

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

POLICE ASSOCIATION OF :
FALLS TOWNSHIP :
 : Case No. PF-C-10-74-E
 v. : Case No. PF-C-10-99-E
 :
FALLS TOWNSHIP :

PROPOSED DECISION AND ORDER

PF-C-10-74-E

On May 10, 2010, the Police Association of Falls Township (PAFT or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Falls Township (Township or Respondent), alleging that the Township violated sections 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with the Policemen and Firemen Collective Bargaining Act (Act 111) when it delayed a promotional process, and ultimately discriminated against PAFT president Sergeant Nelson Whitney in that process by passing over him, in retaliation for Whitney's exercise of protected activities under the PLRA.

On May 21, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and August 5, 2010, in Doylestown was scheduled as the time and place of hearing if necessary.

A hearing was necessary. The charge was consolidated for hearing with Case No. PF-C-10-99-E on March 18, 2011.

PF-C-10-99-E

On June 29, 2010, the PAFT filed another charge of unfair labor practices against the Township, alleging that the Township violated sections 6(1)(a) and (c) of the PLRA and Act 111 when it discriminated against Whitney in the promotion process by again passing over him for promotion to lieutenant.

On July 26, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and November 8, 2010, in Doylestown was scheduled as the time and place of hearing if necessary.

The hearing date was changed to March 18, 2011. The Examiner ordered that the case be consolidated for hearing with Case No PF-C-10-74-E.

A second day of hearing was held on October 7, 2011. The parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Post hearing briefs were submitted on December 6, 2011 and January 10, 2012.

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

FINDINGS OF FACT

1. Falls Township is an employer within the meaning of section 3(c) of the PLRA.
2. The Police Association of Falls Township (PAFT or Association) is a labor organization within the meaning of section 3(f) of the PLRA.

3. The PAFT is the exclusive, recognized bargaining agent for the unit consisting of sworn nonmanagerial police officers employed by Falls Township pursuant to Act 111 and the PLRA.
4. Ranks of sergeant and below are included in the bargaining unit. (N.T. 312, Township Exhibit 3)
5. The Township police department is separated into three divisions, patrol, detectives and operations. (N.T. 10)
6. Historically, each division has been commanded by a lieutenant. (N.T. 10)
7. Historically, when a vacancy would arise in a lieutenant's position, it had been left to the Township as to how it would be filled through promotion. (N.T. 14)
8. This condition prevailed until a then-acting lieutenant, William Wilcox filed both a lawsuit and a grievance over the failure of the Township to adhere to any sort of testing process. (N.T. 14)
9. The Wilcox litigation resulted in a requirement that future promotions, including those for the position of lieutenant, be filled through a competitive testing process. Also required under the resolution was that the testing process result in a list of eligible candidates. (N.T. 15)
10. Wilcox was promoted to Lieutenant following the resolution of the litigation. In 2008, Wilcox was named to the position of Chief of Police. (N.T. 15-17)
11. Wilcox came to believe that even with a testing process, police officers had been treated poorly through the use of bias and favoritism. To address those issues, he announced that it would be his policy as Chief of Police that promotions would be accomplished by following a list in descending order. (N.T. 15-17, 40, 73 and 341)
12. The first twelve promotions made by Wilcox as Chief of Police were made pursuant to that policy. Chief Wilcox followed this policy even over the objections of the Township Manager on an occasion where following the list in descending order would result in two spouses working in the same division. (N.T. 16-17, 39-40, 342-346)
13. The sole departure from this policy occurred when Sgt. Nelson Whitney was at the top of the eligibility list in 2010. (N.T. 39-40; 345-346).
14. Out of the 14 promotions that Chief Wilcox made during his tenure 12 of them were to the first person on the list. The only exceptions were when Sgt. Whitney was on the list and was passed over twice. (N.T. 346)
15. Whitney was passed over for promotion to lieutenant on April 30, 2010 and again on May 19, 2010. (N.T. 76, 116; 322-323; 371)
16. In 2008, a Lieutenant's vacancy was created through the promotion of Chief Wilcox. At the time, there was no standing list for promotion, and in order to comply with the Wilcox litigation, promotion to lieutenant had to be accomplished via a list of eligibles generated in accordance with competitive testing. The Township then announced the promotion would be based on two criteria, evaluations by an outside agency and by observations by the Chief during an "acting lieutenant" period. (N.T. 26-27)
17. In 2008, Lieutenant Ronald McPherson was one of two lieutenants remaining in the department. The other was Lt. Wayne Cloud who was technically employed but

was suffering a long-term illness and was enrolled in the DROP program. (N.T. 17)

