

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

United States Capitol Police,)	
Respondent)	
)	
v.)	
)	Case Number: 15-LMR-01 (CA)
Fraternal Order of Police,)	
District of Columbia Lodge No. 1,)	
U.S. Capitol Police Labor Committee)	
Charging Party.)	
)	

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by the United States Capitol Police (“USCP”). The USCP seeks review of the Hearing Officer’s August 28, 2015 Decision and Order (“Order”), which found that the USCP engaged in certain unfair labor practices when it issued a Command Discipline Report, filed with a Warning to Officer James Konczos (“Officer Konczos”), the Chairman of the U.S. Capitol Police Labor Committee (“FOP”), for being absent without leave.

More specifically, the Hearing Officer found that the USCP issued discipline to Officer Konczos because he had engaged in union activity protected under the Congressional Accountability Act (“CAA”) when he complained about the USCP’s handling of unscheduled emergency shifts. The Hearing Officer ordered the USCP to expunge from all its files any references to the Command Discipline Warning issued to Officer Konczos. The Hearing Officer also ordered the USCP to post a notice to employees for 60 days, which indicates that the USCP had violated the CAA.

Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings¹, and the record in these proceedings, the Board affirms the Hearing Officer’s Order.

I. Background

¹ On October 2, 2015, the USCP filed a motion to raise the page limit for the USCP’s brief in support. The Board grants the USCP’s motion and has reviewed the USCP’s brief in support in its entirety.

Hold Over Shift

Officer Konczos began working for the USCP in 1986. Officer Konczos is also a member and officer of the FOP, the collective bargaining representative of the unit of officers employed by the USCP. He has served as the Chairman of the FOP for over five years.

In 2014, Officer Konczos' regular shift was at the United States Capitol Division, House Intelligence Area in the Capitol Visitor Center (CVC), Section C-1. His regular shift lasted from 11:00 p.m. to 7:00 a.m. Sergeant Danny McElroy ("Sergeant McElroy") was Officer Konczos' first-line supervisor.

On June 25, 2014, Officer Konczos started his regular shift at 11:00 p.m. At approximately 6:10 a.m. on June 26, 2014, Sergeant McElroy contacted Officer Konczos by telephone to inform him that the post at the North Screening Door of the CVC, Section C-2, needed two officers to stay over from their current shifts because of manpower shortages, and that Officer Konczos was the first officer on the draft list. Officer Konczos answered that he could not work the extra shift because he needed to obtain service for his car to allow him to report to work on time later that evening for his regularly-scheduled shift at 11:00 p.m. Sergeant McElroy told Officer Konczos that getting his car serviced did not exempt him from being drafted. Officer Konczos responded something to the effect that, since you are implying that I am being insubordinate by not working the hold over shift, you can come down and take my gun and badge.²

Sergeant McElroy then told Officer Konczos that "you can 1301 it away." A 1301 refers to Article 18, Section 18.03 of the parties' Collective Bargaining Agreement ("CBA"), which permits an officer who has been assigned unscheduled additional duty to obtain a qualified substitute to work the unscheduled shift in his or her place.³

Officer Carlos Ford ("Officer Ford"), who worked for the USCP, assisted officers in finding 1301 substitutes. He kept a running list of bargaining unit employees who were available to work hold over shifts and routinely contacted supervisors at the ends of shifts to determine whether they had any emergency manning needs. Shortly after the phone call between Sergeant McElroy and Officer Konczos, Officer Ford telephoned Officer Konczos around 6:30 a.m. to advise him that he had contacted Officer Albert Law ("Officer Law"), who had agreed to work the additional C-2 duty shift for Officer Konczos.

Officer Law sent a text message to Officer Konczos to inquire if he needed someone to work the additional shift and complete a CP-1301. Officer Konczos responded to Officer Law, via text, "that you can if you want to but I am leaving at the completion of my shift."

Email to Police Chief

² Sergeant McElroy later maintained that he never told Officer Konczos that he was insubordinate.

³ A CP-1301 form memorializes the additional duty qualified substitute request and certification.

At approximately 6:44 a.m., Officer Konczos emailed the USCP Police Chief Kim Dine (“Chief Dine”) with the subject title, “Unscheduled drafts.” He copied Assistant Chief of Police Daniel Malloy (“Assistant Chief Malloy”) on the email. The email⁴ reminded Chief Dine that the problem of emergency drafts had been raised with him in numerous email correspondence and face-to-face meetings, without a satisfactory solution.⁵ In the email, Officer Konczos also informed Chief Dine that he was drafted earlier that morning with little advance notice for a hold over shift. He criticized the lack of flexibility his supervisor had shown when Officer Konczos informed him that he could not stay the extra shift. Officer Konczos complained that “the unscheduled drafts do nothing but disrupt officers’ lives” and this happened for the officers “just about every day, every section and every division.” Further, Officer Konczos stated that if Chief Dine cared about the officers, this issue would be a priority for him, not something that is “dragged out indefinitely.” Officer Konczos ended the email by stating that he fully expected to be suspended at 7:00 a.m., but he was at the point that he “honestly did not care.” At 7:07 a.m., Chief Dine responded to Officer Konczos, via email, that Assistant Chief Malloy would be addressing the matter. Officer Konczos remained at his post until he was relieved by the officer scheduled to work the next shift in the House Intelligence area and clocked out at 7:15 a.m.

Officer Law’s Arrival at the Unscheduled Shift

Officer Law was at home at the time he offered to work the unscheduled shift for Officer Konczos on June 26, 2014. He telephoned Sergeant James Floyd (“Sergeant Floyd”), the Supervisor of the C-2 shift who had made the original request for additional manpower, to inform him that he would be substituting for Officer Konczos, and would be at work as soon as he could. Officer Law arrived at the USCP’s Headquarters, clocked in at 7:29 a.m., and began working the C-2 shift at the north door of the Capital Visitor Center at 7:44 a.m. The Hearing Officer noted that, consistent with past practice and given that the north door did not open until approximately 8:15 a.m., Officer Law was on break from the time he arrived until he reported for duty at the north door. Officer Law worked the unscheduled shift until 3:00 p.m., and then reported to his regularly-scheduled shift that began at 3:00 p.m.

⁴ The email stated in full:

Chief, In numerous emails and face to face meetings we have addressed this issue to you. Like with most issues, there is no solution on your end. You have told us you expect your supervisors to work with officers who can’t stay, even though we know that is a joke. I was just notified that I was drafted this morning, I told my Sgt that I couldn’t stay because I had an appointment to get my car serviced. I was told “I only have to notify you that you are being held over.” Real professional. As I explained to you before, the unscheduled drafts do nothing but disrupt officers lives, this happens just about every day, every section every division. How fair do you think it is for an officer to be told at the last minute that they are drafted...for 8 hours?? Please don’t tell me you are looking into manpower numbers, we have heard that for months. If you cared about the officers this would be a priority, not something that is dragged out indefinitely. I fully expect to be suspended at 7:00 am, but I’m to the point I honestly don’t care.

⁵ Chief Dine confirmed at hearing that he had previously discussed the subject of hold over shifts with Officer Konczos during regularly scheduled labor-management relations meetings.

At 6:12 p.m., on June 26, 2014, Officer Law faxed a completed CP-1301 form to the USCP's designated telephone line to obtain the required supervisory signatures. The USCP did not discipline Officer Law or complain to him about submitting the CP-1301 form after the end of his 7:00 a.m. to 3:00 p.m. unscheduled shift. Also, the USCP did not discipline Officer Law or complain to him about arriving late to work the unscheduled shift. Officer Law was paid overtime for working 16 hours on June 26, 2014.

USCP Investigation

That night, on June 26, 2014, Officer Konczos reported to work at his 11:00 p.m. shift. During his shift, Officer Konczos met with Assistant Chief Malloy to discuss what happened that morning. Officer Konczos said that he was disappointed in Chief Dine and Assistant Chief Malloy because both men had given him assurances that they would be flexible in working with officers who were held over to work shifts on short notice and clearly this did not happen with Officer Konczos.

On June 30, 2014, Deputy Chief Matthew Verderosa ("Deputy Chief Verderosa") sent an email to Inspector Beth Dodgson ("Inspector Dodgson") that stated it was "imperative" that the USCP gather and review all investigatory matters related to the June 26, 2014 unscheduled shift issue involving Officer Konczos. On that same date, Inspector Dodgson forwarded that email, as well as two emails Lieutenant Kathleen McBride ("Lieutenant McBride") had sent on June 26, 2014, to Captain Andrew Bolinger ("Captain Bolinger").⁶ The USCP assigned Captain Bolinger the responsibility of deciding what discipline, if any, to impose on Officer Konczos.

On July 3, 2014, Officer Konczos and Sergeant McElroy both gave sworn statements about what took place on June 26, 2014. In his sworn statement, Sergeant McElroy attested that, although he told Officer Konczos that getting his car serviced did not exempt him from being drafted for an emergency shift, he had also told Officer Konczos that "you can 1301 it away." In his sworn statement, Officer Konczos explained, among other things, that he had been informed by Officer

⁶ On June 26, 2014, Lieutenant McBride sent Deputy Chief Verderosa an email, at 7:35 a.m., indicating that Officer Konczos did not complete a 1301 form and had left for the day. The email also stated that Officer Law had texted Officer Konczos to find out if he needed a 1301 substitute and that Officer Konczos answered that Officer Law could do the 1301 but Officer Konczos did not care and was leaving anyway. In addition, the email advised that Sergeant McElroy would be speaking with his lieutenant but expressed his desire to address Officer Konczos' alleged insubordination and non-compliance with directives. Also that date, Lieutenant McBride sent a second email at 7:44 a.m. to some USCP officials noting that Sergeant McElroy had advised Officer Konczos that he was scheduled to work, that his scheduled car service was not a legitimate reason for Officer Konczos not to work, and that "he could stay or find a replacement." The email also noted, among other things, that Chief Dine asked Deputy Chief Verderosa to investigate the matter. Finally, the email stated that Officer Law had called Sergeant Floyd to tell him that he would be at the USCP as soon as he could to cover Officer Konczos' emergency C-2 shift.

Ford that Officer Law “was coming over to work [the C-2 shift] for me.”⁷ Both sworn witness statements were given to Captain Bollinger before the discipline was issued.

Captain Bolinger later asked for the names of officers who had received discipline for failing to appear for duty without specified consent from a supervisor. The USCP provided Captain Bolinger with examples of three comparators whom it believed fit this description.⁸

Command Discipline Warning

On July 21, 2014, Captain Bolinger issued Officer Konczos a Command Discipline Report, filed with a Warning (“Command Discipline Warning”). The Command Discipline Warning stated that Officer Konczos’ actions violated the USCP Rules of Conduct under Directive 2053.013, Category B; Performance of Duty; Rule B3: Absence from Duty, which provides: “Employees who fail to appear for duty at the date, time, and place without consent of a supervisor are Absent without Leave.” The Command Discipline Warning stated that on June 26, after being informed of his assignment to the holdover shift, Officer Konczos “failed to appear for duty at the date, time and place specified by Sergeant McElroy.” It did not mention the fact that Officer Law had worked the holdover shift in question, explain why this did not comport with Sergeant McElroy’s statement that Officer Konczos could “1301 [the assignment to the holdover shift] away”, or otherwise address the impact of this possibly mitigating factor.

During their July 21, 2014, meeting when Officer Konczos was required to sign and acknowledge receipt of the Command Discipline Warning, he asked Captain Bolinger how he could be disciplined if he had a qualified substitute who worked the extra duty shift on his behalf. Captain Bolinger did not answer Officer Konczos.

On July 22, 2014, Captain Bolinger submitted a memorandum to Deputy Chief Verderosa that discussed relevant facts and circumstances surrounding Officer Konczos’ Command Discipline Warning. Under the section for “[a]ny mitigating factors in the case,” the memorandum indicated “[n]one.” While the memorandum noted that officers “may seek a qualified substitute for unscheduled additional duty”, it did not mention that Officer Law had worked the C-2 shift

⁷ According to Officer Konczos’ July 3, 2014 statement, he was drafted to work a hold over shift but told Sergeant McElroy that he could not work the shift because he had a scheduled car appointment. He also stated that Officer Ford told him that Officer Law was going to work the unscheduled shift for him. He indicated that he sent the email to Chief Dine on June 26, 2014, in his capacity as the Chairman of the FOP to complain about the ongoing issues with unscheduled holdovers and that later that night he spoke with Assistant Chief Malloy about what happened and that the supervisors did not work with him. In his statement, Sergeant McElroy indicated that he told Officer Konczos that he was next on the draft list and needed to work the unscheduled shift. He also told Officer Konczos that getting his car serviced did not exempt him from being drafted but told him that “you can 1301 it away.” Sergeant McElroy stated that although Officer Konczos had accused him of threatening to suspend Officer Konczos, he had not.

⁸ The comparators were limited to a two-year period prior to June 26, 2014 based on the requirements of the CBA. None of the comparators involved a situation where a 1301 substitute had worked the shift for which the officer was charged as being AWOL.

for Officer Konczos on June 26, 2014, address why Officer Law should not be considered a qualified substitute under the circumstances presented, or explain why Officer Law's working the shift should not be considered a mitigating factor.

In his role as disciplinary reviewing officer, Deputy Chief Verderosa approved and signed the Discipline Command Warning on July 25, 2014. He admitted at hearing that although he knew that Officer Law was going to cover the C-2 shift on June 26, he did not investigate whether Officer Law actually worked as a 1301 substitute for Officer Konczos, or take that into account as a mitigating circumstance in approving the discipline of Officer Konczos on the charge of AWOL.

Procedural Background

On May 20, 2015, the General Counsel filed an administrative complaint based on a charge submitted by the FOP. The General Counsel alleged that Officer Konczos engaged in protected activity when he met with and emailed Chief Dine about his own, as well as bargaining unit employees' unscheduled draft concerns. Further, the General Counsel alleged that this protected activity was a motivating factor in the USCP's decision to issue the Command Discipline Warning to Officer Konczos.

After a two day hearing, in an Order issued on August 28, 2015, the Hearing Officer found that the USCP had committed an unfair labor practice when it issued the Command Discipline Warning to Officer Konczos due to his protected activity. The Hearing Officer directed the USCP to expunge from all its files any references to the Command Discipline Warning issued to Officer Konczos. The Hearing Officer also directed the USCP to post a notice to employees for 60 days, which indicates that the USCP had violated the CAA. On September 11, 2015, the USCP filed a petition for review to appeal the Hearing Officer's Order.

II. Hearing Officer's Decision

The Hearing Officer applied the burden shifting analysis of *Letterkenny Army Depot*, 35 FLRA 113 (1990) and *United States Capitol Police Board v. Fraternal Order of Police*, 2002 WL 34461688 (June 11, 2002), in analyzing the General Counsel's claims of discrimination based on protected union activity. The Hearing Officer found that Officer Konczos engaged in protected activity when he discussed with Chief Dine the unscheduled emergency drafts during regularly scheduled labor-management meetings and by reiterating the substance of those conversations in the June 26, 2014 email to Chief Dine. In addition, the Hearing Officer noted that Officer Konczos expressed his disappointment to Assistant Chief Malloy on June 27, that while both Chief Dine and Assistant Chief Malloy had previously given assurances that they would be flexible in working with officers who were held over for shifts on short notice, they were not, in fact, being flexible.

The Hearing Officer also concluded that the General Counsel had proved that Officer Konczos' protected activity was a motivating factor in the decision to issue him the Command Discipline Warning on July 21, 2014. In this respect, the Hearing Officer found that the USCP was aware of Officer Konczos' protected activity when it issued the Command Discipline Warning, and that the timing of the Command Discipline Warning in relation to the protected activity supported a finding that Officer Konczos' protected activity was a motivating factor in the decision to discipline him. The Hearing Officer further found that, but for Officer Konczos' June 26 email, which included a complaint on behalf of the Union regarding the unscheduled shifts, the matter of his conduct on June 26 would never have been investigated.

Having determined that the General Counsel sustained the initial burden of showing that Officer Konczos' protected activity was a motivating factor in the decision to issue him the Command Discipline Warning, the Hearing Officer examined whether the USCP had met its burden of showing that it would have disciplined Officer Konczos even in the absence of protected activity. The Hearing Officer determined that the USCP had not met its rebuttal burden.

The Hearing Officer rejected the USCP's claim that it had a legitimate reason for issuing the Command Discipline Warning to Officer Konczos. The Hearing Officer observed that Officer Konczos had been disciplined for Absence Without Leave: "Employees who fail to appear for duty at the date, time and place specified without the consent of a supervisor are 'Absent without Leave.'" The Hearing Officer found that Officer Konczos obtained permission from his first line supervisor, Sergeant McElroy, to find a qualified substitute for the emergency C-2 shift on June 26, and a qualified substitute had worked the shift. The Hearing Officer also noted that Officer Law worked the C-2 shift without concern or complaint from Sergeant Floyd or any other supervisor, and was paid for the two shifts he worked. As such, the Hearing Officer concluded, the charge of "Absence without Leave" could not be sustained. The Hearing Officer therefore concluded that the reason advanced by the USCP for the discipline was pretextual under governing law.

The Hearing Officer found further evidence of pretext in the manner in which the USCP conducted its disciplinary investigation. Based on the file materials provided to him, Captain Bolinger knew or should have known that Sergeant McElroy had authorized the use of a 1301 substitute and that Officer Law had notified Sergeant Floyd that he would work the additional shift for Officer Konczos. Captain Bolinger testified that he did not investigate whether a qualified 1301 substitute had worked Officer Konczos' shift, despite receiving evidence to this effect before disciplining Officer Konczos for AWOL. Similarly, Deputy Chief Verderosa, who reviewed and approved the Command Discipline Warning, knew that a 1301 substitute was on his way to cover the C-2 shift on June 26, but did not investigate whether Officer Law in fact covered the shift as a qualified substitute.

The Hearing Officer reasoned that if either Deputy Chief Verderosa or Captain Bolinger had conducted a thorough investigation, they would have conclusively established that Officer Konczos was not absent without leave on June 26, 2014, and that supervisory consent was given for Officer Law to work as a qualified substitute for Officer Konczos. The Hearing Officer held that the USCP's failure to conduct a full and complete investigation was evidence of pretext.

With regard to the alternative defenses made by the USCP, the Hearing Officer rejected the USCP's arguments that Officer Konczos did not follow routine procedure by informing any management official that he was going to seek a qualified substitute, and that no management official approved a qualified substitute to work the additional duty shift on June 26, 2014. The Hearing Officer determined that Officer Konczos "complied with all requirements necessary in obtaining a qualified substitute who covered the additional duty shift assigned to him." Further, the Hearing Officer noted that the Command Discipline Warning given to Officer Konczos did not charge him with a violation of the Standard Operating Procedures in obtaining a qualified substitute or with improperly completing and submitting a 1301 form. Moreover, the Hearing Officer found that the USCP did not introduce any evidence into the record that showed that discipline had been issued to an officer when a substitute had been obtained, and worked the additional duty shift to completion.

III. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c). *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

IV. Analysis

In *Letterkenny Army Depot*, 35 FLRA 113 (1990), the Federal Labor Relations Authority ("FLRA") established the framework to be applied in cases, such as this, alleging discrimination based on protected union activity in violation of section 7116(a)(2) of the Act. The Board adopted the *Letterkenny* framework in *United States Capitol Police Board*, Case No. LMR-CA-0037, 2002 WL 34461688 (June 11, 2002).

Under *Letterkenny*, to establish a *prima facie* case of discrimination, the General Counsel must show that (1) the employee against whom the alleged discriminatory action was taken had engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. *Letterkenny*, 35 FLRA at 118. The burden then shifts to the employer to demonstrate, by a preponderance of the evidence, that (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of

protected activity. If the USCP's asserted justification for its action is found to be pretextual, then it is not necessary to determine whether it would have taken that action absent the protected activity. *Id.* at 120. It is unnecessary because if the evidence establishes that the reasons given for its actions are pretextual—that is, either false or not in fact relied upon—the USCP fails by definition to show that it would have taken the same action for those nondiscriminatory reasons. *See Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *see also Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Board concludes that the Hearing Officer's decision is supported by substantial evidence and must be affirmed under the applicable standard of review. First, the record supports the Hearing Officer's finding that Officer Konczos participated in protected activity when he sent Chief Dine the June 26, 2014 email to complain about the emergency draft procedure and how it disrupted officers' lives, and when he later complained to Assistant Chief Malloy that he was disappointed with Chief Dine's and Assistant Chief Malloy's handling of the emergency draft issue.⁹ Also, there is substantial evidence in the record to support the Hearing Officer's finding that the USCP was aware of this protected activity and undertook the investigation that led to Officer Konczos' discipline as a result of it.¹⁰ *See U.S. Dep't of Justice, Fed. Bureau of Prisons,*

⁹ Although Officer Konczos complained about how he was personally affected by the emergency holdover shift on June 26, 2014, his email to Chief Dine was still protected activity under the Act. The email's connection to the unit officers' working conditions was specific and direct: Officer Konczos titled the email "Unscheduled drafts", and in it he reminded Chief Dine of the Union's repeated labor-management efforts to resolve the problem of emergency holdover shifts, complained about the disruptive impact they had on officers, and questioned the fairness of the USCP's response to the Union's concerns.

Indeed, the Hearing Officer found that Officer Konczos' email to Chief Dine was protected activity and was a motivating factor in the decision to conduct an investigation. Although Officer Konczos' email referenced a personal concern that he was going to be suspended, the Hearing Officer's determination that Officer Konczos was engaging in protected activity in his capacity as the Chairman of the FOP and on behalf of the bargaining unit employees is supported by the record and must be upheld. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (findings of fact "are conclusive when supported by substantial evidence on the record considered as a whole" and reversal is required "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary"); *see also Dougherty Lumber Co. v. NLRB*, 941 F.2d 1209 (6th Cir. 1991) (unpublished) (rejecting the employer's claim that the union member's personal refusal to work was not protected activity; the Court found that the union member acted in the interest of most of his fellow employees concerning a matter upon which the employees had discussed and agreed, i.e., their desire to stop work for the day due to a coworker's death, where the union member had the union steward accompany him to request that the workers be given the day off). Further, Officer Konczos' arguably inappropriate comments to the USCP officials after learning that he was drafted to work an emergency holdover shift do not render Officer Konczos' activity unprotected as courts recognize that labor relations often involve heated disputes that are "likely to engender ill feelings and strong responses." *Kiewit Power Constructors*, 355 N.L.R.B. 708 (2010), *enforced*, 652 F.3d 22 (D.C. Cir. 2011); *see e.g., Inova Health Sys. v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (union member's physical contact with management official did not sink to such a low level to strip the union member of her right to protected activity as the union member was protesting the discharge of a co-worker).

¹⁰ The USCP introduced evidence that the investigation was initiated because Chief Dine was concerned about an alleged suspension of Konczos. The Hearing Officer, nonetheless, found that Konczos' e-mail to Chief Dine was protected activity and was the motivating factor in the decision to conduct an investigation. We are bound by the Hearing Officer's factual finding under the substantial evidence standard.

Fed. Correctional Inst., Florence, Colo., 59 FLRA 165, 168 (2003), *overruled on other grounds* by *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Oklahoma City, Okla.*, 67 FLRA 221 (2014) (where a union official was investigated and disciplined after engaging in protected activity by posting flyers with advice for bargaining unit members, the “motivating factor” prong of the *Letterkenny* test was satisfied, because “but-for” the union representative’s posting of the flyer, he would not have been the subject of the OIA and SIS investigations; he would not have received the proposed 1-day suspension; and he would not have had the allegation underlying the proposed suspension sustained”).

Substantial record evidence also supports the Hearing Officer’s conclusion that the USCP’s reason for the discipline it issued to Officer Konczos was pretextual. The reason given for the discipline was for failing “to appear for duty at the date, time, and place without consent of a supervisor.” Sergeant McElroy told Officer Konczos that he could “1301 [the holdover request] away.” Officer Law notified Sergeant Floyd that he was on his way to cover the C-2 shift for Officer Konczos. Officer Konczos’ sworn statement shows that Officer Ford had told him that Officer Law “was coming over to work [the C-2 shift] for me.” E-mails from Lieutenant McBride indicate that Sergeant Floyd knew that Officer Law was going to work the shift, and it is undisputed that he did so. Also, no staffing supervisor raised a concern or complaint about the shift coverage. The USCP paid Officer Law overtime for working two full shifts on June 26, 2014. As a result, the record substantially supports the Hearing Officer’s finding that Officer Law worked the C-2 shift as a substitute, with the consent of the two responsible supervisors.¹¹

The Hearing Officer also noted, based on substantial record evidence, that the disciplining officer, Captain Bolinger, did not seek to determine whether a substitute worked for Officer Konczos on June 26, 2014. Captain Bolinger did not interview Officer Law or direct anyone else from the USCP to do so. Further, Deputy Chief Verderosa, who reviewed and approved the Command Discipline Warning for AWOL, testified that despite knowing that Officer Law was on his way to cover the C-2 shift for Officer Konczos, he did not confirm whether Officer Law covered and worked the holdover shift that Officer Konczos was drafted to work.

The Command Discipline Warning and Captain Bolinger’s July 22, 2014 memorandum to Deputy Chief Verderosa both ignore the fact that Officer Konczos’ supervisor told him that he could find a substitute to work in his place and that Officer Law worked the shift. By its own admission, the USCP, in its investigation, did not review whether a substitute actually worked the duty shift for Officer Konczos. Pretext may be inferred from the USCP’s failure to consider

¹¹ Although the USCP introduced evidence that a) an officer who is assigned to extra duty must be excused by a supervisor before he can leave or it is a B3 violation, Absence from Duty, and b) if an officer thought a substitute was going to cover for him and the substitute did not show up, the regularly scheduled officer would be disciplined unless there was a pre-approved 1301, the Hearing Officer found that the USCP did not meet its rebuttal burden.

Officer Law working for Officer Konczos as a mitigating factor when issuing Officer Konczos' discipline, from its failure to show that another officer was similarly disciplined for being absent without leave when a substitute worked the shift in question, and from the close timing of Officer Konczos' discipline to his protected activities. *See NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 226 (6th Cir. 2000) ("Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge."); *see also W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (citing *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985)). As the record contains substantial evidence to support a finding of pretext, the Board affirms the Hearing Officer's Decision.

Also, the Hearing Officer reasonably rejected the USCP's claim that it would have disciplined Officer Konczos, regardless of his protected activity, given the allegedly inadequate 1301 documentation submitted for Officer Law's substitution. Substantial evidence supports the Hearing Officer's findings that the USCP had accepted irregularity in 1301 documentation, without resulting discipline, including: CP-1301 forms submitted without the supervisor's signature or without the signature of all parties, faxed copies of the form, and forms submitted well after the substituted shift. Moreover, the USCP failed to prove that any other officer was similarly disciplined for absence without leave despite the fact that a substitute had worked the assigned shift.¹² The disparate enforcement of USCP policies and procedures towards other officers undermines the USCP's rationale for actions towards Officer Konczos. *Inova Health Sys.*, 795 F.3d at 85; *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936-39 (D.C. Cir. 2011) (Board reasonably concluded that employer failed to meet rebuttal burden when it enforced a "zero tolerance" policy against union adherent, but not against others); *NLRB v. ADCO Electric, Inc.*, 6 F.3d 1110, 1119 (5th Cir. 1993) (employer failed to meet rebuttal burden when it meted disparate discipline against union supporter).

The USCP also argues that Officer Konczos clocked out before Officer Law arrived to the C-2 shift. These circumstances may well have had merit if they had been considered *during* the USCP's investigation and *before* the USCP issued discipline to Officer Konczos. Instead, there

¹² Indeed, substantial evidence supports the Hearing Officer's further finding that even where officers were in fact Absent Without Leave, and failed to obtain a qualified 1301 substitute to work in their stead, the USCP has assessed less severe discipline than the disciplinary warning given to Officer Konczos.

is no evidence here that the USCP investigated or considered these issues prior to issuing the Command Discipline Warning to Officer Konczos for allegedly being absent without leave.¹³

Also, under applicable case law, the Hearing Officer's finding of pretext defeats any attempt by the USCP to show that it would have disciplined the employee absent his or her protected conduct, as a matter of law. *See Golden State Foods Corp.*, 340 NLRB at 385 (failure to investigate union member's alleged impropriety before his suspension was strong evidence of pretext; thus employer fails by definition to show that it would have taken the same action absent the protected conduct); *see also Sanderson Farms, Inc.*, 340 NLRB 402 (2003) (failure to investigate union member's alleged attendance rule violation before actually discharging him shows that "[t]he Respondent's reason for discharging [the union member] was, therefore, pretextual and defeats its attempt to show that it would have discharged [the union official] absent his union activities.").

The Board recognizes that it is vitally important to the law enforcement mission of the USCP that all its officers properly cover their scheduled shifts. We further recognize that attendance at one's duty station, when and as ordered, is a critical responsibility of the officers of the USCP. In today's world, every assignment could be crucial. However, given that substantial record evidence supports the Hearing Officer's finding of pretext in the circumstances of this case, we therefore must affirm the Hearing Officer's finding that the USCP engaged in unfair labor practices in its issuance of the Command Discipline Warning to Officer Konczos.¹⁴ *See Inova Health Sys.*, 795 F.3d at 84 (evidence of discrimination included employer's failure "to explain why, if [the employee's] behavior was legitimately at issue, it conducted such a one-sided investigation" and refused to consider information favoring the employee).

¹³We would also note that the Command Discipline Warning failed to charge Officer Konczos with leaving without authorization of his commander or leaving before his substitute arrived.

¹⁴The procedural arguments made by the USCP do not warrant a reversal of the Hearing Officer's Decision. The USCP maintains that the following issues and Hearing Officer rulings prejudiced the USCP: (i) the failure to allow the introduction of numerous cases, going back almost 13 years, in which the USCP had allegedly taken disciplinary action against employees similarly-situated to Officer Konczos; (ii) the failure to allow the admission into the record of 1301 form documents that were not introduced at the hearing by the General Counsel; and (iii) the implementation of substantive regulations and procedural rules governing the ULP proceedings that were not adopted under the CAA (i.e. ordering the FOP to be on the caption and allowing the FOP to participate as a party). None of the above issues or rulings, however, were prejudicial to the USCP. The Hearing Officer had the right to exercise his discretion to find that the alleged comparator cases proposed by the USCP were too remote to be admissible at hearing. Moreover, any arguable prejudice associated with these rulings is insufficient to warrant reversal of the Hearing Officer's finding that the USCP's alleged legitimate reason for issuing the Command Discipline Warning to Officer Konczos was pretextual.

ORDER

For the foregoing reasons, the Board affirms the Hearing Officer's Decision in favor of the General Counsel.

It is so ORDERED.

Issued, Washington, DC on July 5, 2016