

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NEW HOLLAND POLICE ASSOCIATION :
 :
 v. : Case No. PF-C-14-108-E
 :
 :
 NEW HOLLAND BOROUGH :

PROPOSED DECISION AND ORDER

On September 17, 2014, the New Holland Police Association (Association or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against New Holland Borough (Borough or Employer), alleging that the Borough violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111 by making threats and issuing new work orders in retaliation for protected activity.

On September 24, 2014, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating March 23, 2015, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary and was held on March 23, 2015 before the undersigned Hearing Examiner, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief in support of its position on May 19, 2015. The Borough filed a post-hearing brief in support of its position on July 13, 2015. The Borough subsequently filed a "corrected" post-hearing brief in support of its position on July 27, 2015.

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

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 6-7)
2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 7)
3. The Association and Borough are parties to a collective bargaining agreement (CBA), which contains a contractual grievance procedure. (Association Exhibit 1)
4. On July 4, 2014, Officer Wendell L. Metzler of the Association filed a grievance alleging a violation of the CBA regarding the distribution of overtime. Specifically, the grievance provided, in pertinent part as follows:

On Friday, June 27, 2014 Lieutenant Jonathon Heisse violated Article VIII-Overtime, section 8.2 in our current New Holland Police Officers Association Labor Contract. Lieutenant Heisse contacted Junior Police Officer Josh Bitner by telephone to work a 4 hour overtime shift for a roving DUI Patrol on Saturday, June 28, 2014 between the hours of 11pm-3am. Lieutenant Heisse failed to make any other phone calls offering Senior Patrol Officers as myself the option to work this overtime shift in violation of Article VIII, section 8.2.

RESOLUTION: I'm seeking 4 hours of overtime pay as reimbursement for this violation of our current Labor Contract since I was

available to work the overtime shift and was not given the option as a Senior Patrol Officer.

(Association Exhibit 1)

5. On July 11, 2014, Mayor Wilbur G. Horning, in addressing the step 1 grievance, responded as follows:

I agree with your position regarding the allocation of overtime. The Chief of Police has assured me he will implement, and communicate, procedures to prevent further occurrences of this type.

In light of his response, I respectfully ask that you forego your request to be paid for the time allocated to a junior officer.

(Association Exhibit 1)

6. The parties were not able to resolve the grievance at step 1 of the procedure, and the matter progressed to step 2 on July 15, 2014. (Association Exhibit 1)
7. On August 4, 2014, Council Chairman William Clisham issued the following step 2 grievance response to Metzler:

Following the Step 2 Grievance hearing by the Police Committee with you, the Committee has denied your Grievance due to past practice and the fact that the NHPA [Association] noted they (sic) do not have any other examples of this type of shift/OT issue. Going forward under the current contract, the Department will assign all OT by seniority except when specialized work is needed, such as bike patrol or Honor Guard. In specialized situations the Department will assign OT based on seniority of those in specialized units.

(Association Exhibit 1)

8. On August 6, 2014, Metzler responded as follows:

On Friday, June 27, 2014 Lieutenant Jonathon Heisse violated Article VIII-Overtime, section 8.2 in our current New Holland Police Officers Association Labor Contract. Lieutenant Heisse contacted Junior Police Officer Josh Bitner by telephone to work a 4 hour overtime shift for a roving DUI Patrol on Saturday, June 28, 2014 between the hours of 11pm-3am. Lieutenant Heisse failed to make any other phone calls offering Senior Patrol Officers as myself the option to work this overtime shift in violation of Article VIII, section 8.2. The resolution I submitted to this conflict was 4 hours of overtime reimbursement pay for this labor contract violation since I was available to work this overtime and I was not given the option.

On July 11, 2014 I received written notice from Mayor Wilbur Horning stating that he agreed with my claim and ask (sic) me to forego my request to be paid. A resolution during Step #1 of our grievance policy was not reached and Step #2 of the grievance policy was submitted on July 15, 2014.

On August 5, 2014 I received written notice from the New Holland Police Committee indicating that my grievance was denied. A resolution to this grievance was not reached during Step #2 of our grievance policy as outline (sic) in the current labor contract.

Acting on the advice of my Labor Attorney and majority of the New Holland Police Officer Association Members, I will not except (sic) any remedy to this conflict other than the reimbursement of 4 hours of overtime pay. Thank you for your time.

(Association Exhibit 1)

9. On August 12, 2014, Chief Donald Bowers sent out an email to Sergeant John Yanarella, President of the Association, and Sergeant Mark Willwerth, a bargaining unit member, which provided in relevant part as follows:

Boro (sic) Council and the Mayor have obviously been working with me on the grievance. Again, for publication; Council and I are more than willing to use seniority for ALL overtime assignments. They are NOT willing to pay Wendell [Metzler] for OT he didn't work. For starters, does the Boro (sic) then have to pay Hughes, Heisse, Zimmerman and so on since everyone here is senior to Josh [Bitner]?

Again, maybe I'm not too smart, but if I was a member of a police association, it would be a cold day in hell before I would pay to fight for that \$\$ (sic).

And, I'm kind of looking forward to the day an officer walks in to my office complaining about the inequitable distribution of overtime (per the contract) when Wendell [Metzler] is taking too much. I'm not sure if I'll laugh or just physically throw the man out, with directions to ask Wendell [Metzler] to give up some of his OT himself.

FOP Lodge 14 (in which I'm still a member) will send an ad hoc committee to investigate a member's request for legal aid for validity and/or to broker some type of compromise, if possible, so as to avoid a frivolous use of legal fees. Just a thought (sic).

This grievance over four hours of OT is not exactly endearing the members of the police department to all the council members. Again, I'm not in your bargaining unit, but its (sic) easier to get along that (sic) it is to fight. Especially when the fight usually ends up costing you about the same \$\$ (sic) you gain AND you have now pissed off the people that write your check every two weeks...

(N.T. 14; Association Exhibit 2)

10. On August 20, 2014, Bowers had a discussion with Yanarella in the police station, during which Bowers indicated that Borough Council was not happy with the grievance progressing to the level it had and that it was making Bowers, as the Chief of Police, look bad. Bowers also stated that there was going to be some major changes and that those changes would be painted with a large brush, meaning that they would apply to the entire department. However, the Association did not withdraw the grievance. (N.T. 20-22, 74)
11. Borough Council was contractually mandated to issue a final response on the grievance by August 27, 2014. (N.T. 75)
12. On August 26, 2014, Bowers sent out an email to Yanarella, Willwerth, and Heisse, instituting a new duty for members of the bargaining unit as follows:

Whenever school is in session-an officer will park in front of the building New Holland Dental is located in across the street from the high school and monitor speed through the school zone during **the afternoon dismissal time**. Unless the officer has made a car stop as a result of that monitoring, the officer WILL get

out of his car, put his ugly grelow (sic) vest on, and get the buses out.¹

(Association Exhibit 3) (Emphasis in original)

13. Willwerth read the email on August 26, 2014 and was surprised. He did not understand the reason for this duty since there was already a crossing guard and school resource officer (SRO) on site. He questioned Bowers on August 26, 2014 if this was something the SRO could do. Bowers replied that it would not be the SRO, as he had other things to do. Bowers also indicated that the reason he was doing this was because he was "pissed off," and that Willwerth could relay that to the other officers. (N.T. 99-100)
14. On August 27, 2014, the Borough Council issued a step 3 grievance decision, denying the grievance. (Association Exhibit 1)

DISCUSSION

The Association has alleged that the Borough violated Section 6(1)(c) of the PLRA² and Act 111 by issuing the new work orders in retaliation for protected activity. Specifically, the Association submits that the Chief issued the new work orders as a result of the Association's refusal to withdraw the Metzler grievance. The Borough, meanwhile, contends that it had a legitimate business reason for the new duties. The Borough maintains that the Chief was simply trying to enhance the safety of children riding the school bus, slow traffic through the area, help the school buses get out of the parking lot, and prevent students from congregating at a nearby business.

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

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

The record here shows that the Association has sustained its burden of proving the first two elements of the three-part test under Section 6(1)(c) of the PLRA. The Association has clearly engaged in protected activity, as Metzler filed a grievance over the distribution

¹ Bowers testified that he was referring to the green and yellow traffic vests which the officers wear when he used the term "grelow." (N.T. 26-27)

² Section 6(1)(c) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer...[b]y discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization..." 43 P.S. § 211.6(c).

of overtime, which was supported by a majority of the Association's members. Likewise, the Association continued to process the grievance despite the Borough's strong opposition to it. Similarly, the Borough clearly had knowledge of the protected activity. The Mayor, Police Chief, and Borough Council were all well aware of the grievance. As a result, the issue depends on whether the Borough engaged in conduct that was motivated by the Association's progression of, and continued support for, the grievance.

The record supports an inference that the Borough did, in fact, engage in conduct, which was motivated by protected activity. First of all, the close timing of the Chief's new orders directing the bargaining unit to begin speed monitoring and bus duty at the high school is highly indicative of unlawful motivation. Metzler initially filed the grievance on July 4, 2014. And, the Chief issued the new work orders by email on August 26, 2014, which was less than two months afterwards. What is more, the Chief's new work orders are even closer in time to Metzler's August 6, 2014 response to the Borough Council Police Committee's step 2 denial, in which he indicated that he would not accept any remedy to the dispute other than the reimbursement of four hours overtime pay on the advice of his labor attorney and majority of the Association members. Metzler's August 6, 2014 response clearly had an effect on the Chief, as evidenced by the tone of his August 12, 2014 email, which was essentially a warning to the Association about continuing to process the grievance.

The Borough contends that the timing of the new work orders simply coincided with the beginning of the school year. However, I find this argument unpersuasive. Bowers acknowledged that he has been the Chief since 2010. (N.T. 63). He also conceded that, despite his claim regarding how necessary the job duties are and his purported obligation to impose them, he never did so during the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 school years. (N.T. 63-65).

In addition, the Employer's statements also support an inference of unlawful motive. On August 12, 2014, the Chief sent an email to Yanarella and Willwerth, which clearly had the tone of a warning with regard to the Metzler grievance. The Chief indicated that the grievance was "not endearing the members of the police department to all council members." The Chief also hinted that the dispute was not worth it by pointing out the money it would cost, and stating that the Association had "now pissed off the people that write your check every two weeks." In addition, the Chief had a discussion with Yanarella on August 20, 2014, during which he reiterated that Council was not happy with the grievance progressing to the level it had and that it was making him, as the Chief, look bad. What is more, the Chief predicted that there would be some major changes and that those changes would be painted with a large brush, meaning they would apply to the entire department. But perhaps most tellingly, the Chief told Willwerth on August 26, 2014, shortly after he had issued the new work orders, that the reason he was doing this was because he was "pissed off," and that Willwerth could relay that to the other officers. These August 26, 2014 remarks of the Chief are strong evidence of his unlawful motivation, especially when combined with his previous statements and the timing of the incidents.

Further, the Borough's lack of an adequate explanation also supports an inference of anti-union animus. At the hearing, the Chief claimed that he had four legitimate, nondiscriminatory reasons for the new work orders. The Chief testified that he was simply trying to enhance the safety of children riding the school bus, slow traffic through the area, help the school buses get out of the parking lot, and prevent students from congregating at a nearby business. (N.T. 41-42). While these are all very laudable goals, they are not supported by the record here. As the Association points out, the Chief did not offer even one of these explanations when Willwerth questioned him about it on August 26, 2014, which was the date of his email notice. (N.T. 100-101). Nor did the Chief list any of these explanations in his August 26, 2014 email. (N.T. 65; Association Exhibit 3). Instead, the Chief simply told Willwerth that the reason he was doing this was because he was "pissed off," and that Willwerth could relay that to the other officers, revealing his true motivation. As a result, the explanations offered at the hearing were simply after the fact justifications, which are wholly self-serving and not persuasive. Accordingly, the Borough's proffered reasons for the new work orders are not accepted as credible.

These factors, including timing, employer statements, and the failure to provide an adequate explanation for the new work orders, together are sufficient to support an inference of anti-union animus.³ On this record, I must conclude that the Chief would not have issued the August 26, 2014 new work orders had it not been for Metzler and the Association engaging in protected activity. Therefore, the Borough has violated Section 6(1)(a) and (c) of the PLRA.

Finally, the Association contends that the Borough has committed an independent violation of Section 6(1)(a) of the PLRA⁴ and Act 111. The Board will find an independent violation of Section 6(1)(a) of the PLRA if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employees have been shown in fact to have been coerced. **Bellefonte Police Officers Ass'n v. Bellefonte Borough**, 27 PPER ¶ 27183 (Proposed Decision and Order, 1996) *citing* **Northwestern Education Ass'n v. Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 6(1)(a). **Northwestern School District**, *supra*.

The record here contains an adequate showing that the Borough's actions in retaliating against the Association by issuing the new work orders on August 26, 2014 would have a tendency to coerce employees in the exercise of their rights. In the same vein, the Chief's August 12, 2014 email and his August 20, 2014 discussion with the Association President would have a tendency to coerce employees in the exercise of their rights. In the August 12, 2014 email, the Chief explained that the grievance "was not endearing" Association members to Council and warned the Association that it had "now pissed off the people that write your check every two weeks." In his August 20, 2014 discussion with Yanarella, the Chief again stated that Council was not happy with the grievance progressing, that the grievance was making the Chief look bad, and that there would be major changes applicable to the entire department. As such, the Chief was clearly warning the Association members that they were acting at their own peril in proceeding with the grievance, which would have a tendency to coerce officers in the exercise of their statutory right to present grievances to their employer. See **Dormont Police Ass'n v. Dormont Borough**, 32 PPER ¶ 32119 (Proposed Decision and Order, 2001). As a result, the Borough has also committed an independent violation of Section 6(1)(a) of the PLRA.

CONCLUSIONS

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

1. The Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The Borough has committed unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA and Act 111.

³ At the hearing, the Borough made a Motion to Dismiss the charge of unfair practices once the Association rested its case-in-chief. (N.T. 117). However, I find that the Association had established a prima facie case for its allegations that the Borough violated Section 6(1)(a) and (c) of the PLRA. Indeed, the Association established that it engaged in protected activity, of which the Borough had knowledge, and that the Borough engaged in conduct that was motivated by the protected activity, i.e. the new work orders, prior to resting its case. This is supported by the Association's establishment during its case-in-chief of close timing, lack of an adequate explanation, and the Chief's statements, all of which clearly support an inference of unlawful motivation. Similarly, the Chief's verbal and written statements which were introduced into the evidentiary record during the Association's case-in-chief also establish a prima facie case for an independent violation of Section 6(1)(a) of the PLRA. Accordingly, the Borough's Motion to Dismiss is denied.

⁴ Section 6(1)(a) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer...[t]o interfere with, restrain or coerce employees in the exercise of the rights guaranteed in this act." 43 P.S. § 211.6(a).

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Borough shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111;
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 labor organization;
3. Take the following affirmative action:
 - (a) Rescind the August 26, 2014 directive immediately;
 - (b) Post a copy of this Decision and 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 this Decision and Order by completion and filing of the attached Affidavit of Compliance; and
 - (d) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventh day of August, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NEW HOLLAND POLICE ASSOCIATION

v.

NEW HOLLAND BOROUGH

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Case No. PF-C-14-108-E

AFFIDAVIT OF COMPLIANCE

New Holland Borough hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union 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