18. McPherson selected Safe City Solutions, a law enforcement consulting firm, to conduct the promotional process. Safe City Solutions is co-owned by Chief William Heim from the City of Reading, and Chief Tim Dickinson from Towamencin Township. The test consisted of three parts: an in-basket exercise, problem resolution and an oral board. (N.T. 18, 177-178)
19. Safe City generated a report in which it classified the performance of each test taker as Excellent, Very Good or Good. (N.T. 18, Union Exhibit 1)
20. In addition, the list created by Safe City Solutions ranked the performers highest to lowest. (N.T. 19, Union Exhibit 1)
21. It was intended by the author that the names on the list would appear as they were ranked in the process. (N.T. 190-191)
22. Of the top performers, Whitney was the only candidate who answered questions in a way that the raters believed would not expose the Township to liability or poor performance within the police department. (N.T. 196)
23. Also, Whitney did the best on the "in basket" part of the test, a one hour exercise in which the candidates must respond quickly with a written answer to simulated situations. Reading Chief of Police Heim called this the "most taxing" part of the test. (N.T. 199)
24. Safe City Solutions ranked the candidates in this order:
 - Sergeant Todd Pletnick (Excellent)
 - Sergeant Nelson Whitney (Very Good)
 - Corporal Henry Ward (Very Good)
 - Sergeant Donald Airey (Good)
 - Sergeant James Jones (Good)
 - Sergeant Christopher Clark (Fair)(N.T. 19, Union Exhibit 1)
25. In 2008, upon receipt of the ranked list, the Township decided that Sgt. Pletnick and Sgt. Whitney would both be afforded the opportunity to be evaluated in the role of lieutenant in an acting capacity. (N.T. 27)
26. During the "acting lieutenant" periods, MacPherson performed the role of evaluator. (N.T. 31, 335-336)
27. At the conclusion of the 2008 acting rotations, MacPherson informed Wilcox that "out of the two candidates at the time [Whitney] did a better job as an acting lieutenant." The promotion of Sgt. Pletnick meant that all three lieutenant positions in the department were then filled, at least on paper. (N.T. 31)
28. In 2009, Detective Martial Belinsky served as President of the PAFT. During the early winter of 2009, an issue arose as to the filling of a sergeant's vacancy within the department. (N.T. 35-36)
29. In December 2009, Chief Wilcox advised Belinsky that he would not fill the sergeant's vacancy. PAFT filed a grievance pursuant to the collective bargaining agreement. (N.T. 36, 41-42)
30. The next meeting of the PAFT was scheduled for January 10, 2010. Prior to this meeting, Belinsky indicated he would bring to the floor of the PAFT meeting the

question of taking the sergeant promotion grievance to the Township Manager level. (N.T. 37)

31. When Belinsky advised Chief Wilcox of his plans to do this, Wilcox directed him to communicate to the PAFT that if a grievance proceeded to the Township Manager level, "there would be a halt to the promotion process." (N.T. 37-38)
32. Belinsky was startled that such a threat would be made. However, at the meeting, he communicated what he perceived to be the threat and placed the question as to whether to proceed to the Township Manager level to the PAFT membership. (N.T. 38)
33. Whitney attended the January 10 PAFT meeting. He made a motion to take the Belinsky grievance to the Township Manager level and to investigate what should be done concerning what the body perceived was a threat to PAFT's Union's rights. (N.T. 38)
34. The next morning, January 11, at 9:00 a.m. Chief Wilcox approached Belinsky and told him that Belinsky had either misunderstood or misspoken to the PAFT body the previous evening. (N.T. 46, 50)
35. Chief Wilcox had knowledge of what happened the previous evening. He also had been made aware that the January 10 meeting would be discussing the grievance because two days before the January 10 meeting, Chief Wilcox was meeting with Sgt. Whitney over routine operational matters. During that meeting, Wilcox explained to Whitney that based upon the anticipated departure of Lt. McPherson, it was determined that a second "acting lieutenant" rotation be undertaken. Wilcox explained to Whitney that the purpose, at least for him, was to see if Whitney still wanted the job. (N.T. 59, 94)
36. Suddenly, Chief Wilcox told Whitney, "I know you speak your mind at union meetings." The remark struck Whitney as odd and out of place. (N.T. 59-60)
37. The sergeant's vacancy grievance was taken to the manager level and resolved in PFTA's favor. (N.T. 62)
38. At the January 10, 2010 PAFT meeting, the PAFT members nominated Whitney to be president of the PAFT. (N.T. 61)
39. On February 12, 2010, Whitney approached Chief Wilcox to question him as to when the existing Lieutenant's vacancy caused by the departure of MacPherson and the anticipated vacancy due to the imminent departure of Lt. Cloud, would be filled. (N.T. 62)
40. Chief Wlcox did not offer an answer. (N.T. 63)
41. The meeting then turned to the issue of implementing the resolution of the Sergeant's vacancy, which had been resolved earlier by the Township Manager. A dispute had arisen between the parties as to the duties to be assigned to the sergeant promoted as a result of that grievance. During the discussion, Chief Wilcox became angry and indicated that it was not his fault that he "created a job nobody wanted." Chief Wilcox also became upset and red-faced. When Whitney continued to press him on the issue, Wilcox stated "if this is how it is going to be, it's going to be very long year." (N.T. 66-68)
42. At the February 16, 2019 PAFT meeting, the members elected Whitney to the office of president. (N.T. 61, 69)
43. On March 16, Whitney, as the newly elected PAFT president, had an hour and a half meeting with the chief and Whitney raised, for a second time, the issue of when Lieutenant promotions would take place. (N.T. 63-64, 76-79)

44. Chief Wilcox became upset at Whitney. Wilcox said he intended to fill one of the vacancies off the standing list, and run a new exam for the second vacancy. (N.T. 64)
45. The meeting evolved into an angry exchange between Wilcox and Whitney on the issue, with Wilcox telling Whitney that "Whitney was the main source of anxiety in his life." (N.T. 366)
46. Wilcox ended the meeting by suggesting that it might be time to take Whitney out of the Detective division and put him into a patrol sergeant's slot Whitney responded by advising Wilcox that if no promotions were made within a reasonable period of time, PAFI would file a charge of unfair labor practices. (N.T. 75-79)
47. From that point forward, Wilcox refused to meet with Whitney unless a Township lawyer was present. (N.T. 263-264)
48. During this time, the issue of the duties assigned to the newly created administrative sergeant was left unresolved. (N.T. 76)
49. In March, 2010, the Township decided to fill the two lieutenant vacancies caused by the retirements of MacPherson and Cloud. Despite Chief Wilcox's earlier statement that he would recommend promotions from the results of a new test, the Township decided that it would make promotions based on the 2008 test. Since Pletnick had already been promoted from the 2008 Safe City Solutions list, Chief Wilcox went to the next three candidates, Whitney, Ward and Airey. He informed them that they would serve as an "acting lieutenant" for two months. Wilcox advised each of the three candidates that there were two purposes to serving in the acting lieutenant capacity; 1) to see if each was comfortable in the position and 2) to be evaluated in his performance. (N.T. 206-207, 297-298)
50. The Safe City Solutions' 2008 test results had included a comment from the evaluators that one of Whitney's answers to a question raised concerns about his loyalty and should be explored further with him. Whitney had answered "No" when questioned whether he would follow an order to go into a building alone on an alarm call. Whitney was adamant in his answer because of the risk to his safety. Safe City Solutions devised the question to test an officer's loyalty by seeing if he would follow an "unpopular" order. (N.T. 19, 129, Union Exhibit 1)
51. When Wilcox met with Whitney and asked about his answer, and Whitney responded "It was bullshit." (N.T. 350)
52. In this unfair labor practice hearing, Chief Wilcox admitted on cross-examination that he himself would never issue such an order. (N.T. 351)
53. Airey, Ward and Whitney each understood that his two month period as Acting Lieutenant was a trial period in which his performance was being evaluated. (N.T. 93-95, 162-65, 207)
54. Chief Wilcox observed Sgt. Airey in his position as acting lieutenant, and determined that he did an "outstanding job" and went "above and beyond." (N.T. 317)
55. Chief Wilcox observed Cpl. Ward and concluded that he "did an outstanding job" and "was a buzz saw in there" as acting lieutenant. "Sgt. Ward out-hustled, out-performed and just did a better job in that position. " (N.T. 319-320, 323)
56. Chief Wilcox observed Sgt. Whitney and saw that he "doesn't act, interact, well with uniformed guys." (N.T. 326)

