

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

HANOVER POLICE ASSOCIATION :
 :
 v. : Case No. PF-C-11-167-W
 :
 HANOVER TOWNSHIP :

PROPOSED DECISION AND ORDER

On December 12, 2011 Hanover Police Association (Association) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the Hanover Township (Township) violated sections 6(1)(a), (b), (c) and (d) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by retaliating against a Chief James Geho because he gave testimony in a prior unfair labor practice case.

On December 30, 2011, the Secretary of the Board issued a complaint and notice of hearing assigning the case to a conciliator to resolve the matter without a hearing and establishing April 18, 2012, in Pittsburgh as the time and place of hearing, if necessary. The hearing was necessary and was held as scheduled. The parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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

FINDINGS OF FACT

1. Hanover Township is an employer within the meaning of Section 3(c) of the PLRA, with its address located at 11 Municipal Drive, Burgettstown, PA 15021. (N.T. 18-19)
2. Hanover Police Association is a labor organization within the meaning of Section 3(f) of the PLRA, with its address located at c/o Kent Mitchell, 859 Phelps Road, Bulger, PA 15019. (N.T. 18-19)
3. 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)
4. On July 7, 2011, the Association filed a charge of unfair labor practices against the Township at Case No. PF-C-11-98-W alleging that the Township violated sections 6(1)(a), (b) and (c) of the PLRA 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." On October 19, 2011 and November 15, 2011, Board Hearing Examiner Donald Wallace held hearings on this charge. On December 23, 2011, the Examiner issued a Proposed Decision and Order dismissing the charge. (N.T. 18-19)
5. On September 6, 2011, the Association filed a charge of unfair labor practices against the Township at Case No. PF-C-11-114-W alleging that the Township violated sections 6(1)(a), (b), (c) and (d) of the PLRA 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." (N.T. 18-19)
6. On September 30, 2011, the Township laid off Chief James Geho and the other officers of the police department. (N.T. 23, 30)

7. At the time of the 2011 unfair practice hearings, Geho was on layoff status. He remains on layoff status. (N.T. 26, 30-31) (N.T. 23, 30)

8. Chief Geho and Officer Kent Mitchell are the only members of the Association. Mitchell signed the specification of charges for this unfair labor practice. Before the hearing on this unfair labor practice charge, Geho and Mitchell discussed who be the advocate to present evidence to support the charge and they agreed that Geho should be the advocate. (N.T. 6-8, 13-14)

9. On October 12, 2011, the Honorable Janet Moschetta Bell, Judge of the Court of Common Pleas of Washington County, issued an Order of Court granting Geho a Private Detectives License for two (2) years from the date of the order and as long as he paid the filing fees, met the \$10,000 bonding requirement, and surrendered his Municipal Police Officers Education and Training Certification (MPOETC) Card. (N.T. 23, 62, Complainant's Exhibit 1)

10. Geho surrendered his MOEPTC card along with his Township police badge when he was laid off. (N.T. 23)

11. On October 19, 2011, Geho was a witness for the complainant and gave testimony on behalf of the Association for Case No. PF-C-11-98-W and Case No. PF-C-11-114-W. The second day of hearing on those cases was November 15. Geho did not appear at the second day of hearing. (N.T. 19-21, 37-38)

12. On November 18, 2011, Township special labor counsel Dennis M. Makel wrote the following letter to Geho:

It has been brought to the attention of Hanover Township that you have obtained a Private Detective License pursuant to a Court Order dated October 12, 2011. This license is good for a period of two (2) years. As you should be aware, the courts have held that you cannot be a Police Officer and a Private Detective at the same time. I am directing that you appear at Hanover Township Municipal Building on November 22, 2011 at 11:00 a.m. to discuss your position of employment with Hanover Township. Your failure to appear may result in an adverse finding against you. If you have any questions please direct them to my attention.

(N.T. 30, 39, 40-41, 62, Complainant's Exhibit 2)

13. Geho attended the November 22 meeting. The meeting was held in Attorney Makel's office. In addition to Makel, Donald Winkler, Chairman of the Township Board of Supervisors and Albert Contumelio, a member of the Board of supervisors, attended the meeting. (N.T. 31-32)

14. Makel asked him questions about the license. Makel told Geho that the law prevented him from being employed as a police officer if he had an active private detective license. Makel wanted Geho to know whether he would give up his private detective license in the event that the Township recalled Geho from layoff status (N.T. 32, 53)

15. Geho said that he thought the issue had been addressed in the unfair labor practice hearing in 2011. Geho went on to say that he could place the license in escrow and he would return to work if the Township brought the police department out of layoff. (N.T. 32, 53)

16. The November 22 meeting lasted no longer than five minutes. (N.T. 33, 41)

DISCUSSION

The Hanover Township Police Association contends that Hanover Township has committed unfair labor practices under sections 6(1)(a),(b),(c) and (d) of the PLRA as read in pari materia with Act 111 on November 18, 2011 by calling James Geho into a meeting to discuss his non-Township employment "only three days following the final day of testimony" at another unfair labor practice hearing.

The Township raised two preliminary objections. The first objection was to hearing any charge related to Officer Craig Arture because the Township received a Complaint and Notice of Hearing (CNH) from the Board that contained only the specification of charges relating to Geho, specifically a an attachment of "1 page" in the Association's words. The CNH received by the Township is the same as found in the Board's official file. There is nothing in Board's file about Arture. Without anything in the Board's official file about the Arture, there is nothing to decide. The Township's objection to the Arture charges is dismissed because there is nothing in the CNH or the Association's official specification of charges relating to Arture.

The Township's second objection was to Geho's appearance as an advocate for this unfair labor practice hearing. The Township's objection was based on the fact that Officer Kent Mitchell signed the complaint for the Association.

The Township's second objection is dismissed. The complainant is the Hanover Police Association. The Association can choose who it wants to present the case. Mitchell did file the charge on behalf of the Association. But Geho testified credibly that he and Mitchell are the only members of the Association and that they agreed that he could present the case since he was the affected employe.

Turning to the merits of the charge, the Association argues that the November 22 meeting violated four separate sections of the PLRA. The Association argues that the meeting was an attempt to intimidate Geho. The Association argues that it was unnecessary because Township officials knew on October 19, the date of the earlier unfair labor practice hearing, that Geho had a private detective license. The notes of testimony from that earlier hearing show that the Township's attorney moved to dismiss the charges on the grounds that Geho, as the holder of private detective's license, was no longer a police officer and therefore lacked standing to testify as a member of the police department or a member of Association. Examiner Wallace denied the motion to dismiss. The hearing on those charges proceeded. The Examiner dismissed the charges.

The Township's defense to the merits of the charge is that the November 22 meeting was a legitimate exercise of its right to manage and supervise the police department.

The Association, as the complainant, has the burden of proving the unfair labor practice charges by substantial and legally credible evidence. Pennsylvania Labor Relations Board v. Kaufman Department Stores, Inc. 345 PA. 398, 29 A.2d 90 (1942); St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977). If this burden is not met, the charges must be dismissed.

Section 6(1)(a) Allegation

In City of Butler, 41 PPER 116 (Final Order 2010), the Board explained that it

"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 employe in the exercise of protected rights. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police v. City of Scranton, 38 PPER 104 (Final Order, 2007)."

Id. at 391.

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 protected rights, then no violation of section 6(1)(a) may be found. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 44 (Proposed Decision and Order 2010). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 6(1)(a) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order 1995)(construing the analogous provision of the Public Employee Relations Act (PERA)).

The Association contends that the November 18 letter calling Geho to a November 22 meeting would have a tendency to coerce a reasonable employee because of the letter implied a threat of "an adverse finding" if he failed to attend; that three persons from the Township's side were at the meeting and because the Township already had the information about Geho's private detectives license.

The Township's witness was the special labor solicitor Dennis M. Makel. He testified credibly that the purpose of the letter calling for the meeting was to verify that Geho had a private detective license and that Geho knew he could not be a police officer as long as he had such a license. He also testified that the Township wanted to avoid having a grievance filed over the issue and wanted to provide Geho with due process. The Township made no threats that related to Geho's exercise of his protected rights under the PLRA.

That the private detective license issue was raised in a motion to dismiss the prior unfair labor practice charge case does not prevent the Township having the November 22 meeting with Geho. The November 22 meeting made it clear, in a non-litigation setting without anything else on the agenda, that Geho was prohibited from serving as a police officer while holding a private detective license. It is difficult to conclude that Geho, as a reasonable police officer, would be coerced from engaging in future protected activity by the Township's November 18 letter calling for a November 22 meeting or by the meeting itself.

Even if the letter and the meeting could conceivably be found to have a "tendency to coerce", the Township presented substantial evidence that it had a legitimate business interest taking the action it did. The Township's special labor solicitor, as set forth above, explained those business interests in his testimony.

Accordingly, the Section 6(1)(a) charge is dismissed.

Section 6(1)(b) Allegation

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).

On its face the specification of charges does not state a cause of action under section 6(1)(b). There is no allegation that the Township has created a company union. Thus, to the extent that the charge allege violations of section 6(1)(b), it is dismissed as a matter of law.

Section 6(1)(c) Allegation

An employer commits an unfair labor practice under section 6(1)(c) if it discriminates against an employee 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 employee 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 make a prima facie case of discrimination the complainant must prove three elements: that the affected employe engaged in protected activity; that the employer had knowledge of the protected activity and that the employer took the adverse action against the employe because of the protected activity, in other words, that anti-union animus motivated the employer's action. Duryea Borough, supra.

In the present case, the Association proved the first two elements. First, Geho was active in the Association and he was a witness in an earlier unfair labor practice hearing. Second, the employer had knowledge of his activity. As for the third element, employer motivation for the action, the Association offers no direct proof of discriminatory motivation, such as supervisors' statements or documents implicating the employer. The Association instead relies on other factors to support an inference being drawn from the record.

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 employe, the effect of the employer's adverse action on other employes and protected activities, and whether the action complained of was "inherently destructive" of important employe 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.

The Association argues that a finding of animus can be drawn from two sources: from the suspicious timing of the November 18 letter calling for a meeting and from a failure to adequately explain the decision to call Geho to the meeting.

The Association contends that the fact that employer called Geho into the meeting just three days after the Association completed its testimony in the earlier unfair labor practice hearing on November 15 shows suspicious timing. The timing argument is not a persuasive indicator of anti-union animus. From the Township's perspective, it made sense that the Township waited until the Association had completed its earlier unfair labor practice hearing so that it could not be accused of coercing the Association from putting its entire case on to conclusion. Accordingly, I will not infer animus from the close timing of the November 18 letter to the November 15 hearing.

The second factor to infer anti-union animus is the failure of the Township to adequately explain the need for a November 22 meeting, given that the Township's attorney had earlier in the fall, on October 19, put the Association on notice that Geho could not be a police officer while holding a private detective's license. However, as explained in the discussion above of the Section 6(1)(a) allegation, the Township had a legitimate business interest in (1) learning from Geho directly, independently of the unfair labor

practice litigation, whether he had a private detective license and (2) of informing him directly of the legal prohibition of him being a police officer while he held the private detective license. On this record, I cannot find that the Township failed to adequately explain its reason for calling Geho into a meeting on November 22, 2011.

Without any basis to infer anti-union animus, the Association has failed to carry its burden of making a prima facie case the Township committed a violation of Section 6(1)(c) of the PLRA. This charge is dismissed.

Section 6(1)(d) Allegation

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.

Because the analysis mirrors that of the Section 6(1)(c) allegation, for the same reasons as were discussed above in the Section 6(1)(c) allegation, this charge is also dismissed.

CONCLUSIONS

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

1. Hanover Township is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. Hanover Police 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) and (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 complaint is rescinded and the charge dismissed.

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-ninth day of June, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner

