

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

NAZARETH BOROUGH POLICE ASSOCIATION :  
 :  
 v. : Case No. PF-C-12-59-E  
 :  
 NAZARETH BOROUGH :

**PROPOSED DECISION AND ORDER**

On April 27, 2012, the Nazareth Borough Police Association (Association or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Nazareth Borough violated sections 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with Act 111 of 1968 (Act 111).

On June 7, 2012, the Secretary of the Board issued a complaint and notice of hearing in which the case was assigned to a conciliator to resolve the matter without a hearing and November 7, 2012 in Harrisburg was established as the time and place of hearing, if necessary. The hearing was necessary and was held as scheduled. The parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

**FINDINGS OF FACT**

1. Nazareth Borough is an employer within the meaning of Section 3(c) of the PLRA, with its address located at 134 South Main Street, Nazareth, PA 18064. (N.T. 8)
2. Nazareth Borough Police Association is a labor organization within the meaning of Section 3(f) of the PLRA, with its address located at c/o Lightman, Welby & Stoltenberg, Harrisburg, PA 17110. (N.T. 8)
3. The Borough recognized the Association as the exclusive representative of the full time police officers of the Borough.
4. The Borough and the Association are parties to a collective bargaining agreement that provides for pay scales for two ranks, sergeants and patrolmen. (N.T. 35, 40-41, 73, Borough Exhibit 1)
5. Frederick A. Lahovski has been a police officer of the Borough since February, 2008. (N.T. 10)
6. On January 30, 2009, the Borough Chief of Police Michael A. Sinclair re-assigned Lahovski from Patrol Line Squad to Criminal Investigator. (N.T. 10, Association Exhibit 1)
7. The Chief stated in his appointment letter that the position of Criminal Investigator "shall carry the title of Detective and receive all benefits of the position as determined by the job description." (N.T. 10, Association Exhibit 1)
8. Lahovski wrote the job description for the detective position, which became part of the police department's policies and procedures manual. (N.T. 11-12, Association Exhibit 2)

9. The title of detective has not been approved by the Borough Council, is not recognized in the CBA and is not approved by the Borough Civil Service Commission. (N.T. 35-36, 59-60, Association Exhibit 3 3 and 4)
10. In 2009, Lahovski held the position of Association secretary. In 2012, he became the Association president. (N.T. 17-18)
11. On January 3, 2010, Fredrick C. Daugherty, Jr. became the the Borough's Mayor. (N.T. 56)
12. On June 3, 2011, the Association filed a grievance alleging the Borough violated the CBA when it failed to pay officers shift differentials in accordance with section 4(b) of the CBA. (N.T. Association Exhibit 4)
13. As Association secretary, Lahovski was the Association member who processed the grievance through the various stages of the grievance process, including arbitration of the grievance. (N.T. 19-20)
14. On January 8, 2012, the arbitrator sustained the Association's grievance and directed that the Borough make the affected police officers whole. (N.T. 20, 55, Association Exhibit 4)
15. In February, 2012, the Borough changed the hours of work for Association members. The hours changed from a 6 a.m to 6 p.m. schedule to a 7 a.m. to 7 p.m. schedule. The Association filed a grievance regarding the change in hours of work. (N.T. 21-22, 24, Association Exhibit 5)
16. After the grievance was filed, the Mayor agreed with the Association and ordered the schedule resume to the 6 a.m to 6 p.m. shift. (N.T. 62-63)
17. On March 17, 2012, the Mayor notified Lahovski that the Borough was eliminating the position of detective and that he would do patrol. He informed Lahovski that the Chief would make such an order and the chief did so. (N.T. 25-26, 31, 60-61)
18. Mayor Daugherty made the decision to move Lahovski to patrol because of police officer staffing shortages caused by a 50% decrease in the full-time police force. As for the performance of detective duties, he intended to have all the patrol officers do detective work. (N.T. 61-62)
19. Between 2009 and 2012, the department's full-time police officers dropped from six (6) to three (3) officers. (N.T. 46-47)
20. The 2009 interest arbitration award set forth a shift schedule matrix for the full-time officers based on 12 hour shifts. (N.T. 40-45, Borough Exhibit 1)
21. Lahovski worked the 12 hour shift schedule matrix with two other full-time police officers. (N.T. 45)
22. Lahovski testified that department "staffing would dictate" if there was leeway in the shift schedule to allow for special detective duties. (N.T. 46)
23. A minimum number of patrol officers are necessary to make the shift schedule matrix work properly. (N.T. 47)
24. The Borough had to use part-time officers to help cover the open shifts or parts of open shifts. There were also times when the department did not operate as a 24 hour department. (N.T. 48-49)
25. Mayor Daugherty's decision to assign Lahovski to patrol was not based on retaliation for Lahovski's Association's activities. (N.T. 61-64)

26. Under Mayor Daugherty's powers as mayor he has the power to assign and schedule officers. (N.T. 63)
27. Section 401 of the Borough Ordinances, states, "The Chief of Police shall be the chief executive of the police department. He shall, under the direction of the Mayor, be in charge of the Police Department and have supervision over its members, in the exercise of their powers, duties and authority." (N.T. 56, Borough Exhibit 2)
28. Section 402 of the Borough Ordinances, states, in part, "Subordinate to the Chief of Police in the Police Department, the classifications of Deputy Chief, Sergeant and Patrolman are hereby established." (N.T. 56, Borough Exhibit 2)
29. The Borough did not bargain with the Association over the elimination of the detective position (N.T. 34)

### DISCUSSION

The Nazareth Borough Police Association contends that the Borough committed unfair labor practices under sections 6(1)(a), (c) and (e) of the PLRA as read *in pari materia* with Act 111 when it assigned Officer Frederick Lahovski from detective duties to patrol duties after he had performed those duties for three years. The alleged statutory violations will be discussed separately.

#### Section 6(1)(c) Allegation

In order to prove that the Mayor assigned Lahovski from detective to patrol because of his protected activity, the Association must prove that Lahovski engaged in protected activity, that the Borough officials had knowledge of his protected activity and that the Borough officials took action against Lahovski because of his protected activity. **Camp Hill Borough v. Pennsylvania Labor Relations Board**, 507 A.2d 1297 (Pa. Cmwlth. 1986);

There is no dispute about the first two elements. Lahovski was the public face of the Association. He was its only witness during the presentation of the shift differential grievance to the arbitrator. By Lahovski's visible role, the Borough had knowledge of his protected activity.

The present case is a dispute is over the third element, whether the employer was motivated by anti-union animus. The Association has no direct evidence of anti union animus. However, the Board has recognized that an employer will rarely admit to anti-union animus so it will give weight to several factors upon which an inference of unlawful motive may be drawn. **Borough of Geistown v. PLRB**, 679 A.2d 1330 (Pa. Cmwlth. 1996). **Camp Hill Borough, supra**; **City of Reading v. Pennsylvania Labor Relations Board**, 568 A. 2d. 715 (Pa. Cmwlth. 1989)

Those factors were set forth in **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), where the Board declared that such factors as the entire background of the case, including any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employe, the effect of the employer's adverse action on other employes and protected activities, and whether the action complained of was "inherently destructive" of important employe rights could be grounds to infer animus. *Id.* at 380. Also, the close timing of an employer's adverse action, when combined with other factors, can give rise to the inference of anti-union animus. **PLRB v. Berks County**, 13 PPER ¶ 13277 (Final Order 1982); **Teamsters Local No. 764 v. Montour County**, 35 PPER ¶ 12 (Final Order, 2004); **AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry**, 16 PPER ¶ 16020 (Final Order, 1984). **Camp Hill Borough, supra**.

The Association argues that animus can be inferred from the close timing of Lahovski's assignment, two months after an arbitrator sustained an Association grievance over shift differential pay and around the same time as the mayor asked to speak to Lahovski about the grievance being sustained.

The Borough first defends the allegation by arguing that this is a case of the Mayor exercising legal managerial authority over job assignment within the police department. It points out that the Mayor expressed real concerns about the staffing levels and police coverage for the Borough, with a force that had lost half of its full-time officers. The Mayor testified that "in order to facilitate adding more officers on the street, it was decided we were going to have all the officers doing their own investigations." The Mayor presented this rationale in a credible fashion.

Also, as for the argument that the Mayor's questions can be the basis to infer anti-union animus, the Mayor's questions were raised in a respectful manner that did not appear to be hostile. It is difficult to use this encounter as a basis to infer animus.

Furthermore, there is additional evidence that supports the Borough's argument that the Mayor was not possessed of anti-union animus. About the same time as the alleged retaliation, the Mayor, in another dispute with the Association, responded in a conciliatory manner by agreeing with the Association's grievance. In February, 2012, the Borough changed the hours of work for Association members, from a 6 a.m to 6 p.m. schedule to a 7 a.m. to 7 p.m. schedule. The Association filed a grievance regarding the change in hours of work. After the grievance was filed, the Mayor agreed with the Association and returned to the 6 a.m to 6 p.m. shift.

Based on the record as a whole, the facts do not lead to the conclusion that the Mayor was motivated by anti-union animus in his decision to assign Lahovski to patrol duties. Absent a finding of illegal motivation, the Association's allegations of a Section 6(1)(c) violation will not be sustained.

#### Section 6(1)(a) Allegation

The PLRA makes it an unfair labor practice for an employer "[t]o interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act." 43 P.S. 211.6(1)(a).

In **Commonwealth of Pennsylvania, Pennsylvania State Police**, 36 PPER ¶121 (Final Order 2005), the Board explained that an independent violation of Section 6(1)(a)

"occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable bargaining unit employe, regardless of whether any one particular employe was actually coerced."

*Id.* at n. 9. See also **Commonwealth of Pennsylvania, Pennsylvania State Police**, 41 PPER ¶33 (Final Order, 2010).

If, however, the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have on employes in the exercise of a protected activity, then no violation of Section 6(1)(a) may be found. **Brookville Area School District**, 38 PPER ¶44 (Proposed Decision and Order, 2007) (construing the Public Employe Relations Act's (PERA's) counterpart to section 6(1)(a)); **Commonwealth of Pennsylvania, Department of Corrections, Graterford State Correctional Institution**, 27 PPER ¶27169 (Proposed Decision and Order 1996); **Temple University**, 23 PPER ¶23118 (Proposed Decision and Order 1992), *affirmed on another ground*, 25 PPER ¶25121 (Final Order 1994); **Philadelphia Community College**, 20 PPER ¶20194 (Proposed Decision and Order 1989).

In considering all the facts of the present case, the conclusion that must be reached is that the Mayor's assignment of Lahovski would not have a tendency to coerce a

reasonable employe in the exercise of protected rights. It stands to reason that the Mayor's assignment was a common sense approach to staffing a police department that was had lost half its full-time officers in three years. The Mayor credibly testified that the department's staffing needs did not allow for one officer to be devoted to detective duties. Even if the Mayor's decision did not pass the "reasonable bargaining unit employe" test, it would pass the test of being a legitimate basis for a decision that would outweigh any coercive effect of the decision. The Borough will be not be found to have committed an independent violation of Section 6(1)(a) of the PLRA.

#### Section 6(1)(e) Allegation

The Association also contends that the Borough's actions violated Section 6(1)(e) of the PLRA, which makes it an unfair labor practice for an employer "[t]o refuse to bargain collectively with the representatives of his employes." 43 P.S. 211.6(1)(e).

The Borough has presented two winning defenses to the refusal to bargain allegation. First, the Borough had no duty to bargain over the Mayor's assignment of Lahovski from detective duties to patrol duties because the issue of assignment of duties to employes in a bargaining unit is a matter of managerial authority. **Shillington Borough**, 21 PPER ¶ 21195 (Proposed Decision and Order, 1990), 22 PPER ¶ 22074 (Final Order, 1991). Furthermore, the evidence of record shows that the parties never bargained for a separate pay scale and benefits for a position known as detective.

Second, Chief Sinclair's creation of a new rank in the department when he appointed Officer Lahovski to detective was done without authority in the first place. The Borough Code gives this authority to the Borough Council. Section 1121 of the Borough Code authorizes only a borough council to establish and organize borough police department; designate the ranks in the police department and the duties of each rank. 53 P.S. § 46121. **See also, Municipality of Penn Hills v. Municipality of Penn Hills Pers. Bd/Civil Serv. Comm'n.**, 487 A.2d 1048, 1050-51(Pa. Cmwlth. 1985)

Also, Mayor Daugherty's decision was consistent with the Borough Code. Section 1123.1(b) of the Borough Code gives the Mayor the power to "direct the time, during which, the place where and the manner in which the chief of police and the police perform the duties of their rank." 53 P.S. § 46123.1

The position of detective was never legally established by Borough Council either in the Borough's ordinances, the Borough's Civil Service Rules or in the Borough's collective bargaining agreement with the Association. Given these facts, the re-assignment of Lahovski to patrol duties, was not a subject that had to be bargained by the Borough. Accordingly, there will be no finding that the Borough has violated its duty to bargain.

#### CONCLUSIONS

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

1. Nazareth Borough is an employer under section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. Nazareth Borough Police Association is a labor organization under section 3(f) of the PLRA as read *in pari materia* with Act 111.
3. The Board has jurisdiction over the parties.
4. The Borough has not committed unfair labor practices under sections 6(1)(a), (c) and (e) of the PLRA as read *in pari materia* with Act 111.

**ORDER**

In view of the foregoing and in order to effectuate the policies of the PLRA as read *in pari materia* with Act 111, the hearing examiner

**HEREBY ORDERS AND DIRECTS**

that the charge 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of October, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner