppel cannot be established. Considering the complexity of this case, the full scope of Montgomery County's Anti-Union discrimination wasn't fully fleshed out until Mr. Keenan's termination." (Union's Supplemental Brief at 4). In Mr. Keenan's case, argues the Union, "all the material facts in the previous adjudications were not identical. As such, it is impossible to conclude the first prong of collateral estoppel has been established because all the facts were not available until Mr. Keenan's termination. (Union's Supplemental Brief at 5).

I disagree that the case law limits the application of collateral estoppel to one-issue cases. I also disagree that there was only one issue in those cases. I further disagree that "a clear composite" of all the material facts presented before this Board are not identical or were not available or presented in full during the Civil Service Commission adjudication.

Mr. Keenan challenged his termination from County employment before the State Civil Service Commission. A full adversarial hearing was held on February 24, 2011. (County Exhibit 8). Mr. Keenan was represented by Attorney Edward C. Sweeney, Esquire at the hearing, and the County was represented by Attorney Michael C. Shields, Esquire. (County Exhibit 8). The Civil Service Commission framed the issue as follows:

At issue before the Commission is whether the appointing authority [County] discriminated against appellant [Mr. Keenan] when it removed him from his County Caseworker 2 (Local Government) position. Appellant [Mr. Keenan] contends that the appointing authority discriminated against him based upon his participation in union activities. The appointing authority [County] maintains that it removed appellant [Mr. Keenan] for just cause: specifically, sexual harassment of a coworker and violation of his Last Chance Agreement.

(County Exhibit 8 at 13).

It is clear from the Commission's discussion that it applied the same discrimination analysis applied by this Board in union discrimination cases. In its adjudication of Mr. Keenan's Union discrimination claims, the Commission stated the following:

In claims of "traditional discrimination" the appellant [Mr. Keenan] must prove a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority [County] to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate that the proffered merit reason is merely a pretext for discrimination.

(County Exhibit 8 at 13).

The Civil Service Commission issued its adjudication on July 25, 2011. After reviewing all the evidence of Mr. Keenan's Union organizing activities, as well as the investigations into his sexual harassment misconduct, the complaints by three female coworkers, the last chance agreement, his transfer to the Eastern Office and the cumulative circumstances that resulted in his termination, the Civil Service Commission concluded "that appellant [Mr. Keenan] did not present sufficient evidence to establish that his union activism led to his removal." (County Exhibit 8 at 22). The Commission emphasized that the unionization process ended in July 2010 and that Mr. Keenan was not removed until four months later "as a result of inappropriate and harassing behavior unrelated to the union activities. We find Jackson, Goldstein, and Costello credible that

appellant's [Keenan's] removal was based upon his inappropriate and harassing conduct in violation of his second LCA [Last Chance Agreement], based on sexually harassing conduct." (County Exhibit 8 at 22).

A review of the State Civil Service Commission's adjudication and the record generated before this Board reveals that the conjunctive elements of collateral estoppel have been satisfied and **Board of Probation and Parole, supra**, requires the dismissal of Mr. Keenan's allegations that he was terminated for his Union activities on December 16, 2010. The issues are identical as are the facts necessary to establish Mr. Keenan's cause of action for discrimination in both fora. The State Civil Service Commission issued final judgment on the merits and both the complaining and responding parties in the Civil Service proceedings are identical to those here. Moreover, both parties were represented by counsel and both parties had a full and fair opportunity to fully litigate the identical factual and legal issues that have been presented here. In Mr. Keenan's union discrimination claim before the Civil Service Commission, the Union and Mr. Keenan called no less than six witnesses including Mr. Keenan, the Union's staff attorney and four caseworkers. The County called five witnesses. Most of these witnesses were the same individuals who were called at the Board hearings in this case because the identical factual and legal claims and defenses were litigated in both fora.

The Civil Service adjudication contains findings of fact and a legal analysis that evidences a thorough evaluation of the clear and complete composite of facts from both sides in the litigation that were presented here. Indeed, there were facts established before the Civil Service Commission that were not presented at any of the three hearings before this Board Examiner.⁸ All the facts presented here were presented and available during the Civil Service hearing and adjudication. Accordingly, the Union's argument, that all the facts were not available in the prior adjudication thereby preventing Mr. Keenan from having a full and fair opportunity to litigate his claim, is simply not supported by the record and the Civil Service Commission adjudication.

Repeatedly bringing the County before forum after forum, thereby causing the County to expend precious public funds and other resources to litigate the same set of facts and issues in the hopes of eventually attaining a favorable result, is vexatious and abusive. In **Board of Probation and Parole, supra**, the Commonwealth Court rejected allowing multiple inconsistent results across Commonwealth agencies over the same issues and supporting facts. The **Board of Probation and Parole** Court also expressly rejected the argument (advanced by the PHRC in that case) that different agencies operating under and enforcing different statutes with different public purposes and policies should not be collaterally estopped from relitigating the same claims already adjudicated by another agency.

Mr. Keenan was well represented by experienced and savvy Union lawyers throughout both the Civil Service and the Labor Board proceedings. His experienced legal counsel guided his decision to choose the agency/forum subjectively more desirable to bring his union discrimination claims in the first instance. Mr. Keenan may not, however, litigate the same factual and legal claims before multiple agencies. **Board of Probation and Parole, supra**. If Mr. Keenan wished to have the Labor Board hear and decide his claims for discriminatory discharge based on his Union and other protected activities under Article IV of PERA, he should have brought those claims to the Board in the first instance, rather than the Civil Service Commission.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The County is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

⁸ E.g., Finding of Fact No. 34.

3. The Board has jurisdiction over the parties hereto.
4. The County has committed unfair practices in violation of Section 1201(a)(1) of PERA independently, under Case No. PERA-C-10-209-E.
5. The County has not committed unfair practices in violation of Section 1201(a)(3) of PERA, under both case nos.
6. The County has not committed unfair practices in violation of Section 1201(a)(4) of PERA, under Case No. PERA-C-11-1-E.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge, filed at Case No. PERA-C-11-1-E, is dismissed and the complaint is rescinded; and that, in Case No. PERA-C-10-209-E, Montgomery County shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:
 - (a) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the County's employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-first day of January 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES UNION :
LOCAL 668 :
SERVICE EMPLOYEES INTERNATIONAL UNION :
 :
v. : Case No. PERA-C-10-209-E
 :
MONTGOMERY COUNTY :

AFFIDAVIT OF COMPLIANCE

Montgomery County hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) of the Public Employe Relations Act; that it has posted a copy of the decision and order as directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public