

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

WEST SHORE REGIONAL POLICE :  
ASSOCIATION :  
 :  
v. : Case No. PF-C-15-50-E  
 :  
LEMOYNE BOROUGH AND WORMLEYSBURG :  
BOROUGH, ACTING BY AND THROUGH WEST :  
SHORE REGIONAL POLICE COMMISSION :

**PROPOSED DECISION AND ORDER**

On July 2, 2015, the West Shore Regional Police Association (Association or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Lemoyne Borough and Wormleysburg Borough, both of which are represented by the West Shore Regional Police Commission (Commission, Department or Employer), alleging that the Commission violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On July 22, 2015, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating August 21, 2015, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary. The Employer requested a continuance and, without objection, the request for a continuance was granted. A hearing was held on October 30, 2015, in Harrisburg, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. By letter dated November 2, 2015, the Hearing Examiner incorporated the transcripts and exhibits from related matters PF-C-15-49-E and PF-C-15-54-E into the record of this matter.<sup>1</sup> The Association submitted a post-hearing brief in support of its charge on February 12, 2016. The Commission submitted a post-hearing brief in support of its position on March 28, 2016.

The Hearing Examiner, based on all matters of record, makes the following:

**FINDINGS OF FACT**

1. Lemoyne Borough and Wormleysburg Borough, as represented by the the West Shore Regional Police Commission, are public employers and political subdivisions under Act 111 as read *in pari materia* with the PLRA. (N.T. 6).
2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 6).
3. Corporal Joseph Scalera (Scalera) is a member of the bargaining unit. He sometimes serves on the bargaining committee. (N.T. 8-9).
4. On April 22, 2015, Scalera suffered a work-related injury covered by Workers' Compensation. Scalera was on an active duty call at a church building and lost his footing and fell on a flight of stairs. (N.T. 9-10; Joint Exhibit 1).
5. Related to his work injury, on May 1, 2015, Scalera made a request for Heart and Lung Act Benefits. He gave his application directly to Chief Michael Hope (Hope). Hope forwarded the application to the Department's solicitor. (N.T. 12, 58, 78; Association Exhibit 1).

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<sup>1</sup> The transcript for this matter, PF-C-15-50-E, will be referred to as "N.T." and the exhibits from this matter will be referred to as "Association Exhibit" or "Employer Exhibit". References to the transcripts and exhibits of PF-C-15-49-E and PF-C-15-54-E will include "(49-E)" or "(54-E)" in the reference as appropriate.

6. Due to his work injury, Scalera was out of work from April 25, 2015, until June 23, 2015, when he returned to work. Scalera was in the Department's office to pick up a new Department issued gun on June 10, 2015. (N.T. 13, 25, 44).

7. On May 29, 2015, the Department's panel physician authorized Scalera to return to work on modified duty. The Department did not have a light duty policy at that time. Hope developed a new light duty policy with the Department's solicitor in order to let Scalera, a supervisor, perform administrative tasks. The new light duty policy was first available to Hope on June 23, 2015. (N.T. 45, 73-75; Association Exhibit 8, Employer Exhibit 3,4)

8. Scalera did not hear anything from Hope regarding his application for Heart and Lung Act Benefits and ultimately a grievance was filed on behalf of Scalera on June 12, 2015. (N.T. 14; Association Exhibit 2).

9. Subsequent to the filing of the grievance, on or about June 17, Scalera saw his personal doctor again as his Workers Compensation claim had been denied. Scalera's personal doctor wrote a note at this time stating that Scalera could not go back to work. Scalera emailed this note to Hope on June 22, around 4:00 pm. (N.T. 22-24; Association Exhibits 3, 4).

10. Hope received the email from Scalera and on June 22, 2015, called Scalera. Hope was highly upset in his tone and told Scalera that he needed to show up to work on June 23, 2015. Scalera told Hope that he had a doctor's appointment for physical therapy. Hope said that Scalera had to be at work at 9:00 am on June 23, 2015. (N.T. 24).

