

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LAWRENCE LUDWIG AND MICHAEL GRING :
 :
 :
 v. : Case No. PF-C-17-39-E
 :
 WOMELSDORF BOROUGH :
 :

PROPOSED DECISION AND ORDER

On May 17, 2017, Lawrence Ludwig and Michael Gring (Complainants) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Womelsdorf Borough (Borough or Employer), alleging that the Borough violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111 by terminating their employment in retaliation for their protected activity.

On June 6, 2017, 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 14, 2017, in Harrisburg, as the time and place of hearing, if necessary. The Borough filed an Answer to the Complaint on August 14, 2017, denying all material averments contained in the specification of charges.

Hearings were necessary and were held before the undersigned Hearing Examiner of the Board on August 14, 2017 and September 20, 2017, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Complainants filed a post-hearing brief on October 31, 2017. The Borough filed a post-hearing brief on November 1, 2017.

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

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 5)
2. Lawrence Ludwig and Michael Gring were employes under Act 111 as read *in pari materia* with the PLRA prior to their separation from the Borough on April 25, 2017. (N.T. 5-6)
3. Ludwig was employed as a part-time police officer with the Borough from March 17, 2015 to April 25, 2017 when he was discharged. (N.T. 7-9; Exhibit C-1)
4. Gring was employed as a part-time police officer with the Borough for approximately eight-and-a-half years prior to his discharge on April 25, 2017. (N.T. 124-125; Exhibit C-3)

5. In 2017, the Borough's police department consisted of seven part-time officers, plus a full-time Police Chief, John Pontician. (N.T. 9-10, 15)

6. On April 18, 2008, the Board issued a Nisi Order of Certification recognizing the Womelsdorf Police Officers' Association (Association) as the exclusive bargaining representative for a unit described as "[a]ll full-time and regular part-time police officers including but not limited to patrol officers, sergeants and corporals; and excluding the Chief of Police and any other managerial employes." (See PERA-R-08-10-E)

7. The Association was never able to negotiate a collective bargaining agreement (CBA) with the Borough and eventually became inactive. (N.T. 13-14)

8. In July 2015, Ludwig asked the Chief about the status of the CBA, to which the Chief replied that it never went anywhere. Ludwig asked the Chief why, and the Chief stated that the Borough did not want collective bargaining. The Chief also indicated that if the officers unionized, the Borough would shut down the department and they would all be out of a job, including the Chief. (N.T. 17-20)

9. In October 2015, Ludwig asked the Chief about the CBA and whether the Association was active because he had concerns regarding an alleged employe handbook, which another officer had given him. Ludwig stated that he thought the handbook was ambiguous and that the terms of employment should be set forth in a CBA. The Chief stated that it was not going to happen, that the Borough does not want a union, and that they would all lose their jobs if they pursued it. (N.T. 20-23)

10. In November 2015, Ludwig got into an argument with the Chief about overtime hours and stated that was why a CBA was necessary, to prevent disagreements of that kind. The Chief replied that it was not going to happen. (N.T. 24-26)

11. In February 2016, Ludwig went to the Chief on behalf of another officer and discussed the condition of that officer's bulletproof vest, which was falling apart. Ludwig also addressed wages and the schedule with the Chief. The Chief simply stated that he was trying with regard to wages and sent out an email to the officers about their shifts and the schedule. (N.T. 26-29)

12. In October 2016, Gring had a discussion with Ludwig, during which he informed Ludwig that he learned part-time officers could unionize and be represented by the Fraternal Order of Police. The Berks County FOP Lodge 71 (FOP) is an association that provides collective bargaining services to police departments throughout the county. (N.T. 13-15, 32, 126-128)

13. At some point thereafter, Ludwig had a discussion with the Chief about the part-time officers unionizing. The Chief doubted that the FOP could represent the part-time officers and stated that if the officers pursued collective bargaining, the Borough would disband the police department. (N.T. 32-35)

14. In January 2017, Ludwig had a discussion with the Chief regarding working conditions, during which the Chief asked Ludwig if he was going to

join the FOP. Ludwig replied that he would be and stated "I will have representation." (N.T. 42-43)

15. On February 7, 2017, the Chief informed Ludwig and Gring that they were the subjects of an internal investigation regarding a possible violation of the state wiretap law and department policy. (N.T. 44; Exhibit R-4)

16. On February 11, 2017, Ludwig had a meeting with the Borough Mayor, Jennifer Gettle, and Borough Council Vice President, Bruce Edwards. Ludwig discussed working conditions and concerns with Gettle and Edwards. Edwards asked Ludwig if he was speaking on behalf of other officers and whether Ludwig was a member of a collective bargaining unit. Ludwig replied in the negative to both inquiries. (N.T. 47-49, 299)¹

17. Ludwig went off work from February 16 or 17, 2017 through March 29, 2017 for medical reasons. (N.T. 51-52)

18. On February 28, 2017, Gring underwent an interview with the Chief regarding the alleged wiretap violation. Gring attended the interview with Anthony Garipoli, who is the immediate past president of the FOP and who identified himself as Gring's union representative. After the interview, Gring finished working the rest of the days he was previously scheduled and was never scheduled again. (N.T. 131-133, 142; Exhibit R-20)

19. On March 29, 2017, Ludwig returned to work and underwent a previously scheduled interview with the Chief regarding the alleged wiretap violation. Ludwig attended the interview with Ron Mohl, who identified himself as being an FOP representative and who was not a member of the Borough's police department. Ludwig did not work any shifts either the day of or after the interview. (N.T. 52-54)

20. By text message exchange dated April 24, 2017, Gring asked the Chief about scheduling hours for May, to which the Chief replied "[a]t this time you are not scheduled for May." When Gring asked why, the Chief replied "[y]ou know why." When Gring further pressed for a reason, the Chief stated "[y]ou made your decision during (sic) interview. Out of my hands now." (N.T. 134-137, 224; Exhibit C-4)

21. By letter dated April 25, 2017, Gettle indicated the following to Ludwig and Gring, separately:

Please be advised that the Womelsdorf Borough will no longer be needing your services as a part-time police officer with the Borough of Womelsdorf. You are directed to return any and all department issued police equipment to Chief John Pontician on or before Monday, May 1, 2017. I would encourage you to contact Chief Pontician to make arrangements for the return of any and all equipment issued to you by the Womelsdorf Borough Police Department.

(Exhibit C-1, C-3)

¹ Ludwig testified that he objected to the meeting because he originally requested that it be with the entire police committee of Borough Council and all the members of the police department. (N.T. 48)

DISCUSSION

The Complainants have alleged that the Borough violated Section 6(1)(a) and (c) of the PLRA² and Act 111 by terminating their employment in retaliation for their protected activity. The Borough, on the other hand, contends that it did not violate the PLRA or Act 111, and the charge should be dismissed because the Complainants failed to sustain their burden of proving a prima facie case of discrimination, and the Borough had legitimate nondiscriminatory reasons for discharging the officers.

To establish a violation of Section 6(1)(c) under the PLRA, the charging party must show that the employee was engaged in protected activity, the employer knew of that protected activity, and there was an adverse employment action motivated by anti-union animus. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, PA State Police, 33 PPER ¶ 33011 (Final Order, 2001). It is the motive for the adverse employment action that creates the offense under Section 6(1)(c). PLRB v. Ficon, 254 A.2d 3 (Pa. 1969). An employer may rebut a claim of discrimination under Section 6(1)(c) of the PLRA by proving that the adverse employment action was based on valid nondiscriminatory reasons. Duryea Borough Police Dept. v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. City of Philadelphia, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities—for example, whether leading organizers have been eliminated; the extent to which the adversely affected employees engaged in union activities; and whether the action complained of was “inherently destructive” of employee rights. City of Philadelphia, supra, citing PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employee engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

In this case, the Complainants have sustained their burden of proving the first two elements of the Section 6(1)(c) discrimination test. Indeed, Ludwig engaged in protected activity by discussing the option of collective bargaining with the Chief on numerous occasions. In fact, Ludwig intervened on behalf of at least one other officer to the Chief with regard to that officer's bulletproof vest, openly stated his preference for a CBA to the Chief, and unequivocally told the Chief he would be joining the FOP. What is more, Ludwig and Gring both attended their administrative interviews with the

² Section 6(1) of the PLRA provides that “[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in this act... (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization... 43 P.S. § 211.6.

Chief for the alleged wiretap violation with representatives from the FOP. Thus, it cannot be seriously contested that the Complainants engaged in protected activity and that the Borough knew of that protected activity, as the Chief was present for all of these interactions. As a result, the issue hinges on whether the Borough was motivated by anti-union animus when it discharged Ludwig and Gring on April 25, 2017.

The Complainants point to a number of alleged factors, which they claim support an inference of unlawful motivation on behalf of the Borough, including the timing of the investigation into the alleged wiretap violation, as well as the terminations, statements by the Chief evidencing anti-union animus, pretext, and lack of an adequate explanation for the adverse employment action. However, I have credited the Borough's proffered reasons for its actions here and conclude that the record does not support an inference of unlawful motive.

In support of its position, the Borough presented the testimony of the Chief, John Pontician, who convincingly described why he began an investigation of Complainants. Pontician testified that, on February 6, 2017, he learned of a possible wiretap violation by Complainants from Ludwig himself. (N.T. 179-180)³. Ludwig had Gring let him listen over the phone to an interview or conversation between Gring and the father of an alleged victim in a sexual assault investigation. (N.T. 179-180). Pontician immediately advised Ludwig on February 6, 2017 that this was a possible wiretap violation. (N.T. 180). Later that day, Pontician contacted Gettle and Edwards to inform them of the alleged wiretap violation, which could expose the Borough to potential civil liability. (N.T. 181). Edwards directed Pontician to contact the District Attorney's office, which Pontician did on February 7, 2017. (N.T. 181-182). Pontician spoke to the First Assistant District Attorney, Dennis Skayhan, who concluded that the Complainants had violated the wiretap act because, even though there was no recording, they had surreptitiously listened in through a communication device without prior court approval. (N.T. 182, 246). Skayhan advised Pontician that the violation appeared to be inadvertent, and the District Attorney's office did not deem it worthy of charging as a crime. (N.T. 246-247, 258). Skayhan suggested that Pontician handle it as a disciplinary matter instead. (N.T. 247).

At that point, Pontician contacted Edwards and told him what Skayhan had said. (N.T. 182). Edwards then directed Pontician to complete a memo informing Complainants that an internal investigation would follow, which Pontician did on February 7, 2017. (N.T. 182-183; Exhibit R-4). In the memo, Pontician also ordered the Complainants not to discuss the matter with anyone else, including each other. (Exhibit R-4). As part of the investigation, Pontician interviewed Gring on February 28, 2017 while Gring's union representative was present. During the interview, Pontician asked to see Gring's cellular phone, which Gring was reluctant to permit. However, Gring eventually relented and gave his phone to Pontician, who discovered that Gring had been on the phone with Ludwig for an hour and 53 minutes at the time of the alleged incident. (N.T. 187-188). Pontician further testified that when he interviewed Ludwig on March 29, 2017, Ludwig came in with his phone records, but could not explain why he did so when Pontician confronted him about it, which was suspicious given that the Complainants were ordered not to discuss the incident with each other. (N.T. 189).

³ The Wiretapping and Electronic Surveillance Control Act is set forth at 18 Pa.C.S.A. § 5701, et seq.

Pontician also questioned Ludwig about Gring's phone being connected to his during the time of the incident, to which Ludwig replied "I didn't do it. I got up to get a Pepsi." (N.T. 189-190). Pontician concluded that neither Ludwig, nor Gring had been truthful during their respective interviews. (N.T. 226-227, 230). Pontician eventually prepared a report of his investigation, which he provided to Borough Council at the beginning of an executive session on April 18, 2017, and in which he concluded that it was highly likely the alleged wiretap offense occurred. (N.T. 195-196; Exhibit C-6, R-21).

The Borough also presented the testimony of Edwards, who is the chair of the police committee and who listened to the interview recordings. (N.T. 299-300, 303). Edwards described how the interviews were part of the Borough's decision to terminate the Complainants. (N.T. 300). After Pontician presented his report of the investigation to Borough Council, the full Council discussed disciplinary action during its executive session on April 18, 2017. (N.T. 305). Edwards testified that Borough Council decided to discharge the Complainants because the Council believed they violated the wiretap act and exposed the Borough to potential civil liability. (N.T. 305-307). Edwards further explained that the full Borough Council did not believe that Complainants were truthful during their interviews regarding the incident, which was the reason the Borough did not wish to give them a second chance. (N.T. 310). Edwards testified credibly that the Borough did not put any of these reasons in the discharge letters because the Complainants were at-will employees. The Borough was trying to protect the officers by not publicly declaring what the Council's determination was. (N.T. 311-312).

The Complainants contend that the April 25, 2017 discharge letters for both officers contain no mention of any disciplinary reasons for their terminations and instead simply state that their services are no longer needed, which was contradicted by nearly contemporaneous advertisements to hire two more police officers. (Exhibit C-1, C-3, C-7). The Complainants argue that this is strong evidence of pretext. However, I find the testimony of Edwards credible on this point. The Borough simply withheld the disciplinary reasons from the discharge letters as a favor to the Complainants. As such, there is no record evidence of pretext to support an inference of discriminatory intent.

Likewise, the Complainants note that the Borough did not cite any specific section of the wiretap act or the department's standard operating procedures, which were alleged to have been violated. The Complainants further aver that the Chief's report of his investigation into the alleged wiretap violation was undated, leading to an inference that it did not take place until after the decision was made to terminate the officers. Similarly, the Complainants point out that the opinion of First District Attorney Dennis Skayhan that a wiretap violation occurred was based solely on information received from the Chief and that Skayhan could not say when he received the inquiry from the Chief regarding the incident in question. Thus, the Complainants submit that the Chief did not make the call until well after the decision was made to terminate. In addition, the Complainants point out that the timing supports an inference of unlawful motive because the Borough began its investigation into the alleged wiretap violation and discharged the officers shortly after they engaged in protected activity. Finally, the Complainants rely on the Chief's statements as evidence of discriminatory intent, including his statements that the Borough would shut down the police department if the officers unionized and his text message to Gring indicating "[y]ou made your decision during (sic) interview. Out of my

hands now." The Complainants argue that the only decision Gring made during his interview was to attend with his FOP representative.

These arguments are unavailing, as I find the testimony of Pontician credible and persuasive. Indeed, Pontician was direct, non-evasive, and convincingly explained that the reason for discipline was the alleged wiretap violation, the exposure of the Borough to potential civil liability, and the Borough's belief that the Complainants were not truthful during their administrative interviews. Further, Pontician's testimony was extensively corroborated by Edwards and Skayhan on these very same points. What is more, Pontician convincingly refuted Gring's allegation with regard to the decision he made during his interview, stating that he also made the decision to be untruthful at that time. (N.T. 226-227). The timing of the investigation and subsequent terminations was merely coincidence, as Ludwig disclosed the alleged wiretap violation shortly after some of his conversations with Pontician, during which he discussed the option of collective bargaining, and then Pontician immediately began his investigation of the alleged wiretap violation. In any event, the timing alone is not sufficient to support a finding of unlawful motive. Accordingly, the charge under Section 6(1)(c) must be dismissed.

Finally, the Complainants have alleged that the Borough violated Section 6(1)(a) of the PLRA. The Board holds that a violation of Section 6(1)(a) may be derivative or independent. Raymond McMahon v. Springfield Township, 28 PPER ¶ 28164 (Final Order, 1997). A derivative violation of Section 6(1)(a) occurs whenever an employer commits any other unfair labor practice, whereas an independent violation of Section 6(1)(a) occurs when an employer has taken an action which, in light of all the circumstances, tends to be coercive of the free exercise of employee rights, whether or not employees were in fact shown to be coerced. *Id.*; McAdoo Police Ass'n v. McAdoo Borough, 37 PPER 69 (Proposed Decision and Order, 2006). In this matter, the Borough has not violated Section 6(1)(c) of the PLRA, as alleged by Complainants. Therefore, the Borough has not committed a derivative violation of Section 6(1)(a). Furthermore, the Complainants have not alleged an independent violation of Section 6(1)(a) of the PLRA. As such, the charge under Section 6(1)(a) will also be dismissed.

CONCLUSIONS

The 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 political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. Ludwig and Gring were employees under Act 111 as read *in pari materia* with the PLRA prior to their separation from the Borough on April 25, 2017.
3. The Board has jurisdiction over the parties hereto.
4. The Borough has not committed unfair labor practices in violation of Section 6(1)(a) or (c) of the PLRA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 28th day of December, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner