

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LACKAWANNA COUNTY DEPUTY SHERIFF'S :
ASSOCIATION :
 :
v. : Case No. PERA-C-18-103-E
 :
LACKAWANNA COUNTY :
LACKAWANNA COUNTY SHERIFF :

FINAL ORDER

Lackawanna County and the Lackawanna County Sheriff (collectively County) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on October 18, 2019, challenging a Proposed Decision and Order (PDO) issued on September 30, 2019. In the PDO, the Board's Hearing Examiner concluded that the County violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA) when Sheriff Mark McAndrew did not promote Glenn Capman to the position of Sergeant and issued him a verbal warning on March 13, 2018 in retaliation for filing a grievance. The Lackawanna County Deputy Sheriff's Association (Association) filed a brief in opposition to the exceptions on October 23, 2019.

The facts of this case are summarized as follows. The Association is the exclusive bargaining agent for a unit of deputy sheriffs employed by the County Sheriff's Office. The Association and the County are parties to a collective bargaining agreement (CBA) effective January 1, 2010 through December 31, 2013, which was amended pursuant to an interest arbitration award effective January 1, 2014 to December 31, 2017. Mark McAndrew has been the County Sheriff since January 2014.

Glenn Capman has been employed as a deputy sheriff in the County Sheriff's Office for more than 21 years. He has held the rank of Corporal since 2010. He has also held several positions in the Association, including President, Vice President and Secretary.

In March 2017, Mr. Capman attended a meeting with Chief Deputy Boland, Corporal Callaghan and Corporal Novak, in which the corporals were informed that they would rotate Sergeant Acculto's duties while he was off work for several months. Later that day, Chief Deputy Boland informed Mr. Capman that, due to the busy court schedules of Corporals Callaghan and Novak, Sheriff McAndrew was reassigning Mr. Capman to cover the Sergeant's duties and serve as Acting Sergeant.

After his first paycheck as Acting Sergeant, Mr. Capman noticed that he was not being compensated for out-of-class pay and asked Chief Deputy Boland about it. Chief Deputy Boland responded that Mr. Capman should receive the pay and that he would take care of it. After several paychecks, Mr. Capman still was not receiving his out-of-class pay and filed a grievance on June 9, 2017. Sheriff McAndrew denied the grievance at the first step and the

grievance proceeded to a second step with County Deputy Director of Human Resources Justin MacGregor.

Sergeant Acculto returned to work approximately three weeks after Mr. Capman filed the grievance. Consequently, Mr. Capman went back to his position as Training Corporal and resumed his training duties with regard to firearms, tasers, the Pennsylvania Commission on Crime and Delinquency and any other type of outside training for the office. About a week after Mr. Capman resumed his duties as Training Corporal, he attended a meeting with Sheriff McAndrew and Chief Deputy Boland. During the meeting, Sheriff McAndrew stated "this isn't retaliatory or discriminatory, but I can't justify keeping you in the training corporal's position anymore." Sheriff McAndrew then told Mr. Capman that he was going to distribute the duties of the Training Corporal to the rest of the corporals. Sheriff McAndrew further advised Mr. Capman that he was going to be assigned to the family court building to assist Sergeant Buza. Neither Sheriff McAndrew nor Chief Deputy Boland provided any reasons for why they took away Mr. Capman's training duties. Prior to this meeting, Mr. Capman was never disciplined for his performance as Training Corporal.

Mr. Capman was the senior corporal and frequently served as Acting Sergeant. After Mr. Capman was removed as the Training Corporal, Sheriff McAndrew did not assign him those opportunities anymore. Mr. Capman never received any complaints during the four months he served as Acting Sergeant.

In early 2018, a vacancy arose for the Sergeant position due to the resignation of Sergeant Acculto. Mr. Capman signed his name to the posting along with Corporal Cavalieri and several non-ranking deputies. Mr. Capman expressed his interest to Chief Deputy Tighe who had replaced Chief Deputy Boland. Chief Deputy Tighe informed Mr. Capman that Sheriff McAndrew was going to give the position to Corporal Cavalieri, who ultimately received the promotion. Mr. Capman was senior to Corporal Cavalieri as both a corporal and in overall service to the Sheriff's Office. Mr. Capman received his promotion to corporal in 2010, while Corporal Cavalieri was promoted in 2016. Further, Mr. Capman was hired in 1998 and Corporal Cavalieri began working for the Sheriff's Office around 2005. Neither Sheriff McAndrew nor Chief Deputy Tighe provided Mr. Capman with any reasons for promoting Corporal Cavalieri instead of him.

By letter dated March 13, 2018, Mr. Capman was informed by Mr. MacGregor to appear for a due process hearing for his alleged violation of the County's social media policy for posting information on his Facebook page concerning the active shooter training provided to the deputy sheriffs by County SWAT team members. At the conclusion of the March 13, 2018 due process hearing, Sheriff McAndrew informed Mr. Capman that he would be given a verbal warning for giving a press release to the media.

On March 24, 2018, Corporal Novak informed Mr. Capman that, per Sheriff McAndrew, Mr. Capman was no longer permitted to be put in a supervisory position as long as another ranking supervisor was on duty. Mr. Capman had been the senior corporal, but had been moved to the bottom of the seniority list by Sheriff McAndrew.

The Association filed its Charge of Unfair Practices on April 25, 2018, alleging that the County violated Section 1201(a)(1) and (3) of PERA when it did not promote Mr. Capman to the Sergeant position as well as issuing him the March 13, 2018 verbal warning in retaliation for filing a grievance. On

May 23, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held before the Hearing Examiner on August 8, 2018. After several continuances, the hearing was held on May 15, 2019, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the County violated Section 1201(a) (1) and (3) of PERA when it promoted a less senior deputy sheriff to the Sergeant position instead of Mr. Capman and issued Mr. Capman a verbal warning for allegedly violating a media policy. By way of remedy, the Hearing Examiner ordered the County to immediately offer to promote Mr. Capman to the position of Sergeant, to make him whole for all wages and benefits he would have received, and to rescind the March 13, 2018 verbal warning.

The County alleges in its exceptions that the Hearing Examiner erred in concluding that its failure to promote Mr. Capman and issuance of the March 13, 2018 verbal warning were motivated by anti-union animus.¹ In order to sustain a charge of discrimination under Section 1201(a) (1) and (3) of PERA, the charging party must prove that (1) the employe engaged in protected activity; (2) the employer was aware of the employe's protected activity; and (3) the employer took adverse action against the employe because of a discriminatory motive or anti-union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The charging party must demonstrate that all three elements are present in order to establish a *prima facie* case of discrimination. Colonial Food Service Educational Personnel Association v. Colonial School District, 36 PPER 88 (Final Order, 2005). The burden then shifts to the respondent to rebut the charging party's *prima facie* case. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993).

There is no dispute as to the first two elements for discrimination under St. Joseph's Hospital. Indeed, the filing of grievances is activity protected by PERA, of which the employer is aware. Montrose Area Education Association v. Montrose Area School District, 38 PPER 127 (Final Order, 2007). It is the employer's discriminatory motive that is the offense under Section 1201(a) (3) of PERA. PLRB v. Ficon, Inc., 254 A.2d 3 (Pa. 1969).

¹ The County asserts that the Hearing Examiner erred in finding that Mr. Capman was given a verbal warning for giving a press release to the media because he was disciplined for violating the County's social media policy. For purposes of the exceptions, the Hearing Examiner's Findings of Fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Here, the Hearing Examiner credited the testimony of Mr. Capman that Sheriff McAndrew informed him that he would receive a verbal warning for providing a press release to the media concerning the active shooter training provided to the deputy sheriffs by the County SWAT team. This finding is supported by the record and the County has failed to present any compelling reasons to warrant reversal of the Hearing Examiner's credibility determination. Therefore, its exception to this finding is dismissed.

Because an 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. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). In determining whether union animus was a factor in an employer's decision, the Hearing Examiner may look to 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 actions against the adversely affected employees, the effect of the employer's adverse action on the employees' protected activities and whether the action complained of was "inherently destructive" of important employee rights. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Close timing between employee protected activity and an employer's adverse action alone is not enough to infer animus, but when combined with other factors can support the inference of anti-union animus. Colonial School District, supra.

In finding union-animus or motive, it is well-settled that the Board defers to the hearing examiner's decision to credit some, all, or none of a witness' testimony because 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 the most compelling of circumstances. Id.

In concluding that the Association established that Sheriff McAndrew's actions were motivated by anti-union animus, the Hearing Examiner stated, in relevant part, as follows:

The record shows that Capman filed a grievance on June 9, 2017, alleging a violation of the CBA for being denied his out-of-class pay. Approximately three weeks later, Sergeant Acculto returned to work and Capman briefly resumed his regular duties as Training Corporal. However, just one week later, [Sheriff] McAndrew called Capman to a meeting with himself and [Chief Deputy] Boland, during which McAndrew stripped Capman of his duties as Training Corporal and informed Capman that he was distributing those duties to the rest of the corporals. What is more, McAndrew prefaced the removal of Capman's duties by stating "this isn't retaliatory or discriminatory, but I can't justify keeping you in the training corporal's position anymore." That McAndrew felt the need to immediately disclaim retaliation or discrimination as his motive is rank evidence of animus on behalf of the Sheriff, especially in light of the fact that neither McAndrew nor Boland provided any reasons for why they were removing Capman's training duties, and because Capman had never been disciplined for his performance as Training Corporal.

...

Then, in early 2018, when Capman signed his name to the posting for the vacant Sergeant position, the Sheriff awarded the job to [Corporal] Cavalieri, who has far less seniority than Capman, both as a corporal and as a deputy sheriff working for the County. Once again, however, McAndrew never provided Capman with any reasons for why Capman did not receive the promotion. To make matters worse, McAndrew then directed Corporal Novak to inform Capman that Capman was no longer allowed to serve in a supervisory capacity, as long as there was another ranking supervisor on duty. This, despite the fact that Capman had previously been the senior corporal. However, Capman was somehow now moved to the bottom of the list, such that all the other corporals were his superior officer now.

(PDO at 6).

With regard to the March 13, 2018 verbal warning issued to Mr. Capman, the Hearing Examiner held that Sheriff McAndrew's involvement in issuing the verbal warning tainted the discipline with unlawful motivation. Thus, the Hearing Examiner credited the testimony of Mr. Capman that the Sheriff's actions were in retaliation for his filing of the June 9, 2017 grievance. The Sheriff did not testify at the hearing in this matter and, therefore, the County failed to rebut the Association's *prima facie* case of discrimination under Section 1201(a) (3) of PERA.

The County next asserts that the Hearing Examiner erred in making Findings of Fact 10, 11, 12 and 17 concerning Sheriff McAndrews' decision to remove the Training Corporal duties and opportunities to serve as the Acting Sergeant from Mr. Capman along with his transfer to the new government building on the midnight shift because those facts were not alleged in the Association's Charge. However, the Association may present evidence of events which occurred prior and subsequent to the alleged unfair practices in its Charge as background to explain the Sheriff's conduct and to establish a pattern of discrimination. See Camp Hill Borough v. PLRB, 507 A.2d 1297 (Pa. Cmwlth. 1986), *appeal denied*, 531 A.2d 781 (Pa. 1987); see also Lackawanna County Area Vocational-Technical Federation of Teachers, Local 3876, AFT v. Lackawanna County Area Vocational-Technical School, 25 PPER ¶ 25064 (Final Order, 1994). Here, a review of the entire background of the case demonstrates that Sheriff McAndrew engaged in a pattern of discrimination after Mr. Capman filed the June 9, 2017 grievance, by repeatedly reducing his duties and seniority status in the County Sheriff's Office to the point that Mr. Capman was no longer receiving supervisory opportunities and becoming the least senior corporal even though he had the most experience. Therefore, the Hearing Examiner did not err in making these findings to infer anti-union animus on the part of Sheriff McAndrew.

The County additionally alleges that the actions of Sheriff McAndrew did not affect Mr. Capman's wages or job duties and, therefore, the Association failed to demonstrate that he suffered any adverse action. However, as found by the Hearing Examiner, Mr. Capman was denied a promotion as well as opportunities to serve as Acting Sergeant resulting in the loss of pay. Further, Mr. Capman was disciplined by Sheriff McAndrew through the issuance of the March 13, 2018 verbal warning.

The County further asserts that Sheriff McAndrew, in promoting Corporal Cavalieri over Mr. Capman and issuing the verbal warning, was exercising his authority under Section 1620 of the County Code² to hire, fire and supervise the employes of the County Sheriff's Office and that the Hearing Examiner's finding of a violation of Section 1201(a)(1) and (3) of PERA interferes with that authority. Section 1620 provides, in relevant part, as follows:

[W]ith respect to representation proceedings before the Pennsylvania Labor Relations Board or collective bargaining negotiations involving any or all employes paid from the county treasury, the board of county commissioners shall have the sole power and responsibility to represent judges of the court of common pleas, the county and all elected or appointed county officers having any employment powers over the affected employes. The exercise of such responsibilities by the county commissioners shall in no way affect the hiring, discharging and supervising rights and obligations with respect to such employes as may be vested in the judges or other county officers.

The Pennsylvania Supreme Court has held that Section 1620 was enacted to designate county commissioners as the bargaining agents for row officers while retaining the row officers as the principle in bargaining the rights and obligations for matters involving hire, discharge and supervision of their staffs. See PLRB v. Della Vecchia, 537 A.2d 805 (Pa. 1988); AFSCME, District Council 88 v. Berks County, 29 PPER ¶ 29044 (Final Order, 1998); see also County of Lehigh v. PLRB, 489 A.2d 1325 (Pa. 1985). Section 1620 does not, in any way, vest rights to terminate employes for unlawful reasons or shield row officers from complying with statutory laws such as Section 1201(a)(3) of PERA, which prohibits public employers from discriminating against employes for engaging in protected concerted activities.

It is not disputed that Sheriff McAndrew has the authority to hire, discharge and supervise his employes, as does any public employer.³ However, pursuant to Section 1201(a)(3) of PERA, the exercise of that authority must not be done with a discriminatory motive. On this record, the Hearing Examiner concluded that the Association met its burden demonstrating that Sheriff McAndrew had a discriminatory motive when he failed to promote Mr. Capman and issued the March 13, 2018 verbal warning. The County failed to rebut this conclusion because Sheriff McAndrew did not appear at the hearing in this matter to offer any explanation for his conduct.

The County also excepts to the Hearing Examiner's conclusion that Mr. Capman would have been promoted if not for Sheriff McAndrew's discriminatory actions. The uncontested findings indicate that Mr. Capman had been employed by the Sheriff's Office for over 21 years and that he was

² Act of August 9, 1955, P.L. 323, as amended, 16 P.S. §§ 101-3000.3903.

³ Section 702 of PERA provides, in relevant part, that public employers "shall not be required to bargain over matters of inherent managerial policy, which shall include ... selection and direction of personnel..." 43 P.S. § 1101.702. Further, an employer's right to hire or discharge its employes for just cause is not impaired. 43 P.S. § 1101.706.

the most senior corporal to apply for the Sergeant position. (FF 5, 13, 14). Further, Mr. Capman had frequently served as Acting Sergeant and did not receive complaints while serving in that capacity. Therefore, the Hearing Examiner properly inferred that Mr. Capman would have received the promotion absent Sheriff McAndrew's discriminatory motive.

Upon review of the record, there was adequate evidence to support an inference of unlawful union animus. Specifically, the close timing of the removal of Mr. Capman's Training Corporal duties to the filing of the June 9, 2017 grievance, as well as, the systematic reduction of acting supervisory duties and seniority status even though he had the most experience as a corporal. These actions culminated in Sheriff McAndrew's refusal to promote Mr. Capman to the Sergeant position and issuance of a verbal warning. Accordingly, the Hearing Examiner properly concluded that the County violated Section 1201(a)(1) and (3) of PERA.

Citing to Section 1620 of the County Code, the County further asserts that the Board lacks authority to order Sheriff McAndrew to comply with the remedy directed in the PDO. However, as noted above, Section 1620 does not vest row officers with a right to hire or fire employees for unlawful reasons, and as found by the Hearing Examiner, Sheriff McAndrew's actions were motivated by anti-union animus in violation of Section 1201(a)(1) and (3) of PERA. Section 1303 of PERA authorizes the Board to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action ... as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, and not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000).

The County additionally excepts to the remedy issued by the Hearing Examiner. Specifically, the County alleges that Mr. Capman resigned his position with the Sheriff's Office and that the Hearing Examiner's order that the County make an unconditional offer to promote Mr. Capman to the position of Sergeant should be reversed as moot. However, the fact that Mr. Capman has resigned his position with the Sheriff's Office does not resolve the Association's Charge that Sheriff McAndrew engaged in anti-union animus when he failed to promote Mr. Capman to the Sergeant position. AFSCME, Council 13 v. State System of Higher Education (Edinboro University), 32 PPER ¶ 32080 (Final Order, 2001), *aff'd sub nom.*, State System of Higher Education (Edinboro University) v. PLRB, 839 C.D. 2001 (Pa. Cmwlth. January 4, 2002) (unreported opinion). Nevertheless, we find that Mr. Capman's resignation necessitates modification of the Hearing Examiner's remedy directing the County make him whole from the date Corporal Cavalieri was promoted to the date Mr. Capman is promoted to the Sergeant position. Instead, the remedy will be modified to direct make whole relief from the date Corporal Cavalieri was promoted to the Sergeant position to the date of Mr. Capman's resignation from his position in the Sheriff's Office.⁴ The Board finds that the remedy directing the County to make Mr. Capman whole for

⁴ The County additionally alleges that the Association's unfair practice claims are moot because Mr. Capman executed a settlement agreement and general release purportedly releasing any claims he had against the County. However, both the County and the Association allege in their respective briefs that the Association rejected the County's demand that the underlying Charge in this matter be withdrawn. Therefore, the record does not establish that there was a meeting of the minds or binding agreement on this matter.

all wages and benefits, and to rescind the March 13, 2018 verbal warning to be remedial and in furtherance of the purposes and policies of PERA. As we have modified the remedy herein, the County's exceptions to the remedy are moot in part, and are dismissed.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final as modified herein.

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Lackawanna County and the Lackawanna County Sheriff are hereby dismissed, and the September 30, 2019 Proposed Decision and Order be and the same is hereby made absolute and final as modified herein.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that Lackawanna County and the Lackawanna County Sheriff shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA;
2. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization;
3. Take the following affirmative action:
 - (a) Immediately make Capman whole for all wages and benefits, plus six percent per annum interest, that he would have earned as Sergeant, beginning with the date the Sheriff promoted Cavalieri to the Sergeant position through the date of Capman's resignation from his position with the Sheriff's Office, as well as rescind the March 2018 verbal warning and any reference thereto from Capman's file;
 - (b) Post a copy of the Proposed Decision and Order and Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;
 - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with the Final Order by completion and filing of the attached Affidavit of Compliance; and
 - (d) Serve a copy of the attached Affidavit of Compliance upon the Association.

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 twenty-first day of April, 2020, 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 on April 24, 2020.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LACKAWANNA COUNTY DEPUTY SHERIFF'S :
ASSOCIATION :
v. : Case No. PERA-C-18-103-E
LACKAWANNA COUNTY :
LACKAWANNA COUNTY SHERIFF :

AFFIDAVIT OF COMPLIANCE

Lackawanna County and the Lackawanna County Sheriff hereby certify that they have ceased and desisted from their violations of Section 1201(a) (1) and (3) of the Public Employe Relations Act; that they have made Mr. Capman whole for all wages and benefits, plus six percent per annum interest, beginning with the date the Sheriff promoted Cavalieri to the Sergeant position through the date of Capman's resignation from his position with the Sheriff's Office; that they have rescinded the March 13, 2018 verbal warning and any reference thereto from Mr. Capman's file; that they have posted a copy of the Proposed Decision and Order and Final Order as directed; and that they have served a copy of this affidavit on the Association at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public