57. Chief Wilcox consulted with Township Manager Peter Gray about Mr. Gray's observations of the candidates while they served in the Acting Lieutenant position. Gray told Chief Wilcox that he found Airey to be "very helpful," "energetic, a very nice gentleman to work with. I thought he did fine." Gray testified that whenever he had issues to handle and he would ask Airey to take care of it and Airey would. (N.T. 247-248)
58. Gray described Ward as "very respectful," and "very helpful." (N.T. 248)
59. Gray would frequently visit the police department offices and he would see Airey and Ward at their desks. (N.T. 248)
60. Gray did not recall having seen Whitney in the Lieutenant's office at that time. (N.T. 249)
61. Gray testified concerning a situation in which Whitney, while serving as acting lieutenant, raised a budget issue with Gray without first going through the chain of command and receiving clearance from the Chief. (N.T. 157-168, 249-250)
62. Chief Wilcox asked Faith Friedhofer, his office manager and administrative assistant, about her observations of the performance of each of the acting lieutenants. She stated that Airey and Ward had "gone above and beyond what was expected of them," and their performance was "exceptional." (N.T. 229)
63. Friedhofer contrasted their effort to learn the different aspects of the position with "several others", who "didn't go that far" and who did what was asked but did not attempt to do more. (N.T. 229-230)
64. Chief Wilcox also conferred with Lt. Pletnick, his one remaining Lieutenant. Pletnick recommended that the Township promote Airey and Ward. (N.T. 144)
65. Pletnick observed that Airey did an "exemplary job" as acting lieutenant. He saw Airey as having "jumped into the acting position with both feet. He kept me well informed...I found that he was an excellent communicator.." (N.T. 137)
66. Lt. Pletnick observed that Ward "also communicated with me constantly...[h]e constantly was coming in and asking how things were, what could he do, what needed to be done. Was very inquisitive. Seemed to be very much involved. The kind of guy that was being evaluated and was putting his best foot forward. ..." (N.T. 138)
67. Lt. Pletnick testified he "didn't see a whole lot of" Sgt. Whitney during his time as acting lieutenant. (N.T. 138)
68. Sgt. Whitney did not inquire about how he could help and did not inquire about what kind of work needed to be done. At one point, Lt. Pletnick wanted to go over paperwork with Sgt. Whitney, he rebuffed Pletnick's offer. (N.T. 139)
69. Lt. Pletnick testified that "there would be times I would go up front to where Sergeant Whitney's office is and try to find him to discuss whatever it may have been, and Sergeant Whitney wouldn't be there." (N.T. 139-140)
70. On April 30, 2010, Whitney filed a formal grievance pursuant to the collective bargaining agreement over unresolved issues regarding the newly created administrative sergeant's position that Belinsky had filled and that had caused Chief Wilcox's negative reaction to Whitney as stated in Finding of Fact 42, **supra**. (N.T. 76)
71. Whitney filed the grievance at the opening of business on April 30, 2010. (N.T. 76)

72. At the close of business on April 30, 2010, the Township announced that Sgt. Airey, who was ranked 4th on the list of eligibles, was being promoted to lieutenant. (N.T. 76)
73. Airey had served as President of PAFT for two terms and as treasurer for ten (10) years. (N.T. 206)
74. This was the first time since Wilcox had become Chief that an officer on a promotional list had been skipped over in favor of a candidate who was lower on the list. (N.T. 40)
75. On May 10, 2010, PAFT filed the charge of unfair labor practices to Case No. PF-C-10-74-E in response to Whitney being passed over.
76. On May 19, 2010, the Township appointed Cpl. Henry Ward to the second lieutenant vacancy. (N.T. 227, 371)
77. Ward had formerly served two terms as president of PAFT. (N.T. 160-161)
78. On June 29, 2010, PAFT filed the second charge of unfair labor practices to Case No. PF-C-10-99-E in response to Whitney being passed over a second time.

DISCUSSION

The PAFT's two charges of unfair labor practices contend that the Township violated the sections 6 (1)(a) and (c) of the PLRA and Act 111 by discriminating against Sergeant Nelson Whitney by passing over him for a promotion to lieutenant on two separate occasions. The two charges were consolidated for hearing.

Section 6(1)(c) Allegation

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.**

To support a charge that the Township's passing over Whitney was discriminatory, the PAFT had to establish that Whitney engaged in activity protected by the PLRA, and that with knowledge of that activity, the employer took adverse action against the employe because of union animus. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). It is the motive for the adverse action that creates the offense under Section 6(1)(c) and (d) of the PLRA. **PLRB v. Ficon**, 434 Pa. 383, 254 A.2d 3 (1969).

The PAFT has proven the first and second parts of the **St. Joseph's Hospital** test for making a prima facie case of anti-union animus. First, as for the "protected activity" part of the test, the PAFT proved that Whitney took visible stances in support of PAFT issues. In January, 2010, Whitney took the lead in moving a grievance over a sergeant vacancy to the Township Manager level of the grievance procedure and to investigate the possible filing of a charge against Chief Wilson. At the same time, he agreed to be nominated to be PAFT president. He then began to vigorously push the chief to fill the lieutenant vacancies. He filed a grievance on April 30, 2010 over unresolved issues related to a newly filled sergeant position.

Second, as for the employer knowledge part of the test, the key employer actor in this case is Chief William Wilcox. It was Chief Wilcox who made his recommendations to

the Township's Board of Supervisors not to appoint Whitney to the lieutenant vacancy. The PAFT proved that Chief Wilcox knew of Whitney's protected activity. The record is replete with references to his knowledge of Whitney's protected activity, both when Whitney was a member and when he was its president. Accordingly, the PAFT has proven employer knowledge of protected activity.

The third part of the **St. Joseph's** test requires proof that the Township was motivated by anti-union animus in passing over Whitney. This issue is deeply disputed. To support its burden of proof, the PAFT introduced an impressive amount of evidence to make a prima facie case that anti-union animus motivated the Township in its two decisions to pass over Whitney for the promotion.

Recognizing that an employer will rarely admit to anti-union animus, the Board will give weight to several factors upon which an inference of unlawful motive may be drawn. Because direct evidence of anti-union animus is rarely presented, or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. **Borough of Geistown v. PLRB**, 679 A.2d 1330 (Pa. Cmwlth. 1996). **Camp Hill Borough v. Pennsylvania Labor Relations Board**, 507 A.2d 1297 (Pa. Cmwlth. 1986); **City of Reading v. Pennsylvania Labor Relations Board**, 568 A. 2d. 715 (Pa. Cmwlth. 1989)

In **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board declared that such factors as the entire background of the case, including 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 action against the adversely affected employee, the effect of the employer's adverse action on other employees and protected activities, and whether the action complained of was "inherently destructive" of important employee rights could be grounds to infer animus. **Centre County**, 9 PPER at 380. Also, the close timing of an employer's adverse action, when combined with other factors, can give rise to the inference of anti-union animus. **PLRB v. Berks County**, 13 PPER ¶ 13277 (Final Order 1982); **Teamsters Local No. 764 v. Montour County**, 35 PPER ¶ 12 (Final Order, 2004); **AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry**, 16 PPER ¶ 16020 (Final Order, 1984). **Camp Hill Borough, supra**.

Only if the union establishes a **prima facie** case that an employer's adverse action against an employee was motivated by the employee's protected activity does the burden shift to the employer. **West Shore Educ. Ass'n v. West Shore Sch. Dist.**, 23 PPER ¶ 23031 (Final Order, 1992). In such instances, the employer may rebut the union's **prima facie** case in one of two ways: (1) an employer may prove that the action complained of was taken for legitimate business reasons and not unlawful motive; or (2) the employer may prove that, despite evidence of unlawful motive, the employer would have taken the same action anyway because the legitimate business reason was the overriding, proximate cause of the adverse employment action and not the unlawful motive. **Upland Borough, supra**. **West Shore Sch. Dist., supra**; **Teamsters Local Union No. 32 v. Washington Township Mun. Auth.**, 20 PPER ¶ 20128 (Final Order, 1989). The latter is otherwise known as a "dual motive" case. **Indiana Area Educ. Ass'n v. Indiana Area Sch. Dist.**, 34 PPER 133 (Final Order, 2003). In either defensive posture, an employer's insubstantial or pretextual explanation for adverse action coupled with close timing of that adverse action to protected activity can establish a **prima facie** case and a sufficient evidentiary basis to find a violation of Section (6)(1)(c). **Colonial Food Service Educ. Personnel Ass'n v. Colonial Sch. Dist.**, 36 PPER 88 (Final Order, 2005); **Lehigh Area School District v. PLRB**, 27 PPER ¶ 27001 (Pa. Cmwlth., 1996).

The PAFT's evidence to infer that anti-union animus motivated the Township falls into three factors.

The first factor is made up of Chief Wilcox's threatening statements to PAFT officers and members who had engaged in protected activity when they advocated that the Township make promotions and fill vacancies.

In January, 2010, when Martial Belinsky informed Chief Wilcox that he was going to bring his own grievance over a sergeant vacancy grievance to the Township Manager level,

Wilcox told him to tell the PAFT that if a grievance was taken to the Manager that "there would be a halt to the promotion process."

The Township disputes that Belinsky made such a statement. It first argues that Belinsky is not to be believed because Whitney testified "inconsistently" that Corporal Belinsky had reported to him that "if the Union pursued a grievance in that matter, that all promotions would be slowed down," rather than "halted." Chief Wilcox denied making either statement. On this point, having viewed the witnesses, Sgt. Belinsky impressed me with his forthright demeanor while testifying, which is an indicia of credibility. Since it was his statement that was being used by the PAFT I will determine that his testimony is the relevant testimony and will not hold against him any alleged "inconsistency" from another witness who was not party to the conversation with Chief Wilcox.

On March 16, 2010, when Whitney brought up the issue of filling lieutenant vacancies, Chief Wilcox threatened Whitney. In a meeting with Whitney following his election to the presidency of the PAFT, Chief Wilcox blew up when Whitney, for a second time, raised the issue of when lieutenant promotions would take place. Wilcox told Whitney that he was the source of anxiety in his life and ended the meeting by telling Whitney that it might be time to take Whitney out of the Detective division and put him into a Patrol Sergeant's slot.

The Township argues that these statements should be given little weight because the Chief has credibly denied making the statements attributed to him. The Township advanced witnesses who said that Chief Wilcox had a tolerance for differing views and had a conciliatory attitude toward the union. Whatever those witnesses may have experienced with Chief Wilcox, I find that Whitney and Belinsky testified credibly in a direct manner that Chief Wilcox threatened the PAFT for their members' exercise of protected activity.

The second factor that the PAFT has developed to infer that anti-union animus was the motivation for not promoting Whitney was the close timing between Whitney's exercise of protected activity and the Township's decisions to pass over him for promotion. The protected activity all occurred in early 2010, in the weeks before the Township's decided who would be promoted to lieutenant. The last instance of Whitney's protected activity was on the morning of April 30, the same day as the Township made its first decision to pass over Whitney when it promoted Sgt. Airey to the lieutenant's position.

The third factor that the PAFT has developed to infer that anti-union animus was the motivation for not promoting Whitney comes under the category of "an insubstantial explanation" for its decisions. This was the first time in Wilcox' tenure as Chief that the leading candidate for a vacancy was passed over. From 2008 to 2010, Chief Wilcox was responsible for recommending 12 promotions. All the successful candidates were the leading candidates. However, when it came time on April 30, 2010 to promote to the lieutenant opening, the chief recommended Airey, who was lower in the rankings than Whitney. The Township again passed over Whitney when it promoted Ward. This departure from the promotion policy occurred when Whitney was in the beginning of his PAFT presidency and during a contentious period between the PAFT and Chief Wilcox. The passing over of Whitney was remarkable in that Whitney was the candidate who had done the best on the most "taxing part" of the test, the inbox test, and who had answered the questions on the inbox test in a way that exposed the township to no liability or the likelihood of poor job performance.

By the evidence of these factors, when combined and considered as a whole, the PAFT has made a prima facie case that the Township's decisions to pass over Whitney for promotion to lieutenant on two separate occasions was motivated by anti-union animus.

Township's Rebuttal Case

The Township offers as rebuttal to the PAFT's prima facie case two over-arching arguments: that it would not have promoted Whitney even if he had not engaged in protected activity and, second, that it had a legitimate business reason for not promoting him.