11. On June 23, 2015, Scalera arrived at work and immediately had a meeting with Hope. During this meeting, Hope gave Scalera three documents: a Departmental Corrective Notice, a denial of the Heart and Lung Act Benefit grievance, and a written order to return to modified duty. All of these documents were dated June 23, 2015. (N.T. 26-27; Association Exhibits 5, 6, 7).

12. The Departmental Corrective Notice disciplined Scalera for violating Departmental Directive 2011-010 (Securing of Weapons and Ammunition) because "Pistol, Ammunition, Taser, Loaded Magazines and other weapons were found in your unsecured locker". The Corrective Notice was a "written reprimand with possibility of suspension and/or demotion." Scalera had never been warned or disciplined about this type of offense before. (N.T. 31; Association Exhibit 6).

13. Prior to his injury, Scalera worked the following 12 hour schedule: Week 1 Monday 4:00 pm to Midnight, Tuesday Noon to Midnight, Wednesday off, Thursday off, Friday 3:00 pm to 3:00 am, Saturday 3:00 pm to 3:00 am, Sunday 3:00 pm to 3:00 am. Week 2 Monday off, Tuesday off, Wednesday Noon to Midnight, Thursday 3:00 pm to 3:00 am, Friday off, Saturday off, Sunday off. Scalera had every other weekend off. (N.T. 31-32).

14. Hope's June 23, 2015, return to work letter to Scalera assigns the following new schedule: 7:00 pm to 3:00 am Wednesday thru Sunday with Monday and Tuesday off. (Association Exhibit 7).

15. Hope's June 23, 2015, return to work letter assigned to Scalera a large variety of Department clerical tasks that could be done at any time and not specifically the 7:00 pm to 3:00 am shift. Hope scheduled him for that time because that is the busiest time in terms of officers on the street and Scalera can provide supervision in addition to performing administrative tasks. The requirement to keep a log of activities was implemented to allow Hope to gauge the effectiveness of the new policy. The requirement for Scalera to wear a shirt and tie was implemented because Hope believed it would be appropriate for a supervisor. (N.T. 36, 75-76, 82-84; Association Exhibit 7).

16. Hope's June 23, 2015, return to work letter assigned to Scalera required Scalera to wear plain clothes including a shirt and tie. The dress code for

administrative staff in the Department is cargo style pants and a polo shirt with the Department's logo on it. (N.T. 38; Association Exhibit 7).

17. Scalera's Heart and Lung Act Benefits grievance was ultimately settled by the parties on October 20, 2015. (N.T. 49; Employer Exhibit 2).

18. On June 18, 2016, Officer Stoley placed a series of four grievances (the June 18th Grievances) in Hope's inbox. (N.T. (49-E) 6-7; Association Exhibit (49-E) 1).

19. Officer Timothy Rine (Rine) is a patrol officer with the Commission. He is also president of the Association. (N.T. (49-E) 8).

20. Rine authorized the filing of the June 18th Grievances regarding overtime. Rine worked the next day on June 19th from 6:00 PM to 6:00 AM. (N.T. (49-E) 8-9).

21. These were among the first grievances to be filed by the Association in a few years. (N.T. (49-E) 15).

22. On June 19, 2015, Hope and Detective Friel (Friel) went into the Department's locker room and discovered that Rine's locker was not locked. The locker contained Rine's duty belt, ammunition, and an AR-15 ("patrol rifle" or "long gun"). (N.T. (54-E) 97-98).

23. When Hope cleared out Rine's locker, he put Rine's belongings, including Rine's duty belt, ammunition, and AR-15, in his office but not in a secure locker or in a manner to sufficiently secure the material. (N.T. (54-E) 112).

24. Hope was aware of the June 18th Grievances when he found Rine's locker unlocked. (N.T. (49-E) 26).

25. When Rine arrived at the station before his shift at 6:00 PM he found his locker unlocked. Rine's weapons and duty gear were not in his locker. Specifically, Rine's duty belt, ammunition and an AR-15 were missing. (N.T. (49-E) 9; N.T. (54-E) 15).

26. Rine notified Hope, and shortly after this notification, Hope arrived at the Department and summoned Rine to his office. As Rine entered Hope's office, he noticed that his gear was in Hope's office and that Hope already had a Departmental corrective notice printed up. Hope provided Rine the departmental corrective notice for an infraction. Specifically, the Departmental corrective notice was a "written reprimand with possibility of suspension." (N.T. (49-E) 10; N.T. (54-E) 16-17; Association Exhibit (49-E) 2).

27. The Departmental corrective notice had the following description of the infraction: "Patrol Rifle, Ammunition, Taser, Loaded Magazines and other weapons were found in your unsecured locker in Direct Violation of Departmental Directives 2011-010 (Securing of Weapons and Ammunition) and 2013-009 (Long Gun Locker)". (Association Exhibit (49-E) 2).

28. It has been Departmental rule since at least September 7, 2011, that no weapons will be "placed in, left unattended or otherwise left unsafe in unsecured lockers, desks, or other areas inside the Department." Additionally, it has been Departmental rule since at least August 30, 2013, that "all the Department's Long Guns will be stored in the locker that has been placed at the entrance to the locker rooms." (N.T. (54-E) 35-36, Employer Exhibits (54-E) 1, 2).

29. When Hope handed Rine the Departmental corrective notice, Rine asked Hope if the Departmental corrective notice was in retaliation for the June 18th Grievances. During this conversation, Hope said to Rine that he was going to change shifts back to eight hours, make the police officers perform written daily logs, and angrily said "You want a war, you got a fucking war." (N.T. (49-E) 11-12, 14, 31; N.T. (54-E) 19).

30. Hope viewed the June 18th Grievances as a challenge to his authority as, in his opinion, he has the authority to grant overtime. (N.T. (49-E) 31).

31. Hope stated that, after the filing of the June 18th Grievances, he was no longer going to informally negotiate with the Association on work issues but strictly comply with the collective bargaining agreement. (N.T. (49-E) 34).

32. The bargaining unit members are not currently required to complete written logs as their activity is logged on a computer. (N.T. (49-E) 13).

33. The change from written reports to computer reports was made because Hope determined the substantive content of the written reports could be put on the computers and making the bargaining unit members do both was, in effect, doubling the work. (N.T. 80).

34. The bargaining unit members currently work twelve-hour shifts. Previously, the bargaining unit members worked eight-hour shifts and the Association negotiated to change it to twelve hours. (N.T. (49-E) 13).

35. Hope told Rine that he would switch them back to eight-hour shifts and make them do logs because: "I, did, because they were not performing their job duties and they came to me in regard to the 12 hour shifts. And I gave into them and allowed them to switch to 12 hour shifts. I tried to work with them and tried to accommodate them to make working conditions for them better." (N.T. 72).

36. Prior to June 25, 2015, all departmental ammunition not currently assigned to officers was stored in a separate locker room, called "the female locker room". Prior to June 25, 2015, the lockers or cabinets in the female locker room did not have locks. (N.T. (54-E) 79-80).

#### DISCUSSION

The Association alleges the Employer violated Section 6(1)(a) and (c) of the PLRA when, on June 23, 2015, Hope issued discipline to Scalera and modified his work duty. In this discrimination claim under Section 6(1)(a) and (c) of the PLRA, the Association has the burden of proving that an employee engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employee that was motivated by the employee engaging in that known protected activity. **Duryea Borough Police Department v. PLRB**, 862 A.2d 122 (Pa. Cmwlth. 2004); **FOP, Lodge 5 v. City of Philadelphia**, 38 PPER 184 (Final Order, 2007). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). 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).

The Board will weigh several factors upon which an inference of unlawful motive may be drawn. In **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor." **Id.** at 380. These factors include 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. **Centre County**, 9 PPER at 380. Close timing combined with another factor can give rise to the inference of anti-union animus. **PLRB v. Berks County**, 13 PPER ¶ 13277 (Final Order 1982); **City of Philadelphia, supra**; **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). Evidence that the employer has failed to adequately explain its adverse actions or that it has set forth shifting reasons for an adverse action can support an inference of anti-union animus and may be part of the union's prima facie case. **Stairways, supra**; **Teamsters Local 312 v. Upland Borough**, 25 PPER ¶ 25195 (Final Order, 1994); **Montgomery County Geriatric and Rehabilitation Center**, 13 PPER ¶ 13242 (Final

Order, 1982), **aff'd, Montgomery County v. PLRB**, 15 PPER ¶ 15089 (Court of Common Pleas of Montgomery County, 1984).

In this matter, the record is clear and there is no dispute that Scalera engaged in protected activity and that the Employer was aware of this activity. Scalera engaged in protected activity when a grievance was filed on his behalf on June 12, 2015. Additionally, the Association, of which Scalera was an active member, filed four grievances on June 18, 2015.

The dispute thus turns to whether the Employer was motivated by anti-union animus when Hope disciplined and assigned Scalera on June 23<sup>th</sup>. On June 23, 2015, Scalera arrived at work and immediately had a meeting with Hope. During this meeting, Hope gave Scalera three documents: a Departmental Corrective Notice, a denial of the Heart and Lung Act Benefit grievance<sup>2</sup>, and a written order to return to modified duty. All of these documents were dated June 23, 2015. I find that the Association has carried its burden and made its *prima facie* case. The timing of the June 23, 2015, discipline and reassignment of Scalera followed very closely to the June 19, 2015, conversation between the Association President Rine and Hope wherein Hope said that he was going to change shifts back to eight hours, make the police officers complete written daily logs, and angrily said "You want a war, you got a fucking war." These statements are clear expressions of Hope's anti-union animus only four days before Scalera was disciplined and demonstrate Hope's state of mind. He told Rine that he was going to make the bargaining unit members complete daily written logs and switch to eight-hour shifts, two changes which would be regressions in the terms and conditions of employment for the bargaining unit members. Indeed, Hope admitted that, in cooperation with the Association, he had previously stopped the written report requirement because it was unnecessary doubling of work. Further, Hope admitted he approved twelve-hour shifts to make working conditions better, but now threatened to go back to eight-hour shifts because the bargaining unit members were "not performing their job duties." These statements, taken together, show that Hope's state of mind at the relevant time was that he was at odds with the Association and that he was taking an antagonistic and aggressive stance towards the Association.

Animus is also seen in the June 22, 2015, phone call between Hope and Scalera, which was three days after Hope's conversation with Rine. During this phone call, Hope was highly upset in his tone and told Scalera that he needed to show up to work on June 23, 2015, notwithstanding Scalera's justifiable excuse that he had a doctor's appointment that day. I find that Hope's attitude during this phone call also shows his anti-union animus during the relevant time period.

The larger context of the Department also supports an inference of animus in this matter. The Association filed four grievances on June 18, 2015, regarding overtime. These were the first grievances that had been filed in some time and Hope viewed these grievances as a challenge to his authority. Hope admitted that the filing of these grievances caused him to change the way he was dealing with the Association. Coupled with the statements made to Rine, discussed above, Hope's mindset on June 23, 2015, was that he was antagonistic and adverse to the Association. Scalera was an active bargaining unit member and Hope's actions against him were partially born out of this mindset.

Notwithstanding the finding of anti-union animus in this matter, in discrimination cases, the employer has a defense even if the union proves discriminatory motive. Once the burden of a *prima facie* case has been met, the employer may rebut a *prima facie* case of discrimination by proffering a credible, nondiscriminatory reason for its actions. **Deputy Sheriffs Association of Chester County v. Chester County**, 46 PPER 22 (Final Order 2014); **see, Wright Line, Inc.**, 251 NLRB 1083, 105 LRRM 1169 (1980), **enforced**, 662 F.2d 899 (1st Cir. 1981), **cert. denied**, 455 U.S. 989, 102 S.Ct. 1612 (1982). Once the employer establishes a nondiscriminatory reason for its actions, the burden shifts back

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<sup>2</sup> Scalera's Heart and Lung Act Benefits were later awarded by joint agreement of the Parties. Therefore, this issue will not be addressed.

to the complainant to prove that the employer's asserted reasons were a mere pretext for the discipline imposed. **Chester County, supra.**

The Employer has provided credible, nondiscriminatory justifications for both the discipline issued to Scalera and Scalera's reassignment to light duty. For the discipline issued to Scalera, it is not contested that Hope found Scalera's locker unsecured with weapons and ammunition in it. Further, it is not contested that the Department has a regulation from 2011 that prohibited weapons and ammunition from being left in unsecured lockers. For the reassignment of Scalera's duties, it is not contested that Scalera was limited in function due to his work injury and that the Department needed to develop a light duty policy. The Department developed the new policy in cooperation with its counsel and implemented it when it became available to Hope. The Department developed the light duty policy to get Scalera, a valuable supervisor, back to work doing administrative tasks until he was fit to perform his regular duties. Additionally, the shift assigned to Scalera was made during the evening and late night because that is when his ability as a supervisor in the Department's office would be most valuable. The requirement to log activities was so that Hope could gauge whether the new policy was effective and the requirement to wear a shirt and tie is because Hope wanted employees on the light duty policy to portray a professional appearance.

Addressing the discipline issued to Scalera on June 23, 2015, I find that the Association has shown that the Employer's justifications were pretext. Hope's manifest statements of anti-union animus made to Rine on June 19, 2015, most strongly support the finding of pretext. I find that, absent Hope's anti-union animus in this matter, he would not have disciplined Scalera on June 23, 2015. Further, Hope's non-discriminatory justifications for disciplining Scalera are undercut by the fact that it had been Department practice to keep ammunition in unsecured lockers at the Department. In addition to Department-wide practice of not securing ammunition, Hope also did not secure Rine's weapons, ammunition and gear in his own office after he confiscated these items from Rine's locker

Focusing on the assignment issued to Scalera on June 23, 2015, I find that the Association has not shown that the Employer's justifications were pretext. The matter of the work reassignment is substantially different from the discipline discussed above because Hope began the process which lead to Scalera's work assignment in May, 2015, well before any grievances were filed by the Association. It was not until June 23, 2015, that the new policy, which Hope developed in concert with the Employer's counsel, was available. The timing of the work assignment was coincidental to the protected activities performed in June, 2015. Additionally, the terms of Scalera's light duty assignment are not punishment or unreasonable and were credibly explained by Hope to be supported by credible, non-discriminatory justifications.

Thus, with regard to the discipline issued to Scalera on June 23, 2015, I am compelled to conclude that the County has violated Section 6(1)(a) and (c) of PLRA.

#### **CONCLUSIONS**

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

1. Lemoyne Borough and Wormleysburg Borough, as represented by the the West Shore Regional Police Commission, are public employers and political subdivisions under Act 111 as read *in pari materia* with the PLRA.
2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. Lemoyne Borough and Wormleysburg Borough have committed unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA.

**ORDER**

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Hearing Examiner

**HEREBY ORDERS AND DIRECTS**

that the Lemoyne Borough and Wormleysburg Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.

2. Cease and desist from discriminating 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) Revoke and rescind the Departmental Corrective Notice issued to Corporal Joseph Scalera, dated June 23, 2015;

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(c) 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

(d) Serve a copy of the attached Affidavit of Compliance upon the Association.

**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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 26th day of April, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

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Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

WEST SHORE REGIONAL POLICE :  
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AFFIDAVIT OF COMPLIANCE

Lemoyme Borough and Wormleysburg Borough hereby certify that they have ceased and desisted from their violations of Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act; that they have complied with the Proposed Decision and Order as directed therein; they have revoked and rescinded the Departmental Corrective Notice issued to Corporal Joseph Scalera, dated June 23, 2015; that they have posted a copy of the Proposed Decision and Order as directed therein; and that they have served an executed copy of this affidavit on the Association at its principal place of business.

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Signature/Date

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Title

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

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Signature of Notary Public