

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PALMYRA BOROUGH POLICE OFFICERS :
ASSOCIATION :
 :
v. : Case No. PF-C-13-65-E
 :
PALMYRA BOROUGH :

FINAL ORDER

Palmyra Borough (Borough) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on December 10, 2014, challenging a Proposed Decision and Order (PDO) issued on November 20, 2014. In the PDO, the Board's Hearing Examiner concluded that the Borough violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111 of 1968, when it issued new work rules to police bargaining unit members during an interest arbitration hearing and in rapid succession for several consecutive days after the hearing.¹ Pursuant to an extension of time granted by the Secretary of the Board, the Palmyra Borough Police Officers Association (Association) timely filed a brief in response to the exceptions on January 12, 2015.

The facts found by the Hearing Examiner are summarized as follows. The Association represents six full-time police officers who serve within the two-mile square Borough of approximately 4,000 people. The remainder of the police department consists of one Lieutenant and Chief of Police Stanley Jasinski.

The parties were subject to a collective bargaining agreement that expired on December 31, 2011. The Association took steps to initiate negotiations for a successor contract and began bargaining. The Association made demands concerning maintaining the status quo for wages, providing for a fifteen cent increase in shift differential and converting to a 12-hour shift schedule. The Borough responded negatively to the demands and countered with proposed changes to the medical benefit coverage. In response, the Association offered premium sharing on the medical benefit coverage. However, the Borough responded by requesting arbitration.

On May 15, 2013, the parties proceeded to an Act 111 interest arbitration hearing, which was conducted at the Borough building during daylight hours of a workday. Chief Jasinski allowed the Association to use the police department conference room for meeting with their counsel and observed the Association members doing so throughout the day during the course of the hearing. Prior to the close of the hearing, Chief Jasinski issued a memorandum regarding "Improving Patrol/Out of Office Hours." The memorandum set forth new time limits for police activity, which never previously existed and to which the officers were expected to strictly adhere. It also demanded more detailed explanations of police activity on officers' daily logs. The memorandum expressly states, in pertinent part, as follows:

It appears that complaints received regarding our patrol cars always sitting in our parking lot whenever they pass the Municipal Building certainly have some validity to them. During the last several weeks I have been paying special attention while off-duty to our parking lot and am quite disappointed in what I have been observing.

¹ The Hearing Examiner also concluded that the Borough did not violate its duty to bargain under Section 6(1)(e) of the PLRA in issuing the new work rules because the Examiner found that they involved matters that fall within the Borough's managerial prerogative. The Association did not file exceptions to the Hearing Examiner's dismissal of its Charge under Section 6(1)(e). Therefore, the issue of whether the work rules are mandatorily bargainable is not before the Board.

However, Chief Jasinski never discussed these alleged complaints with the Association members nor did he attempt to ascertain what the officers were doing within the police department if and when the patrol cars were in the parking lot. In fact, the Association was never made aware of any alleged complaints nor did they discuss such complaints with Chief Jasinski or the Lieutenant.

On May 16, 2013, Chief Jasinski issued another memorandum regarding what he referred to as a clarification for daily activity logs. The memorandum required more detailed information for daily activity logs, such as which report numbers officers had completed, the location of their lunch breaks and the reason they were in the office at any given time, including restroom use. Chief Jasinski admitted that he had been a patrol officer or chief within the Borough for 35 years and never had to note the time or location of his restroom use.

On May 17, 2013, Chief Jasinski issued a third memorandum entitled "Enforcement of Vehicle Code-Duties At Stop Signs." The memorandum indicates that Chief Jasinski believed the officers were not enforcing the Vehicle Code section regarding duties at stop signs due to the lack of citations. The memorandum goes on to provide that enforcement will be monitored and "[i]f improvement in enforcement is not noted, additional administrative steps will be taken." Chief Jasinski admitted that the warning of "administrative steps" could not be found in other memoranda regarding enforcement of vehicle code sections. The Association viewed this memorandum as indicating that if officers did not write more citations for the particular code section, they would be disciplined.

On May 18, 2013, Chief Jasinski issued a fourth memorandum regarding the officers' patrol reporting system and the PennDOT crash reporting system within the patrol vehicles. Due to the detailed nature of crash reports, coupled with the time limits set forth in the memorandum issued on May 15, 2013, the Association viewed this memorandum as dictating that all reports, and especially crash reports, would need to be issued from the patrol cars, which was a requirement not previously imposed. Chief Jasinski admitted that the alleged complaints which gave rise to the four memoranda came in weeks and even months prior to their issuance. Chief Jasinski failed to explain why he issued the memoranda on those particular days and in the manner that they were issued.

The Association filed its Charge of Unfair Labor Practices on June 26, 2013, alleging that the Borough violated Section 6(1)(a), (c) and (e) of the PLRA and Act 111 by issuing the four memoranda in retaliation for engaging in protected activity and failing to bargain over the issuance thereof. After two continuances, a hearing was held before the Board's Hearing Examiner on May 30, 2014, during which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The Hearing Examiner concluded in the PDO that the Borough violated Section 6(1)(c) of the PLRA because the timing of the issuance of the memoranda along with Chief Jasinski's failure to provide an adequate explanation for issuing the memoranda supported an inference that they were issued in retaliation for the Association engaging in protected activity. The Hearing Examiner further concluded that the Borough committed an independent violation of Section 6(1)(a) of the PLRA because the Borough's actions in issuing the memoranda during an interest arbitration hearing, and in rapid succession for several days after the hearing, would have a tendency to coerce reasonable employees in exercising their rights under the PLRA. However, the Hearing Examiner also held that the Borough did not violate its duty to bargain under Section 6(1)(e) of the PLRA because the underlying subjects of the four memoranda issued by Chief Jasinski were within the Borough's managerial prerogative to select and direct its employees and the Association failed to request bargaining over the impact of the memoranda on the officers wages, hours and working conditions. By way of remedy, the Hearing Examiner ordered the Borough to rescind the four memoranda issued by Chief Jasinski.

The Borough 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).

In its exceptions, the Borough alleges that the Hearing Examiner erred in concluding that it violated Section 6(1)(c) of the PLRA because Chief Jasinski was not involved in the negotiations for a successor collective bargaining agreement and had not made any anti-union statements against the Association. In order to sustain a charge of discrimination under Section 6(1)(c) of the PLRA, the charging party must prove (1) that the employees engaged in protected activity, (2) that the employer was aware of the employees' protected activity, and (3) that the employer took adverse action against the employees 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. **West Conshohocken Police Officers v. West Conshohocken Borough**, 45 PPER 21 (Final Order, 2013). The burden then shifts to the respondent to rebut the charging party's **prima facie** case. **Id.**

Because an employer's motives are rarely overt, a finding that the employer harbored union animus or an unlawful motive may be based on inferences from the facts of record. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). In determining whether union animus was a factor in an employer's decision, the Hearing Examiner may look to the entire background of the case, 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 adequately explain its actions against the adversely affected employees, the effect of the employer's adverse action on the employees' protected activities and whether the action complained of was "inherently destructive" of important employee rights. **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). The close timing of an employer's adverse action alone is not enough to infer animus, but when combined with other factors can give rise to the inference of anti-union animus. **Police Association of Falls Township v. Falls Township**, 44 PPER 93 (Final Order, 2013); **Teamsters Local No. 764 v. Montour County**, 35 PPER 12 (Final Order, 2004).

The record shows that Chief Jasinski issued the four memoranda starting on the day of the interest arbitration hearing and continuing for the next three days. (Finding of Fact (FF) 10, 13, 14, 16). The memoranda set forth new work rules that had not previously existed, including the requirement to list the officers' restroom use on their daily logs. (FF 14). Chief Jasinski stated that he issued the memoranda in response to receiving complaints from the Mayor regarding the time spent by officers in the Borough's Municipal building instead of patrolling. However, the uncontested findings of the Hearing Examiner demonstrate that Chief Jasinski knew of these complaints weeks and even months prior to the issuance of the memoranda, that he failed to discuss the complaints with the officers or ascertain what the officers were doing in the police department when he observed the patrol cars in the parking lot and failed to provide an explanation as to why he issued the memoranda beginning on the very day of the interest arbitration between the police officers and the Borough, weeks or months after receiving the complaints. (FF 12, 22). Although Chief Jasinski did not make anti-union statements and was not directly involved in the negotiations, the above-cited factors support the Hearing Examiner's inference of an unlawful motive on the part of the Chief.

The Borough further alleges that the timing of issuance of the four memoranda is insufficient to support an inference of anti-union animus. However, as discussed above, the Hearing Examiner did not solely rely upon the timing of the issuance of the memoranda in making his decision in this case. Rather, he also relied upon Chief Jasinski's failure to provide an adequate explanation as to why he issued the memoranda at the very time that the parties were involved in interest arbitration, long after receiving alleged complaints about the police officers' work activity. The Hearing Examiner found further support for an inference of an unlawful motive in the Chief's failure to conduct any real investigation into the reasons why the police officers were present at the police station before imposing the new restrictions on their activities.

The Borough additionally asserts that the Hearing Examiner erred by failing to credit the testimony of Chief Jasinski that the four memoranda were issued because he received a complaint from the Mayor that the police officers were spending too much time at the Borough's Municipal building instead of patrolling. 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**.

Regarding Chief Jasinski's reasons for issuing the four memoranda, the Hearing Examiner stated as follows:

First of all, the Chief admitted that he never discussed these alleged complaints with the Association members. (N.T. 14-15, 54). What is more, the Chief claimed that the alleged complaints which gave rise to the memos came in weeks and even months prior to their issuance. (N.T. 66). Notably, the Chief provided no explanation whatsoever as to why the memoranda were issued on the days and manner they were. Further, the Chief, in describing his "independent investigation," provided no specific dates or time period for when he observed the Borough's parking lot. Nor did he attempt to ascertain what the police officers were doing in the office on the days he purportedly observed their patrol cars there.

(PDO at 6). As set forth above, the Hearing Examiner thoroughly explained his reasons for discrediting Chief Jasinski's testimony regarding the issuance of the four memoranda. Thus, the Borough has failed to present compelling reasons to warrant reversal of the Hearing Examiner's credibility determination. **Id.**

The Borough further asserts that the Hearing Examiner erred in relying on Chief Jasinski's failure to discuss the complaints with the Association or its members prior to the issuance of the memoranda as indicative of anti-union animus because the underlying subjects of the memoranda were within the Borough's managerial prerogative. The Hearing Examiner's determination that the Borough was not required to bargain over the work rules addressed in the four memoranda does not negate the Borough's statutory obligation to refrain from imposing new work rules in retaliation for employee protected activity. **Falls Township, supra**. The Hearing Examiner did not err in relying on Chief Jasinski's failure to discuss the complaints with the Association or its members as indicating lack of any real investigation into the alleged complaints against the police officers, and supportive of an inference of anti-union animus.

The Borough also alleges that the Hearing Examiner erred in suggesting that it needed to present the Mayor as a witness in order to establish a non-discriminatory reason for issuing the memoranda. A review of the record indicates that in discussing the reasons why he failed to credit Chief Jasinski's testimony about his alleged reasons for issuing the memoranda, the Hearing Examiner noted that the Mayor possibly could have been a source of corroboration for the Chief's testimony, but was not called as a witness by the Borough. It was entirely the Borough's choice whether to call the Mayor as a witness, and the Hearing Examiner did not hold otherwise. At the same time, the Hearing Examiner did not err in noting the lack of corroboration for the Chief's testimony in discussing the reasons why he found the testimony not credible. In sum, we find no error in the Hearing Examiner's conclusion that the Borough violated Section 6(1)(c) of the PLRA, and committed a derivative violation of Section 6(1)(a).

The Borough further contends that the Hearing Examiner erred in concluding that it committed an independent violation of Section 6(1)(a) of the PLRA because none of the officers were disciplined as a result of the memoranda, and the Association did not provide any evidence demonstrating that the memoranda actually interfered, restrained or coerced the officers in engaging in protected activity. The Board will find that an independent violation of Section 6(1)(a) has occurred where, in light of the totality of

the circumstances, "the employer's action has a tendency to coerce a reasonable employee in the exercise of protected rights." **Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police**, 42 PPER 46 at 156 (Final Order, 2011). Actual coercion of the employees and improper motive on the part of the public employer need not be shown in order to find a violation of Section 6(1)(a). **Teamsters Local No. 249 v. Millvale Borough**, 36 PPER 147 (Final Order, 2005). A review of the totality of the circumstances discloses that the new work rules were issued during the interest arbitration hearing and in rapid succession for several days thereafter. Given these circumstances, the Hearing Examiner did not err in concluding that the Borough's actions would have a tendency to coerce reasonable employees from engaging in interest arbitration, which is an activity protected under the PLRA and Act 111. Therefore, the Hearing Examiner did not err in concluding that the Borough violated Section 6(1)(a) of the PLRA.

The Borough finally argues that the Hearing Examiner erred in ordering the rescission of the four memoranda because the Examiner found that the memoranda involved matters of managerial prerogative. It is within the Board's discretion to determine the appropriate remedy in an unfair practice case. **Mid Valley Education Association v. Mid Valley School District**, 25 PPER ¶ 25138 (Final Order, 1994). The Board is authorized under Section 8(c) to issue an order requiring the respondent to "cease and desist from such unfair labor practice, and to take such reasonable affirmative action ... as will effectuate the policies of [the PLRA]." 43 P.S. § 211.8(c). The Board's authority to remedy unfair labor practices is remedial in nature, not punitive. **Uniontown Area School District v. PLRB**, 747 A.2d 1271 (Pa. Cmwlth. 2000). The Borough's statutory obligation to refrain from retaliating against employees for engaging in protected activity is not obviated by the fact that the work rules may have involved subjects that ordinarily need not be bargained. In view of the unlawful motive for imposition of the work rules and/or the coercive nature of the manner in which they were imposed, the Board finds the remedy in this case to be remedial and in furtherance of the purposes and policies of the PLRA and Act 111.²

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 Palmyra Borough are dismissed and the November 20, 2014 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, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this seventeenth day of February, 2015. 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.

² The Board's remedy herein should not be viewed as a prohibition of the Borough's ability to fashion work rules involving these subjects. Any subsequent promulgation of work rules can be judged on their own merits.

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Pennsylvania Labor Relations Board

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PALMYRA BOROUGH :

AFFIDAVIT OF COMPLIANCE

Palmyra Borough hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act, that it has rescinded the four memoranda dated May 15, 16, 17, and 18, 2013, that it has posted a copy of the Proposed Decision and Order and Final Order as directed and that it has served an executed copy of this affidavit on the Palmyra Borough Police Officers Association at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public