

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NAZARETH BOROUGH POLICE ASSOCIATION :
 :
 v. : Case Nos. PF-C-13-123-E
 : PF-C-14-36-E
 NAZARETH BOROUGH :

PROPOSED DECISION AND ORDER

On December 27, 2013, the Nazareth Borough Police Association (Association or Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA), as read **in pari materia** with Act 111, at Case No. PF-C-13-123-E, and therein alleged that Nazareth Borough (Borough) violated Section 6(1)(a) and (c) of the PLRA by discriminating against and intimidating Officer Stephen Schlegel for his protected Union activities in the manner by which it conducted an interview of Officer Schlegel on December 5, 2013, and both scheduled and cancelled another administrative interview for January 6, 2014, the notice of which threatened discipline. On April 25, 2014, the Union filed another unfair labor practice charge, at Case No. PF-C-14-36-E, alleging that the Borough violated Section 6(1)(a), (c) and (d) of the PLRA. The second charge sets forth the same allegations proffered in Case No. 13-123, and additionally alleges that the Borough discriminated against and coerced Officer Schlegel by directing Officer Schlegel to submit to a psychological evaluation to determine whether he was fit for duty and thereafter to submit to ten counseling sessions.

On January 23, 2014, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on Tuesday, May 20, 2014, in Harrisburg, Pennsylvania, before Hearing Examiner, Thomas P. Leonard, Esquire. On May 8, 2014, the Secretary of the Board issued a complaint and notice of hearing for Case No. PF-C-14-36-E, scheduling a hearing for September 17, 2014, in Harrisburg, before Mr. Leonard. On May 19, 2014, Mr. Leonard continued the May 20, 2014 hearing scheduled in Case No. 13-123 and consolidated it for hearing with Case No. 14-36, on September 17, 2014.

By letter dated September 4, 2014, the Borough requested the hearing for the consolidated matters be continued due to the unavailability of the Mayor. By letter dated December 16, 2014, I informed the parties that both Case Nos. had been reassigned to me and rescheduled the consolidated hearing for July 13, 2015. A hearing occurred on July 13, 2015, but a second day of hearing was necessary. On July 14, 2015, I scheduled the second day of hearing for December 11, 2015. Due to unforeseen conflicts in my schedule, I continued the December 11, 2015 hearing and rescheduled the hearing for January 22, 2016. I continued the January 22, 2016 hearing due to a family emergency. On January 28, 2016, I rescheduled the hearing for March 3, 2016, in Harrisburg. On March 2, 2016, I continued the March 3, 2016 hearing at the request of the Borough and without objection from the Union and rescheduled the hearing for June 13, 2016. At the hearings on July 13, 2015 and June 13, 2016, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On September 1, 2016, the Union filed its post-hearing brief. On November 7, 2016, the Borough filed its post-hearing brief.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision pursuant to Act 111 and the PLRA. (N.T. 4)
2. The Association is a labor organization pursuant to Act 111 and the PLRA. (N.T. 4)

3. Thomas Trachta has been the Borough's Chief of Police since October 2009. (N.T. 115)

4. Stephen Edward Schleig has been a full-time police officer for the Borough since March 3, 2009, and he has been the Union Vice-President since 2011. From 2009 to 2010, Officer Schleig was the Union President. In 2012, he negotiated a contract extension. Throughout 2012 and 2013, Schleig participated in the processing of numerous grievances regarding overtime and shift differentials. (N.T. 7-9, 57; Association Exhibit 1)

5. Frederick Lahovsky was a Borough Officer who was discharged in September 2012 because of an incident that involved a domestic dispute between a couple named Gruver. Officer Schleig was Lahovsky's **Laudermill**¹ representative at Council chambers. Schleig processed Lahovsky's grievance and issued the arbitration subpoenas for arbitration witnesses. He collected information for processing and arbitrating the Lahovsky grievance. In 2013 and 2014, Officer Schleig attended multiple Lahovsky arbitration hearings. Lahovsky's termination was reduced to a 30-day suspension by Arbitrator Walt DeTreu. (N.T. 10-11, 25-26, 57; Association Exhibit 2)

6. Due to time constraints at arbitration hearings and weather delays, Schleig was subpoenaed to appear four different times for the Lahovsky arbitration from October 22, 2013 to January 13, 2014. A January 3, 2014 hearing was cancelled due to weather. (N.T. 11-12; Association Exhibit 2)

7. Schlieg's January 13, 2014 arbitration testimony was favorable to Fred Lahovsky who was subsequently reinstated by the arbitrator. (N.T. 12)

8. On Thanksgiving Day 2013, Officer Schleig and Officer Troxell engaged in a hostile exchange. Troxell allegedly felt threatened by information being collected by Union supporting officers for presentation at the Lahovsky arbitration. Troxell's statements during this exchange allegedly made Schleig feel threatened for himself and his family. As a result of this exchange, it became Schleig's understanding that Chief Trachta and Officer Troxell had conspired to target Schleig for testifying on behalf of Lahovsky. Schleig did not at any time report to the Chief that Troxell allegedly threatened his family. (N.T. 14-21, 34, 137; Association Exhibit 4)²

9. Troxell is trying to become a full-time officer and testified on behalf of the Borough at the Lahovsky arbitration. (N.T. 20)

10. On Sunday, December 1, 2013, Schleig was involved in a police incident regarding Lamont Scott. Paula Galante owns and operates a wedding boutique across the street from the police station. She owned an iPad Mini which she used for her business appointments and transactions; it was also her cash register. On December 1, 2013, upon discovering that her iPad was missing (sometime between November 30, 2013 and December 1, 2013), she contacted officer Schleig. She activated the GPS locator on the iPad and determined that it was located at a McDonald's in Monroe County. Schleig is not permitted to go into Monroe County, as an officer on duty. Schleig contacted Officer Richard Gehring at the East Stroudsburg Regional Police Department. Officer Gehring accompanied Ms. Galante to the McDonald's in Monroe County and found Lamont Scott with the iPad, which Ms. Galante identified as hers. (N.T. 58-60, 63, 70, 117-120; Borough Exhibit 1)

¹ **Cleveland Bd. of Educ. v. Loudermill**, 470 U.S. 532 (1985). Loudermill requires that a public employer give due process to a public employe with a property interest in his/her continued employment, provided by civil service, before terminating the employe. The process that is due a public employe includes a pre-termination hearing that provides oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his/her denials, defenses and justifications. A pre-hearing **Loudermill** letter fulfills the requirement of written notice, and should include an explanation of the employer's evidence. To fulfill the remaining due process requirements, a **Loudermill** letter must also inform the employe of his opportunity for a **Loudermill** hearing.

² Officer Schleig testified to the statements allegedly made by Officer Troxell during their Thanksgiving Day exchange. Also, Association Exhibit 4 contains a summary of the statements allegedly made by Officer Troxell. I have excluded both the document and the testimony as inadmissible hearsay. However, I have narrowly permitted Schleig's testimony regarding effect the alleged statements had on Officer Schleig.

11. East Stroudsburg Regional Police Officer Gehring escorted Scott to a Rita's Italian Ice in Wind Gap in Lehigh County where he handed Scott over to Officer Schleig. Schleig advised Scott that he was not under arrest and Scott voluntarily went with Schleig back to the Borough. Based on statements made by Scott during the ride back to the Borough, Schleig arrested Mr. Scott for theft and receiving stolen property, when they arrived. (N.T. 21, 60-61; Borough Exhibit 1)

12. On Monday or Tuesday, December 4th or 5th, 2013, Paula Galante called the Chief. She sounded upset and the Chief invited her to come into the station. (N.T. 63, 116-117)

13. Ms. Galante was dating Nazareth Police Officer Schwab at the time that her iPad was stolen. Officer Schwab took Ms. Galante's written statement on December 3, 2013, while Lamont Scott was in a holding cell. Schleig charged Mr. Scott with theft and not felony burglary. Ms. Galante was upset with Schleig because he did not charge Mr. Scott with felony burglary and Mr. Scott was released on bail. Mr. Scott lives in the same building as the boutique, and Ms. Galante employs a female worker for whom she was concerned. (N.T. 62, 68, 117-121)

14. The Chief believed that Schleig should have charged felony burglary because Galante left her iPad inside her boutique. (N.T. 120-121)

15. The Chief contacted Assistant District Attorney James Augustine who counseled the Chief to withdraw all charges and re-file the charges to include burglary. Although Schleig's affidavit of probable cause provided that Scott gave him a written confession, there was no written confession with the report.³ (N.T. 66, 72-73, 120-121)

16. Schleig's sworn affidavit of probable cause was presented to a judge claiming that there was a written confession when one did not exist. Chief Trachta directed Officer Troxell to withdraw the charges from the courthouse. Later, Officer Troxell re-arrested Scott and re-arraigned him before the judge and charged him with burglary. (N.T. 72-73, 121-122; Borough Exhibit 1)

17. Chief Trachta also spoke to the Magisterial District Judge and Officer Gehring from Monroe County. He then scheduled an interview with Schleig to seek clarification about the missing written confession and to direct Schleig to stay away from Paula Galante, who was upset with him. (N.T. 124)

18. The Chief scheduled Schleig for an interview on Thursday, December 5, 2013. Union President Lahovsky wrote the Chief stating that, if discipline could result, Schleig was entitled to a Union representative. (N.T. 21, 71-73, 124-125)

19. The purpose of the December 5, 2013 interview with Schleig was to determine whether there was a written confession from Scott and to inform Schleig that Troxell was handling the Scott matter. (N.T. 125, 152)

20. The Chief interviewed Schleig in the Police Station interview room which has 24-hour video surveillance. The Chief also placed a hand-held MP-3 player in the middle of the desk where everyone could see it. The Chief records a lot of employee interviews. Attending the interview of Schleig were Mayor Carl Strye, Chief Trachta, Schleig and Union representative Officer Alan Koch. It is not uncommon for Chief Trachta to meet with Schleig to review procedure and reports while recording the meeting. (N.T. 22-23, 56, 125-126, 163)

21. The Chief believed that Schleig handled Scott improperly. The Chief used the interview to inform Schleig that he should have had the East Stroudsburg Police in Monroe County arrest Scott; he should have obtained a warrant for burglary, then picked up Scott at the Monroe County Prison. The Chief wanted to teach Schleig that he should not have

³ I do not credit Officer Schleig's testimony that he explained to the Magisterial District Judge that the attestation contained in the affidavit of probable cause (that he obtained a written confession from Lamont Scott) was a typographical error. Significantly, Schleig did not attempt to correct the error until he returned to work on Wednesday, December 4, 2014. Seemingly, Schleig only had to cross out the word "written" before presenting the affidavit to the Magistrate. (Borough Exhibit 1).

cuffed Scott, placed him in the back of the police car, released him, then re-arrested him, given him Miranda, all without an arrest warrant. (N.T. 126)

22. During the interview, the Chief accused Schleig of lying on his affidavit of probable cause, by attesting that he had obtained a written confession when he had not. The Chief also mentioned the "Gruver" incident. The purpose of the interview was for mentoring and training. The Chief did not mention Lahovsky. He told Schleig that he basically "body-snatched" or "kidnapped" Scott. The Chief wanted Schleig to understand that he needed the paperwork. The purpose of mentioning Gruver was for teaching Schleig proper procedure. Gruver was an incident where Nazareth Police had to retrieve Gruver from another county. The Chief said "remember in Gruver, me and Alan Koch had the paperwork." Officer Koch, who was Schleig's Union representative during this clarification interview, worked with the Chief to obtain an arrest warrant and a waiver of Gruver's rights in Lehigh County, which was proper procedure. (N.T. 25-26, 30, 73-77, 127-129, 144, 152)

23. By raising the "Gruver" incident, the Chief was trying to teach procedure to Schleig about arresting perpetrators in other counties; he was not threatening him with discharge or discipline by referring to the "Gruver" case, the occurrence of which led to Lahovsky's termination. Also, I credit the Mayor's testimony that the December 5, 2013 interview was a question and answer session that did not involve any "finger pointing" and that he was aware at the time of that interview of the complaints filed against the Chief and Troxell by Schleig. (N.T. 128, 164-165)

24. During the December 5, 2013 interview of Schleig, Union representative Koch requested that Schleig be given his **Garrity**⁴ warnings. The Chief already knew from Assistant District Attorney Augustine that the District Attorney's Office would not file charges against Schleig for his alleged perjury on his affidavit of probable cause for stating therein that there was a written confession. Consequently, the Chief refused **Garrity** and told Koch and Schleig that the interview was not a **Garrity** situation and that he was seeking clarification. Schleig did explain to the Chief that he charged Scott with theft because he did not believe that he could prove burglary. (N.T. 24-25, 129, 139, 153-154)

25. At the end of the interview, Chief Trachta advised Schleig that Lamont Scott could file a civil complaint against him for the manner in which he was detained, and possible criminal charges could be filed against Schleig for the perjury. (N.T. 30-31)

26. On December 13, 2013, Chief Trachta scheduled an administrative interview for January 6, 2014. The Chief scheduled the administrative interview for that date due to the holidays and work schedules. It was the first date when all individuals involved could be present and it gave Schleig time to prepare. It is common knowledge that an administrative interview may result in discipline. (N.T. 33, 131-132; Association Exhibit 3)

27. Chief Trachta was aware of Officer Schleig's Union activities. He knew that Schleig was subpoenaed to testify at the Lahovsky arbitration. The Chief credibly testified, and I find, that he did not schedule the January 6, 2014 interview with Schleig to be close in time to a scheduled January 3, 2014 arbitration hearing in the Lahovsky matter. The Chief knew generally that an arbitration hearing was scheduled, but he did not know the exact date of the arbitration hearing when he scheduled the administrative interview for January 6, 2014. (N.T. 132)

28. The video recording of the December 5, 2013 interview revealed that, after Chief Trachta left the interview, Schleig was emotionally upset. Also, when the Mayor returned to the interview room after the interview to say good-bye to Officer Koch, he observed that Officer Schleig was bawling. In January 2014, Schleig called the Chief on a

⁴ **Garrity v. New Jersey**, 385 U.S. 493 (1967). **Garrity** rights are meant to inform a police officer that they must answer any and all questions during an employer's investigatory interview of him/her, but that anything that the officer says during the investigatory interview for the purpose of determining discipline cannot be used for any other purpose including criminal charges against the officer.

Sunday to report a listening/ monitoring device in the squad room of the police station. An examination revealed that the alleged device was a BIC cigarette lighter, with a flashlight on one end and a butane lighter on the other. (N.T. 133-135)

29. After the December 3, 2013 interview, Mayor Strye contracted with private investigator Dan Monek to independently investigate Schleig's complaints against the Chief and Troxell to effectuate the Union attorney's request to remove the Chief from the investigation. The investigation grew into an examination of the Lamont Scott arrest and Schleig's alleged perjury in his affidavit of probable cause. As circumstances changed, Mr. Monek's investigatory assignment grew and included an investigation of the BIC lighter incident. (N.T. 165-166)

30. Sometime after the December 5, 2013 interview and the scheduled January 6, 2014 administrative interview, Chief Trachta learned that Schleig filed a complaint against Officer Troxell and himself. The Chief learned that the Borough hired Mr. Monek to investigate the Lamont Scott matter and the investigation had been taken from the Chief. (N.T. 148-149, 166)

31. Also in early 2014, Parking Officer Tarnok reported, in writing, that Schleig was acting in a manner that made Tarnok feel uncomfortable. At some point, Borough Police Officer Timar also reported that he was concerned for Schleig's emotional well-being. As a result of reports made by Tarnok and Officer Timar, the Chief became concerned for Schleig's emotional stability at work. Included in the reports were allegations that Schleig was either crying or almost crying at work.

32. Mayor Strye told the Chief to cancel the January 6, 2014 interview on Sunday, January 5, 2014 because Dan Monek had been hired to conduct an independent investigation. The Chief did not notify Schleig of the cancellation until the morning of January 6, 2014. (N.T. 47-48, 132, 148-151, 177)

33. Schleig has not been disciplined for falsifying the affidavit of probable cause in the Scott matter (by attesting that he had obtained a written confession when he had not). He has not been disciplined for anything. Also, neither Lamont Scott nor Paula Galante has filed any civil complaints against Officer Schleig. (N.T. 54, 152)

34. Chief Trachta has not been involved in any collective bargaining negotiations or contract arbitrations. He was involved in the Lahovsky arbitration on behalf of the Borough, which proceeded from late 2013 through early 2014, when the Lamont Scott matter occurred and the Chief investigated and interviewed Schleig. (N.T. 142-143)

35. On January 29, 2014, Schleig attended an Act 111 interest arbitration hearing with Fred Lahovsky on behalf of the Union. (N.T. 36-40; Association Exhibit 5)

36. The Mayor reviewed reports from Officers Timar and Tarnok and consulted with the Borough's attorney. Together, the Mayor and the Borough's attorney decided to send Schleig to a psychological evaluation to prevent a "meltdown" under a stressful police situation. (N.T. 167-168)

37. After the January 29, 2014 interest arbitration hearing, Schleig received a letter from Mayor Strye, dated January 28, 2014, directing him to obtain a psychological evaluation. (N.T. 40-41; Association Exhibit 6)

38. The Mayor's January 28, 2014 letter states, in relevant part, as follows:

On Monday, February 3, 2014 you are directed to report to the office of Dr. Robert M. Gordon at 11:00 a.m. for a psychological evaluation. Since this appointment is scheduled during your regular shift, you may remain in uniform and utilize a NBPd vehicle to attend. Dr. Gordon's office is located at

(Association Exhibit 6)

39. The appointment with Dr. Gordon was rescheduled for February 7, 2014 at noon. (N.T. 43; Association Exhibit 8)

40. Schleig participated in the evaluation, and Dr. Gordon issued a report. Dr. Gordon reported that Schleig passed all three evaluation exams given and that he was fit for duty, but he recommended ten counseling sessions. (N.T. 43-44, 168; Association Exhibit 9)

41. As a result of Dr. Gordon's recommendations for ten counseling sessions, Mayor Strye arranged for Schleig to receive that counseling with Michael Otto. (N.T. 45; Association Exhibit 10)

42. On February 17, 2014, Mayor Strye sent a letter to Schleig concerning Schleig's February 12, 2014 interview with independent investigator Dan Monek.⁵ (N.T. 47-48; Association Exhibit 11)

43. The Mayor's February 17, 2014 letter provides, in relevant part, as follows:

As you know, the Borough of Nazareth hired Dan Monek to investigate, on the Borough's behalf, certain allegations that have been made concerning interactions between Officer Troxell, Chief Trachta and you, as well as your conduct in connection with the Lamont Scott arrest. The Borough asked Mr. Monek to investigate these matters, as opposed to a Borough employe, at the request of your attorney, Todd Eagen.

It has come to my attention that, during your interview with Mr. Monek on February 12, 2014, you refused to answer questions about the Lamont Scott arrest. You also refused to answer questions about a car stop on Main Street on February 4, 2014.

As Mayor of the Borough, I am hereby ordering you to: (1) make yourself available within seven (7) calendar days of the date hereof for a second interview with Mr. Monek during which time he will ask you questions about the Lamont Scott arrest and the February 4, 2014 car stop as well as the other topics you discussed during the first interview); and (2) to answer all of Mr. Monek's questions as if I were the one directly asking them.

Please be advised that, if you refuse to comply with these **direct orders**, your refusal will be considered an act of insubordination and you **will be** subject to discipline.

(Association Exhibit 11)

44. In response to the Mayor's February 17, 2014 letter, the Union's attorney sent a letter to the Mayor, dated February 20, 2014, which states that Schleig will comply with the Mayor's directive but that he did not at any time specifically request Dan Monek to investigate Schleig, rather he requested that someone other than the Chief investigate Schleig's complaint because the Chief was a subject of the complaint. (N.T. 53; Association Exhibit 12)

45. On March 14, 2014, Mayor Strye sent a letter to Schleig stating, in relevant part, as follows:

As you are aware, Dr. Gordon recommended 10 private counseling sessions as a follow up to your interview with him. Borough Council has authorized the employment of Counselor Michael Otto to conduct the 10 sessions. You are instructed to contact Mr. Otto by phone to schedule your sessions. His contact number is Your sessions should be scheduled during your regular shift hours.

⁵ Officer Schleig testified to statements and inquiries made by Mr. Monek during the interview, but I have excluded any such statements and inquiries as hearsay.

As a prerequisite for attending the sessions, you must execute the enclosed Consent for Release form. Please review the Consent, execute it, and deliver the same to Mr. Otto at your first session. The counseling process is provided by the Borough for your benefit and your sessions are intended to be private.

(Association Exhibit 10)

46. Schleig attended sessions during his regular shift in uniform using a Borough vehicle until Fred Lahovsky was reinstated to day shift, which bumped Schleig to evening shift, when Mr. Otto did not have hours. The Borough offered to pay Schleig overtime on his day off to finish his counseling with Mr. Otto, but Schleig refused. The Mayor did not force Schleig to attend, and he still is invited to complete the remaining four counseling sessions with Mr. Otto. (N.T. 168-170, 190-193)

DISCUSSION⁶

The Union's brief chronicles Schleig's late 2013 and early 2014 experiences with the Borough and his interactions with the Chief, the Mayor and Officer Troxell. In that context, the Union asserts that the cumulative evidence of record supports the conclusion that the Borough intimidated and retaliated against Schleig for his Union activities, his support for Fred Lahovsky and Lahovsky's discharge grievance as well as the filing of the first charge. (Post-hearing Brief at 6-12). The Union argues that the Borough surreptitiously initiated its retaliatory campaign against Schleig with the menacing, harassing statements made by Officer Troxell. Officer Troxell allegedly threatened Schleig and his family and allegedly implicated the Chief as participating in an alleged conspiracy with Troxell to target officers who reveal information about fellow officers in the Lahovsky grievance procedure. Troxell also allegedly claimed that the Chief is very good at "covering his tracks." (Union's Post-hearing Brief at 6).

The Union further contends that the Borough's campaign against Schleig continued shortly after Thanksgiving 2013 and the alleged threats from Officer Troxell, which allegedly implicated the Chief. On December 5, 2013, the Chief conducted an interview of Schleig, in the presence of the Mayor, concerning his arrest of Lamont Scott. Officer Alan Koch was Schleig's representative during the interview. (Union's Post-hearing Brief at 7). The interview was recorded over Schleig's objection, who was also denied Garrity warnings, after Koch requested them, even though the Chief informed Schleig that he could be disciplined. (Union's Post-hearing Brief at 7). The Union additionally contends that, during the December 5, 2013 interview, the Chief asserted that Schleig lied during the Scott investigation and that Schleig kidnapped Scott. The Union emphasizes that the Chief also told Schleig to remember the "Gruver" incident, in reference to the reason for Fred Lahovsky's discharge, in an alleged attempt to intimidate Schleig. (Union Post-hearing Brief at 8).

The Union argues that the January 6, 2014 scheduled interview of Schleig was cancelled at the last minute to further intimidate Schleig because it was close in time to the scheduled January 3, 2014 Lahovsky arbitration hearing. (Union's Post-hearing Brief at 16). The Union further maintains that, after Schleig participated in the interest arbitration hearing as a witness, the Mayor ordered him to report for a psychological evaluation and that, even though he passed the evaluation, the Borough ordered Schleig to attend ten counseling sessions, further demonstrating its retaliatory campaign against Schleig. The Borough, claims the Union, failed to adequately explain all these actions against Schleig, which further supports an inference of unlawful motive. (Post-hearing Brief at 11-12). I disagree.

⁶ When the Union rested and concluded its case-in-chief, the Borough moved for dismissal of both charges. (N.T. 107-112). After entertaining and considering both sides' arguments on the matter, I denied the Borough's motion to dismiss both charges. (N.T. 114).

The Board and its examiners have consistently applied the following elements, standards and factors in determining whether complainants have met their burden of establishing a discrimination claim under Act 111 and the PLRA:

In a discrimination claim under Section 6(1)(c) [and 6(1)(d)] of the PLRA, the claimant has the burden of proving that the employe engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employe that was motivated by the employe's 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 give weight to 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 in the [adverse action against] the Complainant." *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 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. **Centre County**, 9 PPER at 380. *The close timing of an employer's adverse action alone is not enough to infer animus, but when combined with other factors can give rise to the inference of anti-union animus.* **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). However, mere suspicion is insufficient to sustain a discrimination charge. **Shive v. Bellefonte Area Board of School Directors**, 317 A.2d 311 (Pa. Cmwlth. 1974).

Only if the union establishes a **prima facie** case that an employer's adverse action against an employe was motivated by the employe'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).

FOP, Lodge No. 7 v. City of Erie, 39 PPER 60 at 204-205 (Proposed Decision and Order, 2008).

Additionally, the Board will find an independent violation of Section 6(1)(a) of the PLRA if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employees have been shown in fact to have been coerced. **Bellefonte Police Officers Ass'n v. Bellefonte Borough**, 27 PPER ¶ 27183 (Proposed Decision and Order, 1996) *citing* **Northwestern Education Ass'n v. Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 6(1)(a). **Northwestern School District, supra**. However, an employer does not violate the PLRA or PERA where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employee rights. **Ringgold Educ. Ass'n v. Ringgold Sch. Dist.**, 26 PPER 26155 (Final Order, 1995).

The Union has attempted to force together numerous incongruent puzzle pieces to depict an intimidating and discriminatory relationship between the Chief and the Mayor on one side and Officer Schlegel on the other. However, those puzzle pieces, when properly assembled with matching counterparts, do not depict the intimidating or discriminatory environment or relationships claimed to exist by the Union. The only thing presented on this record is the timing of union activity with Schlegel's investigation, interviews and psychological evaluation and counseling, which cannot be combined with any other factors to infer anti-union motive in this case. Indeed, timing is always present for a Union Vice President and former Union President who is consistently, frequently and chronically involved in Union activities throughout the year, every year. The Lahovsky grievance arbitration process is not the first time that Schlegel has been involved in Union activities or grievances. An examination of the timing in this case of the legitimate, timely concerns of the Chief and the Mayor in response to Schlegel's performance deficiencies and emotional outbursts supports and favors the Borough's legitimate response (and does not support an inference of animus), especially in light of Schlegel's constant participation in Union activities throughout the preceding three or four years. Under the Union's theory, an employer would never be able to counsel or discipline a Union officer because of his/her constant engagement in protected activities.

Chief Trachta has been the Borough's Chief of Police since 2009. Also, in 2009 and 2010, Schlegel was the Union President, and he has been the Union's Vice President since 2011 during which time he has processed numerous grievances. During all that time as a Union Officer, Schlegel engaged in constant overt Union activities and the Chief did not subject Schlegel to any adverse employment action or conditions. The Union offered evidence of a conversation between Troxell and Schlegel on Thanksgiving Day 2013, the result of which led Schlegel to believe that Troxell was threatening his family and that the Chief was involved in a calculated conspiracy to target anyone supporting Lahovsky. Aside from the multiple layers of inadmissible hearsay contained in Schlegel's testimony and the report attached to his complaint against the Chief and Troxell, there is no substantial competent evidence of record corroborating Schlegel's allegations against the Chief or even remotely supporting the allegation that the Chief is involved in anything untoward with Troxell. Therefore, the Chief is not and cannot be connected in any way to what Troxell allegedly said to Schlegel on Thanksgiving Day 2013 or the alleged trepidation those statements may have caused Schlegel.

The Lamont Scott arrest and investigation was a matter specifically brought to the Chief's attention by Paula Galante who was the victim of a burglary at her business across the street from the police station. She was dating one of the Borough Police Officers who presumably educated her on the difference between burglary and theft. She lodged a complaint with the Chief about Scott's being charged with a lesser offense and his release on bail because she had concerns about his access to her shop and the female employee who worked alone in her shop, while Scott lived in the same building. The Chief did not decide on his own to initiate and investigation of the Lamont Scott burglary and Schlegel's handling of it. It is in this context, having to address a citizen/victim

complaint, that the Chief reviewed Schlegig' s investigation. Following up on Ms. Galante's complaint, the Chief discovered problems with the investigation and the charges. The Chief wanted clarification from Schlegig about the lack of a written confession, to which Schlegig attested in his affidavit of probable cause and his handling of the Scott arrest, transport, detention and charges. The Chief credibly testified that he often meets with officers, specifically Schlegig, to mentor and educate them on proper procedure and investigation techniques.

The December 5, 2013 interview was just such a meeting. Although the Chief refused to provide **Garrity** warnings to Schlegig upon the request of Union representative Koch, the Chief did explain that criminal charges were not an issue because the District Attorney's office assured the Chief that no such charges would be filed against Officer Schlegig. The fact that the Chief informed Schlegig and Koch that discipline could result did not affect the **Garrity** warnings because criminal charges could not result. As far as the potential for discipline, Schlegig already had his **Weingarten** representative. In this manner, Schlegig was not denied anything during the interview on December 5, 2013. The Mayor and the Chief, as the managers of the Police Department, were certainly within their rights to timely investigate a citizen's complaint against one of its officers. The Chief's investigation of the Scott matter has a nexus with Paula Galante's citizen/victim complaint and has no nexus whatsoever with Schlegig' s Union activities regarding the Lahovsky grievance, especially when Schlegig has been processing grievances for years. It was because Ms. Galante was so upset with Schlegig's handling of the matter and the Chief's concern that Schlegig' s perjury before the local Magistrate may have repercussions for the Department, that he re-assigned the Scott case to Troxell.

Chief Trachta scheduled the January 6, 2014 interview with Schlegig before he became aware of the Union's complaint against him and Troxell. The Chief was also unaware that the Borough hired Dan Monek to investigate Schlegig's complaints and his performance. The Chief did not become aware that he was removed from the investigation process until the Friday night before the scheduled January 6, 2014 interview and he did not receive direction to cancel the meeting from the Mayor until the night before. Therefore, the Chief could not cancel the meeting until the morning of January 6, 2014. The Chief credibly testified that the timing of the meeting was dictated by the holidays and it was the first day that all involved were working and available. For these reasons, there is nothing retaliatory or intimidating in the scheduling or cancelling of the interview. The Chief was trying to educate, and perhaps discipline an officer for his improper procedure and behavior. Also, the Union's own attorney demanded that Schlegig' s complaint against the Chief and Troxell be investigated by someone other than the Chief. The Mayor granted the Union lawyer's request and hired Dan Monek, a private investigator, to independently investigate the complaint. However, as Schlegig began to demonstrate emotional and professional deficiencies, Mr. Monek's investigatory range grew. Again, there is no evidence of unlawful motive where the overwhelming evidence shows that the Borough's Mayor and Chief needed to timely address Schlegig's professional and emotional problems and where the independent investigation of Schlegig' s complaints against the Chief and Troxell by Mr. Monek was the Borough's attempt to effectuate the Union's request that the Chief be removed from the investigation. When the Chief was removed from the investigation of Schlegig because of Schlegig's complaints against him, the Chief needed to cancel the administrative interview scheduled for Monday, January 6, 2014. The fact that the Chief did not cancel that interview until the morning of January 6th was not meant to be intimidating or harassing; it was a function of not being able to confer with the Mayor until Sunday night and communicate with Schlegig until Monday morning.

Moreover, Schlegig demonstrated a heightened sensitivity to any confrontation or criticism, which was a concern for the Chief and the Mayor, especially considering that a police officer's daily duties include stressful and adversarial confrontations. At the end of the December 5, 2013 interview, the Mayor observed Schlegig crying. In addition, within a few weeks, the Chief received reports from two other employees that they were concerned for Schlegig' s emotional stability. Fittingly, therefore, the Mayor deemed it necessary to send Schlegig for a psychological evaluation. I find no retaliation or intimidation in the Mayor's compassionate interest in seeking a determination about the emotional stability of one of his officers, who has outwardly demonstrated signs of emotional distress. Had Schlegig been deemed unfit for duty by Dr. Gordon, Schlegig could

have received the help he needed to return to duty better adjusted and able to confront the stressful conflicts required of a police officer. The ten counseling sessions were offered to Schleig to help him because Dr. Gordon recommended it. There is no evidence that the counseling sessions were ordered to be retaliatory or intimidating. Although there were Lahovsky arbitration hearings and interest arbitration hearings occurring at this time, Schleig was involved in such activities for years prior with no adverse action. The timing of the investigation of Schleig and his psychological evaluation and counseling was coincidental at best.

After a thorough review of the record as a whole, I conclude that the Union did not meet its burden of proving unlawful motive or that the Chief or the Mayor or any other Borough representative intimidated, coerced or retaliated against Officer Schleig in any manner. Also, the Borough met its burden of proving, on this record, that it possessed legitimate business reasons for all the actions of which the Union complained in both charges, thereby rebutting both the discrimination claims and the independent claims for intimidation and coercion. Under the totality of the circumstances a reasonable employee in Schleig's position would not be intimidated or coerced with respect to exercising protected rights. The Chief and the Mayor investigated Schleig's handling of an investigation and arrest after receiving a complaint about the same and the Mayor timely required psychological treatment and testing after witnessing Schleig's emotional breakdowns and after receiving reports from other employees of Schleig's emotional instability. Indeed, the Mayor and the Chief were fulfilling their sworn duties to the public by ensuring proper police procedure and by ensuring that its officers are fit for the pressures of police duty. Significantly, Schleig has not received any discipline or adverse employment action as a result of anything claimed to be intimidating or retaliatory in these two cases, including the filing of the first charge. Contrary to the Union's claim that the Borough lacks a sufficient explanation for its treatment of Schleig, I conclude that the Borough provided adequate and legitimate explanations for each of its actions and behaviors with respect to Schleig.

Accordingly, the Borough did not engage in unfair labor practices under Section 6(1)(a), (c) or (d) of the PLRA, as read with Act 111, under both charges consolidated for disposition herein. Both charges are hereby dismissed, and the complaints on both charges are hereby rescinded.

CONCLUSIONS

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

1. The Borough is a public employer and a political subdivision of the Commonwealth within the meaning of the PLRA, as read in **pari materia** with Act 111.
2. The Union is a labor organization within the meaning of the PLRA as read in **pari materia** with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The Borough has **not** committed unfair labor practices within the meaning of Section 6(1)(a) or (c) of the PLRA as read in **pari materia** with Act 111, under Case No. PF-C-13-123-E.
5. The Borough has **not** committed unfair labor practices within the meaning of Section 6(1)(a), (c) or (d) of the PLRA as read in **pari materia** with Act 111, under Case No. PF-C-14-36-E.

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 charges are dismissed, the complaints are rescinded and 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twentieth day of January, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner