

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

WEST CONSHOHOCKEN POLICE OFFICERS :  
v. : Case No. PF-C-10-163-E  
WEST CONSHOHOCKEN BOROUGH :

**FINAL ORDER**

The West Conshohocken Police Officers (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on February 19, 2013, challenging a Proposed Decision and Order (PDO) issued on January 30, 2013. In the PDO, the Board's Hearing Examiner concluded that West Conshohocken Borough (Borough) did not violate Section 6(1)(c) of the Pennsylvania Labor Relations Act (PLRA), as read **in pari materia** with Act 111 of 1968, when the Borough issued a twenty-day suspension to Officer Adam Pagliaro.<sup>1</sup> The Borough timely filed a brief in response to the exceptions on March 13, 2013.

The facts found by the Hearing Examiner are summarized as follows. Michael Sinclair became the Chief of Police for the Borough in August 2009. Steven Walker has been the Sergeant at the Borough's Police Department for nine years. He is the only Sergeant and he supervises all of the patrol officers. Adam Pagliaro has been a patrol officer with the Borough for approximately nineteen years. Officer Pagliaro is one of three members of the Union bargaining committee. Brian Raskiewicz has been a police officer with the Borough for approximately sixteen years. Officer Raskiewicz is also a member of the Union's bargaining committee. Salvatore Carfagno is a police officer with the Borough and he is a member of the Union bargaining committee.

The Borough and Union entered into a collective bargaining agreement (CBA) in November 2009, which was effective from January 1, 2009 through December 31, 2012. In early 2010, the officers' pay did not include the retroactive four percent wage increase for 2009 that was required by the parties' CBA. In January 2010, all of the officers, including Sergeant Walker, complained directly to Chief Sinclair about not receiving their proper wage increases. Based on those complaints, Chief Sinclair invested approximately eight hours of his time determining that the Borough made a mistake in calculating the officers' retroactive pay for 2009, mistakenly calculating the retroactive wages based on the officers' shift differential instead of their base pay.

On February 4, 2010, Chief Sinclair issued a memo to all of the officers informing them that he had resolved the calculation error and that the officers would receive their properly calculated retroactive pay increase for 2009. Some officers then approached Chief Sinclair indicating that they did not understand the memo. Chief Sinclair went to the Borough Manager who in turn used the Chief's calculations to produce a spreadsheet. On February 11, 2010, Chief Sinclair issued another memo and attached the spreadsheet prepared by the Borough Manager. On February 12, 2010, Officers Pagliaro and Raskiewicz hand delivered a grievance dated February 9, 2010, complaining about the error in calculating the officers' retroactive pay increase for 2009.<sup>2</sup> The grievance was signed by eight full-time officers. There are nine full-time officers, including Sergeant Walker,

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<sup>1</sup> The Hearing Examiner further concluded that the Borough had violated its duty to bargain under Section 6(1)(a) and (e) of the PLRA and Act 111 when Police Chief Michael Sinclair failed to meet with the Union to discuss issues related to interrogation of police officers during internal interviews and the handling of civilian complaints in order to form a Police Bill of Rights. No exceptions were filed to the Hearing Examiner's decision under Section 6(1)(a) and (e) of the PLRA, and the Borough filed an Affidavit with the Board on February 15, 2013, stating that it had complied with the relief directed in the Hearing Examiner's PDO.

<sup>2</sup> The Board notes that Finding of Fact 14 states that Officers Pagliaro and Raskiewicz, on February 12, 2012, hand delivered a grievance dated February 9, 2009, complaining about the error in calculating the officers' retroactive pay increase for 2009. The testimony cited by the Hearing Examiner, and the record as a whole, clearly indicates that Officers Pagliaro and Raskiewicz hand delivered the grievance on February 12, 2010 and that the grievance was dated February 9, 2010. Thus, Finding of Fact 14 is hereby amended to reflect the correct dates for issuance and filing of the grievance.

and one Detective, who did not sign the grievance. Chief Sinclair informed Officers Pagliaro and Raskiewicz that he had already fixed the calculation error and that the Borough would be paying the correct wage increases based on his two previous memos dated February 4 and 11, 2010. He did not discourage them from filing the grievance and was not angry about it. Rather, he was excited that he had discovered the source of the Borough's payroll calculation error. He explained to them that he had already taken care of the matter and that his answer to the grievance would mirror his February 4 and 11, 2010 memos. The retroactive four percent wage increase for 2009 was properly calculated and paid to the officers in their next paycheck.

In April 2010, Officer Pagliaro was involved in an accident with his patrol car. He collided with a tree planter in a privately owned restaurant parking lot. The estimated vehicle damage was \$2,261.88. Chief Sinclair directed Sergeant Walker to contact the property owner, obtain a damage estimate from the property owner and an estimate for the car. After the investigation was completed, Chief Sinclair directed Sergeant Walker to schedule Officer Pagliaro for Emergency Vehicle Operations Course (EVOC) training. On April 20, 2010, Officer Pagliaro sent an e-mail to Sergeant Walker, which was addressed to Chief Sinclair, regarding the requirement to attend EVOC training and his concern that the EVOC training would reflect negatively on his performance as a police officer. The April 2010 accident was Officer Pagliaro's second vehicle accident within approximately two years.

Chief Sinclair stated that, based on his past experience with two other police departments, the first vehicle accident requires counseling and the second requires training. Chief Sinclair was unaware that the Police Officer Disciplinary Proceeding for the Borough provides that remedial training is considered discipline. Chief Sinclair stated that driver training after two accidents is proactive and protects both the Borough and the officer. Officer Pagliaro attended the EVOC training and was paid for his attendance.

On May 12, 2010, the Union bargaining committee wrote a letter to Chief Sinclair requesting to meet monthly with him to discuss the Police Bill of Rights. Article IV, Section II of the CBA provides that "[t]he bargaining unit and the Chief of Police shall form a committee to discuss issues related to police interrogation during internal interviews and the handling of civilian complaints." The letter also proposed open, positive and productive communication between the bargaining committee and Chief Sinclair and noted that "[f]or several years communication within the Department on any level has been nonexistent." The letter was signed by Officers Pagliaro, Raskiewicz and Carfagno. Chief Sinclair did not respond to the May 12, 2010 letter.

On July 7 and 14, 2010, Officer Pagliaro e-mailed Sergeant Walker to inform him that he could not log onto the Mobile Data Terminals (i.e., patrol car computers). Sergeant Walker counseled Officer Pagliaro about completing his reports even though the computers in the cars were not functioning properly. Sergeant Walker stated that he expected Officer Pagliaro to complete his reports on another computer at the station rather than not completing his reports.

On July 14, 2010, Chief Sinclair arrived early in the morning because the Borough Solicitor requested that he be present when the Borough Manager discharged the Borough's Highway Superintendant that morning. Chief Sinclair arrived at the Borough Police Station at 5:20 a.m. Upon arriving, Chief Sinclair pulled behind the station and saw a police car parked by the rear door with the engine running. Chief Sinclair parked, walked up to the car and saw Officer Pagliaro sleeping. Chief Sinclair knocked on the window, at which time Officer Pagliaro became startled, rolled down the window and blurted out "Chief, I was only asleep 20 minutes!" and "Chief the wiper blades put me to sleep!" Chief Sinclair had not, up to this point, encountered any of his officers asleep on duty.

On July 15, 2010, Chief Sinclair began investigating Officer Pagliaro's sleeping incident by contacting the network vendor to help him download information from the GPS system, as well as video from the camera system, and to help him read and understand that information. GPS reports must be compared to a patrol log. Chief Sinclair compared the patrol log and GPS report for the July 14, 2010 sleeping incident. The GPS report

indicated that Officer Pagliaro's car was parked idle behind the station from 3:00 a.m. until 5:20 a.m.

Chief Sinclair was off on Friday, July 16, 2010. Sergeant Walker was off the following week. When Sergeant Walker returned on July 26, 2010, Chief Sinclair asked him to conduct an investigation of the sleeping incident and to question Officer Pagliaro. Sergeant Walker informed Chief Sinclair that he had never investigated one of his own officers and suggested that Chief Sinclair do it because he had all the information. Chief Sinclair, Sergeant Walker and the Chief's assistant were on vacation at one time or another during late July into early August delaying the investigation of Officer Pagliaro's sleeping incident.

On July 29, 2010, Chief Sinclair received a letter dated July 27, 2010 from the Union bargaining committee requesting to meet in an effort to finalize the Police Bill of Rights issue outlined in the CBA. On July 30, 2010, Officers Pagliaro and Raskiewicz sat in the lunchroom interrupting a non-uniformed staff meeting that the Borough Manager was trying to conduct. The Borough Manager came to Chief Sinclair two times. After the second time, Chief Sinclair went to the lunchroom and ordered Officers Pagliaro and Raskiewicz to come upstairs, at which time the officers told Chief Sinclair that they did not like the Borough Manager. Thereafter, Officer Pagliaro and Raskiewicz discussed the Police Bill of Rights with Chief Sinclair. Chief Sinclair informed the officers that he had contacted two other townships regarding the Police Bill of Rights. Officer Pagliaro told Chief Sinclair that the officers wanted the Police Bill of Rights from Norristown Borough. Chief Sinclair responded that he would review and approve the Police Bill of Rights if they got him a copy of the Norristown Borough Police Bill of Rights. Chief Sinclair did not receive the Norristown Borough, or any other, Police Bill of Rights from the Union bargaining committee.

Chief Sinclair issued a memo on July 30, 2010 to all of the officers about the Police Bill of Rights issue. In the memo, Chief Sinclair informed the officers that the bargaining committee gave him the letter requesting to meet to finalize the Police Bill of Rights on July 29, 2010. The Chief's memo also informed the officers that Chief Sinclair met with Officers Pagliaro and Raskiewicz on July 30, 2010, during which time Officer Pagliaro indicated that he wanted to use the Norristown Borough Police Bill of Rights and that Chief Sinclair advised Officer Pagliaro to obtain a copy for review and approval. The Police Bill of Rights committee was never formed and the issue was unresolved at the time of the hearing in this matter.

On August 5, 2010, the Union bargaining committee wrote a letter to Borough Council seeking to meet with the Council members to discuss with them their perceived low morale resulting from the Borough Manager's bullying of employees and Chief Sinclair's accommodation of the Borough Manager and application of Philadelphia police procedures to their small Borough Police Department. The letter further stated the Union's concerns that specific members of its negotiation team were being harassed (i.e., Officers Pagliaro and Raskiewicz) and that Chief Sinclair looked at those specific members as troublemakers. Chief Sinclair did not at any time refer to Officers Pagliaro or Raskiewicz as troublemakers.

On August 9, 2010, Chief Sinclair issued a memo to all of the officers directing them to follow the chain of command with regard to the operations of the Police Department. Specifically, Chief Sinclair stated that the canvassing of members of Borough Council or any official of the Commonwealth, County, Borough or public about any matter concerning the Police Department without the authority of the Chief is considered conduct unbecoming an officer. Officer Pagliaro sent an e-mail to Sergeant Walker on August 9, 2010, stating that the Union had some contract issues to finalize with Borough Council and that contract issues are not chain of command issues.

Chief Sinclair issued a second memo on August 9, 2010, to "All Personnel, West Conshohocken Police Department," regarding radio patrol vehicles. The memo states that "[e]ffective immediately, 3801 will not be used for patrol. #3801 will be used by the sergeant." It further provides that "Radio Patrol Car #3803 and #3804 will be used by Patrol. Radio Patrol Car 3802 and 3806 will be used as replacement vehicles."

On August 10, 2010, Chief Sinclair issued a memo to Officer Pagliaro informing him of an employment interview scheduled for August 18, 2010. The memo does not identify the subject matter of the interview. Officer Pagliaro was unaware of the subject of the interview when he received the memo. On August 13, 2010, Officer Pagliaro e-mailed Sergeant Walker informing him of the contents of the memo and stating that he was unaware that he was being investigated for any performance issues.

On August 14, 2010, Sergeant Walker e-mailed Officers Pagliaro and Raskiewicz the following message: "Chief Sinclair has ordered me to order the two of you to NOT use patrol unit 3801 this weekend due to it's [sic] GPS being out of service. I will also relay this message to you at shift change." Chief Sinclair did not direct Sergeant Walker to issue this e-mail or any such directive to Officers Pagliaro and Raskiewicz. Officers Pagliaro and Raskiewicz were the only two officers on duty the weekend of August 14 and 15, 2010. Chief Sinclair stated that, contrary to Sergeant Walker's e-mail, he did not order only Officers Pagliaro and Raskiewicz not to use unit 3801. Chief Sinclair ordered all officers not to use it. Patrol Unit 3801 is an SUV. Officer Raskiewicz prefers to use an SUV, like unit 3801, because he has back and leg problems. The Police Department has three other SUVs available for Officer Raskiewicz to use.

Due to delays in obtaining representation, the employment interview for Officer Pagliaro was delayed to August 23, 2010. During the interview on August 23, 2010, Officer Pagliaro was expressly notified that he had no right to refuse to answer any questions and that if he refused to answer or gave a false answer, the Borough would construe such action as an act of insubordination which would separately subject him to discipline. Officer Pagliaro expressed his understanding of these warnings. Present at the interview were Chief Sinclair, Fraternal Order of Police Lodge President Steve Newfer, Police Administrative Assistant Susan Van Fossen, and Officer Pagliaro. During the interview, Officer Pagliaro did not admit to sleeping. He stated that he did not recall Chief Sinclair waking him up or telling Chief Sinclair that the wiper blades put him to sleep, citing the fact that the incident occurred over a month before the interview. Chief Sinclair concluded that Officer Pagliaro provided false and misleading statements during the August 23, 2010 interview.

On August 24, 2010, Chief Sinclair issued a **Loudermill** notice to Officer Pagliaro outlining the bases for contemplating disciplinary action, which provided, in relevant part, as follows:

Based upon the above events, it appears to me that you were, in fact, sleeping on duty on July 14, 2010. Although you acknowledged this at the time on July 14, 2010, during the interview you stated that you could not recall being asleep on duty on July 14, 2010, did not recall any conversation with me regarding the incident and denied that you were sleeping, though you could not account for the 2+ hour gap in your log during the time that the GPS placed your vehicle at the police station and the cameras in the back showed the vehicle parked there and you not exiting the vehicle during the time in question. Accordingly, it also appears to me that you provided knowingly false and misleading information during the interview. This included denying during the interview that you were observed by me sleeping on duty, denying that we had a conversation at that time during which you acknowledged sleeping on duty and by also stating during the interview that you simply could not recall what you were doing for those 2 hours.

On August 31, 2010, Officer Pagliaro responded to Chief Sinclair's **Loudermill** notice, stating, in pertinent part, as follows:

I acknowledge that there is an idling time of 139 minutes generated by GPS on July 14 if you tell me that there is. Many officers also sit behind the police station for varying lengths

of [time] during the overnight shift. I am sure that it is on the GPS system. It has been past practice to do so. To the best of my knowledge no other officer has been questioned or has had an investigation started against them, except me. I also do not recall ever receiving any verbal or written Memo or Order outlining this. No radio calls were missed during this time.

On August 23, 2010, you questioned me about a shift that occurred on July 14. That was forty (40) days later. You stated that I was sleeping. I was not notified of committing an infraction right there on the spot or anytime after that until the 23<sup>rd</sup> of August. I was not told anything verbally or receive anything in writing. Our Department SOP states in Section I, Procedure of Investigations, subsection a, that all investigations should be completed in 10 (ten) days.

I have a good record of performance in the Department. I have received commendations for my performance and duty. And I am proud to serve West Conshohocken. I have never been disciplined for any infraction in my 17 (seventeen) years as a police officer.

The Police Officer Disciplinary Proceedings, Article IV, subsection I, clause (a) provides that "[a]ll investigations should, if possible, be completed within ten (10) days after the institution thereof." Chief Sinclair presented Officer Pagliaro's response to Borough Council and recommended a five-day suspension for sleeping and a fifteen-day suspension for providing false and misleading information during an official investigation. Chief Sinclair has no authority to suspend any police officer.

On September 22, 2010, Borough Council issued a suspension without pay to Officer Pagliaro for 160 hours, i.e., twelve 12-hour shifts and two 8-hour shifts. The suspension provides that Officer Pagliaro was suspended without pay for "[n]eglect or violation of your official duties" and for "[i]nefficiency, neglect, disobedience of orders and/or conduct unbecoming an officer." The Borough Council's suspension notice adopted the investigative findings and conclusions of Chief Sinclair as recited in his **Loudermill** notice of August 24, 2010. The suspension notice further provides as follows:

[I]t also appears that you provided knowingly false and misleading information during the interview. This included denying during the interview that you were observed by Chief Sinclair sleeping on duty, denying that you had a conversation with him at that time during which you acknowledged sleeping on duty and by also stating during the interview that you simply could not recall what you were doing for those 2 hours.

At no time did Chief Sinclair authorize any of the officers to sleep on duty. He did tell the officers that, as a safety issue, they should pull off the road if they are so tired that they may get into an accident. Chief Sinclair did not authorize any sleeping on duty for either Officer Carfagno or Officer Weiler while they conducted a stakeout of a threatened resident's home.

On October 14, 2010, Chief Sinclair issued another **Loudermill** notice to Officer Pagliaro, which provides, in relevant part, as follows:

You are in violation of the West Conshohocken Borough Duty Manual, Neglect of Duty, in that you failed to patrol your assigned area and prepare the required Electronic Patrol Log indicating your activities. This violation occurred between 0255 hours and 0645 hours during your assigned 7pm-7am shift on August 10, 2010, into August 11, 2010. Your Electronic Patrol Log indicates 3 hours and 50 minutes of un-accounted time during the above listed patrol shift. In addition the GPS indicates you were

stationary at Police Headquarters from 0345 hours until the end of your tour of duty at 0645 hours.

As outlined above you are in violation of the West Conshohocken Borough Duty Manual, Neglect of Duty, in that when you were interviewed by Sgt. Steven Walker on September 12, 2010 at 0600 hours you indicated that you were aware that you were required to account for your patrol activities during your designated shift and record such activities on your Electronic Patrol Log...

...

You are also in violation of the West Conshohocken Borough Duty Manual, Neglect of Duty, for repeated violations of the duty manual in that you were charged with Neglect of Duty on 7-14-2010 for sleeping on duty and for providing false and misleading information during the interview. By your actions, you have indicated that your repeated violations of departmental rules and regulations or any other kind of conduct indicates that you have little or no regard for your duties and responsibilities as a West Conshohocken Borough Police Officer which will be cause for dismissal regardless of the severity and the type of violation.

Prior to the October 14, 2010 **Loudermill** notice, Chief Sinclair examined all of the officers' GPS reports and patrol logs for a 30-day period. Within that period, only Officer Pagliaro had a long period of time where he was not patrolling or doing anything.

On or about May 20, 2012, Chief Sinclair issued a thumb drive to all of the officers containing multiple documents comprising the Police Department's policy revisions. One of the documents was General Order 2.3. This document was consistent with the prior policy regarding anonymous complaints, civilian complaints and internal investigations. General Order 2.3 contains procedures for internal affairs administration and operations. It specifically delineates the procedure for investigating complaints against police officers.

The Union filed its Charge of Unfair Labor Practices on November 2, 2010, alleging that the Borough violated Section 6(1)(a), (c) and (e) of the PLRA and Act 111 by suspending Officer Pagliaro in retaliation for engaging in protected activity and failing to meet with the Union to discuss issues related to interrogation of police officers during internal interviews and the handling of civilian complaints in order to form a Police Bill of Rights. A hearing was held before the Board's Hearing Examiner on May 25, 2012, during which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Hearing Examiner held the record open for the limited purpose of permitting the post-hearing submission of additional GPS reports and patrol logs. Both parties filed post-hearing briefs.

The Hearing Examiner concluded in the PDO that the Borough did not violate Section 6(1)(c) of the PLRA because the Union failed to establish that the Borough's suspension of Officer Pagliaro was motivated by anti-union animus. However, the Hearing Examiner further concluded that the Borough had violated its duty to bargain under Section 6(1)(a) and (e) of the PLRA and Act 111 when Chief Sinclair failed to meet with the Union to discuss issues related to interrogation of police officers during internal interviews and the handling of civilian complaints in order to form a Police Bill of Rights. No exceptions were filed to the Hearing Examiner's finding of a violation of Section 6(1)(a) and (e) of the PLRA. Rather, the Union's exceptions solely concern the dismissal of the Charge under Section 6(1)(c).

The Union does not challenge any of the Hearing Examiner's findings of fact in its exceptions. Therefore, the Hearing Examiner's findings of fact are conclusive. **FOP Lodge #5 v. City of Philadelphia**, 34 PPER 22 n.3 (Final Order, 2003).

As an initial matter, the Union alleges in its exceptions that the Hearing Examiner erred in failing to admit into evidence or to reopen the record to admit General Order 1.8 (Union Exhibit O), which concerns conduct and disciplinary issues for Borough police officers. The Union alleges that the Board should reopen the record to admit General Order 1.8 because it is new in that it was given to the Union shortly before the hearing, the Union did not become aware of General Order 1.8 until after the hearing and the penalty in General Order 1.8 for sleeping while on duty for a first offense (reprimand to 2 days) is relevant to show that the discipline issued to Officer Pagliaro was excessive. When a request to reopen the record for additional evidence is made, the party making such a request must establish that the evidence to be admitted (1) is new; (2) could not have been obtained at the time of the hearing through the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purpose of impeachment; and (5) is likely to compel a different result. **Teamsters Local #205 v. Peters Creek Sanitary Authority**, 34 PPER 27 (Final Order, 2003).

The Union alleges that General Order 1.8 was included on a flash drive containing a series of documents, including General Order 2.3 (Union Exhibit B), that was given to the Union shortly before the hearing and that the Union did not discover General Order 1.8 until after the hearing. The fact that the Union was able to obtain General Order 2.3 from the flash drive and admit it into evidence during the hearing belies the Union's assertions that General Order 1.8 is new and that it could not have been obtained at the time of the hearing through exercise of due diligence. Further, the Board concurs with the Hearing Examiner's assessment that General Order 1.8 is not relevant and would not compel a different result due to the fact that Officer Pagliaro was also disciplined for providing knowingly false and misleading information, and not solely for sleeping while on duty. Accordingly, the Union failed to demonstrate that the five criteria to reopen the record have been met and its request to reopen the record is denied.

The Union further alleges in its exceptions that the Hearing Examiner erred in concluding that it failed to establish a discriminatory motive for the Borough's twenty-day suspension issued to Officer Pagliaro. Citing to **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978) and **FOP Lodge #5 v. City of Philadelphia**, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995), 26 PPER ¶ 26200 (Final Order, 1995), the Union asserts that the Hearing Examiner failed to consider the entire background of the alleged instances of anti-union animus, including, among others, the discipline for Officer Pagliaro's minor vehicle accident, the excessive discipline imposed on Officer Pagliaro for the July 14, 2010 sleeping incident, the timing of discipline imposed for the July 14, 2010 sleeping incident, Chief Sinclair's selective inquiry into the GPS reports and the October 14, 2010 **Loudermill** notice issued to Officer Pagliaro, and merely reviewed each allegation individually.<sup>3</sup>

In order to sustain a charge of discrimination under Section 6(1)(c) of the PLRA, the charging party must prove (1) that the employe engaged in protected activity, (2) that the employer was aware of the employe's protected activity, and (3) that the employer took adverse action against the employe because of a discriminatory motive or anti-union animus. **Duryea Borough Police Department v. PLRB**, 862 A.2d 122 (Pa. Cmwlth. 2004) (citing **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977)). The charging party must demonstrate that all three elements are present in order to establish a **prima facie** case under Section 6(1)(c) of the PLRA. **Colonial Food Service Educational Personnel Association v. Colonial School District**, 36 PPER 88 (Final Order, 2005). The burden then shifts to the respondent to rebut the charging party's **prima facie** case. **PLRB v. Commonwealth of Pennsylvania, Department of Education, Edinboro State College**, 14 PPER ¶ 14054 (Final Order, 1983).

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<sup>3</sup> The Union additionally alleges that the Hearing Examiner ignored substantial evidence concerning Officer Pagliaro's union activities including, among other things, his involvement in filing the grievance concerning the 2009 retroactive pay increase and his questioning of the actions of Chief Sinclair on behalf of the Union on numerous occasions. However, the Hearing Examiner found that the Union met its burden of establishing that Officer Pagliaro engaged in protected activity and, therefore, there is no indication that the Hearing Examiner failed to consider Officer Pagliaro's protected activities in coming to his decision.

While the Hearing Examiner discussed each incident of alleged anti-union animus individually, it is clear that the Hearing Examiner properly considered the entire record in reaching his conclusion. Indeed, the Hearing Examiner stated that "[a]fter reviewing the entire record in this case and making credibility determinations resolving evidentiary conflicts in favor of the Borough, I conclude that the Union has not established a **prima facie** case of discrimination. Specifically, there is insufficient evidence from which to draw an inference that the actions complained of were unlawfully motivated." (PDO at 19). Accordingly, the Union's allegation is meritless in that a review of the PDO demonstrates that the Hearing Examiner properly reviewed all of the evidence of record in concluding that the Union failed to establish that the Borough discriminated against Officer Pagliaro for his union activities.

The Union asserts that the Hearing Examiner erred in failing to conclude that Chief Sinclair engaged in disparate treatment of Officer Pagliaro when he required Officer Pagliaro to attend EVOC training for the April 2010 vehicle accident. The Union further asserts that the Hearing Examiner erred in failing to credit the testimony of Sergeant Walker that it was unusual for an officer involved in a minor vehicle accident to be subjected to discipline. To establish disparate treatment, the complainant must prove that the employer treated similarly situated employees differently from the complainant based upon their support or lack of support for the union. **City of Reading v. PLRB**, 568 A.2d 715 (Pa. Cmwlth. 1989); **International Brotherhood of Painters and Allied Trades Local Union 1968 v. Erie City School District**, 40 PPER 12 (Final Order, 2009); **Teamsters Local No. 764 v. Montour County**, 35 PPER 12 (Final Order, 2004).

The major flaw in the Union's argument concerning disparate treatment is that the Union failed to put forth any evidence establishing that Chief Sinclair treated other police officers who had been involved in more than one vehicle accident differently than Officer Pagliaro. The record shows that the April 2010 vehicle accident was the second accident in which Officer Pagliaro had been involved within a two-year period. In concluding that Chief Sinclair's investigation of the April 2010 accident and subsequent requirement that Officer Pagliaro attend EVOC training was not motivated by anti-union animus, the Hearing Examiner stated as follows:

The Chief credibly testified that, based on his experience in other police departments, the first accident requires counseling and the second requires training. He also credibly testified that he was unaware that the disciplinary procedures characterize remedial training as discipline and that he does not view training as discipline.

(PDO at 15). It is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. **North Wales Borough Police Department v. North Wales Borough**, 38 PPER 181 (Final Order, 2007); **E.B. Jermyn Lodge No. 2 of the FOP v. City of Scranton**, 38 PPER 104 (Final Order, 2007). The hearing examiner may accept or reject the testimony of any witness in whole or in part. **Limerick Township Police Officers v. Limerick Township**, 36 PPER 125 (Final Order, 2005). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. **City of Scranton, supra**. The Union presents no compelling reasons warranting the reversal of the Hearing Examiner's decision to credit Chief Sinclair's testimony over that of Sergeant Walker. Therefore, Chief Sinclair's requirement that Officer Pagliaro attend EVOC training does not show disparate treatment.

The Union next alleges that Officer Pagliaro has been treated differently than other officers with regard to Chief Sinclair's review of GPS reports and that the Hearing Examiner erred in crediting the testimony of Chief Sinclair that he reviewed the GPS reports and patrol logs for all of the officers for thirty days after the July 14, 2010 sleeping incident without any documentation to support his testimony. Again, the Union's allegations concern the Hearing Examiner's credibility determinations. Concerning Chief Sinclair's review of Officer Pagliaro's GPS report and patrol log on August 10, 2010, the Hearing Examiner stated as follows:

The Chief clearly, consistently and credibly testified that he was "incident-driven," and that, as a result of [Officer] Pagliaro's sleeping on duty, he was looking at all the officers' GPS records and patrol logs for a thirty-day time period. (N.T. 271-272). The record does **not** provide that the Chief "suddenly" began conducting these record reviews on all the officers on August 10, 2010, which is the same date that the Chief issued the notice of employment interview. The record does **not** provide that the Chief singled out Officer Pagliaro. Contrarily, it provides that the Chief and the Sergeant reviewed the records for all the officers and initiated the investigation based on [Officer] Pagliaro's July 14, 2010 behavior, which certainly constitutes an "incident to cause the Chief to [investigate]."

(PDO at 17). The fact that the Borough did not present any documentary evidence to support Chief Sinclair's testimony on this matter is not a compelling reason to reverse the Hearing Examiner's credibility determination. As such, the record demonstrates that Officer Pagliaro was not treated differently than the other officers concerning Chief Sinclair's review of GPS reports and patrol logs because Chief Sinclair reviewed all of the officers' GPS reports and patrol logs for a thirty day period after Officer Pagliaro's July 14, 2010 sleeping incident.

The Union asserts that the Board's decision in **City of Reading v. PLRB, supra**, applies in that it involves facts similar to those present here. However, the Union's reliance on **City of Reading** is misplaced. In **City of Reading**, the employer alleged that it discharged the chief union steward for being intoxicated at work, sleeping while on duty and insubordination. However, the Board concluded, based upon evidence that similarly situated employes who were intoxicated at work received lesser discipline, that the employer discharged the union steward due to his union activity. As stated above, that is not the case here, where the Union has failed to show that Chief Sinclair treated Officer Pagliaro differently from the other officers concerning the April 2010 vehicle accident and the review of the officers' GPS reports and patrol logs.

The Union additionally alleges that the timing of the commencement of the disciplinary process against Officer Pagliaro for the July 14, 2010 sleeping incident, the issuance of the notice of employment interview dated August 10, 2010, along with Chief Sinclair's review of Officer Pagliaro's GPS reports and patrol logs shortly after the issuance of Officer Pagliaro's August 5, 2010 letter to Borough Council is suggestive of anti-union animus. However, the Hearing Examiner credited the testimony of Chief Sinclair and Sergeant Walker, the Union's own witness, that the investigation into Officer Pagliaro's July 14, 2010 sleeping incident began on July 15, 2010, which was before the bargaining unit sent the August 5, 2010 letter to Borough Council, and that the investigation was delayed due to the vacation schedules of Chief Sinclair, Sergeant Walker and Chief Sinclair's assistant. The Union fails to set forth any compelling reasons to overturn the credibility determinations regarding the testimony of Chief Sinclair and Sergeant Walker. Therefore, the Hearing Examiner did not err in concluding that the timing of the disciplinary process fails to demonstrate anti-union animus.

The Union also alleges that the twenty-day suspension of Officer Pagliaro for the July 14, 2010 sleeping incident was excessive and that the Hearing Examiner erred in failing to credit the testimony of Sergeant Walker that the discipline imposed on Officer Pagliaro was excessive and that it was due to his union activities. The record establishes that Officer Pagliaro was issued the twenty-day suspension for sleeping on duty and providing knowingly false and misleading information during the investigation of the July 14, 2010 sleeping incident. As credited by the Hearing Examiner, Chief Sinclair stated that Officer Pagliaro received five days for sleeping while on duty and fifteen days for providing knowingly false and misleading information about sleeping while on duty. Although the Union asserts that the Hearing Examiner erred in crediting the testimony of Chief Sinclair over Sergeant Walker concerning the twenty-day suspension, the Union fails to provide any compelling reasons for the Board to reverse the Hearing Examiner and credit the testimony of Sergeant Walker over Chief Sinclair. Accordingly,

the Hearing Examiner's conclusion that the twenty-day suspension of Officer Pagliaro was not excessive and did not establish anti-union animus will not be disturbed.

The Union further alleges that the Hearing Examiner erred in failing to consider the second **Loudermill** notice issued to Officer Pagliaro on October 14, 2010 regarding unaccounted for time on his patrol log for August 11, 2010 as evidence of Chief Sinclair's continued discriminatory actions against Officer Pagliaro. The Union asserts that the Hearing Examiner failed to consider the GPS reports and patrol logs the Union provided, which show that it is common practice for officers to remain stationary in their cars for extended periods while on duty without explanation.

The October 14, 2010 **Loudermill** notice states that Officer Pagliaro violated, **inter alia**, the Borough's Duty Manual regarding Neglect of Duty by failing to patrol his assigned area on August 11, 2010 and to prepare the required patrol log for that date. Indeed, the notice indicates that GPS reports for August 11, 2010 showed that Officer Pagliaro had three hours and fifty minutes of unaccounted for time during his patrol shift. The record also reveals that Officer Pagliaro had been counseled by Sergeant Walker in July 2010 concerning completion of his patrol logs. Additionally, the Hearing Examiner credited Chief Sinclair's testimony that, during his thirty-day review of the officers' GPS reports and patrol logs, Officer Pagliaro was the only officer who had substantial unaccounted for time while he was on duty.

Although the Union alleges that it provided GPS reports and patrol logs that demonstrate that other officers commonly remain stationary for extended periods while on duty without explanation, Chief Sinclair's testimony only concerned the GPS reports and patrol logs for the thirty-day period following the July 14, 2010 sleeping incident. The Hearing Examiner credited Chief Sinclair's testimony that while GPS reports did suggest that other officers had remained stationary for extended periods of time, patrol logs showed that, unlike Officer Pagliaro, the other officers were either actually engaged in legitimate police duties while their vehicle was stationary or were taking an authorized break. The GPS reports and patrol logs submitted by the Union concern different dates than the timeframe testified to by Chief Sinclair. In order to undermine the Chief's credibility on this issue, the Union needed to submit GPS reports and patrol logs for the thirty-day period following the July 14, 2010 sleeping incident showing that other officers were stationary for extended periods without explanation in the patrol logs. The Union failed to provide any evidence that contradicts Chief Sinclair's testimony that only Officer Pagliaro had substantial unaccounted for time while he was on duty during that thirty-day period. Therefore, the Union did not meet its burden to prove a discriminatory motive because it failed to show that Officer Pagliaro was treated differently than other similarly situated patrol officers.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

#### **HEREBY ORDERS AND DIRECTS**

that the exceptions filed by the West Conshohocken Police Officers are dismissed and the January 30, 2013 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this sixteenth day of July, 2013. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

CHAIRMAN MARTIRE DISSENTS.