COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 104, AFL-CIO	:	
	:	Case No. PF-C-16-83-E
v.	:	
CITY OF WILKES-BARRE	:	

FINAL ORDER

The International Association of Fire Fighters, Local 104, AFL-CIO (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on November 26, 2018, challenging a Proposed Decision and Order (PDO) issued on November 8, 2018. In the PDO, the Board's Hearing Examiner found that the City of Wilkes-Barre (City) did not violate Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968, by demoting Thomas Makar from Assistant Chief of the Wilkes-Barre Fire Department to the rank of Captain. Pursuant to an extension of time granted by the Secretary of the Board, the Union filed a brief in support of the exceptions on December 20, 2018. The City filed a response to the exceptions and a supporting brief on December 11, 2018, and January 25, 2019, respectively.

The Union filed a Charge of Unfair Labor Practices on September 1, 2016, alleging that the City violated Section 6(1)(a),(c) and (e) of the PLRA by demoting Mr. Makar from Assistant Chief to Captain in retaliation for his support of the Union and activities as Union President.[1] On September 14, 2016, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held before the Hearing Examiner on December 7, 2016. After numerous continuances, a hearing was held on April 25, 2018, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

For purposes of addressing the exceptions to the PDO, the facts are summarized, as follows. The Union is the exclusive representative for a unit of firefighters in the City of Wilkes-Barre, including the rank of Captain and Assistant Fire Chief. The Assistant Fire Chief positions are obtained only by Mayoral appointment and are subject to demotion without just cause. (FF 6). For the past twenty-five years, every mayor has, upon assuming office, declared the Assistant Chief positions open and has filled them with persons of their choice. (FF 6).

Thomas Makar has been employed by the City as a firefighter, and has been a member of the Union, since 1981. (FF 3, 4). In 1988, Mr. Makar was promoted to Captain of the Fire Department. (FF 3). In 1998, Mr. Makar became the Union president, and served in that capacity until 2012. (FF 4). During his tenure as Union President, he was responsible

[1] The Union withdrew its charge pursuant to Section 6(1)(e) of the PLRA at the hearing.

for the filing of grievances on behalf of the Union and advocating safety concerns for the firefighters and the City. (FF 4).

During Mr. Makar's time as President of the Union, Thomas Leighton became Mayor of the City and declared the Assistant Chief positions in the fire department to be open. (FF 6). After interviewing for the position, Mr. Makar was promoted to Assistant Chief in 2004. (FF 5). He served in that capacity until 2016. (FF 3). In 2016, Anthony George became Mayor and declared all four of the Assistant Fire Chief positions to be open. (FF 7). In March of that year, Mr. Makar submitted his resume for consideration for the position of Assistant Chief, which he believed was of low quality.[2] (FF 8).

Thereafter, the City formed a Committee to conduct interviews and make recommendations to the Mayor for the Assistant Chief positions. (FF 9). The Committee consisted of City Administrator Ted Wampole, Human Resources Director Nicole Ference, and Deputy Fire Chief Alan Klapat. (FF 9). A total of twelve applicants, including Mr. Makar, were interviewed. (FF 12). All the applicants were Union members. (FF 12).

During Mr. Makar's interview, he expressed anger at being required to apply for a position he already held. (FF 13). Mr. Makar was not professionally dressed when he appeared at the interview whereas the other candidates wore a suit or their uniform. (FF 10). Additionally, during the interview, Mr. Makar spoke negatively about the City's incident command system.[3] (FF 13).

After completion of the interview process, the Committee unanimously recommended that Bill Murtha and John Ostrum be retained as Assistant Chiefs, and that the remaining two positions be offered to Robert Suchoski and Damian Lenadacky. (FF 16, N.T. 34). Mr. Suchoski declined the position, having determined that he would rather remain a fire inspector, such that Ed Snarski, who was a sitting Assistant Fire Chief, was offered that position. (N.T. 34)

Mr. Makar was not given an offer for the position of Assistant Fire Chief. The Committee members testified that their reasons for not extending an offer to Mr. Makar included his overall attitude and demeanor throughout the process, especially his expressed anger at having to interview, and his negative remarks about the incident command system. (FF 12, 13). Mr. Makar's union activity was not discussed by the Committee when deciding not to recommend him for retention as Assistant Chief. (FF 11). Mr. Makar was officially demoted to Captain on August 1, 2016, by order of the Mayor. (FF 14). Mr. Makar retired from the Fire Department in February of 2018, with the rank of Captain. (FF 3).

---

[2] Mr. Makar testified that he thought his resume was "piss poor." (N.T. 52-53).

[3] The incident command system is a nationally mandated system developed by the federal government after September 11, 2001, which provides an organizational structure to manage emergencies, including the proper use of resources and time management. (N.T. 82-84). Both the Mayor and Chief Delaney favor use of the incident command system in the City of Wilkes-Barre. (N.T. 81)

After considering the testimony and documentary evidence presented at the hearing, together with the post-hearing briefs, the Hearing Examiner issued a PDO concluding that the Union failed to sustain its burden of establishing a violation of Section 6(1)(c) of the PLRA because the record does not support a conclusion that the City was motivated by anti-union animus when it demoted Mr. Makar from the position of Assistant Chief.[4]

Initially, we note that the Board defers to the Hearing Examiner's decision to credit some, all, or none of a witness' testimony as he is best able to observe the manner and demeanor of the witnesses at the hearing. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER ¶ 33011 (Final Order, 2001); Crestwood School District v. Crestwood Education Association, 32 PPER ¶ 32050 (Final Order, 2001). The Board will not disturb the hearing examiner's credibility determinations absent compelling circumstances. Id. Here, the Union did not allege any such circumstances. The factual findings of the Hearing Examiner are supported by substantial credible evidence of record, and thus, the Union's exceptions to the findings of fact must be dismissed.

To succeed on a claim of discrimination pursuant to the PLRA, the employe must show (1) that he was engaged in a protected activity; (2) the employer was aware of the employe's protected activity; and (3) the action taken by the employer against the employe was motivated by anti-union animus. Lancaster County v. PLRB, 124 A.3d 1269 (Pa. 2015). The charging party bears the burden of proof and must show substantial, credible evidence that the employer displayed anti-union animus to establish a *prima facie* case of discrimination. See Polizzi v. Lehigh Carbon Community College, 47 PPER 87 (Final Order, 2016).

Here, the Union asserts that "Makar's demotion simply makes no sense," and therefore, the reasons offered by the City for his demotion must be "nothing but pretext." (Union Brief, p. 15). Specifically, the Union argues that although Mr. Makar admittedly had not been involved with the Union since 2012, he had been actively engaged on social media speaking out in a manner which was unflattering to the Mayor from 2012 to 2016. However, the only testimony on this issue was Mr. Makar's own statement that he maintained a Facebook page in 2016, which had been critical of the Mayor. (N.T. 16-17). Further, there is no record evidence to establish that the Mayor or the members of the interview Committee were aware of Mr. Makar's posts on his Facebook page.

Indeed, the Union did not elicit any testimony from the City's witnesses at the hearing concerning whether they had seen Mr. Makar's Facebook page, or knew of its contents. Rather, the Union is merely relying on the fact that City Administrator Wampole is one of Mr. Makar's "friends" on Facebook. (N.T. 18). Significantly, however, the record does not show that Mr. Wampole actually saw any of Mr. Makar's Facebook posts. This militates against the Union's claim of discrimination under Section 6(1)(c) of the PLRA. See Shive v.

[4] The Hearing Examiner did not entertain the Union's claim of an independent violation of Section 6(1)(a) as it was not alleged in the Union's Charge, filed on September 1, 2016.

Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

The record further establishes that the City did not act out of anti-union animus. Because motive creates the offense, but is rarely admitted by the employer, animus may be inferred from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1130 (Pa. Cmwlth. 1996). To infer anti-union animus, the entire background of the case must be considered, including any anti-union statements made by the employer, the failure of the employer to adequately explain its adverse action taken against an employe, and whether the action complained of was inherently destructive of important employe rights. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). When combined with another factor, close timing can give rise to an inference of anti-union animus. PLRB v. Berks County, 13 PPER ¶13277 (Final Order, 1982). Conversely, a lapse in time between the protected activity and the adverse action weakens such an inference. Teamsters Local 776 v. Dauphin County, 32 PPER ¶32126 (Final Order, 2001). An inference of anti-union animus must be based on substantial evidence which is "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." PLRB v. Kaufmann Dept. Stores, 29 A.2d 90, 92 (Pa. 1942); Lancaster County v. PLRB, supra.

Here, the substantial evidence of record establishes that the City's reason for its action in demoting Mr. Makar was not discriminatory. The evidence adduced at the hearing clearly shows Mr. Makar's disdain for the City's process of selecting new Assistant Fire Chiefs by attending his interview in blue jeans (N.T. 66), acting discourteous and resentful at having to interview for a position he already held (N.T. 89), and disparaging a federally mandated emergency management protocol favored by the Fire Chief during his interview. (N.T. 84).

Importantly, one of the members of the interview committee, Alan Klapat, stated unequivocally that although Mr. Makar's experience "cannot be questioned," he presented himself "with [such] a poor attitude, fringing on being belligerent and disrespectful" throughout the entire process that he could not, in good conscience, recommend him for the Assistant Fire Chief post. (N.T. 78-80). Further, all three of the interviewers testified that they did not discuss or consider Mr. Makar's involvement with the Union in the decision-making process. The Hearing Examiner credited this testimony, and as such, it simply cannot be disturbed. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, supra.

Moreover, it should be noted that the process of declaring the Assistant Fire Chief positions open with each Mayoral change is rooted in a long-standing City practice, of which Mr. Makar was well aware, given that he participated in this same process in 2004 when he was promoted to an Assistant Fire Chief position. (N.T. 41-45). Although the Union asserts that this was the first time a sitting Assistant Chief was demoted after a change in Mayor, just such a situation occurred in 2004 when Mr. Kosciolek and Mr. Turinski were not chosen to retain their positions as Assistant Chief, but both chose to retire rather than take the demotion. (N.T. 44-45). On this record, the Union has not demonstrated that the City acted with anti-union animus in

offering the Assistant Chief positions to persons other than Mr. Makar. Therefore, the Hearing Examiner properly concluded that the Union did not establish a *prima facie* claim pursuant to Section 6(1)(c) of the PLRA.

Finally, the Union asserts in its exceptions that the Hearing Examiner erred in dismissing the Section 6(1)(a) charge by ignoring the "derivative nature" of its allegations, and "by requiring a specific pleading to that end." In its brief on exceptions, however, the Union argues that an independent violation of Section 6(1)(a) exists in this matter, and that the Hearing Examiner erred by concluding that the Union failed to properly allege such a violation.

The Charge filed by the Union alleged only that Mr. Makar was demoted without just cause from his position as Assistant Chief in retaliation for his activities on behalf of, and in support of, the Union. Significantly, the Charge did not allege that the City's actions "interfered with, restrained or coerced" other employes from engaging in protected activity. Allegations not included in the initial Charge filed with the Board cannot form the basis for finding an independent violation of Section 6(1)(a). Manor Township Police Association v. Manor Township, 42 PPER 57 (Final Order, 2011). As such, only a derivative violation of Section 6(1)(a) was put forth in this matter. See Pennsylvania State Troopers Association v. PLRB, 39 A.3d 616 (Pa. Cmwlth. 2012); Independent State Store Union v. PLRB, 18 A.3d 367 (Pa. Cmnwlth. 2011).

"The Board only has jurisdiction to find the unfair practices alleged in a charge. As a matter of due process, a charging party may not allege one charge and then prosecute another." Teamsters Local Union No. 384 v. Kennett Consolidated School District, 37 PPER 89 (Final Order, 2006).[5] Accordingly, the Hearing Examiner did not err by refusing to entertain an independent violation of Section 6(1)(a) because it was not properly alleged in the Charge filed by the Union.

Therefore, after a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the City did not violate Section 6(1)(a) and (c) of the PLRA by demoting Thomas Makar from Assistant Fire Chief to Captain. Accordingly, the exceptions filed by the Union shall be dismissed, and the PDO made absolute and final.

ORDER

[5] The Union's citation to McMahon v. Springfield Township, 28 PPER 28164 (Final Order, 1997) is unavailing in this matter. First, in that case, the Union alleged an independent violation of Section 6(1)(a) of the PLRA. Springfield Township, 28 PPER 28072 at 155 (Proposed Decision and Order, 1997). Secondly, on exceptions, the Board determined that the Charge was time-barred such that it vacated the Hearing Examiner's disposition thereof without addressing the propriety of the Hearing Examiner's finding of an independent violation of Section 6(1)(a). Springfield Township, 28 PPER at 357.

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the International Association of Fire Fighters, Local 104, AFL-CIO, are hereby dismissed, and the November 8, 2018, Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member, this sixteenth day of July, 2019. 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.