COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DELAWARE COUNTY PRISON EMPLOYEES INDEPENDENT UNION	:	
v.	:	CASE NO. PERA-C-22-170-E
DELAWARE COUNTY GEORGE W. HILL CORRECTIONAL FACILITY	:	

PROPOSED DECISION AND ORDER

On July 12, 2022, the Delaware County Prison Employees Independent Union (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Delaware County (County) violated Section 1201(a)(1), (3), and (5) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that, by letters dated March 29, 2022, the County informed Union President Frank Kwaning and Union Vice President Ashley Gwaku that they would not be hired by the County to work as corrections officers at the George W. Hill Correctional Facility (Facility or Jail) because of their Union activities. The Union further alleged that, upon assuming operation of the Facility from the GEO Group, the County unilaterally changed policies and practices changing mandatory subjects of bargaining and that the County issued a Handbook also changing mandatory subjects of bargaining. The Union also alleged that the County refused to provide requested information for bargaining and repeatedly denied requested Union representation for employes subject to investigatory interviews.

On July 25, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of August 22, 2022, in Harrisburg. After several continuances at the request of the parties, the hearing was held on January 30, 2023, via Microsoft TEAMS. During the hearing on that date, the Union withdrew its Weingarten claim, (1-N.T. 9),[1] and the parties agreed upon April 7, 2023, for a second hearing date. After 2 more continuances at the request of the Union, the second hearing was held on July 18, 2023, via Microsoft TEAMS. During the video hearings on January 30, 2023, and on July 18, 2023, both parties were afforded a full and fair opportunity to present testimony, to introduce documents, and to cross-examine witnesses. On September 22, 2023, both parties filed post-hearing briefs in support of their respective positions.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (1-N.T. 8-9)

[1] The hearing transcript for the second day of hearing is not continuously paginated with the transcript from the first day of hearing. Accordingly, citations to the first hearing transcript will be referred to herein as "1-N.T." and citations to the second hearing transcript will be referred to herein as "2-N.T."

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (1-N.T. 8-9)

3. The GEO Group is a private firm that managed and operated the Facility from 1996 to 2008, when Community Education Center (CEC) assumed management of Jail operations. In 2017, GEO Group acquired CEC and again managed Jail operations. (1-N.T. 14-15; UXs-2, 4, 6, 11)

4. The County had always overseen GEO's and CEC's Jail operations. At least since 2017, GEO had a warden in control of inmates and employes, and the County had a warden overseeing GEO at the Jail. In 2006, John Reilly was the County Warden at the Jail. After Mr. Reilly, Donna Mellon became Interim County Warden until she retired. Lee Tatum became the County's Interim Warden when Warden Mellon retired, until his contract expired. After Interim Warden Tatum's contract expired, the County recruited Warden Mellon from retirement, and she oversaw the GEO operations of the Jail for the County until the County assumed all Jail operations from GEO, on April 6, 2022. (1-N.T. 16-17, 258, 270-273; 2-N.T. 18-19, 21)

5. On December 13, 2021, the County hired Laura Williams to serve as the County Warden of the Facility. At the time of Warden Williams' hiring, the County was transitioning from GEO's operation of the Jail to full County operational control. Warden Williams officially started working at the Facility on January 31, 2022, performing transitional duties and preparing for County management of the Facility. When Warden Williams arrived, there were 4 County employes at the Facility: Interim Warden Mellon; Deputy Warden Lisa Mastroddi, who was retained by the County after April 6, 2022; an Assistant Warden, a position which no longer exists; and an Office Manager. Warden Williams fully controlled Jail operations and management on April 6, 2022, and thereafter. (1-N.T. 14, 270-272; 2-N.T. 10-14, 18-19)

6. Warden Williams is supposed to report directly to the County Executive Director, and the Jail Oversight Board. Currently, the Executive Director position is vacant, and Warden Williams reports to the Chief Administrative Officer, Marc Woolley, and the County Jail Oversight Board. Warden Williams immediately began working with the Executive Director and County Council members. The County directed Warden Williams to align management of the Facility with penal institution industry standards and accrediting agencies, to reduce the County's risk of liability, and to meet certain fiscal goals. (2-N.T. 13-15)

7. Upon hiring Warden Williams, the County directed her to change the management of the Facility, to improve the quality of hired employes, to ensure the quality of care, custody, and control of inmates, and to mitigate the liability risks to the County. (1-N.T. 29)

8. Until April 6, 2022, all corrections officers at the Facility were employed by GEO. On April 5, 2022, the GEO collective bargaining agreement expired.[2] By April 6, 2022, every position at the Facility needed to be filled, and every GEO employe who wanted County employment had to be interviewed for consideration. Warden Williams and Deputy Warden Mastroddi

[2] The MOU extending the collective bargaining agreement between GEO and the Union states that the MOU expires on April 5, 2021. However, this date is a typographical error since the MOU was signed on December 30, 2021.

posted a memo informing GEO employes of the need for an interview for County employment. (2-N.T. 20-21; UX-27).

9. Juno is a recruitment firm that conducted pre-screening of GEO employes at the Facility during the transition to County management. Juno also informed GEO employes that there would be interviews to make hiring determinations and that there was no guarantee that the County would hire them. The County management team made sign-up sheets available for employes to schedule interview times in collaboration with GEO because the employes were still scheduled for their assigned shifts with GEO. (1-N.T. 15, 98; 2-N.T. 21-22)

10. Warden Williams and her management team established a standard list of questions for interviewers to ask every applicant seeking positions at the Facility to create uniformity in the interview process. The list of interview questions was provided to each of the interviewing managers. (1-N.T. 15-17)

11. In February and March 2022, the management team that conducted interviews of applicants consisted of Interim County Warden Donna Mellon, Rangemaster Damen Schneider, Investigator George Rhoades, and Deputy Warden Lisa Mastroddi. Interviewers were directed to ask the interviewees all the same questions on the list for consistency. Interviewers were also instructed to write down the answer exactly as given by the candidate during the interview. The Warden informed the interviewers that the County was seeking qualified candidates with integrity and that they should use their judgment in make an initial hiring recommendation. Rangemaster Schneider and Investigator Rhoades told candidates during their interviews to be honest. (1-N.T. 16-17; 2-N.T. 22-24, 81, 114-115, 128-129, 155-158)

12. Warden Williams had the ultimate hiring authority, and she alone made all hiring decisions. County Council had no role in the hiring decisions of corrections officers. Council only participated in the hiring of Warden Williams. The interviewers made recommendations but not hiring decisions. Neither the Executive Director, Chief Administrator, nor the Jail Oversight Board has any input into Warden Williams' personnel decisions, such as hiring, discharge, discipline or the daily operations of the Facility. The County did not require Warden Williams to hire any GEO employes. (1-N.T. 17-18, 276-277; 2-N.T. 16-17, 25, 82)

13. Warden Williams developed criteria for hiring qualified corrections officers. These criteria required candidates to be fit for duty, to be free of criminal history, to be able to pass a criminal background check, and to be free of pending criminal adjudications. If offered employment, the candidates would further be required to pass a urine test to screen for drugs and to agree to work mandatory overtime. Generally, qualified candidates were required to demonstrate values of integrity that aligned with the County's mission for the Facility. Other than the requirement that candidates demonstrate honesty and integrity, Warden Williams did not share the remaining criteria with her interviewers. (1-N.T. 18; 2-N.T. 27-28, 128-129)

14. Warden Williams also factored into her hiring decisions any unresolved investigative matters regarding a candidate and any excessive discipline from GEO employment that could affect the integrity of the employe as a corrections officer. Based on her professional experience and a review of the GEO disciplinary process, Warden Williams concluded that excessive

discipline was disqualifying and a suspension of 10 days or more constituted excessive discipline. The Union subpoenaed documents in preparation for the January 30, 2023 hearing seeking: "Interview notes for every former GEO correctional officer whom the County hired notwithstanding that each individual had been disciplined with at least a 10-day suspension." Warden Williams followed that standard, although interviewers and candidates were unaware of the disqualification. Any dishonesty during the interview process was disqualifying for employment. Dishonesty was determined by the answers to the interview questions about prior discipline. Also, relationships with incarcerated individuals and a criminal history automatically disqualified a candidate. (1-N.T. 19-20; 2-N.T. 27-31, 34-35; Joint Exhibit 1; CX-1)

15. While transitioning from GEO, Warden Williams was given employment histories of GEO employes who were applying for County employment at the Facility. GEO's Human Resources Office employes, who were mostly not on site, sporadically provided personnel records to dispute or corroborate candidates' interview responses. GEO employes also provided arbitration awards for employes other than Frank Kwaning and Ashley Gwaku. Warden Williams did not have direct access to employes' personnel files. Another way Warden Williams learned of candidates' prior disciplinary history was through their self-disclosure during the interview process. (1-N.T. 22-23; 2-N.T. 37)

16. Frank Kwaning worked for GEO as a corrections officer from 2009 until the County assumed control over the Facility on April 6, 2022. He was elected Union President in 2017. Ashley Gwaku was hired by GEO in 2006, and he worked at the Facility as a corrections officer until April 6, 2022. He was elected Vice President in 2017 and engaged in protected activities representing bargaining unit members. During Kwaning's tenure as President, he interacted with Kevin Madden, a County Council Member and Chairman of the Jail Oversight Board. As Union President, Kwaning was personally involved in grievances, arbitrations, and settlement agreements pertaining to employes' discipline. Both President Kwaning and Vice President Gwaku received letters dated March 29, 2022, stating that the County was not hiring them to work at the Facility. (1-N.T. 149-156, 255-258; UXs-7 & 8)

17. GEO Investigator Keith Heyward provided Warden Williams with arbitration awards pertaining to Kwaning and Gwaku. The arbitrator in the Gwaku award stated that, during the arbitration, the Union "demonstrated that Heyward and Gwaku had an 'adversarial' relationship, and that Heyward made comments in the past about Gwaku being 'gone soon.'" The Gwaku arbitrator noted that Heyward and Gwaku may have had an adversarial relationship because of Heyward's investigations for management and Gwaku's advocacy for Union members. As a GEO investigator, Heyward maintained case files on GEO employes from his own investigations. He was a supervising or lead investigator over George Rhoades under GEO at the time that he provided the arbitration awards to the Warden. GEO Human Resources employes provided disciplinary history for other GEO employes. Warden Williams did not request those arbitration awards. Warden Williams did not receive any opinions about Kwaning or Gwaku, other than their unsolicited arbitration awards. (1-N.T. 23-24; 2-N.T. 163-166; Union Exhibit 2 at 21-22)

18. Rangemaster Schneider started working at the Facility on June 2, 2008, while the Facility was operated by CEC. Some time ago, Range Master Schneider became Gwaku's Sergeant and then he became the K-9 Lieutenant. Rangemaster Schneider conducted Gwaku's interview on March 9, 2022, and he knew Gwaku for approximately 15 years prior to the interview. Schneider testified that Gwaku's prior disciplinary suspension was common knowledge,

but that he did not discuss it with Gwaku during his interview. He recommended that the County hire Gwaku. Question 6 on page 2 of the interview question sheet for every candidate asked: "Have you ever been terminated from previous employment? If yes, what were the circumstances?" Question 7 asked: "Have you ever been awarded discipline? If yes, what were the circumstances and what discipline was served?" (1-N.T. 25-26, 259-260; 2-N.T. 111-113, 123-124, 129; UX-1)

19. Rangemaster Schneider wrote down a simple "NO" for the answers to question numbers 6 & 7 on Gwaku's interview sheet. Gwaku testified that he discussed his termination, which the arbitrator turned into an 8-month suspension, during his interview with Schneider. Schneider testified that he asked the questions on the list and recorded the answers as given and that he never changed or omitted a given answer. Schneider was not permitted to record anything other than the answers given by Gwaku, and other candidates, to the questions on the sheet. Schneider was not permitted to change an answer even if he had a different knowledge. Warden Williams overrode Schneider's recommendation to hire Gwaku. Warden Williams wrote at the end of Gwaku's interview sheet that an arbitration award established conduct unbecoming of the candidate and that Gwaku denied previous discipline during the interview. From the Warden's perspective this suggested that Gwaku was dishonest by misrepresenting his prior discipline and suggested that Gwaku did not have the integrity required for a law enforcement position. Warden Williams noted on the Gwaku interview sheet: "Not recommended for hire." (1-N.T. 26-27, 260-262, 278-283; 2-N.T. 65, 117, 119, 123-124, 142-143, 172; UX-1)

20. On page 4 of the Gwaku arbitration award, the arbitrator stated that "[a]t all times material to this matter, Gwaku was also Vice President of the Union." Gwaku was accused by GEO of allegedly using excessive force on an inmate during an incident at the Facility on May 5, 2020. GEO terminated Gwaku on August 4, 2020, after an investigation by investigator Heyward. On page 20 of the award, the arbitrator stated: "I conclude that Gwaku's failure to fully cooperate in GEO's investigation into the incident of May 5 is a serious offense that warrants the imposition of serious discipline. I find the appropriate level of discipline to be a 'time served' suspension." The date of the award is March 28, 2021, and Gwaku returned to work on April 12, 2021, resulting in an 8-month suspension. (1-N.T. 255-256, 259-260, 284-290; UX-2)

21. After receiving Gwaku's arbitration award from GEO, Warden Williams concluded that Gwaku's 8-month suspension contradicted the County's mission to improve the quality of employes and improve the care, custody, and control of inmates at the Jail. Warden Williams also concluded that the discrepancy between Gwaku's interview answers, as written by Schneider, and the arbitration award disqualified him from employment based on comparing those two documents, which comparison appeared as though Gwaku misrepresented his prior discipline. (1-N.T. 29-33, 262-263, 284-290; 2-N.T. 64-66, 72)

22. Warden Williams credibly testified that, had Gwaku's interview sheet referenced his arbitration award reducing his termination to an 8-month suspension, she would not have hired him based on the length of his suspension. Warden Williams did not knowingly hire any candidates with suspensions similar to Gwaku's. Schneider did not talk to Warden Williams about Gwaku, and he did not discuss Gwaku's position on the Union's Executive Board with the Warden. Schneider did not tell anyone at the County that Gwaku

should not be hired or that he was on the Union Board. (1-N.T. 34; 2-N.T. 125)

23. GEO terminated Kwaning as a result of progressive discipline for several alleged infractions, including taking Union leave without 5-days' notice, bringing non-prescription medication into the Facility without prior approval, tardiness, and insubordination for refusing to use a device that electronically records an officer's tour of their assigned unit. In the arbitration award, the arbitrator noted that Kwaning was the Union President and one of the issues before the arbitrator was whether "the Employer [GEO] retaliated against Grievant Frank Kwaning for his union activities?" (1-N.T. 150-151; UX-4)

24. In the Kwaning award, the arbitrator denied Kwaning's grievance regarding the verbal warning for failing to report to shift on September 1, 2017, and denied his grievance for the written warning regarding his bringing non-prescription medication into the Jail on October 16, 2017. The grievance regarding termination on November 17, 2017, was sustained in part and denied in part. The arbitrator concluded that GEO had just cause to discipline but not to terminate Kwaning, and he found no retaliation for Union activity. The arbitrator directed GEO "to reduce Grievant's [Kwaning's] discharge to a 10-day unpaid suspension and to reinstate Grievant to his former position with no loss of seniority as soon as practicable after issuance of this Award." The arbitrator granted backpay less the 10-day unpaid suspension. (1-N.T. 40-41, 186-192; UX-4 at 23)

25. In January 2021, while Gwaku was still terminated, he met with Council Member, and Jail Oversight Board Chairman, Kevin Madden. Upon returning to work, on April 12, 2021, Gwaku met with interim Warden Lee Tatum and spoke about Gwaku's termination. (1-N.T. 257-258, 268-269)

26. Rangemaster Schneider conducted the interview of President Kwaning on March 15, 2022. Schneider knew Kwaning, knew Kwaning was on the Union Board, and had no knowledge of Kwaning's discipline from GEO prior to the interview. Schneider recorded Kwaning's answer to Question 6 ("Have you ever been terminated from previous employment? If yes, what were the circumstances?") as "Yes, here, but reinstated by arbitrator." Schneider recorded Kwaning's answer to Question 7 ("Have you ever been awarded discipline? If yes, what were the circumstances and what discipline was served?") as "Yes, one for [in]subordination, which was overturned later by an arbitrator." Schneider recommended Kwaning for hire. (1-N.T. 35, 150-151, 212; 2-N.T. 125-126; UX-3)

27. Schneider testified that he did not omit any part of Kwaning's answers and that he does not recall Kwaning telling him during the interview that he served a 10-day suspension. Schneider did not speak with Warden Williams about Kwaning. Schneider was not permitted to change any answers to questions on the interview sheet for Kwaning, even if he had different knowledge. One of the purposes of the interviews was to measure candidate honesty. Schneider testified that, if Kwaning had told Schneider about his 10-day suspension during the interview, he would have written it down on the question sheet, and he would have still recommended him for hire. He also testified that, if Gwaku had told Schneider about his 8-month suspension during the interview, he would have written it down on the question sheet and still recommended him for hire because Warden Williams had the responsibility to make the final hiring determinations. (2-N.T. 126-127, 142-145)

28. Kwaning was out of the Jail for approximately 8 months before the arbitrator converted his termination into a 10-day suspension. Keith Heyward, an investigator for GEO, supplied Kwaning's arbitration award to Warden Williams. Warden Williams did not ask for Kwaning's arbitration award. Investigator Heyward also provided records for other bargaining unit employes of GEO at the Facility, including Gwaku's arbitration award. Warden Williams relied on Kwaning's arbitration award to decide not to hire him. Warden Williams credibly testified that, throughout the interview and hiring determination process, she did not know that Kwaning or Gwaku were Union officials and that she had not met either of them. (1-N.T. 36-40; 2-N.T. 64-67, 73-74, 93; UX-4)

29. On March 25, 2022, the County met with Union officials regarding the transition from GEO to County operation of the Facility. Present at the meeting were Warden Williams, the County's attorney, the County's Chief Human Resources Officer and Hector Figueroa, the County's Labor Relations Director. Also present for the Union were two Union attorneys, plus Ashley Gwaku, and Frank Kwaning, who were introduced as Union Board members. President Kwaning did not meet Warden Williams prior to March 25, 2022, and Warden Williams did not know they were involved with the Union before March 25, 2022. (1-N.T. 45, 57, 242-243; 2-N.T. 97-98; UX-5)

30. At the March 25, 2022 meeting, Warden Williams presented a document entitled: "Statement of Terms and Conditions of Employment-Correctional Officers at GWH [the Facility]." The terms and conditions of employment contained in that document were to become effective April 6, 2022. The Union did not agree to those terms at the time. The document was prepared by the County's attorney to establish terms of employment while negotiations were beginning for a new collective bargaining agreement between the County and the Union. At the meeting, the parties also discussed joint certification. By its own terms, the statement of terms and conditions of employment provides that the officers hired to work for the County after April 6, 2022, "may be represented by [the Union] for purposes of collective bargaining, and that as such, negotiations for a collective bargaining agreement would then be scheduled." (1-N.T. 45-49, 52; UX-6)

31. The Warden was informed that the GEO contract would no longer apply after its April 5, 2022 expiration and the County take-over on April 6, 2022. Warden Williams and the County changed several policies, including vacation, progressive discipline, and the probationary period for external hires. Effective April 6, 2022, the County also increased starting wages from $15/hour, under GEO, to $21/hour for new County employes. The March 25, 2022 statement of terms and conditions of employment contained terms that were different from the GEO contract. Vacation scheduling was different; the probationary period for new employes remained at 90 days for employes hired from GEO but increased to 180 days for employes hired from outside GEO. (1-N.T. 49-51; 2-N.T. 89-90; UX-6)

32. Warden Williams had already decided not to offer employment to Kwaning and Gwaku before the March 25, 2022 meeting between the Union and management, based on their arbitration awards provided by Investigator Heyward. Iris Wiley is the Human Resources Manager for the Facility who issued the no-hire letters to all employes, including Kwaning and Gwaku, on March 29, 2022. Management conducted interviews and made hiring decisions beginning in February 2022. Management delayed informing GEO employes that they were not hired by the County in an effort to prevent them from calling off work in the midst of a staffing shortage, from contributing to negative

outcomes at the Facility, and from increasing Facility liability risks. (1-N.T. 54-55, 82; 2-N.T. 75, 80-81; 2-N.T. 97-99; UXs-7 & 8; CX-5)

33. At some point, after the County assumed complete control over Facility operations, at a role call for second shift in the presence of over 50 officers, Corrections Officer George Moore heard Sergeants Greeno, Milburne, and Cooper tell the officers that "there is no Union in the Jail. And if anyone took it for a joke, the same way how all the people are being fired and kicked out of the jail, we will be following them the same way." Moore does not know if Warden Williams told the Sergeants that there was no Union. (1-N.T. 244-249)

34. There are several former GEO employes who were hired by the County and who had received suspensions of 10 days or more by either CEC or GEO and/or who appeared to have been dishonest during their interviews about their discipline. Those employes were hired because the Warden lacked knowledge of the discipline or the dishonesty. There were also employes who failed to disclose discipline who were not hired because Warden Williams became aware of the discipline and/or dishonesty before they were officially hired, as with Kwaning and Gwaku. There were candidates who were given conditional offers of employment, which offers were later rescinded when the Warden learned of their prior excessive discipline and/or discrepancies in their interview answers. Candidates hired with unknown discipline were not terminated if the discipline was subsequently discovered. All new County employes were given a clean slate for progressive discipline, as of April 6, 2022, and no GEO discipline carried over. (2-N.T. 38, 69-71)

35. George Rhoades was hired by GEO as an investigator in October 2021. He conducted interviews during the transition, and he became a County employe on April 6, 2022. Because of his short time at the Facility, Rhoades did not know any of the candidates that he interviewed or their prior discipline. As with Schneider, Warden Williams gave him the list of questions to be asked for all candidates in the same order, but he was not given any disqualifying criteria. Rhoades did not have any access to employe personnel files during the initial interview phase. On March 9, 2022, Investigator Rhoades interviewed Deja Ball-Kelly who Rhoades recommended for hire and Warden Williams agreed with his recommendation. In response to rumors in the Jail about certain previously disciplined officers, Rhoades began investigating disciplinary histories of those officers and provided that information to Warden Williams. On March 24, 2022, Rhoades emailed Warden Williams and Deputy Warden Mastroddi that he reviewed Ball-Kelly's disciplinary record which contained more discipline than she admitted to during her interview. She was not hired. (2-N.T. 40-42, 148-153, 158, 163-164; CX-2)

36. On March 8, 2022, Rangemaster Schneider interviewed Charles Sevor, who Schneider recommended for hire. On March 24, 2022, Investigator Rhoades emailed Warden Williams and Deputy Warden Mastroddi informing them that Sevor admitted to discipline for calling out sick in response to Question No. 7, but a review of his disciplinary record revealed that Sevor failed to disclose multiple disciplines including a suspension and final warning. Sevor was not hired. (2-N.T. 44-45; CX-3)

37. During his interview on March 9, 2022, Ian Lofton responded to Question No. 7 that he had been disciplined for allegedly sleeping on the job and was out of the Facility for 6 months. Mr. Lofton was not recommended for hire, and he was not offered employment. (2-N.T. 45-46; CX-3)

38. On March 18, 2022, Investigator Rhoades interviewed Kalimah Abdullah who told Rhoades that she was not disciplined or terminated, answering "No" to both questions 6 & 7 on the interview sheet. Rhoades recommended her for hire. However, Warden Williams received Abdullah's payroll report showing that she served a suspension of at least 10 days or more due to AWOL status, which Abdullah failed to disclose during her interview "though afforded the opportunity to do so." She was not hired. (2-N.T. 47-49; CX-3)

39. Kwaning does not know what records were in employes' personnel files or whether GEO gave those files to the County. Michael Bassetti was terminated by CEC. He was reinstated pursuant to a grievance settlement agreement dated January 24, 2011, after an arbitration hearing. George Rhoades interviewed Mr. Bassetti on March 15, 2022. Rhoades wrote on the interview sheet that Bassetti was terminated and reinstated. Rhoades did not write that Bassetti was out of work for approximately one year before he was reinstated. Rhoades recommended Bassetti for hire. Rhoades did not know Bassetti, and he had no knowledge of Bassetti's prior disciplinary history. Bassetti did not see the Warden until months after she became Warden. Bassetti has no knowledge of whether the Warden knew of his discipline or settlement when offered County employment, and the County was not a party to the settlement or discipline. The Warden hired Bassetti. (1-N.T. 85-97, 195-199; 2-N.T. 38, 159; UXs-15 & 16)

40. On March 11, 2022, Vernon Brown was interviewed by Schneider who wrote that Brown had not been terminated but that he was disciplined a long time ago. Schneider did not know of Brown's prior discipline, although he knew Brown prior to the interview. Schneider had no reason to question Brown's answers or to suspect dishonesty. Brown's settlement agreement, dated May 31, 2019, shows that GEO discharged Brown and converted Brown's termination into a 60-day suspension. The 60-day suspension was not noted on Brown's interview sheet. Brown has no knowledge of whether Warden Williams knew about his 60-day suspension. Kwaning does not know whether Brown's personnel record indicated a suspension or termination. Brown was hired by the Warden. (1-N.T. 101-108, 194-195; 2-N.T. 121-122; UXs-17 & 18)

41. Rhoades interviewed George Moore on March 8, 2022. Rhoades wrote that Moore had been terminated and that an arbitrator reinstated him with backpay. Moore testified that he told Rhoades that the arbitrator had converted Moore's termination into a 60-day suspension, but Rhoades did not write that on Moore's interview sheet. Moore has no knowledge of whether Rhoades informed the Warden of Moore's 60-day suspension. Moore did not meet the Warden before his interview. Moore does not know whether Warden Williams had his arbitration award prior to his hiring by the County. Kwaning did not review GEO's personnel records for Moore. Rhoades told each candidate to be honest, and he testified that he wrote the exact answer that the candidate provided. Rhoades recommended Moore for hire, and he was hired by the County. (1-N.T. 108-114, 195-196; 2-N.T. 155-158; UXs-19-20)

42. Schneider interviewed Shikieva Motley on March 9, 2022. Schneider wrote on her interview sheet that Motley had not been terminated from previous employment but she had been disciplined, which was overturned by a grievance. In fact, Motley was discharged which was reduced to a 60-day suspension by a settlement agreement, on May 31, 2019. Motley does not know whether the Warden or anyone else in the County knows of her settlement agreement or whether anyone from GEO or her Union provided the agreement to

the Warden before she was hired by the County. Schneider knew Motley prior to her interview, but he did not know anything about her prior discipline. Motley was hired by the Warden. (1-N.T. 115-120, 195-196; 2-N.T. 118-119; Ux-21)

43. Schneider interviewed Trevisa Rainford on March 11, 2022, at which time Rainford claims to have told Schneider that she was terminated and reinstated approximately 8 months later without backpay. She was offered employment with the County. Schneider did not write that Ms. Rainford was terminated by GEO. He wrote that Ms. Rainford was disciplined for being late for roll call. She signed a settlement agreement. She does not know whether Warden Williams saw her settlement agreement. She never met the Warden before her interview. Schneider testified that he did not know Ms. Rainford prior to the interview and recorded the answers she gave at face value. (1-N.T. 124-128, 195-196; 2-N.T. 119-121; UX-23)

44. Schneider interviewed John Smarkola on March 8, 2022. Smarkola worked at the Facility for 44 years, and the County hired him. Schneider wrote on his interview sheet that Smarkola had been disciplined and terminated. Smarkola was terminated in 2010 while employed by CEC. He was reinstated through arbitration after being out for close to one year. Smarkola testified that he told Schneider how long he was out. Schneider did not record the length of time that Smarkola was out or how much the arbitrator reduced his discipline. Smarkola has no knowledge of whether GEO had a copy of Smarkola's arbitration award in his personnel file. Schneider did not have access to Smarkola's personnel file and accepted his answers at face value. (1-N.T. 131-135, 195-196; 2-N.T. 116, 118-119; UX-24)

45. Rhoades interviewed Saba Brownell on March 9, 2022. Rhoades did not know Brownell or about his prior disciplinary history with GEO. Rhoades wrote on Brownell's interview sheet that Brownell had not been terminated or disciplined. Brownell testified that he told Rhoades during his interview that he was terminated by GEO, but Rhoades did not write it down. Brownell entered a settlement agreement converting his termination into a time-served suspension of 8 months. Brownell does not remember telling Rhoades whether he received backpay or that he was out for 8 months. Brownell did not meet Warden Williams before his interview with Rhoades, and he does not know if Warden Williams had a copy of his settlement agreement with GEO. Rhoades recommended Brownell for hire, and the Warden hired him. (1-N.T. 138-147, 195-196; 2-N.T. 159-160; UXs-25 & 26)

46. Approximately 47 GEO employes who were interviewed for County employment at the Facility were not hired, including Frank Kwaning and Ashley Gwaku. Some of those employes were initially extended conditional offers of employment that were subsequently rescinded after information about their prior disciplinary history was obtained. Several of those 47 employes were not bargaining unit personnel. (2-N.T. 51-55, 161-162; CX-4)

47. Rhoades investigated rumors, that certain GEO officers were reinstated after substantial allegations and serious discipline. He investigated discrepancies between those officers' interview sheets and their disciplinary records. Rhoades reported those discrepancies to the Warden because County management was trying to improve Facility operations by hiring officers with integrity and credibility. Rhoades believed that some officers were not credible because their actual disciplinary history did not align with their interview responses. Rhoades believed that management could not

rely on an officer's account of an incident within the Facility if they lied while applying for employment. (2-N.T. 161-164)

48. Warden Williams believes Rangemaster Schneider to be very thorough, and she does not believe that he omitted information provided to him during the interviews of Kwaning and Gwaku or any of his other interviews. Warden Williams has no reason to believe that any of the interviewers intentionally omitted information provided by any of the candidates. (2-N.T. 64-68)

49. On April 8, 2022, the Union's attorney emailed an information request to Labor Relations Director Figueroa requesting 8 items. The Union's attorney again emailed Figueroa requesting that information on May 25, 2022. On June 10, 2022, the Union's attorney emailed Figueroa informing him that the Board had certified the Union as the exclusive bargaining representative of the corrections officers and that the Union needs the requested information to move forward with representation. On June 13, 2022, Mr. Figueroa emailed the Union's attorney stating that he had been away from the County for close to a month and that he would follow up with the Warden and other interested parties and get back to him. On June 15, 2022 and on June 24, 2022, the Union's attorney again requested the information stating: "We have yet to receive any substantive response from the County." By June 24, 2022, and June 27, 2022, the Union attorney was corresponding directly with Warden Williams for the information. (1-N.T. 58-66; UX-9)

50. On April 21, 2022, Warden Williams signed a "RECOGNITION AGREEMENT" with Union President Kwaning agreeing to recognize the Union as the exclusive collective bargaining representative of all full-time and regular part-time employes at the Facility, excluding sergeants, lieutenants, administrative personnel, captains, majors, professional employes and supervisors. On behalf of the County, Warden Williams further agreed to enter and submit a joint petition for certification with the Board for that bargaining unit. (1-N.T. 67-70; UX-11)

51. Warden Williams presented employes with a limited version of the County Employee Handbook on July 7, 2022, because she believed that, with the GEO contract expired, employes new to County employment should know the polices of, and the benefits provided by, the County. The Handbook provides that new employes will be on probationary status for 180 days. The Statement of Terms and Conditions provided to the Union on March 25, 2022, provides that employes transitioning from GEO will be on probationary status for 90 days. The probationary period for new hires was 90 days for all new hires prior to the County take-over. (1-N.T. 70-72, 172, 225; 2-N.T. 84-85)

52. The Handbook contained existing County policies. As applied to the Facility, some of the County Handbook policies constituted a change from the Union's expired CBA with GEO or practices at the Facility. Except for the Handbook, Warden Williams' policy changes were made prior to this Board's bargaining unit certification on June 8, 2022, certifying the Union as the exclusive collective bargaining representative of all prison guards. (1-N.T. 72-74; 2-N.T. 101; UX-13; PERA-R-22-115-E)

53. On May 18, 2022, the Union and the County filed a Joint Request for Certification, which was signed by the attorneys for both parties at case number PERA-R-22-115-E. In the Joint Request for Certification, the parties agreed that approximately 250 employes are included in the bargaining unit. (UX-12; PERA-R-22-115-E)

54. On June 7, 2022, Michelle Miller emailed policy changes made by Warden Williams to shift commanders directing them to discuss the changes at roll call with the officers. The Policy Numbers were 300.04 and 300.16. These were existing policies containing changes in existing conditions in bold lettering. In Policy 300.16, the County now required all employees to stay on the premises during meal and rest breaks, it prohibited food delivery services (e.g., Uber Eats, Grub hub, Door Dash, or any restaurant delivery services) to enter the property, it limited meal breaks to 30 minutes and required employes to clock out for meal breaks. In Policy 300.04, the County now prohibited officers from going to their vehicles during breaks or leaving the property for any reasons, without approval, and that policy also now prohibited food delivery. (1-N.T. 77-80, 224; UX-14)

55. Prior to the County takeover of the Facility, GEO permitted officers to order food from outside and have it delivered to the front gate. The officer who worked the front gate would call the officer who ordered the food. During meal break, the officer would go to front gate and get the food. The Warden unilaterally changed that practice because food delivery drivers had not passed background checks or obtained security clearances to enter the campus, thereby compromising security. Existing policies already provided that only authorized personnel would be permitted through the front gate. There are no longer any unauthorized deliveries without advanced approval, and an officer must obtain permission from his/her supervisor to go to his/her car when off the clock. (1-N.T. 163-165; 2-N.T. 85-87)

56. Under GEO, up to 8 employes could be off on each shift. The Warden now requires that no more than 5 officers can be off at one time on the first and second shifts and that no more than 3 officers can be off at one time on the third shift. As a result of requiring more officers on each shift, there were less vacation slots available on each shift, and some officers were unable to use their fully accrued vacation time. The officers were paid for the vacation time that they could not take, but there were officers who wanted to use the time. (1-N.T. 166-170)

57. Before the County assumed control of the Facility, the officers were afforded a "split-shift option." This option allowed officers who were mandated for overtime to contact another officer and split the overtime with him/her. One officer would work 4 hours before their regular shift and the other officer would work 4 hours after their regular shift. Each officer would then work for 12 total hours instead of 16 hours. Now the officers are mandated to work a full overtime 8-hour shift every other day for 16 hours. Warden Williams eliminated split shifts so management could ensure full shift coverage under managerial control without employes self-scheduling. The Warden credibly testified that, when one employe works 4 hours before his/her scheduled 8-hour shift and another employe works 4 hours after the same scheduled 8-hour shift, the before-shift and the after-shift are only covered for 4 hours instead of a full 8 hours, as required for a safe complement on all shifts. Each shift covered by the two overtime officers are then short an officer for 4 hours. (1-N.T. 167-169; 2-N.T. 107-108)

58. Before the County took over the Facility operations, officers who did not have available sick or vacation time could switch their assigned shift with another officer and take the other officer's assigned shift without using sick or vacation time. The mandated overtime tired the officers so the switching of shifts allowed them to rest instead of continuing to work

after overtime. The County abolished shift switching without negotiating the change with the Union. (1-N.T. 171-172)

59. There are 2 time clocks for all officers to clock in for their shifts. At shift change, long lines formed at the time clocks. Officers, who were otherwise on time, were late for roll call because of the long lines. To alleviate this problem, GEO agreed to a 5-minute grace period for clocking in and a 7-minute grade period to travel to roll call. GEO also allowed 5 minutes at the beginning and end of meal breaks to account for the travel time from their post assignment, which included waiting for other officers to unlock interior gates, so they could have a full 30-minute meal break. The County abolished this extra 10 minutes of time at meal breaks. (1-N.T. 173-178)

60. In the past, GEO had 4 calendar days from an incident to issue minor discipline. GEO had 20 calendar days to investigate alleged misconduct subject to more severe discipline and 4 more days to issue the discipline, if warranted. Since the County began managing the Facility, it has issued discipline after longer time periods passed. (1-N.T. 178)

61. The contract with GEO provided that a bargaining unit member could be out sick for 3 consecutive days before needing a medical note. The County Employe Handbook also provides that "proof of illness in the form of a medical certificate shall be required if an employee is absent for three (3) consecutive working days or more." This Employe Handbook provision is consistent with the expired GEO contract. Kwaning testified that management is now requiring that officers provide a medical note after 1 day out sick. There is no other evidence that the County is not following its own Handbook policy regarding medical notes for sick leave or if the medical note for 1 day of sick leave was a 1-off. (1-N.T. 182, 226-227; UX-13, at 13)

62. On September 11, 2023, the Union signed a new interim collective bargaining agreement (CBA) with the County for the bargaining unit employes at the Facility. On September 20, 2023, the County signed the CBA. The CBA is effective from September 6, 2023 until December 31, 2023, unless extended by mutual written agreement of both parties. (JX-3)

63. Article 8.1 incorporates the County Handbook and provides that the provisions of the CBA will govern where there are conflicts between the Handbook and the CBA. (JX-3)

64. Article 4.12(B) of the CBA provides that officers may voluntarily switch mandatory overtime shifts unless both officers are already mandated to work the overtime shift. (JX-3)

65. Article 4.3 provides that the workday is 8.5 hours with one 30-minute unpaid meal break. (JX-3)

66. Article 21.2 provides that "There are no contractual obligations or past practices applicable to this bargaining unit or the interpretation of this Agreement, except for the express provisions of this collective bargaining agreement." Article 24.2 provides that the parties agree that the CBA shall expire and become unenforceable on December 31, 2023, unless otherwise agreed and that "the status quo doctrine under Pennsylvania labor law shall not apply after such expiration." (JX-3)

67. Article 24.5 of the Interim CBA provides as follows:

> This Interim Agreement is the full and final interim agreement based upon the terms noted above and herein. The parties recognize that there are no other applicable wages, benefits or terms or conditions of employment other than those that are stated herein. The parties further recognize that there are no other verbal agreements or past practices binding on the parties during the term of this Interim Agreement. The parties agree that wages and benefits will not be further reduced without agreement by parties, even at expiration of this agreement.

(JX-3)

DISCUSSION

A. DISCRIMINATION CLAIMS

The Union posits that Kwaning and Gwaku were not hired by the County because they are the Union President and Union Vice President, both of whom engaged in extensive protected activities while employes of GEO.

In a discrimination claim, the complainant has the burden of establishing that the employe(s) engaged in protected activity, that the employer knew of that activity and that the employer took adverse employment action that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994).

Other factors include: any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to explain its action against the adversely affected employe(s), shifting reasons and/or pretext, and the effect of the employer's adverse action on other employes and their protected activities. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing of an employer's adverse action alone is not enough to infer animus, when combined with other factors, close timing can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984).

In Teamsters, Local 776 v. Perry County, 23 PPER 23201 (Final Order, 1992), the Board stated that "once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity." Perry County, 23 PPER at 514. Upon the employer's offering of such evidence, "the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual." Teamsters Local #429 v. Lebanon County, 32 PPER ¶ 32006 at 23 (Final Order, 2000). "The employer need only

show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct." Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 at 64 (Final Order, 1992). The parties, however, may elicit and offer evidence in support of their primary burdens of proof or their rebuttal case at any time during the proceeding. Id.

The Union did not establish a prima facie case of discrimination in this case. The record shows that Warden Williams, who was new to the Jail on January 31, 2022, did not know that either Kwaning or Gwaku were Union officials who engaged in Union activities during the GEO operation of the Jail. The Union argues that the Warden's testimony is not credible because she admitted to reading the arbitration awards for Kwaning and Gwaku which both reference their Union positions. However, those references are on page 1 of the Kwaning award and on page 4 of the Gwaku award. There is no evidence that the Warden actually read the entire opinion and award in either case. Both arbitration awards are 23 pages in length. Absent such evidence, the record is ambiguous regarding whether the Warden actually read that Kwaning and Gwaku were Union officials. Given the ambiguity in the record, I credit Warden Williams' testimony that she did not know of their status or past activities prior to making her decision. Given this ambiguity and the Warden's contrary, credible testimony, the Warden may not read the background and discussion parts of the awards in their entirety during a time that she was faced with the task of making individual hiring determinations for over 250 bargaining unit employes, plus command and administrative staff.

Also, by testifying that she read those awards, it is unclear whether she meant that she literally limited her reading to the "award" section in the back of the 23-page decisions. Given the Warden's testimony that she was unaware of Kwaning's and Gwaku's Union positions, neither attorney questioned the Warden about whether she specifically read the entire background and discussion of the arbitration awards or whether she read that Kwaning and Gwaku were Union officials. Additionally, in response to questioning about the Kwaning award, Warden Williams did not remember the award's reference to Kwaning mistakenly believing that he was permitted to carry Excedrin into the Jail. This shows that Warden Williams did not read the entire factual background contained in the award. Therefore, I credit the Warden's testimony that she did not know that Kwaning and Gwaku were Union officials and that she was unaware of their Union activities when she made her hiring determinations. Even though the Warden learned of Gwaku's and Kwaning's Union positions during the March 25, 2022 meeting, and the no-hire letters were dated on March 29, 2022, the Warden had already made her decision before March 25, 2022, for all applicants. The letters were deliberately withheld to prevent employes, who were not hired by the County, from failing to report for their scheduled shifts or from undermining operations at the Jail.

The Union also argues that County officials (i.e., members of County Council and the Prison Board, the Executive Director, the Chief Administrative Officer, and the Labor Relations Director) knew of Kwaning's and Gwaku's Union involvement and their past activities and that, under the "Small Plant Doctrine," knowledge of that activity can be imputed to the Warden. The Small Plant Doctrine allows the Board to infer that a small employer had knowledge when the record demonstrates that protected activities were carried out in such a manner that the employer must have noticed. Pennsylvania Federation of Teachers v. Temple University, 23 PPER 23033 (Final Order, 1992). The Union must adduce facts satisfying a 3-part conjunctive test for the Doctrine to apply: (1) the employer's operation has a small, but unspecified, number of employes; (2) a defined work space; and

(3) supervisors who regularly interact with employes within the same defined work space. In Temple, the Board refused to apply the Small Plant doctrine to the dental school at Temple University concluding that an employer of 106 bargaining unit eligible employes was too large and that there was no evidence "that the dental school supervisors routinely moved throughout the faculty with such regularity that this Board could infer that the University must have noticed the protected activity." Id.

The Small Plant Doctrine does not apply in this case. The Facility is not a small operation and there are over 250 employes, which far exceeds the 106 employes at issue in Temple, supra. The Warden was brand new to the Facility, and she did not regularly move through the Jail between January 31, 2022, and the time of her hiring decisions, which pre-dated March 25, 2022. Indeed, Kwaning, Gwaku, and the other Union witnesses had not met Warden Williams prior to her hiring decisions. With regard to the County Officials who had previously interacted with Kwaning and Gwaku in their capacity as Union representatives, there was no evidence that they regularly visited the Facility or that those officials informed the Warden of Kwaning's and Gwaku's Union involvement. The Warden simply was not at the Jail long enough to infer that she must have known of Kwaning's and Gwaku's past Union activities or their Union positions. The Warden and other County officials did not regularly tour the Jail and interact with bargaining unit members. There is no evidence that Kwaning or Gwaku overtly engaged in any protected activities between January 31, 2022 and March 25, 2022. Also, the Facility is too large with too many employes for the Doctrine to apply and impute knowledge upon the Warden. Therefore, the record does not establish a prima facie case of discrimination because the Warden, who solely made the hiring decisions, lacked any knowledge of Kwaning's or Gwaku's Union activities or their positions.[3]

The Union further contends that, despite the Warden's lack of knowledge or motive in deciding not to hire Kwaning and Gwaku, the County is liable for discrimination because GEO Investigator Keith Heyward had knowledge of their Union activities and acted with unlawful motive when he provided their arbitration awards to the Warden. The Union cites the United States Supreme Court's decision in Staub v. Proctor Hosp., 562 U.S. 411, 131 S.Ct. 1186 (2011), for the proposition that the animus of a supervisor can be imposed upon the employer when an unknowing manager takes adverse employment action against an employe based on the discriminatory actions of the supervisor. The Supreme Court referred to this type of liability as "Cat's Paw" liability.

The Proctor Hospital Court's decision was premised upon agency law, whereby the employer is liable for the tortious conduct of its agents (i.e., supervisors). In Proctor Hospital, Staub claimed that he was discriminatorily discharged for his military obligations, which required him to take time from work. Staub sued under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits discrimination in employment for obligations of uniformed service. Staub's supervisor gave him a corrective action stating that he was violating an employer policy. The supervisor then disciplined Staub for violating the corrective action, even though Staub

[3] The Union does not argue that Donna Mellon or Lisa Mastroddi had knowledge of Kwaning's and Gwaku's Union activities that should be imputed to Warden Williams, and there is no evidence that they discussed Kwaning or Gwaku with Warden Williams during the hiring and transition period. Also, Interim Warden Tatum was already gone by January 31, 2022.

claimed he did not violate the corrective action. The evidence in the case showed that both of Staub's supervisors were hostile to Staub's military obligations. They scheduled him for extra shifts. They also stated to coworkers that his military duty was a strain on the department and asked a coworker to help get rid of Staub. The supervisors also referred to Staub's military service as a bunch of smoking and joking. Staub's supervisor then informed the Hospital's Director of Human Resources that Staub had violated the corrective action. Based on that complaint, the Human Resources Director reviewed Staub's personnel file and decided to terminate him, without knowing the discriminatory motive of the supervisor's corrective action and discipline.

The Proctor Hospital Court stated that "[t]he employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision" of an independent manager. Id. at 421. The Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." Id. at 422 (emphasis original).

This Board and our Pennsylvania Supreme Court have also held that the discriminatory acts of a supervisor can bind the employer to liability for adverse employment action against an employe, in an unfair practice claim, where the supervisor's conduct had the intended consequence of leading to further adverse employment action by an employer/manager who did not have discriminatory motive. Section 1201(a) of the Act expressly prohibits employers and their agents or representatives from discriminating against employes. In Lancaster County v. PLRB, 633 Pa. 294, 124 A.3d 1269 (2015), the Pennsylvania Supreme Court relied on this statutory provision and held that "as applied to unfair labor practices under PERA, a complainant meets the knowledge requirement by proving a supervisor, who by definition acts in the interest of the public employer, had knowledge of the employee's protected activity." Id. at 1288.

The Lancaster Court further opined as follows:

> The extent to which a supervisor with knowledge of an employee's protected activity played a role in the investigation or disciplinary process is relevant to the inquiry of whether the employer had an anti-union animus in taking adverse action against the employee. That is, the extent to which the supervisor's knowledge was interjected into the matter is a relevant inquiry in determining the motive for the employer's adverse action against an employee. However, we reject the Commonwealth Court's conclusion that the knowledge requirement may not be met in the absence of demonstrating the final decision-making supervisor had knowledge of the employee's union activities.

Id. at 1288. The Pennsylvania Supreme Court's Lancaster County holding is consistent with the United States Supreme Court's holding in Proctor Hospital, although Lancaster is premised on the express statutory incorporation of agency principles in Article XII of PERA.

In this case, Warden Williams did not have any knowledge of Kwaning's and Gwaku's Union activities and could not have acted with Union animus. The question is whether Heyward's knowledge of Kwaning's and Gwaku's Union

activities caused him to provide the arbitration awards to the Warden with the specific intent to cause the Warden to deny them employment with the County, such that Heyward's alleged discriminatory conduct would result in County liability, under Lancaster County. I answer this question in the negative.

In the Gwaku award, the arbitrator found that Gwaku and Heyward had an adversarial relationship as a result of Heyward conducting investigations of bargaining unit employes on behalf of management. The arbitrator mentioned that Heyward had stated that Gwaku would be "gone soon." The arbitrator also determined that Heyward's investigation of Gwaku's discipline was not affected by their prior interactions and that Heyward's investigatory conclusions were not based on prejudgment or animus. Although the Gwaku award may evidence Heyward's knowledge of Gwaku's protected Union activities, it does not support a finding that Heyward acted with animus in conducting the investigations that resulted in Gwaku's discipline at issue in the arbitration.

The statement that Gwaku would be "gone soon" is double hearsay. I have no way of knowing who may have testified during the arbitration hearing that Heyward may have made that statement or who attributed the statement to Heyward. No witnesses testified about the statement or Heyward during these proceedings and there is no way to challenge or test when, where, or if the statement was actually made. Heyward also did not testify during these proceedings. Although the arbitrator may have admitted and credited the statement, I have no basis for doing so without identifying and challenging the arbitration witness who testified that Heyward made the statement or hearing from Heyward himself about what it may have meant. Therefore, I am not admitting the statement into this record, and the statement cannot support an inference that Heyward harbored any animus toward Gwaku or that he intended to act with animus to produce a future adverse employment action against Gwaku (i.e., not being hired by the Warden) especially when the arbitrator did not find that Heyward acted with animus. It was simply Heyward's job to investigate charges against employes, including Gwaku.

This record lacks substantial, competent evidence to support an inference imposing discriminatory motive onto Heyward and then impose it also on the Warden. Such an error would violate basic evidentiary standards designed to protect the reliability of evidence and the requirement that a preponderance of substantial, competent evidence support a conclusion. Moreover, the alleged statement that Gwaku would be gone soon, even if admitted here, which it is not, is ambiguous in context and meaning. The statement could simply mean that, if Gwaku continued to be disciplined for alleged wrongdoing, GEO would terminate him and not that Heyward would have any desires, wishes or input in that outcome. The statement itself does not establish animus on the part of Heyward, even if credited. This unsettled ambiguity is the result of not having the testimony of Heyward in this case to discern whether the statement was made or what he meant by it.

Also, Heyward was not a County employe at the time that he provided the Gwaku and Kwaning arbitration awards to Warden Williams. I cannot conclude that he was acting within the scope of County employment and as an agent of the County such that his knowledge or alleged discriminatory actions can be imputed to the County or the Warden, within the meaning of Lancaster County, supra. In both Lancaster County and Proctor Hospital, the evidence established that the supervising employes, acting within the scope of their employment for their liable employer, affirmatively took adverse

investigative and disciplinary measures based on animus for protected activities which they used to then recommend discharge of those employes to a manager who was unaware of the unlawful motivation of the supervisors. Here, Heyward did not embark on an investigation of Gwaku or Kwaning based on their union activities when investigating the charges against them. Indeed, the arbitrator concluded otherwise. He investigated their alleged wrongdoing, as charged by GEO, within the scope of his assigned duties with GEO. Also, Heyward did not recommend any adverse employment action to the Warden regarding Kwaning and Gwaku in 2022 during the transition period. Absent statements from or actions by Heyward demonstrating an unlawful state of mind, this record does not establish that Heyward provided the 2 arbitration awards with the specific intent that the Warden not hire Kwaning or Gwaku, as required by Lancaster and Proctor Hospital.

The record establishes that Investigator Rhoades actually investigated past discipline of applicants for County employment at the Jail based on rumors about certain employes. Rhoades' investigations were conducted because he understood the mission of the County was to hire credible, trustworthy officers. Rhoades was concerned that officers who omitted revealing prior discipline during their interviews could not be trusted to honestly report on incidents within the Jail. Rhoades was not unlawfully motivated in trying to discover, through past discipline, whether an applicant was fit for County employment as a law enforcement officer.

Also, GEO Human Resources employes provided unsolicited arbitration awards regarding other employes as well as disciplinary information in employes' personnel files. In this regard, I conclude that Heyward was one of many GEO employes similarly interested, as Rhoades, in providing the Warden with information regarding the disciplinary history of applicants, including Kwaning and Gwaku, to determine which applicants met the Warden's and the County's criteria for hiring and to determine which applicants may have omitted their prior discipline during the interview process. I also conclude that Heyward was not an agent of the County at the time and that the record fails to establish that he took action with the unlawfully motivated specific intent to cause the Warden to deny employment to Kwaning or Gwaku. There is no evidence that Heyward shared any alleged negative feelings toward Kwaning or Gwaku with the Warden, or anyone else, or that he even had any negative feelings based on Union activities. Heyward, Rhoades, and Human Resources personnel were GEO employes all providing employe information to the Warden during transition. Accordingly, on this record, although Heyward had knowledge of Kwaning's and Gwaku's protected activities, I cannot conclude that his provision of their arbitration awards was unlawfully motivated and, therefore, I cannot impose discriminatory liability onto the Warden based on Heyward's conduct.

Additionally, to the extent that the arbitration awards themselves evidence that Kwaning and Gwaku engaged in protected activities by going to arbitration over their discipline, and the discipline of other employes, there is no evidence that the Warden categorically excluded all employes with arbitration awards. The Warden simply used the awards for information about the nature and extent of prior discipline. Also, the Union does not argue that Warden Williams discriminated against Kwaning, Gwaku, or anyone else because they arbitrated their discipline.

The Union contends that the Warden's unlawful intent is evidenced by the fact that she contradicted herself regarding her own hiring criteria. The Union argues that, during the first hearing, Warden Williams said that

suspensions in excess of 2 weeks were disqualifying, but on the second day of hearing, the Warden testified that suspensions of 10 days or more were disqualifying. The Union contends that she changed her testimony to fit Kwaning's 10-day suspension into the criteria. However, the Union's argument mischaracterizes the record. The Warden initially testified during the first day of hearing that she was looking at any suspensions that were "in excess of two weeks--at or excess--of two weeks of discipline." (1-N.T. 20)(hyphens added for clarity). Later, still during the first day of testimony, on cross-examination, the Union's attorney characterized the Warden's prior testimony as looking at suspensions in excess of 2 weeks, which was not accurate because she said, "at or excess." Warden Williams attempted to clarify the Union attorney's mischaracterization of her prior testimony, but he did not permit her to do so. The questions and answers were as follows:

> Q. Your testimony under oath was that a disqualification would have to be in excess of two weeks. Mr. Kwaning's suspension was not in excess of two weeks. Was it?
>
> A. Okay. So I would like to clarify the record.
>
> Q. Yes or no?
>
> A. I would like to—
>
> Q. No, you may not.

(1-N.T. 40-41).

During the second day of hearing, Warden Williams confirmed her prior testimony that a suspension of 10 days or more was disqualifying. (2-N.T 27-28, 31, 48-49). Moreover, the Union's subpoena request for the first day of hearing seeks the names of "any other former GEO employee whom the County hired notwithstanding that they had been disciplined with at least a 10-day suspension." (CX-1)(emphasis added). In this vein, the Union and its attorney were somehow made aware before the first day of hearing that one of the Warden's criteria for disqualifying applicants was that those candidates had at least a 10-day suspension, which is consistent with the Warden's testimony during both days of hearing. Accordingly, the Warden was not at any time inconsistent in her testimony, either during the first hearing, or from the first hearing to the second hearing. Thus, Warden Williams' consistent testimony does not support the conclusion that she changed her hiring criteria after she made her hiring decisions in a pretextual attempt to justify her decision not to hire Kwaning.

Also, there is no evidence on this record that the Warden, who was the sole decision maker for hiring officers, made any anti-union statements or disparaged the Union. The Union argues that certain sergeants and a lieutenant told the officers at roll call one day that there is no Union and that if they think it is a joke, they could follow the other employes who were fired or kicked out of the Jail. The record does not provide the date that this statement was made. The Union was not certified between April 6, 2022, and June 8, 2022. During that time period, the Union would not have been able to grieve discipline and management would have had no bargaining obligation. The statement, like the statement an arbitrator attributed to Heyward, is ambiguous and does not itself evidence Union animus. The statement may have been intended to remind officers that during that time period there was no Union protection for employes regarding discipline or job

security, which was not inaccurate at the time. Again, the record leaves these questions unanswered because the declarants did not testify at the hearing in this matter, nor did the Union provide any further factual context for the alleged statements.

To the extent that the statement at roll call could be understood as a threat, there is no evidence that the Warden conveyed to her supervisory staff that there was no Union or that employes could be summarily disciplined or discharged. There is no evidence that Warden Williams even authorized the sergeants to make those comments at roll call. In this regard, the statements are not evidence of animus attributable to and binding upon the Warden, who is solely responsible for hiring employes, and managing the Jail. Moreover, the Warden recognized the Union, entered into a Joint Request for Certification, and bargained with Kwaning and Gwaku ultimately entering into a new CBA. The sergeants' statements at roll call, in this regard, do not support the inference that the Warden harbored any animus towards the Union, Kwaning, or Gwaku, or that she believed there was no Union, especially where the County had always planned on recognizing the Union.

The Warden had established legitimate and independent business reasons for refusing to offer employment to Kwaning and Gwaku. Warden Williams had lawfully developed her own criteria for hiring qualified officers. Some of these criteria included: being fit for duty; being free of criminal history or pending criminal actions; and having no record of fraternizing with inmates. If conditionally offered employment, Warden Williams required officers to pass a drug screen and agree to work mandatory overtime. Also, qualified candidates had to demonstrate integrity, which aligned with the County's mission for improving management and staff at the Facility. Warden Williams also considered discipline that could affect the integrity of the candidate as an officer. She had established, based on experience, GEO's progressive discipline policy, and County policy, that suspensions of 10 days or more were excessive, without regard to the underlying cause for the discipline. Any dishonesty during the interview process was also disqualifying.

Establishing qualifications and standards for employment and promotion, as well as the selection of candidates, remain managerial prerogatives within an employer's right to select, direct, and discipline personnel, provided those prerogatives are not used discriminatorily. PSTA v. Pennsylvania State Police, 34 PPER 29 (Final Order, 2003). Also, the Board does not question the virtue of an employer's exercise of its managerial prerogative to establish qualifications for employment. Id. (stating that "the Board will not delve into the wisdom of [an employer's] chosen means of assessing . . . qualifications"). Moreover, the Warden's hiring criteria, or her decision not to publish her hiring criteria, does not evidence unlawful intent because there is no evidence that she applied the criteria selectively or arbitrarily. Warden Williams credibly testified that she applied her criteria equally to all the candidates. *See also*, Ridgway Area Teachers Association v. Ridgway Area School District, 48 PPER 17 (PDO, 2016)(stating that changing qualifications for employment either before or after hiring is a managerial prerogative).

As part of the transition and hiring process for over 250 employes, GEO personnel had provided information about employes' discipline to the Warden, which the Warden relied upon in making hiring determinations. Warden Williams credibly testified that if that documentation showed an employe had a suspension of 10 days or more, the employe was disqualified. Also, if the

GEO-provided discipline contradicted an employe's interview answers, as transcribed by the interviewers, they too were disqualified. Consistent with the process of comparing employes' interview sheets to their GEO records, as provided by GEO employes, Warden Williams learned that some employes omitted some or all of their prior discipline. The Warden was certainly acting within her managerial discretion to investigate the prior disciplinary records of applicants.

As with other candidates, Warden Williams believed that Kwaning's and Gwaku's answers were inconsistent with the information contained in the arbitration awards and that they were dishonest in reporting their prior disciplinary history. There is conflict in the record testimony about what Kwaning and Gwaku actually told interviewer Schneider. However, I need not resolve this conflict because even if they told Schneider about all their discipline and he failed to accurately record everything they said and even if Schneider ignored what he allegedly knew about their prior disciplinary record, the Warden had no way of knowing that. The Warden did not speak with Schneider about the interviews. The Warden only saw the interview sheets. Whether Kwaning or Gwaku omitted prior discipline during the interview process is irrelevant because the Warden testified that she would not have hired them regardless of whether their interview sheets accurately reflected their prior discipline because their disciplinary history alone disqualified them. The alleged dishonesty that Warden Williams believed about Kwaning and Gwaku was not determinative; it was their prior discipline, notwithstanding whether they accurately told Schneider of that discipline or whether Schneider was responsible for omitting it.

The Union has also emphasized that other employes with disciplinary histories, including suspensions of 10 days or more, were hired by the Warden and that Kwaning and Gwaku were singled out for their prior discipline because of their Union activities under GEO. The Union maintains that the alleged disparate treatment of Gwaku and Kwaning supports an inference of unlawful motive in refusing to hire them. Despite the aforementioned conclusion that the Warden lacked knowledge of protected activity and, as a matter of law, could not have been unlawfully motivated, the record does not establish that the Warden knowingly treated similarly situated applicants disparately. Indeed, the Union acknowledged that the Warden did not know about these candidates' prior discipline when she offered them employment because she did not have access to everyone's disciplinary records. The record does show that some hired applicants had suspensions of 10 days or more.

In this regard, the Union emphasized that several hired employes with excessive discipline testified that they told Schneider or Rhoades about their discipline, but those interviewers did not record their answers properly. The Union's argument, however, does not favor its position. The Union noted the following:

> Vernon Brown testified that he was interviewed by Schneider and had told him that he had been subjected to a 60-day suspension by GEO. (Tr. 104; UX-18). However, Schneider had merely entered "YES, LONG TIME AGO" on the interview document. (UX-17). Similarly, although Shikieva Motley had informed Schneider that she had received a 60-day suspension, her interview record merely states in response to question seven, "YES, OVERTURNED BY GRIEVANCE." (Tr. 117-118; UX-21 and 22). Officer Rainford testified that she informed Schneider

> that she had served an eight- or nine-month suspension (Tr. 125-126); however, her interview record merely states that she had been disciplined for being late for roll call. (UX-23). Officer Smarkola testified that he had informed Schneider that he had been terminated and reinstated about a year later; while his interview sheet records the fact of his termination it does not record the length of his termination. (UX-24). The interview records prepared by Rhoades are similarly lacking in detail. Although officer Bassetti informed Rhoades that he had been suspended for about a year (Tr. 88- 89, 95, 100), his interview record makes no reference to the length of time he lost. (UX-15). Similarly, Rhoades recorded officer Moore as having been reinstated by an arbitrator and awarded back pay (UX-19), whereas, Moore testified that he had lost 60 days' pay (Tr. 110-111), as reflected in the actual award. (UX-20). Officer Brownell's situation is similar. The interview record states that the response to both questions six and seven were "No" (UX-25), whereas Brownell testified that he told Rhoades that he had been terminated and reinstated without back pay after about eight months (Tr. 140) as reflected in the settlement agreement. (UX-26)

Union Brief at 14, fn. 19). Notwithstanding whether the above-applicants with excessive discipline reported it during their interviews, the Warden relied on their interview sheets alone, which did not reflect the discipline, because she did not have their prior GEO records. It is not on the Warden that Rhoades and Schneider may have mistakenly or inaccurately recorded applicants' answers. The Warden testified that she trusted Schneider and Rhoades. Warden Williams believed them to be thorough and had no reason to question or distrust the answers that they recorded on interview sheets, including those of Kwaning and Gwaku. In this manner, Warden Williams understandably and legitimately relied on Schneider's and Rhoades' transcription of applicants' interview answers, even if those transcriptions may have been inaccurate. Significantly, Schneider recommended both Kwaning and Gwaku for hire, with no evidence of animus on his part. Accordingly, Kwaning and Gwaku were not singled out for disparate treatment by the Warden because she was able to learn of their prior discipline. Warden Williams was simply unaware of the prior discipline of the hired employes mentioned above before she made her hiring decisions.

Also, the Warden gave a "clean slate" to all employes permanently hired by the County. This meant that those employes had no record of discipline going forward with County employment. Warden Williams expected her employes to have integrity. With this understanding, the Warden also had to set an example of integrity. In this regard, once the Warden adopted her clean-slate policy, she did not rely on any post-hire discovery of prior GEO discipline to terminate employes because, being loyal to her own policy, GEO discipline did not exist after April 6, 2022. Once employes were hired, they technically had no discipline as far as the Warden was concerned, even if she may have learned of it later or at the hearing in this case. If the Warden relied on after-discovered GEO discipline of newly hired County employes to effectuate discipline or termination, the Warden would not be exercising integrity in neutrally applying her own clean-slate policy. Warden Williams, therefore, remained true to herself and her clean-slate policy. Accordingly, Kwaning and Gwaku were not similarly situated to the employes permanently hired by the Warden with unknown excessive discipline at the time of hire.

Significantly, Warden Williams decided not to hire 47 applicants who interviewed for positions because they failed to meet her criteria, either

through self-disclosure of prior excessive discipline with GEO during the interview process, or by discovering records of excessive discipline. This process of relying on prior disciplinary records was equitably applied to all applicants. The record does not establish that Kwaning and Gwaku were singled out or treated differently than the 45 other non-hires because of their prior Union activities, of which the Warden was unaware at the time. In this regard, Investigator Rhoades, who was new to the County, did not know any of the employes or candidates, and he had no reason to harbor animus against anyone. Yet, Rhoades also investigated employes' disciplinary history based on rumors and provided that information to the Warden who, upon receiving that information, decided to rescind conditional offers where interview sheets did not reveal their actual history of discipline with GEO. Accordingly, the record does not establish that Warden Williams disparately treated Kwaning and Gwaku.[4]

B. BARGAINING CLAIMS

The Union argues that the County violated Section 1201(a)(1) and (5) of the Act by unilaterally changing terms and conditions of employment and by failing to timely respond to information requests. The Union further contends that the County is the legal successor to GEO and, as such, it was obligated to maintain the status quo regarding mandatory subjects of bargaining. The Union maintains that there is no difference in the business operation of the Jail under GEO and, thereafter, under the County. The Union thus contends that the County was the successor employer of GEO, on April 6, 2022, and was precluded from changing the status quo at that time.

In support of this position, the Union cites Teamsters Local 764 v. Milton Borough and Milton Regional Sewer Authority, 34 PPER 159 (Final Order, 2003). However, Milton Borough is inapposite. In Milton Borough, a public employer had assumed operations of another public employer where the employes had been certified by this Board, which had jurisdiction over enforcing the bargaining obligations of the successor employer to its certified employes. The Union here recognizes that Milton Borough "involved the transfer of the workforce from one PERA covered employer to a successor PERA covered employer, while in this case the transfer is from a private employer to a PERA covered employer," but contends that "the result should be the same." The Union posits that the rationale expressed in Milton should equally apply here and argues the following:

> requiring an entire workforce [under a private employer] to undergo unilateral changes to wages, hours and working conditions, simply because they are providing the same public services under a different PERA covered employer, would have a tendency to bring about labor unrest, which is contrary to the policies of our public sector labor laws. Milton, supra at 159, is equally applicable where, as here, the operation of a prison is essentially a public service, regardless of whether the County has opted to do so by contracting with a private concern or to do so on its own, particularly, as in this instance, where the public entity maintained a presence in monitoring the private employer's operations.

[4] Complainant did not allege in its specification of charges a claim for an independent violation of Section 1201(a)(1).

(Union Brief at 17-18)(emphasis added). Yet, the underlined language is why Milton is inapplicable to this case. *See also*, Lycoming County v. PLRB, 480 A.2d 1310 (Pa. Cmwlth. 1984)(opining that the law is clear that a successor employer commits an unfair practice if it refuses to bargain with a union that had been certified with the prior employer where both employers are public employers under the Board's jurisdiction and the employes were previously certified by the Board).

The Board has held that the duty to bargain under PERA arises only after certification. In Butler County, 2 PPER 02119 (Final Order, 1972), the Board held that the employer's unilateral wage increases after an election but prior to certification did not violate the Act because there is no duty to bargain under PERA prior to certification and there is no evidence that the unilateral changes were intended to discredit the Union or undermine the election process. In Jessup Borough Police Department Employes v. Jessup Borough, 33 PPER 33176 (Final Order, 2002), the Board held that the employer had no duty to bargain immediately following an election, under Act 111, because the union had not yet been certified by the Board and the employer had not recognized the union. Id. (citing McKeesport Area School District, 13 PPER ¶ 1318S (Proposed Decision and Order, 1982).

In AFSCME District Council 85, Local 2184 v. McKeon County, 39 PPER 21 (Final Order, 2008), McKeon County, a public employer, owned and operated a nursing home where the public employes at the home were members of a bargaining unit certified by this Board. During contract negotiations, McKeon County entered an agreement with a private management firm called Complete HealthCare Resources (CHR) to operate the home. The public employes then became employes of the private firm and were no longer employed by the County. The private firm CHR did recognize and bargain with the employes bargaining representative. In this regard, the Board stated in dicta that "both public and private sector case law requires a successor employer that maintains substantially the same workforce at the same location performing the same duties to bargain with the current representative of the employes and to maintain the status quo during such negotiations." Id.

However, the dicta in McKeon County is not applicable to the instant case. In the private sector, an employer can recognize a bargaining unit and its exclusive bargaining representative. In the public sector in Pennsylvania, PERA requires that the Board certify the exclusive bargaining representative before the employer has any obligation to bargain or maintain the status quo. In this manner, a private employer may recognize a bargaining unit and its exclusive representative and, if so, may have an obligation to maintain the status quo as a successor employer of previously private or public employes (even though this Board would not have jurisdiction to enforce those obligations on the successor private employer). However, the reverse cannot apply, as a matter of law, when a public employer of PERA covered employes succeeds a private employer, because there is no obligation on the successor public employer to bargain with the employes' bargaining representative or maintain the status quo until the bargaining representative is certified by this Board.

In this case, the County made unilateral changes to terms and conditions of employment between April 6, 2022, and June 8, 2022. The Union was uncertified by this Board during that time and the County did not have a bargaining obligation. Also, the Warden and the County planned on, and did, recognize the Union. (*See*, JX-2; UXs- 6 & 11). The March 25, 2022, statement

of terms and conditions of employment, effective April 6, 2022, expressly provides that the County planned on bargaining with the Union after it became the officers' representative, i.e., after certification. In this context, the changes were not intended to undermine an election or the Union. Therefore, the County was not immediately a successor employer to the private firm GEO for labor relations purposes, because the Union was not certified by this Board when the County assumed control of Jail operations, and this Board could not enforce a bargaining obligation on the County at the time, even though there existed a continuity of operations.[5] Any changes made between April 6, 2022, and June 8, 2022, were not bargainable.

The policy changes made between April 6, 2022, and June 8, 2022, that were not bargainable include the following: the statement of terms and conditions of employment presented to the Union on March 25, 2022, effective April 6, 2022, which included changes to wages, sign-on bonuses, medical insurance, vacation, use of sick leave for probationary employes, uniform standards and the provision of uniforms, the right to change scheduling assignments, progressive discipline, and the extension of the probationary period for external hires from 90 days to 180 days.

On June 7, 2022, the County changed more policies and practices. The Warden now required all employees to stay on the premises during meal and rest breaks, and she prohibited food delivery services to enter the property. Warden Williams also limited meal breaks to 30 minutes and required employes to clock out for meal breaks. Warden Williams also prohibited officers from going to their vehicles during breaks or leaving the property for any reasons, without approval. Under GEO, up to 8 employes could be off on each shift. The Warden changed this practice before June 8, 2022, and now requires that no more than 5 officers can be off at one time on the first and second shifts and that no more than 3 officers can be off at one time on the third shift. The Warden also eliminated the practice of permitting officers to split and switch shifts. The Warden additionally abolished the extra time periods for traveling to roll call and to and from meal breaks. None of these changes were bargainable because the Union was not certified by this Board and, by virtue of that fact, the County was not, as a matter of law, immediately the successor employer to GEO, upon assuming control of Jail operations.

The Board and its examiners have also held that unfair practice claims alleging bargaining violations for unilateral changes in conditions of employment, direct dealing, or the failure to provide requested information relevant to bargaining become moot when the parties reach a new collective bargaining agreement subsequent to those allegations. In Medical Rescue Team South Authority v. Association of Emergency Medical Technicians, 30 PPER 30063 (Final Order, 1999), the Board opined as follows:

> the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations. We have so held irrespective of whether the charging party is a majority representative or a public employer. Continued litigation over past misconduct which has no present effects unwisely focuses the

[5] In this case, there may not necessarily be a continuity of employes where GEO employes were required to go through an application and interview process as well as passing a background check. GEO employes were not guaranteed County employment, and 47 GEO applicants were not hired by the County.

> parties' attention on a divisive past rather than a cooperative future. Under all the circumstances, this case does not warrant an exception to our reluctance to resurrect pre-contract negotiations disputes.

Id. *See also*, Hempfield School District, 34 PPER 75 (Proposed Decision and Order, 2003)(charge alleging unlawful direct dealing with employes during collective bargaining properly dismissed as moot after parties enter into a successor collective bargaining agreement); Temple Association of University Professionals, Local 4531 AFT v. Temple University, 23 PPER 23118 (Proposed Decision and Order, 1992)(charges alleging employer direct dealing, failure to provided requested information for bargaining, the unilateral declaration of impasse and the employer implementation of final, best offer were properly dismissed as moot after the parties' post-charge ratification of a successor collective bargaining agreement); TAUP v. Temple, 40 PPER 129 (Proposed Decision and Order, 2009)(charge alleging that the employer unlawfully engaged in direct dealing, misrepresenting negotiations to employes and denigrating the union to employes was properly dismissed when the parties entered into a post-charge collective bargaining agreement and where the union controlled mootness by choosing to agree or disagree to a contract during litigation); AFSCME District Council 33 v. City of Philadelphia, 36 PPER 158 (Final Order, 2005)(charge alleging the City's refusal to proceed to interest arbitration for its prison guards was properly dismissed as moot after the parties entered into a negotiated collective bargaining agreement covering those employes post charge).

In this regard, the bargaining claims for the changes made by the County and the Warden prior to the CBA were rendered moot by the CBA, including the July 7, 2022 distribution of the County Handbook. The Handbook was expressly included and referenced in the CBA, which provides that the provisions of the CBA will govern where there are conflicts between the Handbook and the CBA. The CBA also addresses mandatory overtime, shift switching, and meal breaks. More importantly, however, the CBA provides that "there are no contractual obligations or past practices applicable to this bargaining unit or the interpretation of this Agreement, except for the express provisions of this collective bargaining agreement."

The CBA also includes a merger provision evidencing that the CBA is the complete expression of the parties agreement and that they resolved any and all bargaining disputes with very explicit language. Article 24.5 of the CBA provides that it is the full and final agreement of the terms of employment. It further states that "[t]he parties recognize that there are no other applicable wages, benefits or terms or conditions of employment other than those that are stated herein. The parties further recognize that there are ***no other verbal agreements or past practices binding on the parties*** during the term of this Interim Agreement. The parties agree that wages and benefits will not be further reduced without agreement by parties, even at expiration of this agreement." (JX-3, Article 24.5)(emphasis added).

For the same reasons, the Union's bargaining claims against the County for the alleged refusal to timely provide requested information must also be dismissed. First, some of those requests for information were made before the Union was certified by the Board, and the County did not have a bargaining obligation at the time to provide the information. On April 8, 2022, and May 25, 2022, the Union's attorney emailed an information request to Labor Relations Director Figueroa requesting 8 items. The County was not obligated to respond to these pre-certification information requests. The information

requests were again submitted by the Union's attorney to the County on June 10, 2022, June 15, 2022, and June 24, 2022. Although the County did have an obligation to respond to these post-certification requests and the Warden did not provide the information until September 8, 2022, a 3-month delay, the bargaining claims for the untimely provision of requested information are rendered moot by the CBA, which was negotiated with the Union having had the information, except for 1 item. The same applies to the bargaining claim that the Warden did not provide information regarding her hiring criteria until the first hearing on January 30, 2023. The Union eventually received the information at or prior to the hearing. Even if the 3-month delay for the provision of the majority of information requested, and the 7-month delay for the provision of the Warden's hiring criteria constituted an unreasonable delay, the claims are rendered moot by the new CBA.

In conclusion, the record does not establish a prima facie case of discrimination against the County. The record does not show that Warden Williams had knowledge of Kwaning's and/or Gwaku's Union activities with GEO or that they were Union representatives at the time she decided not to offer them County employment. The record also does not establish, with substantial, competent evidence that, even had the Warden known of the Union involvement and activities of Kwaning and Gwaku, her actions were the result of animus. The record further fails to establish with substantial, competent evidence that Heyward was an agent of the County or that he acted with Union animus when he provided the arbitration awards to Warden Williams such that unlawful motive and discriminatory liability could be imposed on the Warden. Additionally, the record does not establish that Warden Williams knowingly treated candidates differently regarding their disciplinary histories; and the Warden did not change or adjust her criteria for certain individuals.

Moreover, the County alternatively established independent, non-pretextual, non-arbitrary, and legitimate business reasons for setting certain standards for qualifying and disqualifying candidates that were equally applied to all applicants. Warden Williams applied that rubric to everyone, which resulted in disqualifying Kwaning and Gwaku for County employment at the Jail. Also, the record does not contain evidence that the refusal to hire Kwaning and Gwaku was intended to negatively or significantly impact the bargaining unit or Union representation, especially where the Union successfully bargained a new CBA. Accordingly, under the totality of the circumstances in this case, there is insufficient evidence from which to infer any unlawful motive or discriminatory conduct, under Section 1201(a)(3), by the Warden or the managers who report to her.

Additionally, the County did not violate the Act by unilaterally changing terms and conditions of employment, which may have been mandatory subjects of bargaining, between April 6, 2022, and June 8, 2022. Furthermore, to the extent that any changes were made after Union certification, the bargaining claims for those changes were rendered moot by the CBA. Similarly, the bargaining claims against the County for the alleged refusal to timely provide requested information relevant for bargaining are also rendered moot as a result of the CBA.

Accordingly, the County did not violate Section 1201(a)(1), (3), or (5) of the Act and the charge is dismissed.

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 under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County did not violate Section 1201(a)(1), (3), or (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner:

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twelfth day of October 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

Jack E. Marino, Hearing Examiner