The Township first argues that it cannot be found to possess anti-union animus because it promoted former PAFT officers who were actively involved in the PAFT. This argument is not persuasive. The one case cited is that of Martial Belinsky, who, as Union president in 2009, sought a promotion into a vacancy. The Chief actually opposed the filling of the vacancy, which led to Belinsky filing a grievance. The dispute was only resolved when the Township Manager Peter Gray became involved.

The Township also promoted two individuals to lieutenant who had served as union president: Sergeant Airey and then Corporal Ward. However, the promotion of these two officers does not answer the PAFT's specific argument in this case, that the Township did not promote Whitney because of *his* protected activity on behalf of the PAFT.

The Township also produced testimony that the Chief was open to opposing viewpoints and "was open to criticism" in the words of Lieutenant Ward. While the Chief may have shown a conciliatory attitude toward some officers, the testimony is clear that he did not treat Belinsky and Whitney in the same manner.

Next the Township argues the PAFT failed to prove that Chief Wilcox made any statements reflecting anti-union animus. The Township argues that the Chief made no threats to halt or delay promotions in response to the Belinsky grievance. This point is resolved in favor of the PAFT, as discussed above. Belinsky testified in a credible manner. Also, Whitney testified in a credible manner on Chief Wilcox' threat to move him to another sergeant division when he repeated his request that the Township fill the lieutenant vacancy.

The Township next argues that it had a valid business reason for its promotion decisions: Whitney simply did not make the grade on a fair and impartial evaluation process. The Township's decisions to promote Airey and Ward over Whitney were the product of a process that all the candidates went through in the same manner, a process that relied on outside evaluators and objective standards. The Township used a two part evaluation for the lieutenant vacancies, the Safe City Solutions assessment and a trial period in an acting lieutenant role. The Township contends that it did nothing that treated Whitney differently than other officers who sought a promotion. Furthermore, Whitney himself argued that the Township should retain the first component of the process, the Safe City Solutions, and not replace it with a new testing when vacancies were created in 2010.

According to the Township, Whitney fell down on the second part of the evaluation, the trial period of "acting lieutenant." In this trial period, the Chief and others observed the candidates in the role. According to Chief Wilcox, Ward and Airey performed well. The Chief's evaluation of the candidates was confirmed by the Lt. Pletnick, Office Manager Faith Friedhofer and Township Manager Peter Gray.

The PAFT argues that contrary to the Township's contention that the process was neutral and objective, it actually contained within it the potential for bias and subjectivity that allowed the Township to discriminate against Whitney. The main observer was Chief Wilcox, who had earlier displayed animus toward Whitney. Wilcox testified that Whitney "doesn't act, interact well with uniformed groups." (Finding of Fact 56). This statement of opinion is inconsistent with the fact that the uniformed ranks elected Whitney to be PAFT president. Also, it should be noted that two of the three confirming witnesses, Lt. Pletnick and Office Manager Friedhofer, were the chief's subordinates and therefore were more likely to give opinions supporting his opinion.

Furthermore, it appears that the Township gave more weight to the second part of the process, since it used this as the reason not to promote Whitney. If only the Safe Cities Solution's test was used as the basis for promotion, Whitney would have been promoted before Airey and Ward. By relying on the second component to the degree it did the Township has essentially ignored the first component. This outcome gives greater weight to the opinion of a supervisor who displayed animus toward Whitney. An objective test would give greater weight to that portion of the test run by a neutral organization. Furthermore, the candidates were not told that the results of the second component would weigh more heavily than the first component. The Township has allowed the promotion

process to revert to a process that Chief Wilcox complained about when he was in the rank and file.

The Township argues that the PAFT should not rely so heavily on how well Whitney did on the Safe City Solutions component. It stresses that the Safe City Solutions was not a "simple numbered ranking list." It is true that the ranking was not numbered. However, the Summary of Candidate Performance directly states, "Candidates are listed in the order of performance, highest to lowest." Whitney, who was ranked "very good," was passed over in favor of Airey, who was ranked "good" and in favor of Ward, who was behind Whitney on the list. Furthermore, Whitney, of all the candidates, had the highest score on the most taxing part of the test and his answers were such that Whitney would be a lieutenant who would not expose the Township to liability or would engage in poor performance. The Township apparently gave no weight to those favorable test results.

The Township next argues that the Safe City Solutions, an independent entity, devised a question that tested loyalty and that Whitney's answer to the question raised a "red flag." Whitney's answered that he would not follow an order to enter a building alone in response to an alarm.

The PAFT argues that the question is a flawed measure of loyalty. Sgt. Whitney's answer was notable for its common sense recognition of his own safety, given that there appeared to be nothing in the question to show that a citizen or a fellow officer was at risk in the building. Also, Chief Wilcox himself admitted in this hearing that he would not issue such an order to an officer. Township's reliance on this part of the Safe City Solutions process does not provide a satisfactory basis for finding that the Township "adequately explained" its reason for not promoting Whitney.

In summary, the Township's rebuttal case is not persuasive. I have considered the Township's argument that it passed over Whitney because of the results of a fair assessment process and find that argument lacks credence. The Township's process gave room for the Chief's subjective impressions to dominate the assessment of the applicants. Accordingly, the Township has not persuaded me that it would have passed over Whitney in the absence of his protected activity or that it had a legitimate business reason for not promoting him. The Township will be found to have committed a violation of section 6(1)(c) of the PLRA.

Section 6(1)(a) Allegation

It is an unfair labor practice under section 6(1)(a) of the PLRA for an employer "[t]o interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act." 43 P.S. 211.6(1)(a). A violation of section 6(1)(a) may be independent or derivative. **Springfield Township**, 28 PPER ¶ 28164 (Final Order 1997). A derivative violation of section 6(1)(a) occurs when an employer commits a violation of section 6(1)(c). **Id.** An employer commits unfair labor practices under sections 6(1)(a) if it discriminates against its employes for having engaged in activity protected by the PLRA. **Borough of Geistown v. PLRB**, 679 A.2d 1330 (Pa. Cmwlth. 1996).

In the present case, since the Township was found to have violated section 6(1)(c) of the PLRA, the Township will also be found to have committed a derivative violation of section 6(1)(a) of the PLRA

In **Commonwealth of Pennsylvania, Pennsylvania State Police**, 36 PPER 121 (Final Order 2005), the Board explained that an independent violation of section 6(1)(a)

"occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable bargaining unit employe, regardless of whether any one particular employe was actually coerced."

Id. at n. 9. See also **Commonwealth of Pennsylvania, Pennsylvania State Police**, Case No. PF-C-09-154-E (Final Order, March 16, 2010)(same).

If, however, the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have on employees in the exercise of a protected activity, then no violation of section 6(1)(a) may be found. **Brookville Area School District**, 38 PPER 44 (Proposed Decision and Order 2007)(construing the Public Employe Relations Act's (PERA's) counterpart to section 6(1)(a)); **Commonwealth of Pennsylvania, Department of Corrections, Graterford State Correctional Institution**, 27 PPER ¶ 27169 (Proposed Decision and Order 1996)(same); **Temple University**, 23 PPER ¶ 23118 (Proposed Decision and Order 1992), **affirmed on another ground**, 25 PPER ¶ 25121 (Final Order 1994)(same); **Philadelphia Community College**, 20 PPER ¶ 20194 (Proposed Decision and Order 1989)(same).

When the facts of the present case are considered as a whole, the manner in which the Township passed over PAFT president Whitney in his application for a promotion to lieutenant would have a tendency to coerce a reasonable employe in the exercise of protected rights. Additionally, the Township has not presented persuasive evidence that it had a legitimate business reason for passing over Whitney for the promotion. The Township will be found to have committed an independent violation of section 6(1)(a) of the PLRA.

CONCLUSIONS

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

1. Falls Township is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The Police Association of Falls Township 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. In Case No. PF-C-10-74-E, the Township has committed unfair labor practices under sections 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111.
5. In Case No. PF-C-10-99-E, the Township has committed unfair labor practices under sections 6(1)(a) and (c) 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 Township shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA as read in pari materia with Act 111.
2. Cease and desist from discriminating against employes in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.
3. Take the following affirmative action:
 - (a) Immediately offer Nelson Whitney the position of Lieutenant;
 - (b) Make Nelson Whitney whole for all wages and benefits he would have earned had he been appointed as Lieutenant on April 30, 2010;

- (c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days;
- (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

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 (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of December, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner