COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

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

FINAL ORDER

Falls Township (Township) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on January 7, 2013, to a Proposed Decision and Order (PDO) issued on December 18, 2012. The Township takes exception to the Hearing Examiner's conclusion that the Township violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111 of 1968, by failing to promote the President of the Police Association of Falls Township (PAFT), Sergeant Nelson Whitney, to the rank of lieutenant. The Township simultaneously filed its brief in support of its exceptions. The PAFT timely filed a brief in response to the exceptions on January 28, 2013. Upon a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDINGS OF FACT

- 8. This condition prevailed until then-Sergeant, William Wilcox, filed both a lawsuit and a grievance over the failure of the Township to adhere to any sort of testing process. (N.T. 14, 168)
- The Wilcox litigation resulted in a requirement that future promotions for the 9. position of lieutenant be filled through a competitive testing process. Also required under the resolution was that the testing process result in a list of eligible candidates. (N.T. 15)
- 10. Wilcox was promoted to Lieutenant following the resolution of the litigation. In 2007, Wilcox was named to the position of Chief of Police. (N.T. 15-17, 271)
- 12. The first twelve promotions made by Wilcox as Chief of Police were made pursuant to that policy. Chief Wilcox followed this policy even over the objections of the Township's former director on an occasion where following the list in descending order would result in two spouses working in the same division. (N.T. 16-17, 39-40, 342-346)
- 22. Of the top performers on the "in basket" part of the test, Whitney was the only candidate who answered questions in a way that the raters believed would not expose the Township to liability or poor performance within the police department. (N.T. 196)
- 23. Whitney did the best on the "in basket" part of the test, a one hour exercise in which the candidates must respond quickly with a written answer to simulated situations. (N.T. 199)
- 27. At the conclusion of the 2008 acting rotations, MacPherson informed Wilcox that "out of the two candidates at the time [Whitney] did a better job as an acting lieutenant." The promotion of Sgt. Pletnick meant that all three lieutenant positions in the department were then filled, at least on paper. (N.T. 10, 20, 31)
- 29. In December 2009, Chief Wilcox advised Belinsky that he would not fill the sergeant's vacancy. PAFT filed a grievance pursuant to the collective bargaining agreement. (N.T. 36, 42-43)
- 30. The next meeting of the PAFT was scheduled for January 2010. Prior to this meeting, Belinsky indicated he would bring to the floor of the PAFT meeting the question of the sergeant promotion grievance. (N.T. 37, 59)

- 31. When Belinsky advised Chief Wilcox of his plans to do this, Wilcox directed him to communicate to the PAFT that if a grievance proceeded to Step III arbitration, "there would be a halt to the promotion process." (N.T. 37-38)
- 32. At the PAFT meeting, Belinsky communicated what he perceived to be the threat and placed the question as to whether to proceed to the final step in the grievance procedure to the PAFT membership. (N.T. 38)
- 33. Whitney attended the January 2010 PAFT meeting. He made a motion to take the Belinksy grievance to arbitration and to investigate what should be done concerning what the body perceived was a threat to PAFT's rights. (N.T. 38, 60)
- 34. The next morning, at 9:00 a.m. Chief Wilcox approached Belinsky and told him that Belinsky had either misunderstood or misspoken to the PAFT body the previous evening. (N.T. 46, 50)
- 35. Chief Wilcox had been made aware that the January meeting would be discussing the grievance because two days before the meeting, Chief Wilcox was meeting with Sgt. Whitney over routine operational matters. During that meeting, Wilcox explained to Whitney that based upon the anticipated departure of Lt. McPherson, it was determined that a second "acting lieutenant" rotation be undertaken. Wilcox explained to Whitney that the purpose, at least for him, was to see if Whitney, and the other candidates, still wanted the job. (N.T. 59, 94)
- 37. The sergeant's vacancy grievance was taken to the manager level and resolved in PFTA's favor. (N.T. 38-39)
- 38. At the January 2010 PAFT meeting, the PAFT members nominated Whitney to be president of the PAFT. (N.T. 61)
- 39. On February 12, 2010, Whitney approached Chief Wilcox to question him as to when the existing Lieutenant's vacancy caused by the departure of MacPherson and the anticipated vacancy due to the imminent departure of Lt. Cloud, would be filled. (N.T. 62-63)
- 41. In March 2010 there was an issue of implementing the resolution of the Sergeant's vacancy, which had been resolved earlier by the Township Manager. A dispute had arisen between the parties as to the duties to be assigned to the sergeant promoted as a result of that grievance. During the discussion, Chief Wilcox became angry and indicated that it was not his fault that he "created a job nobody wanted." Chief Wilcox also became upset and red-faced. When Whitney continued to press him on the issue, Wilcox stated "if this is how it is going to be, it's going to be a very long year." (N.T. 65-68)
- 42. At the February 16, 2010 PAFT meeting, the members elected Whitney to the office of president. (N.T. 61, 69)
- 44. Chief Wilcox became upset at Whitney. Wilcox said he intended to fill one of the vacancies off the standing list, and run a new exam for the second vacancy. (N.T. 64, 79)
- 46. Wilcox ended the meeting by suggesting that it might be time to take Whitney out of the Detective division and put him into a patrol sergeant's slot. Whitney responded by advising Wilcox that if no promotions were made within a reasonable period of time, PAFT would file a charge of unfair labor practices. (N.T. 75-79, Township Exhibit-1)
- 47. From that point forward, Wilcox refused to meet with Whitney unless a Township lawyer was present. (N.T. 363-364)

- 48. During this time, the issue of the duties assigned to the newly created administrative sergeant was left unresolved. (N.T. 75-76)
- 49. By early 2010, the Township decided to fill the two lieutenant vacancies caused by the retirements of MacPherson and Cloud. Despite Chief Wilcox's earlier statement that he would recommend promotions from the results of a new test, the Township decided that it would make promotions based on the 2008 test. Since Pletnick had already been promoted from the 2008 Safe City Solutions list, Chief Wilcox went to the next three candidates, Whitney, Ward and Airey. He informed them that they would serve as an "acting lieutenant" for two months. Wilcox advised each of the three candidates that there were two purposes to serving in the acting lieutenant capacity; 1) to see if each was comfortable in the position and 2) to be evaluated in his performance. (N.T. 206-207, 297-298)
- 50. The Safe City Solutions' 2008 test results had included a comment from the evaluators that one of Whitney's answers to a question raised concerns about his loyalty and should be explored further with him. Whitney had answered "No" when questioned about whether he would follow a directive from the chief to issue an order to the department that the department will no longer send two cars to residential alarms. Whitney was adamant in his answer because of the risk to safety. Safe City Solutions devised the question to test an officer's loyalty by seeing if he would follow through with an "unpopular" order. (N.T. 19, 100, 129, Union Exhibit 1)
- 70. On April 30, 2010, Whitney filed a formal grievance pursuant to the collective bargaining agreement over unresolved issues regarding the newly created administrative sergeant's position that Belinsky had filled and that had caused Chief Wilcox's negative reaction to Whitney as stated in Finding of Fact 41, supra. (N.T. 76)

DISCUSSION

In 251 of the Township's exceptions, the Township challenges the Hearing Examiner's credibility determinations, the Hearing Examiner's failure to find the Township's proposed facts, and 42 of the Findings of Fact that were made by the Hearing Examiner. We have reviewed each of the Township's proposed findings and exceptions. With respect to the Hearing Examiner's credibility determinations, there are no compelling circumstances warranting reversal of those findings. The Hearing Examiner is in the best position to assess witness credibility, and the Hearing Examiner's credibility determinations will not be disturbed absent the most compelling of circumstances. International Association of Fire Fighters, Local 955 v. City of Uniontown, 41 PPER 113 (Final Order, 2010). No such circumstances exist on this record. Accordingly, the Township's exceptions to the Hearing Examiner's credibility determinations are dismissed.

As regards the Township's proposed findings of fact, we note that the Hearing Examiner need not make findings concerning all of the evidence presented. The Hearing Examiner's findings need only be made with respect to the evidence found credible and which is adequate to support the conclusions reached. International Union of Operating Engineers, Local 66 v. Franklin Township, 43 PPER 139 (Final Order, 2012). The Findings of Fact which are made must, however, be supported by substantial evidence of record. Substantial evidence is such credible evidence as a reasonable mind would accept as adequate to support the finding. Fraternal Order of Police, Lodge No. 7 v. City of Erie, 41 PPER 149 (Final Order, 2008). Upon review of the Township's exceptions to the Hearing Examiner's Findings of Fact, the exceptions are sustained in part, and we have amended those findings where necessary.¹ Accordingly, the facts of this case, as found by the Hearing Examiner and as amended by the Board, are summarized as follows.

¹ Findings of Fact 8, 9, 10, 12, 34, 38, 42, and 70 have been amended to correct typographical errors. Findings of Fact 27, 29, 37, 39, 44, 46, 47 and 48 are corrections to the citations to the record. Findings of Fact 22, 23, 31, 32, 33, 35, 41, 49 and 50 have been clarified or amended to more accurately reflect the evidence of record.

The PAFT is the exclusive, recognized bargaining agent for the unit consisting of sworn police officers in the rank of sergeant and below. (FF 3 and 4). The Township police department is separated into three divisions, patrol, detectives and operations. (FF 5). Each division is commanded by a lieutenant, which is a managerial position. (FF 6).

Historically, when a vacancy would arise in a lieutenant's position, it had been left to the Township as to how it would be filled through promotion. (FF 7). However, then-Sergeant William Wilcox, seeking a promotion to lieutenant, filed a lawsuit and a grievance over the failure of the Township to adhere to any sort of testing process. (FF 8). The Wilcox litigation resulted in a requirement that future promotions for the position of lieutenant be filled through a competitive testing process. (FF 9). Wilcox was promoted to Lieutenant following the resolution of the litigation. (FF 10).

In 2007, Wilcox was named to the position of Chief of Police. (FF 10). A Lieutenant's vacancy was created through the promotion of Chief Wilcox. In order to comply with the Wilcox litigation, promotion to lieutenant had to be accomplished via a list of eligibles generated in accordance with competitive testing. The Township then announced the promotion would be based on two criteria - evaluations by an outside agency and observations by the Chief during an "acting lieutenant" period. (FF 16). Even with a testing process, Wilcox believed that police officers had been treated poorly through the use of bias and favoritism in the promotion process. Thus, he announced that it would be his policy as Chief of Police that promotions would be accomplished by following the list in descending order. (FF 11).

Lieutenant Ronald McPherson, one of two lieutenants remaining in the department, selected Safe City Solutions, a law enforcement consulting firm, to conduct the promotional testing. (FF 17 and 18). The Safe City Solution's test consisted of three parts: an in-basket exercise, problem resolution and an oral board. (FF 18). The "in basket" part of the test is a one hour exercise in which the candidates must respond quickly with a written answer to simulated situations. (FF 23). Sergeant Nelson Whitney did the best on the "in basket" part of the test, and was the only candidate who answered questions in a way that the raters believed would not expose the Township to liability or poor performance within the police department. (FF 22).

Safe City generated a report in which it classified the performance of each test taker as Excellent, Very Good or Good. (FF 19). In addition, the list created by Safe City Solutions ranked the performers highest to lowest. (FF 20). Safe City Solutions ranked the candidates in this order:

Sergeant Todd Pletnick (Excellent) Sergeant Nelson Whitney (Very Good) Corporal Henry Ward (Very Good) Sergeant Donald Airey (Good) Sergeant James Jones (Good) Sergeant Christopher Clark (Fair)

(FF 24).

Upon receipt of the ranked list, the Township decided that Sergeants Pletnick and Whitney would both be afforded the opportunity to be evaluated in the role of lieutenant in an acting capacity. (FF 25). During the "acting lieutenant" periods, Lieutenant MacPherson performed the role of evaluator. (FF 26). At the conclusion of the 2008 acting rotations, MacPherson informed Chief Wilcox that "out of the two candidates at the time [Whitney] did a better job as an acting lieutenant." (FF 27). Chief Wilcox promoted Sergeant Pletnick to fill the vacant lieutenant position. (FF 27).

Detective Martial Belinsky was President of the PAFT during the early winter of 2009, when an issue arose as to the filling of a sergeant's vacancy within the department. (FF 28). In December 2009, Chief Wilcox advised Belinsky that he would not fill the sergeant's vacancy. PAFT filed a grievance pursuant to the collective bargaining

agreement. (FF 29). Chief Wilcox had been made aware that the PAFT would be discussing the grievance at its January 2010 meeting, when Belinsky advised Chief Wilcox of his plans to bring to the floor of the PAFT meeting the question of the sergeant promotion grievance. (FF 30). In response, Chief Wilcox directed him to communicate to the PAFT that if a grievance proceeded to Step III arbitration, "there would be a halt to the promotion process." (FF 31). At the PAFT meeting, Belinsky communicated what he perceived to be the Chief's threat and placed the question as to whether to proceed to the final step in the grievance procedure to the PAFT membership. (FF 32). Whitney attended the January 2010 PAFT meeting, and made a motion to take the Belinksy grievance to arbitration and to investigate what should be done concerning what the body perceived was a threat to PAFT's rights. (FF 33). The next morning, at 9:00 a.m. Chief Wilcox approached Belinsky and told him that Belinsky had either misunderstood or misspoken to the PAFT body the previous evening. (FF 34).

In addition, two days before the PAFT's January meeting, Chief Wilcox was meeting with Whitney over routine operational matters. During that meeting, Wilcox explained to Whitney that based upon the anticipated departure of Lieutenant McPherson, it was determined that a second "acting lieutenant" rotation be undertaken, and explained that the purpose, at least for him, was to see if Whitney, and the other candidates, still wanted the lieutenant job. (FF 35). Suddenly, Chief Wilcox told Whitney, "I know you speak your mind at union meetings," which struck Whitney as odd and out of place. (FF 36).

At the January 2010 PAFT meeting, the PAFT members nominated Whitney to be president of the PAFT. (FF 38). At the February 16, 2010 PAFT meeting, the members elected Whitney to the office of president. (FF 42).

The PAFT's grievance over the sergeant's vacancy was resolved in PFTA's favor by the Township Manager. (FF 37). In March 2010 there was an issue of implementing the resolution of the Sergeant's vacancy. A dispute had arisen between the parties as to the duties to be assigned to the sergeant promoted as a result of that grievance. During the discussion, Chief Wilcox became angry and indicated that it was not his fault that he "created a job nobody wanted." When Whitney continued to press the issue, Chief Wilcox became upset and red-faced, and stated "if this is how it is going to be, it's going to be a very long year." (FF 41).

On March 16, 2010, Whitney, as the PAFT president, had an hour and a half meeting with Chief Wilcox. Whitney raised, for a second time, the issue of when Lieutenant promotions would take place. (FF 43). Chief Wilcox said he intended to fill one of the vacancies off the standing list, and run a new exam for the second vacancy (anticipated by the retirement of Lieutenant Cloud). (FF 44). The meeting evolved into an angry exchange between Chief Wilcox and Whitney on the issue, with Chief Wilcox telling Whitney that "Whitney was the main source of anxiety in his life." (FF 45). Chief Wilcox ended the meeting by suggesting that it might be time to take Whitney out of the Detective division and put him into a patrol sergeant's slot. (FF 46). After the meeting, Whitney responded by advising Chief Wilcox that if no promotions were made within a reasonable period of time, PAFT would file a charge of unfair labor practices. (FF 46). From that point forward, Chief Wilcox refused to meet with Whitney unless a Township lawyer was present. (FF 47).

By early 2010, the Township decided to fill the two lieutenant vacancies caused by the retirements of Lieutenants MacPherson and Cloud. Despite Chief Wilcox's earlier statement that he would recommend that the second promotion be from the results of a new test, the Township decided that it would make both promotions based on the 2008 test. Since Pletnick had already been promoted from the 2008 Safe City Solutions list, Chief Wilcox went to the next three candidates, Sergeant Whitney, Corporal Henry Ward and Sergeant Donald Airey. Chief Wilcox advised each of the three candidates that they would serve as an "acting lieutenant" for two months and there were two purposes to serving in the acting lieutenant capacity; 1) to see if each was comfortable in the position, and 2) to be evaluated in his performance. (FF 49 and 53).

Chief Wilcox observed Sergeant Airey in his position as acting lieutenant, and determined that he did an "outstanding job" and went "above and beyond." (FF 54). Chief

Wilcox observed Corporal Ward and concluded that he "did an outstanding job" and "was a buzz saw in there" as acting lieutenant. "Sgt. Ward out-hustled, out-performed and just did a better job in that position." (FF 55). Chief Wilcox observed Whitney and saw that he "doesn't act, interact, well with uniformed guys." (FF 56).

Chief Wilcox consulted with Township Manager Peter Gray about Mr. Gray's observations of the candidates while they served in the Acting Lieutenant position. Gray told Chief Wilcox that he found Airey to be "very helpful," "energetic, a very nice gentleman to work with. I thought he did fine." Gray testified that whenever he had issues to handle and he would ask Airey to take care of it and Airey would. (FF 57). Gray described Ward as "very respectful," and "very helpful." (FF 58). Gray would frequently visit the police department offices and he would see Airey and Ward at their desks, but did not recall having seen Whitney in the Lieutenant's office at that time. (FF 59 and 60). Gray also testified concerning a situation in which Whitney, while serving as acting lieutenant, raised a budget issue with Gray without first going through the chain of command and receiving clearance from the Chief. (FF 61).

Chief Wilcox also asked Faith Friedhofer, his office manager and administrative assistant, about her observations of the performance of each of the acting lieutenants. She stated that Airey and Ward had "gone above and beyond what was expected of them," and their performance was "exceptional." (FF 62). Friedhofer contrasted their effort to learn the different aspects of the position with "several others", who "didn't go that far" and who did what was asked but did not attempt to do more. (FF 63).

Chief Wilcox also conferred with Pletnick, his one remaining Lieutenant. (FF 64). Pletnick observed that Airey did an "exemplary job" as acting lieutenant. He saw Airey as having "jumped into the acting position with both feet. He kept me well informed…I found that he was an excellent communicator." (FF 65). Pletnick observed that Ward "also communicated with me constantly… [h]e constantly was coming in and asking how things were, what could he do, what needed to be done. Was very inquisitive. Seemed to be very much involved. The kind of guy that was being evaluated and was putting his best foot forward." (FF 66). Pletnick testified he "didn't see a whole lot of" Whitney during his time as acting lieutenant, and that Whitney did not inquire about how he could help and did not inquire about what kind of work needed to be done. (FF 67 and 68). Pletnick testified that "there would be times I would go up front to where Sergeant Whitney's office is and try to find him to discuss whatever it may have been, and Sergeant Whitney wouldn't be there," and at one point, Lieutenant Pletnick wanted to go over paperwork with Whitney, he rebuffed Pletnick's offer. (FF 68 and 69). Pletnick recommended that the Township promote Airey and Ward. (FF 64).

As for the Safe City Solutions' 2008 test results, one of the comments from the evaluators was that Whitney's answers to a question raised concerns about his loyalty and should be explored further with him. Whitney had answered "No" when questioned whether he would follow a directive from the chief to issue an order to the department that the department will no longer send two cars to residential alarms. Whitney was adamant in his answer because of the risk to safety. Safe City Solutions devised the question to test an officer's loyalty by seeing if he would follow through with an "unpopular" order. (FF 50). Chief Wilcox met with Whitney and asked about his answer, and Whitney responded that it was "bullshit." (FF 51). Chief Wilcox admitted, however, that he himself would never issue such an order. (FF 52).

On April 30, 2010, as PAFT President, Whitney filed a formal grievance pursuant to the collective bargaining agreement over unresolved issues regarding the duties of the sergeant's position filled by the Township Manager's resolution of the previous grievance. (FF 70). On that same day, at the close of business, the Township announced that Sergeant Airey,² who was ranked fourth on the list of eligibles, was being promoted to lieutenant. (FF 72).

 $^{^2}$ Airey had served as President of PAFT for two terms, and as PAFT Treasurer for ten (10) years. (FF 73).

On May 10, 2010, PAFT filed the charge of unfair labor practices to Case No. PF-C-10-74-E in response to Whitney being passed over for promotion. (FF 75). On May 19, 2010, the Township appointed Corporal Ward³ to the second lieutenant vacancy. (FF 76). On June 29, 2010, PAFT filed the second charge of unfair labor practices to Case No. PF-C-10-99-E in response to Whitney being passed over for promotion a second time. (FF 78).

Out of 14 promotions that Chief Wilcox made during his tenure, 12 of them were to the first person on the eligibility list.⁴ The only exceptions were when Whitney was at the top of the eligibility list in 2010, and was passed over twice. (FF 13 and 14, 74).

Based on the evidence and testimony presented, the Hearing Examiner found that the Township discriminated against Whitney in the 2010 lieutenant promotions, and that the Township's actions would tend to interfere and coerce employes in the exercise of protected rights. The Township argues that the Hearing Examiner erred in concluding that the Township coerced employes or discriminated against Whitney in violation of Section 6(1)(a) and (c) of the PLRA.

For the most part, the Township's 44 additional exceptions to the Hearing Examiner's conclusions concentrate on the elements of coercion under Section 6(1)(a). However, several exceptions tangentially address the burdens for discrimination under Section 6(1)(c) of the PLRA sufficient for Board review. See Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order, 2010), affirmed unreported, Pennsylvania State Police v. PLRB, 626 C.D. 2010, 41 PPER 183 (Pa. Cmwlth. 2011) (involving a claim of discrimination under Section 6(1)(c) and a claim for interference and coercion under 6(1)(a) of the PLRA). To support a charge of discrimination, the complainant must establish 1) that the employe engaged in activity protected by the PLRA, 2) that the employer had knowledge of that activity, and 3) that the employer took adverse action against the employe because of the protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

With respect to the claim of discrimination, the Township argues that the Hearing Examiner erred in finding that Whitney was engaged in protected concerted activity. The Township relies on a Hearing Examiner decision in Upper Southampton Township Police Benevolent Association v. Upper Southampton Township, 31 PPER 131068 (Proposed Decision and Order, 2000), to argue that issues of promotions to positions outside of the bargaining unit are not a mandatory subject of bargaining, and therefore Whitney's discussions with Chief Wilcox concerning the filling of the lieutenant vacancies was not a protected activity. However, procedural aspects of employe promotional opportunities constitute conditions of employment. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 34 PPER 29 (Final Order, 2003). Thus, on this record, Whitney's discussions with Chief Wilcox concerning the procedures for the promotion to lieutenant, including which eligibility list would apply, constitutes protected concerted activities. Furthermore, there can be no dispute that Whitney engaged in other statutorily protected activities for purposes of Section 6(1)(c), such as being elected PAFT President, filing and discussing grievances, voicing his views in union meetings, and participating as a PAFT representative in collective bargaining with the Township.

There is no dispute that Chief Wilcox and the Township were aware of Whitney's protected activities on behalf of the PAFT and bargaining unit. As found credible by the Hearing Examiner, even Chief Wilcox admitted to his knowledge that "[Whitney]... speak[s] [his] mind at union meetings." Further, the credited evidence of record supports that Whitney had raised PAFT's grievances and concerns in the presence of Chief Wilcox. The Township's knowledge is clearly evident from the testimony, credited by the Hearing Examiner, that during a meeting to discuss a grievance, Chief Wilcox's response was that "if this is how it is going to be, it's going to be a very long year." At another meeting

 $^{^{\}rm 3}$ Ward had formerly served two terms as president of PAFT. (FF 77).

⁴ Chief Wilcox followed this policy of promoting the top person on the eligibility list, even over the objections of the Township's former director on an occasion where following the list in descending order would result in two spouses working in the same division. (FF 12).

to discuss PAFT business, Chief Wilcox stated that "Whitney was the main source of anxiety in his life." In addition, Township Manager Grey testified to an incident where he and Whitney, as PAFT President, had discussed a budget issue. Thus, there is irrefutable evidence, not only that Whitney engaged in protected activities on behalf of the PAFT, but that Chief Wilcox and the Township were aware of those activities.

With respect to the final element in a charge of discrimination, it is the employer's unlawful discriminatory motive that creates the offense under Section 6(1)(c) of the PLRA. **PLRB v. Ficon**, 434 Pa. 383, 254 A.2d 3 (1969). While the selection of an employe for promotion has elements of managerial prerogative, the fact that the employer's decision may be discretionary and subjective does not obviate the employer's statutory obligation to exercise that decision-making in the absence of union animus or a discriminatory motive. **Uniontown Area School District v. PLRB**, 557 Pa. 180, 732 A.2d 607 (1999); **City of Erie**, *supra*.

As the employer's motives are rarely overt, a finding that the employer harbored union animus or an unlawful motive may be based on inferences from the facts of record. St. Joseph's Hospital, supra.; PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). In determining whether union animus was a factor in the employer's decision, the Hearing Examiner may look to several factors, including the timing of the adverse action in relation to protected activities, 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, and the effect of the employer's adverse action on other employes and protected activities. PLRB v. Berks County, 13 PPER ¶ 13277 (Final Order 1982); PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978).

The Hearing Examiner found as fact that the credible evidence of record supported an inference of union animus. An inference of unlawful motive is supported by statements made by Chief Wilcox.⁵ The anti-union statements by Chief Wilcox include his statement that PAFT's pursuit of a grievance would result in "a halt to the promotion process." In addition, Chief Wilcox stated to Whitney, "I know you speak your mind at union meetings."⁶ In addition, with respect to Whitney's protected activities, Chief Wilcox became agitated during a discussion with Whitney concerning a grievance, and stated that "if this is how it is going to be, it's going to be a very long year."⁷ During another meeting between Chief Wilcox and Whitney, discussing union business, the Chief again became angry and stated that "Whitney was the main source of anxiety in his life." In addition, the record indicates that Chief Wilcox had stated concerns about Whitney's role as PAFT President with regard to the lieutenant promotions. (N.T. 69, 71, 78-79). The statements of Chief Wilcox, as credited and found by the Hearing Examiner, clearly support the inference of union animus and a discriminatory motive.

In addition, the Hearing Examiner relied on the timing of events as indicative of discrimination. Whitney was elected PAFT President in February of 2010. Over the next month, Chief Wilcox expressed anger and agitation when Whitney raised PAFT concerns. Thereafter, in April 2010, Whitney was passed over for promotion. Whitney filed the charge of unfair labor practices with the Board at No. PF-C-10-74-E on May 10, 2010, and was again passed over for promotion nine days later, on May 19, 2010.

The Hearing Examiner also found disparate treatment, noting that out of fourteen promotions made by Chief Wilcox, the 2010 lieutenant promotions were the only instances where the top candidate on the eligibility list was passed over for promotion. The Township argues that the Hearing Examiner erred in finding disparate treatment because

⁵ The fact that there may be conflicting evidence in the record concerning the statements made by Chief Wilcox, is not a compelling reason to reverse the Hearing Examiner's credibility findings. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

⁶ This statement by Chief Wilcox, a management level employe, clearly raises inferences of surveillance of union activities, and animus.

⁷ Chief Wilcox was evidently referring to Whitney's one-year term as PAFT President.

the promotions relied upon as comparables were within the bargaining unit, not to management level positions. $^{\rm 8}$

The Township's argument however ignores the disparity between the 2008 and 2010 lieutenant promotions. The Township used the same Safe City Solution eligibility list for both the 2008 and 2010 promotions. For the 2008 lieutenant promotion, then lieutenant Ronald MacPherson, who evaluated the candidates, testified that Whitney did a better job as an acting lieutenant than Pletnick. Despite Whitney's better performance in the acting lieutenant position, there is no indication of record that Chief Wilcox even attempted to explore Whitney's responses to the Safe City Solution "loyalty" question at that time.⁹ Pletnick, however ranked higher than Whitney on the Safe City Solution eligibility list, and was promoted. The Township is now arguing that its subjective view of the candidates' performance in the acting lieutenant position in 2010 must be accepted as a significant factor in the promotional decision, despite that in 2008 Whitney's performance in the acting lieutenant position was, at best, given little weight as compared to the ranking on the eligibility list. Thus, the record shows a disparity in the considerations for promotion to lieutenant when Whitney was (2010) and was not (2008) PAFT president.

In addition, the Township argues that the Hearing Examiner erred in finding that the Township harbored an anti-union discriminatory motive in promoting Airey and Ward to lieutenant over Whitney. To support its contention that there was no union animus, the Township points out that both Airey and Ward were past presidents of the PAFT. However, unlike Airey and Ward, Whitney was PAFT President at the time of the 2010 promotions. Further, there is no evidence of record that Chief Wilcox was agitated by Airey and Ward's conduct during their terms as PAFT President, whereas the record establishes that Chief Wilcox became angry or upset when Whitney raised PAFT concerns with the Chief. As the Hearing Examiner noted, "the promotion of these two officers does not answer the PAFT's specific argument in this case, that the Township did not promote Whitney because of *his* protected activity on behalf of the PAFT." (PDO at 11).

The employer may generally defend against a charge of discrimination by establishing a credible non-discriminatory reason for its actions. See Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993). Thus, in circumstances where there is an inference of an unlawful motive on the part of the employer in a promotional decision, the Board has held that "[b]alancing the employer's managerial discretion over a decision to promote an employe with the statutory prohibition on discrimination, the Board will infer an unlawful motive, and find a violation of Section 6(1)(c) of the PLRA, where the evidence indicates that 'but for' the union activity, the employe would have been awarded the promotion." City of Erie, 41 PPER at 455 (citing Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000)).

The Hearing Examiner, upon hearing the testimony and reviewing the evidence, found that the Township's asserted reasons for failing to promote Whitney to lieutenant were not credible. As noted above, credibility determinations, such as the rejection of the Township's proffered reasons for not promoting Whitney, are within the province of the Hearing Examiner and will not be disturbed on exceptions absent the most compelling of circumstances. **City of Uniontown**, *supra.*; **Uniontown Area School District**, *supra*.

The Township argues that it was error for the Hearing Examiner to reject its proffered reasons because Whitney's Safe City Solutions test results raised a "red flag" concerning his ability and willingness to follow an unpopular order. The Township points out on exceptions that Ward's Safe City Solution test results were also described as "very good", but his responses did not raise any "red flags". However, the Safe City Solution test results stated expressly, in italics and underlined, that "[c]andidates are listed in order of performance, highest to lowest." Notwithstanding Whitney's responses to the Safe

⁸ We note that, disparate treatment aside, the Hearing Examiner's inference of union animus is adequately supported by Chief Wilcox's statements and the timing of the adverse action in relation to Whitney's exercise of protected rights.

⁹ Chief Wilcox testified that late in 2009, he had a discussion with Whitney concerning his responses to the "loyalty" question on the Safe City Solution testing. (N.T. 282-283).

City Solution questioning, Safe City Solutions still ranked him higher on the promotion eligibility testing than Ward or Airey. Furthermore, MacPherson, who reviewed candidates for the 2008 lieutenants promotion, testified that Safe City Solutions had made similar comments for Airey's response to the questions concerning his ability and willingness to follow an unpopular order from the chief (N.T. 22), and yet he was subsequently promoted. Accordingly, there are no compelling reasons warranting reversal of the Hearing Examiner's determination that the Township's reliance on a "red flag" in Whitney's responses to Safe City Solutions' "loyalty" question was not worthy of credence.

The Township also asserts that it had reason to not promote Whitney to lieutenant because when Chief Wilcox spoke to Whitney about his answer to the Safe City Solution loyalty question, Whitney responded that the question was "bullshit". There is no dispute, however, that Chief Wilcox admitted on the record that he would never issue an order directing that only one officer respond to alarm calls. (FF 52). This admission by Chief Wilcox supports the Hearing Examiner's rejection of the assertion by the Township that Whitney's response to the Chief when asked about the "loyalty" question foreclosed the possibility of his promotion.

The Township further contends that the Hearing Examiner failed to give proper weight to the Township's assessment of the candidates during the acting lieutenant process. However, the ultimate decision maker and reviewer of the candidates' performance was Chief Wilcox who, as established above, harbored union animus. The Hearing Examiner, therefore, did not err in rejecting Chief Wilcox's assessment of Whitney in the acting lieutenant position as tainted. The Hearing Examiner further discredited the testimony of Lieutenant Pletnick and the Chief's office manager and administrative assistant, Faith Friedhofer, as they were direct subordinates of Chief Wilcox. Although Township Manager Gray testified that he did not recall having seen Whitney in the Lieutenant's office during Whitney's rotation as acting lieutenant (FF 60), the record reflects that Whitney remained at his desk with the detectives during his term as acting lieutenant, and did not move to the Lieutenant's office. (N.T. 263). Thus, there is no compelling reason to reverse the Hearing Examiner's rejection of this testimony.

The Township also points to Township Manager Gray's testimony regarding an incident where Whitney, while in the acting lieutenant position, allegedly violated the chain of command. However, at the time, Whitney was also the PAFT President. He spoke to Mr. Gray as the PAFT representative concerning a budget issue on behalf of the detectives in the bargaining unit. (N.T. 81-82). As the Board has recognized, an employer may not interfere or discriminate against an employe by insisting that protected concerted activities must be channeled through management's chain of command. **Teamsters Local No. 249 v. Millvale Borough**, 36 PPER 147 (Final Order, 2005). Accordingly, Chief Wilcox would have no legitimate basis to use PAFT President Whitney's discussion with Township Manager Gray concerning an issue on behalf of PAFT bargaining members as a basis to refuse Whitney a promotion to lieutenant.

Based on the testimony and evidence presented, the Hearing Examiner properly made credibility determinations and findings to conclude that, but for the factor of the Township's union animus, Whitney would have been promoted to the position of lieutenant. The Hearing Examiner's conclusion is on all fours with the Commonwealth Court's decision on remand in **Uniontown Area School District**, *supra.*, wherein the Court held as follows:

In the case *sub judice* there is substantial evidence of record from which it can be reasonably inferred that the school district engaged in discriminatory conduct in filling the position of school superintendent. The PLRB found that the uncontested evidence establishes that the school district questioned Defino regarding her ability to shed her role as union advocate for the newly sought role of school principal. ... The PLRB found that testimony credible. In consideration of that testimony, and evidence that Mr. Packan was not similarly questioned, the PLRB inferred unlawful motive. Thus, the record reflects substantial evidence, as found by the PLRB, to support the PLRB finding that Defino was not promoted because the school district questioned her ability to "change hats," that is, to act as an advocate for management rather than as one for the union. The PLRB inferred unlawful motive based on the content of the questions and on the fact that Packan was not similarly questioned.

The school district asserts that evidence of Packan's superior credentials as compared to Defino's credentials overcomes any inference of anti-union animus. In support thereof the district highlights Packan's 17 years of experience compared to Defino's 1 year of experience; Packan's willingness to work at any school as opposed to Defino's preference to work at Benjamin Franklin Elementary School; and Packan's willingness to work for \$ 2000 less in pay than Defino. However, the district's argument glosses over the fact that the PLRB found that Defino's non-promotion was the result of anti-union animus not because Mr. Packan's credentials were superior. Moreover, there is evidence of record to support the finding that salary was not an issue. ... Neither was the notion that Ms. Defino might be assigned to a site other than the Benjamin Franklin Elementary School an issue. ... The district's argument is nothing more than a recitation of facts of record, facts which the PLRB was free to reject since questions of credibility and the weight to be given conflicting evidence are for the PLRB to determine. [City of Reading v. Pennsylvania Labor Relations Board, 130 Pa. Commw. 397, 568 A.2d 715 (Pa. Cmwlth. 1989)].

Uniontown Area School District, 747 A.2d at 1274.

After a thorough review of the exceptions and all matters of record, there are no compelling circumstances warranting the reversal of the Hearing Examiner's credibility determinations, or the Hearing Examiner's finding that but for the Township's union animus, Whitney would have received the promotion to lieutenant in 2010. Thus, the Hearing Examiner did not err in concluding that the Township violated Section 6(1)(a) and (c) of the PLRA, as read in *pari materia* with Act 111.¹⁰ Accordingly, the Township's exceptions shall be dismissed in part, and the December 18, 2012, Proposed Decision and Order, as amended herein, shall be made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Falls Township are hereby sustained in part and dismissed in part, and the December 18, 2012 Proposed Decision and Order, as modified herein, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr, Member, this nineteenth day of March, 2013. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

¹⁰ Where the facts support a discriminatory motive and violation of Section 6(1)(c) of the PLRA, as a matter of law, the same facts also support a derivative or generic violation of Section 6(1)(a). Accordingly, on this record, a finding of a separate independent violation of Section 6(1)(a) of the PLRA is unnecessary. See **City of Erie**, supra.

COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

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

AFFIDAVIT OF COMPLIANCE

Falls Township hereby certifies that it has ceased and desisted from its violation of Section 6(1) (a) and (c) of the Pennsylvania Labor Relations Act as read in *pari materia* with Act 111; that it has offered to Nelson Whitney the position of lieutenant; that it has made him whole for the wages and benefits he would have earned in the position of lieutenant had he been appointed on April 30, 2010; that it has posted the Final Order and the Proposed Decision and Order in a conspicuous place in the Township and that it has served a copy of this affidavit the Police Association of Falls Township.

Signature/Date

Title

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

Signature of Notary Public