

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

HANOVER POLICE ASSOCIATION :
 :
 :
 v. : Case Nos. PF-C-11-98-W
 : PF-C-11-114-W
 HANOVER TOWNSHIP :

PROPOSED DECISION AND ORDER

On July 7, 2011, the Hanover Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Hanover Township (Township) violated sections 6(1)(a), (b) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by "taking away officers' shifts and promising to give officers' shifts back if the association decertifies" and by attempting "to interfere with the existence of the Hanover Police Association, collective bargaining unit." The Board docketed the charge to Case No. PF-C-11-98-W. On July 27, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October, 19, 2011, if conciliation did not resolve the charge by then.

On August 31, 2011, Hearing Examiner Thomas P. Leonard, pursuant to the Board's blocking charge policy, Charley v. PLRB, 583 A.2d 65 (Pa. Cmwlth. 1990), held the processing of a related decertification petition (Case No. PF-D-11-106-W) in abeyance pending disposition of the charge.

On September 6, 2011, the Association filed a charge alleging that the Township violated sections 6(1)(a), (b), (c) and (d) of the PLRA as read in pari materia with Act 111 by "harassing" and "continu[ing] to create a hostile work environment for the Chief of Police," by "manipulat[ing] the number of votes in an attempt to decertify the Hanover Police Association" and by "intimidating" on two separate occasions "a member of the Hanover Police Association who is a witness to an unfair practice complaint." The Board docketed the charge to Case No. PF-C-11-114-W.

On September 16, 2011, the Township requested that the charge filed to Case No. PF-C-11-98-W be dismissed for lack of specificity as to the names of the police officers allegedly promised shifts back if the Association decertified. On September 21, 2011, the hearing examiner construed the Township's request as a motion for a more specific pleading and gave the Association seven days to provide the Township with the names(s) of the police officers allegedly promised shifts back if the Association decertified or to show cause why the Township's request should be denied. By letter dated September 23, 2011, the Association provided the Township with the names of the police officers allegedly promised shifts back if the Association decertified.

On September 26, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing on the charge in Case No. PF-C-11-114-W be held on October 19, 2011, if conciliation did not resolve the charge by then.

On October 19 and November 15, 2011, the hearing examiner held a hearing on both charges and afforded the parties a full opportunity to present evidence and to cross-examine witnesses.¹ Both parties made closing arguments. The hearing examiner set December 6, 2011, as the deadline for any briefs to be filed (N.T. 484). Neither party filed a brief.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

¹At the outset of the hearing, the Township moved to dismiss the charges for lack of standing on the part of its chief of police (N.T. 9-11). The hearing examiner denied the motion because the charges were filed by the Association, not the chief of police (N.T. 12). The Township also objected to the charges as based on hearsay (N.T. 12-13). The hearing examiner overruled the objection as the Association had yet to present its case (N.T. 14).

FINDINGS OF FACT

1. On September 6, 2007, the Board certified the Association as the exclusive representative of a bargaining unit that includes all full-time and regular part-time police officers employed by the Township. (Case No. PF-R-06-112-W)

2. On December 31, 2007, the parties entered into a collective bargaining agreement effective by its own terms through December 31, 2010. Under "Hours and Working Conditions," the agreement provides as follows:

"Work week seven consecutive working days beginning at 00:00:01 AM on Sunday and ending 12:00 Midnight on the following Saturday.

(1st shift) - 12:00 AM - 8:00 AM
(2nd shift) - 8:00 AM - 4:00 PM
(3rd shift) - 4:00 PM - 12:00 PM
Split Shift - 7:00 PM - 3:00 AM

The split shift of 7:00 PM - 3:00 AM will normally be scheduled Thursday, Friday and Saturday of each week. The Chief of Police at his discretion may schedule the split shifts on other days or eliminate a split shift as he deems appropriate for the mission of the police department.

The Chief of Police shall work forty hours a week in addition to the above staffing. Chief of Police will work a normal schedule of daylight Monday through Friday with weekends off.

Chief of Police may work other scheduled shifts if he deems appropriate for the mission of the police department.

A pay period and work cycle is defined herein as two (2) consecutive weeks.

Each full-time officer shall normally work forty (40) hours each work week."

(N.T. 58; Township Exhibit 3).

3. By the end of December 2010, the Township had disbanded its police department in the face of escalating insurance premiums following a number of law suits involving the police department and had discussed contracting with McDonald Borough for police services. A member of its board of supervisors (David Duerr) also had responded to a question "about the police officers' contract" from the audience at a board meeting that "their contract ends at this time" and "we could contract police now," while another member of the board (Herbert Grubbs) had said, "you can't say that," and the Township had passed a budget for 2011 based on revenues of \$474,000.00 from an amusement tax if 20 shows were held at the First Niagara Pavilion.² (N.T. 42, 154, 189, 214-216, 245, 293, 382)

4. By the end of March 2011, the Township's chief of police (James Geho) had written to the board of supervisors that the Township could not subcontract its police services even though the collective bargaining agreement had expired, the board's chair and liaison with its police department (Donald Winkler) had verified Chief Geho's position with the Township's solicitor (Lane Turturice) and the Township had reinstated its police department. (N.T. 16-17, 42-45, 92, 211, 213, 293)

²Although not dispositive, it is noted that one member of the board of supervisors (Mr. Winkler) testified that the anticipated revenues from the amusement tax were \$474,000.00 (N.T. 245), while another member of the board of supervisors (Mr. Contumelio) testified that they were \$465,000.00 or \$468,00.00 (N.T. 189). The hearing examiner has credited Mr. Winkler's testimony over Mr. Contumelio's because Mr. Contumelio further testified that Mr. Winkler was more knowledgeable about the Township's finances than he was (N.T. 205).

5. In April 2011, the Township was scheduling its police officers to work eleven shifts per week. Officer Craig Arture was usually working three of them, from 12:00 A.M. to 8:00 A.M. (N.T. 16, 98-99)

6. On April 3, 2011, at the beginning of Officer Arture's shift, Mr. Winkler, who is often out and about during the night, met with Officer Arture to monitor suspected drug trafficking along Purdy Road. They discussed the addition of a second car to the shift for safety reasons. Mr. Winkler opined that they would never see a second car during the shift because of the Township's limited finances. They also discussed what shifts were provided for under the collective bargaining agreement. Mr. Winkler said nothing about adding a second officer to the shift if the Association was decertified. (N.T. 99-100, 212-213, 226, 230, 288-292, 301-302; Complainant Exhibit 11)

7. On May 5, 2011, the Township and Live Nation, Worldwide, d/b/a First Niagara Pavilion at Star Lake (LNW) entered into a contract under which LNW paid the Township for police services during shows at the First Niagara Pavilion in 2011. Paragraph 5.2 d of the agreement provided for a payment of "\$16.55 per man hour for each new officer." Paragraph 5.5 of the agreement provided for the payment of "an administrative fee in the total amount of One Dollar and Sixty Cents (\$1.60) per man-hour charged to each event[.]" Paragraph 5.7 of the agreement provided for a payment "of One Hundred Ten dollars (\$110.00) for each vehicle provided for each event pursuant to this Agreement." Paragraph 6 of the agreement provided that

"[f]or each event scheduled or to be scheduled for the 2011 season, the Township shall deploy two (2) officers and vehicles to patrol areas in Hanover Township, exclusive of the Amphitheatre. LNW agrees to pay the Township for such officer(s) and vehicle(s) in accordance with paragraph 5 of this Agreement."

(N.T. 82-83, 158, 166; Township Exhibit 5)

8. By May 26, 2011, FNW had presented two shows at the First Niagara Pavilion, generating approximately \$20,000.00 in amusement taxes for the Township, had eleven more shows scheduled for the year and had advanced \$160,000.00 to the Township. The Township also had borrowed \$135,000.00 from its capital reserves to meet expenses. (N.T. 220-221, 236, 260; Township Exhibit 8)

9. On May 26, 2011, Mr. Winkler, having reviewed the Township's finances and become concerned that revenues would not meet expenses for the year, directed Chief Geho by telephone to remove two shifts from the weekly schedule for financial reasons. The shifts to be removed were usually worked by Officer Arture. Five of the remaining nine shifts were to be worked by Chief Geho. At Chief Geho's request, Mr. Winkler reduced his directive to writing as follows:

"Please remove the 0000 to 0800 hr shifts from Saturdays and Sundays for the month of June 2011.

If the Hanover Police Union **is agreeable** we would like the officers working the 1600 to 0000 shift to work an extra hour till 0100 hr making a 9 hr shift.

If the Union does not agree just remove the stated shifts."

Mr. Winkler did not tell Chief Geho that the removed shifts would be restored if the Association was decertified or that he would work out a separate contract with Chief Geho if the Association was decertified. (N.T. 17-18, 20-21, 105, 233-239, 294-296, 299; Complainant Exhibit 1, Township Exhibit 9)

10. On May 29, 2011, during Officer Arture's shift, Mr. Winkler met with Officer Arture. Mr. Winkler did not tell Officer Arture that the removed shifts would be restored if the Association was decertified. (N.T. 104-106, 231-233, 299-301)

11. By the end of May 2011, a part-time police officer for the Township (Stanley Henry) had approached another part-time police officer for the Township (Julius Zoller)

to decertify the Association, had told the president of the Association (Officer Kent Mitchell) of his plan to decertify the Association and had filed with the National Labor Relations Board a petition to decertify the Association. Officer Henry was under the impression that the Association had to be decertified before another labor organization could represent the bargaining unit. The idea to decertify the Association was Officer Henry's. Officer Henry was unhappy with the Association because non-members of the Association were scheduled to work before members of the Association were, the Association had not held an election and the collective bargaining agreement favored full-time police officers over part-time police officers. Officer Zoller supported decertification of the Association because "[t]he Union was good for nothing, it did nothing for us. It was good for nothing." No member of the board of supervisors had approached Officer Henry or Officer Zoller about decertification. (N.T. 131, 227, 230, 256, 336, 343-345, 353, 389-393, 413, 420-422, 437-438, 442-443)

12. On June 3, 2011, Mr. Winkler met with Chief Geho to discuss police matters. During the course of their discussion, Mr. Winkler told Chief Geho not to prepare a schedule for July because some shifts were going to be removed. Mr. Winkler also said to Chief Geho, "if we don't get any more money next month than we got this month, you're liable to be the only guy we can afford to have working." Mr. Winkler did not tell Chief Geho that officers would be better working things out with the Township or that Chief Geho would be better working things out with the Township. (N.T. 22-25, 254-257, 302, 305-307)

13. Within a few days after June 3, 2011, Mr. Winkler in a phone call with Officer Henry learned "of the decertification process" for the first time. (N.T. 256)

14. In mid-June 2011, Officer Henry and Officer Zoller approached Officer Arture about "switching" from the Association to the Teamsters. (N.T. 26, 108, 110, 123, 130, 343, 392, 398, 400, 402, 438-440)

15. On June 21, 2011, Officer Henry, referring to the "hostility between everyone" in the police department after he told Officer Mitchell of the decertification petition, told Chief Geho that "things were F'ed up." Officer Henry did not tell Chief Geho anything about "being led down the wrong road." (N.T. 404, 418, 423)

16. By letter dated June 22, 2011, Officer Zoller requested of the board of supervisors a leave of absence for a minimum of 60 days "for personal reasons." Before he made the request, he considered resigning, and Mr. Winkler told him to take some time off to think about it. Mr. Winkler thought that Officer Zoller was a dependable employe and did not want him to resign. (N.T. 29-30, 161, 264, 307-309, 355-356, 360, 376-379; Complainant Exhibit 2)

17. July 1, 2011, the Secretary of the Board declined to issue a complaint on a charge the Association filed with the Board alleging that the Township had committed unfair practices under the Public Employee Relations Act (PERA), explaining by letter that "you allege that Hanover Township (Township) is reducing the police officers' shifts in an attempt to force the officers to decertify the Hanover Police Association (Association)" and that "the Board lacks jurisdiction over your claim under PERA." The Board had docketed the charge to Case No. PERA-C-11-207-W. (Complainant Exhibit 5)

18. On July 7, 2011, before a special meeting of the board of supervisors began, Mr. Winkler said to Mr. Duerr, "This is the financial angle that we need to take." During the meeting, the board accepted Officer Zoller's request for a leave of absence, Mr. Winkler told Mr. Duerr they had to accept Officer Zoller's request that evening because they weren't going to get another letter from Officer Zoller, the board hired special labor counsel (Dennis Makel), Mr. Duerr said in response to a question as to why the Township needed another attorney that "with the petition to decertify the union, the Township needs to be careful" and Mr. Duerr moved to terminate probationary police officers. The motion failed. After the meeting, Mr. Winkler read the Secretary's letter and said, "This is all Arture, this is all Arture," and Mr. Grubbs said, "if this is what this was all about, then I would never have agreed to it." The Township had never

granted a leave of absence in the past. (N.T. 67-71, 74, 76-77, 79, 96-97, 161, 262, 264, 266-268, 271-272, 284, 288; Complainant Exhibit 7)

19. Shortly after July 8, 2011, a member of the board of supervisors (Alfred Contumelio), having found doors to the Township's garage unlocked and become concerned that Township property was at risk, gave to Chief Geho for posting on the bulletin board at the police department a notice to "HANOVER TOWNSHIP POLICE OFFICERS" as follows:

"ON JULY 8, 2011, THE WALK IN DOOR AND THE OVERHEAD GARAGE DOOR AT THE OLD TOWNSHIP BUILDING WERE LEFT UNLOCKED AFTER THE NEW FORD EXPLORER WAS TAKEN OUT FOR USE, THIS WAS WITNESSED BY PATROLMAN ANTONINO BALSAMO.

THIS NOTICE IS HEREBY GIVEN FOR ALL OF THE HANOVER TOWNSHIP POLICE OFFICERS THAT ANY DOORS LEFT UNLOCKED AT THE POLICE DEPARTMENT, THE OLD BUILDING WHERE CARS ARE STORED AND CARS LEFT WITH WINDOWS LEFT OPEN AND DOORS LEFT UNLOCKED SHALL RESULT IN A WRITE UP."

Mr. Contumelio did not write up any individual police officer for having left the doors unlocked because he thought that Chief Geho, whose job description includes the responsibility to "[d]irect and coordinate department operation," was responsible for writing them up. (N.T. 39-40, 177-179, 187-188, 191-194; Complainant Exhibit 4, Township Exhibit 7)

20. On July 11 or 12, 2011, the secretary/treasurer of the Township (Wendy Turrentine) put in the mailboxes of the members of the board of supervisors copies of an acknowledgement and notice of filing issued by the Secretary of the Board in Case No. PF-C-11-98-W. (N.T. 65, 78-79)

21. As of July 20, 2011, the Township employed eight police officers: Chief Geho and Officers Arture, Balsamo, Carr, Henry, Kuzio, Mitchell and Zoller. (N.T. 31)

22. On July 21, 2011, at a regular meeting of the board of supervisors, Mr. Winkler discussed the Township's finances, and the board passed a motion to terminate "all probationary officers" effective midnight July 31, 2011. The probationary officers were Officers Balsamo, Carr and Kuzio. Mr. Winkler voted for the motion because he thought that given the Township's finances there was no expectation of permanent employment for the probationary officers. Mr. Contumelio and another member of the board (Nancy Voelker) also voted for the motion for essentially the same reason. (N.T. 79-80, 135, 144-146, 155-157, 163, 177, 189, 204-205, 248-249, 262-263, 271, 284; Complainant Exhibit 9)

23. As of August 1, 2011, the Township employed five police officers: Chief Geho and Officers Arture, Henry, Mitchell and Zoller. Of the five, only Officers Arture and Henry were available to patrol the Township during shows at the First Niagara Pavilion. (N.T. 32-34, 160-162)

24. On August 6, 2011, Mr. Winkler told Office Arture that "every supervisor" wanted to know why Officer Arture's car did not have an inspection sticker in the windshield or a current registration sticker on the license plate. Mr. Winkler also said, "I don't want to get you in trouble, but . . . if you don't get that done pretty soon, I'm going to call the chief," that "on April the 3rd we did not sit on Curry Road" and that he wanted Officer Arture to "write a letter to tell them that statement was untrue." (N.T. 115-116, 128-129, 280-282, 313-318)

25. On August 16, 2011, Officer Henry filed with the Board a petition to decertify the Association. On the line asking for the number of employes in the bargaining unit, Officer Henry had first typed the number 8. Because the Township had recently terminated the three probationary officers, he then crossed out the number 8 and wrote the number 5. The Board docketed the petition to Case No. PF-D-11-106-W. (N.T. 444-445, 448; Complainant Exhibit 10)

26. On August 18, 2011, at a regular meeting of the board of supervisors, the Township authorized up to \$105,000.00 for the purchase of a dump truck with monies from gaming funds designated for capital expenditures and from the Township's capital reserves. (N.T. 86-87, 137-138, 142, 154-155, 186-187, 277-279)

27. On August 19, 2011, after finding doors to police vehicles unlocked and unreported damage to a police vehicle, Mr. Contumelio gave to Chief Geho a memorandum dated August 15, 2011, providing as follows:

"I recently issued a directive that all[]police vehicles that are parked and not being used [m]ust have all the windows rolled up and the doors locked. On August 15, 2011, I found car Whiskey 3 with all the doors unlocked. I also found the Transport van unlocked and the side [v]ent window on the passenger side broken and not reported on designated report forms. See attached notice.

This info[r]mation will be in your file for failing to follow up on your officers for the [a]bove mentioned. The officers that last used those vehicles should be disciplined by you."

Mr. Contumelio wrote the memorandum because he thought Chief Geho was responsible for making sure that the police officers under him in the chain of command were doing what they were supposed to be doing. (N.T. 35-38, 179-180, 185-186, 188, 201-202; Complainant Exhibit 3)

28. By September 29, 2011, the Township had collected "300,000-some dollars" in amusement taxes from 15 shows at the First Niagara Pavilion. (N.T. 164, 189, 218)

29. On September 29, 2011, at a special meeting of the board of supervisors, the Township laid off all of its police officers and a part-time road worker. The police and fire departments were under budget at the time. The roads and parks departments were over budget at the time. The Township had spent an extra \$30,000.00 to pave roads during the year and had the lowest millage rate in the county at the time. Ms. Voelker had no interest in raising taxes to further fund the police department because of the large population of elderly and people on fixed incomes within the Township. Mr. Winkler did not want to raise property taxes because the Township had recently imposed the amusement tax. (N.T. 16, 87-88, 98, 146, 152, 169, 174-175, 188-189, 218, 244-245, 286)

DISCUSSION

The Association has charged in Case No. PF-C-11-98-W that the Township committed unfair labor practices in violation of sections 6(1)(a), (b) and (c) of the PLRA as read in pari materia with Act 111 by "taking away officers' shifts and promising to give officers' shifts back if the association decertifies" and by attempting "to interfere with the existence of the Hanover Police Association, collective bargaining unit."

The Association has charged in Case No. PF-C-11-114-W that the Township committed unfair labor practices in violation of sections 6(1)(a), (b), (c) and (d) of the PLRA as read in pari materia with Act 111 by "harassing" and "continu[ing] to create a hostile work environment for the Chief of Police," by "manipulat[ing] the number of votes in an attempt to decertify the Hanover Police Association" and by "intimidating" on two occasions "a member of the Hanover Police Association who is a witness to an unfair practice complaint."

The Township contends that the charges should be dismissed for lack of proof.

I

An employer commits an unfair labor practice under section 6(1)(a) if, "in light of the totality of the circumstances, the employer's action has a tendency to coerce a

reasonable employe in the exercise of protected rights." Manor Township, 43 PPER 57 at ___ (Final Order 2011).

An employer commits an unfair labor practice under section 6(1)(b) if it creates a company union. Paint Township, 26 PPER ¶ 26169 (Proposed Decision and Order 1995); Kennett Square Borough, 25 PPER ¶ 25179 (Proposed Decision and Order 1994). A company union is created when the employer provides assistance to or is involved with a labor organization to the point that the labor organization "is indistinguishable from the employer." Girard School District, 38 PPER 128 at 366 (Final Order 2007) (construing analogous provisions of the PERA).

An employer commits an unfair labor practice under section 6(1)(c) if it discriminates against an employe for having engaged in an activity protected by the PLRA as read in pari materia with Act 111. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004). If the charging party presents a prima facie case during its case-in-chief, a charge under section 6(1)(c) is to be sustained unless the employer shows that it would have taken the same action even if the employe had not engaged in the protected activity. Brentwood Borough, 35 PPER 112 (Final Order 2004), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992). The discriminatory motivation creates the offense. Id. A valid non-discriminatory reason for the employer's action may rebut any inference that the employer was discriminatorily motivated. Duryea Borough Police Department, supra.

An employer commits an unfair labor practice under section 6(1)(d) if it discriminates against an employe for having filed a charge with the Board. Commonwealth of Pennsylvania, Pennsylvania State Police, 42 PPER 46 (Final Order 2011). "The analysis under Section 6(1)(d) mirrors the analysis of a charge under Section 6(1)(c)." Id. at n. 3.

Any finding of an unfair labor practice must be supported by substantial evidence. Commonwealth of Pennsylvania, PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978). Speculation is not substantial evidence. Haverford Township, 27 PPER ¶ 27130 (Final Order 1996), citing Harbaugh v. Commonwealth of Pennsylvania, PLRB, 528 A.2d 1024 (Pa. Cmwlth. 1987).

II

Neither charge states a cause of action under section 6(1)(b) as there is no allegation in either of them that the Township has created a company union. Thus, to the extent that the charges allege violations of section 6(1)(b), they are dismissed as a matter of law.

III

In support of the charge that the Township "[took] away officers' shifts and promis[ed] to give officers' shifts back if the association decertifies," the Association presented testimony (1) by Officer Arture that on April 3, 2011, the chair of the Township's board of supervisors (Mr. Winkler), in discussing the addition of a second car to a shift for safety reasons, told him "if you got rid of the union we can probably talk about that" (N.T. 100), (2) by Chief Geho that on May 26, 2011, he told Mr. Winkler that police officers had told him that Mr. Winkler was telling them "if they got rid of the collective bargaining unit or the union we'd get [] shifts [that were cut] back," and Mr. Winkler angrily responded that he would talk to the police officers "about anything he wants to," that the "supervisors wanted to lay off the police department," that "if officers were smart they would get rid of the union" and that Chief Geho "would be smart to get rid of the union" (N.T. 18-20) and (3) by Officer Arture that on May 29, 2011, Mr. Winkler joked that "if we didn't have that union place we can probably get them shifts put back on there" (N.T. 106).³

³Although the Association charged that the Township also "[took] away officers' shifts and promis[ed] to give officers' shifts back if the association decertifies" on a fourth occasion (April 30, 2011), it presented no evidence in support of that portion of the charge.

In further support of the charge, the Association presented testimony by Chief Geho that the Township "tried to self-implode us, to get rid of ourselves" ever since (1) a member of its board of supervisors (Mr. Duerr) said in December 2010 that it could subcontract its police services upon the expiration of its collective bargaining agreement with the Association and (2) Chief Geho and its solicitor thereafter advised that it could not subcontract its police services just because the collective bargaining agreement had expired (N.T. 42-46). The Association also presented testimony by Chief Geho that the Township cut shifts "to turn officers against each other" (N.T. 63).

In defense of the charge, the Township presented testimony by Mr. Winkler essentially denying the statements attributed to him by Officer Arture and Chief Geho (N.T. 213, 230, 232-233, 237, 239).

Given the conflicting testimony, resolution of the charge requires a credibility determination.

In making a credibility determination, a hearing examiner is guided by a number of considerations. As former Hearing Examiner Timothy Tietze explained in Douglass Township, 34 PPER 131 (Proposed Decision and Order 2003):

"Credibility judgments are based upon a witness's appearance, general bearing, conduct on the stand, demeanor, manner of testifying (e.g. candor, frankness, clearness of statements), and certainty of the witness with respect to the facts. Ross Township, 23 PPER ¶ 23175 (Proposed Decision and Order, 1992)(citing In Re Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949)). The demeanor of a witness is the touchstone of credibility. Robinson v. Robinson, 183 Pa. Super. 574, 133 A.2d 259 (1957). Additionally, the Board has stated that an examiner may simply choose to believe one witness over another without further explanation. Upper South Hampton Township, PLRB Case. No. PERA-C-90-60-E (Order Directing Remand to Hearing Examiner for Further Proceedings, 1991)(not reported in PPER)."

34 PPER at 402-403. Credibility judgments are also based on whether or not a witness's testimony makes sense. Brentwood Borough, *supra*. A hearing examiner may accept or reject the testimony of any witness in whole or in part. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 34 PPER 134 (Final Order 2003).

Having observed the demeanor of Officer Arture, Chief Geho and Mr. Winkler and considered whether or not their testimony makes sense, the hearing examiner has credited Mr. Winkler's testimony over Officer Arture's and Chief Geho's. Notably, the record shows that in April 2011 the Township had just reinstated its police department after having disbanded the police department in the face of escalating insurance premiums following a number of law suits involving the police department (findings of fact 3-4). The record also shows that in April 2011 the Township was only scheduling officers to work eleven shifts per week (finding of fact 5). Under the circumstances, it strains credulity to suggest, as Officer Arture testified, that on April 3, 2011, Mr. Winkler would have promised to add a second car to a shift if the Association was decertified. It seems far more likely, as Mr. Winkler testified, that he said there never would be a second car on a shift because of the Township's limited finances (N.T. 290), which is hardly coercive. Moreover, the record shows that Mr. Winkler directed Chief Geho to reduce the number of weekly shifts by two for June 2011 but did not cut any of Chief Geho's as the two shifts to be reduced were usually worked by Officer Arture (finding of fact 9). Under the circumstances, it strains credulity to suggest, as Chief Geho testified, that on May 26, 2011, Mr. Winkler encouraged him to get rid of the Association. It seems far more likely, as Mr. Winkler testified, that he said, "if we don't get any more money next month than we got this month, you're liable to be the only guy we can afford to have working" (N.T. 257). Furthermore, the record shows that in May 2011 the Township was already facing a looming financial deficit for the year because its budget was based on amusement taxes from 20 shows at the First Niagara Pavilion but only 13 shows had been held or scheduled to date (findings of fact 3 and 8). Under the circumstances, it strains credulity to suggest, as Officer Arture testified, that on May

29, 2011, Mr. Winkler promised to restore shifts that had been cut if the Association was decertified.

Chief Geho's testimony that the Township (1) "tried to self-implode us, to get rid of ourselves" and (2) cut shifts "to turn the officers against each other" was speculative. Speculation, of course, is not substantial evidence. Haverford Township, supra. Moreover, reflecting the common lament of part-time police officers, Officer Henry credibly testified that he rather than the Township led the decertification effort because, among other things, the collective bargaining agreement favored full-time police officers (such as Chief Geho) over part-time police officers (such as himself) (N.T. 389-391), while another part-time police officer (Officer Zoller) credibly testified that he supported the decertification effort because "[t]he Union was good for nothing, it did nothing for us. It was good for nothing" (N.T. 345). Although Chief Geho testified that Officer Henry, ostensibly referring to the Township leading the decertification effort, said, "Chief, I f****d up and I got led down - I got led down the wrong road" (N.T. 27-28), Officer Henry credibly denied as much, testifying that he "had said that things were F'ed up, you know, about the hostility between everyone" in the police department after the Association found out that he filed the decertification petition (N.T. 404). Throughout their testimony, Chief Geho and Officer Arture cast Officers Henry and Zoller in a bad light, while throughout their testimony Officers Henry and Zoller cast Chief Geho and Officer Arture in a bad light, giving credence to Officer Henry's testimony about the "hostility between everyone" in the police department after the Association found out that he filed the decertification petition. The charge, therefore, must be dismissed for lack of proof.

IV

In support of the charge that the Township attempted "to interfere with the existence of the Hanover Police Association, collective bargaining unit," the Association presented testimony by Chief Geho that on June 3, 2011, Mr. Winkler, in discussing why shifts were being cut, told him

"the officers are going to lose out, and if it wasn't for the contract, see how the contract can get in the way or see how the contract can affect things, and if those officers were smart, they'd get rid of that union and if you were smart, Chief, you would get rid of that - you would have a separate agreement with the Township"

(N.T. 25). The Association also presented testimony by Chief Geho that police officers are guaranteed 29 shifts per week under the collective bargaining agreement (N.T. 16).

In defense of the charge, the Township presented testimony by Mr. Winkler essentially denying the statements attributed to him by Chief Geho (N.T. 257-258).

Again, given the conflicting testimony, resolution of the charge requires a credibility determination.

Having observed the demeanor of Chief Geho and Mr. Winkler and considered whether or not their testimony makes sense, the hearing examiner has credited Mr. Winkler's testimony over Chief Geho's. Notably, contrary to Chief Geho's testimony, the record does not show that police officers are guaranteed 29 shifts per week under the collective bargaining agreement; rather, it only shows that the chief of police is to work 40 hours per week (finding of fact 2). Under the circumstances, it strains credulity to suggest, as Chief Geho intimated, that Mr. Winkler saw the collective bargaining agreement as an impediment to scheduling shifts. Moreover, inasmuch as the collective bargaining agreement provides that the chief of police is to work 40 hours per week, it also strains credulity to suggest, as Chief Geho testified, that Mr. Winkler encouraged him to bargain directly with the Township to benefit himself. The charge, therefore, must be dismissed for lack of proof.

V

In support of the charge that the Township "harassed" and "continued to create a hostile work environment" for Chief Geho in mid-June 2011, the Association presented testimony by Officer Arture that Officer Zoller told him that Mr. Winkler and Mr. Contumelio had said that "they had stuff on the chief and not to quit, just take a leave of absence" (N.T. 115). Officer Arture's testimony was double hearsay, however, and as such insubstantial evidence to support the charge. See Manor Borough, 27 PPER ¶ 27025 (Final Order 1995), citing Walker v. UCBR, 367 A.2d 266 (Pa. Cmwlth. 1976) (a hearing examiner may not rely on hearsay, even if unobjected to, unless one of the exceptions to the hearsay rule applies). In any event, Officer Zoller credibly denied that he never told Officer Arture any such thing (N.T. 356-357). The charge, therefore, must be dismissed for lack of proof.

VI

In support of the charge that the Township "manipulated the votes in an attempt to decertify the Hanover Police Association," the Association presented testimony by the Township's secretary/treasurer (Ms. Turrentine) (1) that before a special meeting of the board of supervisors began on July 7, 2011, Mr. Winkler said to another member of the board (Mr. Duerr), "This is the financial angle that we need to take," (2) that during the meeting the board accepted Officer Zoller's request for a leave of absence, Mr. Winkler told Mr. Duerr "they had to get this done that evening because they weren't going to get another letter from Zoller" and Mr. Duerr moved to terminate three probationary police officers and (3) that after the meeting Mr. Winkler, upon reading a letter from the Secretary of the Board dismissing a related charge, said, "This is all Arture, this is all Arture," and Mr. Grubbs said, "if this is what this was all about, then I would never have agreed to it" (N.T. 67-71, 76-77). The Association also presented testimony by Ms. Turrentine that members of the board held private conversations during the meeting (N.T. 72-73), that the Township subsequently terminated three probationary police officers (N.T. 81), that when the three probationary police officers patrolled the Township during shows at the First Niagara Pavilion they did so at no cost to the Township (N.T. 82-84) and that after terminating the three probationary police officers the Township authorized the purchase of a dump truck for \$105,000.00 and was over budget for the police department (N.T. 86-87). In addition, the Association presented testimony by Chief Geho that after the Township terminated the three probationary police officers it faced the prospect of breaching a contract to provide police services during shows at the First Niagara Pavilion (N.T. 32-35).

The testimony the Association presented did not establish a prima facie case, however. Mr. Winkler's comment that "[t]his is the financial angle that we need to take" is unexceptional in and of itself. Mr. Winkler's reference to time being of the essence with regard to granting Officer Zoller's requested leave of absence is unexceptional as well since the Association did not show that the Township knew or even had reason to know that Officer Zoller supported decertification. Mr. Winkler's reaction to reading the Secretary's letter is unexceptional in and of itself, too, as it bears no obvious relation to the decertification effort. It may be assumed, as Ms. Turrentine did (N.T. 77, 96), that Mr. Grubbs' comment was in reference to the decertification effort, but an assumption, like speculation, is not substantial evidence. The Association did not establish what the private conversations of the members of the board of supervisors entailed, so the mere fact that they had private conversations hardly supports a finding that the Township was manipulating votes in an attempt to decertify the Association. The Association also did not establish that the three probationary police officers opposed decertification, let alone that the Township had any reason to believe that they did, so the fact that the Township terminated them provides no better support for such a finding even though it did not cost the Township anything when they worked and even though it subsequently authorized the purchase of the dump truck and was over budget for the police department. The mere prospect that the Township faced a breach of its contract to provide police services at the First Niagara Pavilion after it terminated the probationary police officers does not support the charge either.

Even if the Association had presented a prima facie case, the record shows that regardless of the decertification effort (1) Mr. Winkler would have advocated for the immediate acceptance of Officer Zoller's request for a leave of absence and (2) the

Township would have terminated the three probationary police officers. As Mr. Winkler credibly testified, Officer Zoller was a dependable employe who he did not want to resign (N.T. 264). As three members of the board of supervisors (Mr. Contumelio, Ms. Voelker and Mr. Winkler) credibly testified, they terminated the three probationary officers because given the Township's finances they saw no need to present the three probationary police officers with false hope of permanent employment (N.T. 144-146, 155-157, 163, 249, 263, 271).

The Association contends that the Township's finances were not as dire as portrayed by Mr. Contumelio, Ms. Voelker and Mr. Winkler because after the Township terminated the three probationary police officers it not only authorized the purchase of the dump truck and was over budget for the police department but also had the lowest property tax rate in the county (N.T. 152). As Mr. Contumelio and Ms. Voelker credibly testified, however, the dump truck was to be paid for with gaming funds designated for capital expenditures and with monies from the Township's capital reserves (N.T. 137-138, 154-155), so those monies were not available to pay salaries for the police department. Moreover, there was no assurance that the police department would remain over budget for the year. Furthermore, although the Township could have raised its property tax rate to further fund the police department, given that the record does not show that the three probationary police officers opposed decertification, let alone that the Township had any reason to believe that they did, the fact that the Township did not raise its property tax rate to further fund the police department provides scant support for a finding that the Township was attempting to manipulate the decertification vote. The charge, therefore, must be dismissed for lack of proof.

VII

In support of the charge that the Township "intimidated a member of the Hanover Police Association who is a witness to an unfair practice complaint," the Association presented testimony (1) by Officer Arture that on August 6, 2011, Mr. Winkler asked if Officer Arture "said something bad about Hanover Township," asked about Officer Arture's car, said that he was going to call the chief, said that Officer Arture had "dates and times wrong on the activity log about him being on Purdy Road" and asked Officer Arture to "type him a letter stating that he believed that they were wrong" (N.T. 116) and (2) by Chief Geho that on August 19, 2011, the Township unreasonably and for the first time ever disciplined him because "we filed unfair labor practices against the township" (N.T. 35-38, 41-42).

In defense of the charge, the Township presented testimony by Mr. Winkler that he told Office Arture that "every supervisor" wanted to know why Officer Arture's car did not have an inspection sticker in the windshield or a current registration sticker on the license plate, that "I don't want to get you in trouble, but . . . if you don't get that done pretty soon, I'm going to call the chief," that "on April the 3rd we did not sit on Curry Road" and that he wanted Officer Arture to "write a letter to tell them that statement was untrue" (N.T. 280-282). The Township also presented testimony by Mr. Contumelio that the job description for the chief of police includes the responsibility to "[d]irect and coordinate department operation" (N.T. 187) and that, after giving notice to the police department that doors were to be locked and finding doors unlocked, he gave Chief Geho a "write up" for cause because he thought that Chief Geho was responsible for making sure that the police officers were doing what they were supposed to be doing (N.T. 180-181, 185-186, 188).

Under both parties' version of events, no adverse action was ever taken by the Township against Officer Arture, so the charge as to him states at best a cause of action under section 6(1)(a). Adverse action was taken by the Township against Chief Geho, however, so the charge as to him states a cause of action not only under section 6(1)(a) but also under sections 6(1)(c) and (d).

As to Officer Arture, given that there is no dispute that he lacked a current inspection sticker in the windshield of his car and had a license plate with an expired registration sticker and that he had an incorrect entry in the activity log, there is no basis for finding that a reasonable employe would be intimidated under the circumstances.

Although Officer Arture testified that he personally felt "very upset and intimidated" during his encounter with Mr. Winkler (N.T. 116), the Board employs an objective standard in deciding whether or not an employe is intimidated, Manor Township, supra, so Officer Arture's testimony is irrelevant. Thus, the charge as to Officer Arture must be dismissed for lack of proof.

As to Chief Geho, given that there is no dispute that the job description of the chief of police includes the responsibility to "[d]irect and coordinate department operation," Mr. Contumelio's testimony that he wrote up Chief Geho for cause was wholly believable and has been credited by the hearing examiner accordingly. Whether or not Mr. Contumelio unreasonably wrote up Chief Geho without just cause as an arbitrator might define the term is not for the Board to decide. See Bucks County Community College, 36 PPER 84 (Final Order 2005). Thus, assuming without deciding that the Association presented a prima facie case of discrimination as to Chief Geho, the Township rebutted it by showing that it would have taken the same action against him regardless of the decertification effort.

A reasonable employe would not be coerced by an employer action taken for cause, Manor Township, supra, which is the case here. The charge as to Chief Geho, therefore, must be dismissed for lack of proof.

CONCLUSIONS

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

1. The Township is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The Association is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Township has not committed unfair labor practices under sections 6(1)(a), (b), (c) or (d) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charges are dismissed and the complaints rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of December 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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December 23, 2011

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HANOVER TOWNSHIP
Case Nos. PF-C-11-98 and 114-W

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: KENT C MITCHELL
HANOVER TOWNSHIP