

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JOSEPH BROWN

v.

WEST READING BOROUGH

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Case No. PF-C-14-72-E

PROPOSED DECISION AND ORDER

On June 27, 2014, Joseph Brown (Brown or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against West Reading 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 refusing to promote him in retaliation for protected activity.

On July 9, 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 December 5, 2014, in Harrisburg, as the time and place of hearing, if necessary. The Borough filed an Answer to the Complaint on July 28, 2014. The hearing was continued to February 26, 2015 at the request of the Borough and without objection from the Complainant.

Hearings were necessary and were held on February 26, 2015, July 21, 2015, and September 8, 2015, 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 November 2, 2015. The Borough filed a post-hearing brief in support of its position on December 2, 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)
2. Joseph Brown is an employe under Act 111 as read *in pari materia* with the PLRA. (N.T. 7)
3. Brown has been employed as a full-time police officer with the Borough since 1991 and currently works as a patrolman assigned to criminal investigations. As a criminal investigator, Brown is responsible for conducting plainclothes investigations of crimes ranging from theft to homicide. (N.T. 15-16, 18)
4. The West Reading Police Officers Association (Association) is the exclusive bargaining agent for the Borough's police officers. (N.T. 24)
5. In the 1990's, Brown served as both chairman and co-chairman of the Association and negotiated contracts. In 2009, he again negotiated a contract, which subsequently went to interest arbitration, during which Brown presented the Association's case to the panel. He then became president of the Association shortly after the interest arbitration award was issued and served in that role until 2013. (N.T. 24-26, Exhibit C-1)
6. The Association and Borough are parties to a collective bargaining agreement (CBA) effective January 1, 2014 through December 31, 2016. The CBA came about after an interest arbitration proceeding in early 2014, after which the parties added the language from the award into the contract. Brown testified during the interest arbitration proceedings. (N.T. 27-28; Exhibit C-2)

7. Brown was a trustee for Berks Lodge 71 of the Fraternal Order of Police (FOP) from 1989 to 1991. In 1998, he became treasurer for the FOP until 2001 when he became vice president. Brown served as vice president from 2001 to 2006 when he became president. He has been the president since that time. Brown also served as chairman of the board of trustees for the Pennsylvania FOP for the past five years. The FOP provides assistance to local police unions, including the Association. (N.T. 25, 29-30)
8. In his role with the Association and FOP, Brown has filed numerous grievances on behalf of the police officers and presented them to the Borough. Brown has also testified at grievance arbitration proceedings on behalf of the Association members. (N.T. 30-39; Exhibits C-3, C-4, C-5)
9. In particular, Brown filed and presented a grievance to the Borough in his capacity as president of both the Association and FOP protesting the termination of three police officers and the suspension of another officer in January 2012. The issue stemmed from the police officers' alleged misuse of a Taser. (N.T. 35-39)
10. On September 11, 2012, Arbitrator Walt DeTreu, Esquire, issued an award denying the grievance in part and sustaining the grievance in part. Specifically, the Arbitrator upheld the termination of Sergeant Matthew Beighley, but converted the terminations of Sergeant Ryan Phillips and Officer Nicholas Karetas to suspensions and directed the Borough to reinstate them without back pay. The Arbitrator sustained the grievance as it related to Officer Matthew Nguyen and directed the Borough to rescind his suspension and make him whole. With regard to Phillips, the Arbitrator directed the Borough to reinstate him at the rank it deemed appropriate. (Exhibit C-5)
11. On September 18, 2012, the Borough Council voted at a public meeting to demote Phillips to the rank of patrolman. (N.T. 39-40; Exhibit C-6)
12. On March 18, 2008, Brown spoke at a Borough Council meeting in his capacity as president of the Berks Lodge FOP in opposition to proposed layoffs of three police officers and/or budgeting cuts to the police department. In doing so, Brown accused two Council members, including vice president Michael Doyle and James Gallen, of being anti-law enforcement. (N.T. 42-45, 49, Exhibit C-7, C-8)
13. Gallen responded that night by stating it was ludicrous and inaccurate for Brown to suggest he was anti-law enforcement. Several days later, on March 26, 2008, Gallen wrote a letter to the editor of the Reading Eagle, the paper of general circulation in Berks County, describing Brown's conduct as "outrageous, improper, and scurrilous." (N.T. 45-49; Exhibit C-9)
14. On July 19, 2011, Brown spoke at a Borough Council meeting in his capacity as president of the FOP and noted a lack of management over the police department. Brown specifically noted there was no guidance, no updated policies, no fairness in the department, and that morale was low. (N.T. 49-54; Exhibit C-10, C-11)
15. In late 2013, Chief Stephen Powell requested that the Borough fill a second sergeant position within the department. The Civil Service Commission contracted with SafeCity Solutions, which is a law enforcement consulting firm, to handle the testing process. (N.T. 156-157)
16. In January 2014, Brown was one of eight police officers who applied to take the test for a promotion to a sergeant position in the department. There were only seven officers who actually showed up to take the written test for the position. (N.T. 57-58)
17. On April 5, 2014, Brown took the written test and was one of four police officers, who obtained a score of 70 or higher, which was required to proceed to the oral examination. (N.T. 60)
18. After Brown took the oral examination, the Civil Service Commission certified an eligibility list for the sergeant position on April 30, 2014. Brown was ranked first with an overall score of

85.494, while Phillips was second with a score of 82.53, followed by Karetas with a score of 76.33 and Wayne Holben at 76.162. (N.T. 60-63; Exhibit C-13)

19. After the certification, the Civil Service Commission provided a certified eligibility list of the top three candidates to the Borough, which included Brown, Phillips, and Karetas in that order. (N.T. 162-163; Exhibit C-18)
20. After the certified eligibility list, Chief Powell advised Brown he was first on the list and asked if he would accept the position because it would cause a change to Brown's schedule. Brown answered in the affirmative, and Powell recommended Brown for the position to the Borough Council. (N.T. 63-66, 118, 135, 162, 179; Exhibit C-19)
21. SafeCity Solutions provided a written summary of each individual's performance during the oral portion of the examination, which the Chief made available to the Borough Council members prior to their vote on the promotion. (N.T. 170-171, 174; Exhibit C-20, C-21)
22. On May 21, 2014, the Borough Council voted to promote Phillips to the sergeant position by a count of five to two. Voting in favor of the motion were Elizabeth Heckler, Deborah Hutcheson, Philip Wert, Nathalie Kulesa, and James Gallen, the president, while Grace Craze and Carl Garman voted against the motion. Craze and Garman both supported Brown. (N.T. 68-69, 227, 246-247; Exhibit C-14)

DISCUSSION

In his charge, the Complainant alleged that the Borough violated Section 6(1)(a) and (c) of the PLRA¹ and Act 111 by refusing to promote him in retaliation for his protected activity. The Borough contends that the Complainant has not sustained his burden of proving a violation of the PLRA or Act 111, as the Borough had legitimate nondiscriminatory reasons for promoting another individual.

To establish a violation of Section 6(1)(c) under the PLRA, the charging party must show that the employe 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 employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe 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 employe 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).

In circumstances where there is an inference of unlawful motive on the part of the employer in a promotional decision, the Board has held that balancing the employer's managerial discretion over a

¹ Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act...(c) By 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.

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. **Police Ass’n of Falls Township v. Falls Township**, 44 PPER 93 (Final Order, 2013).

In this case, the Complainant has established the first two elements of the test for discrimination under Section 6(1)(c) of the PLRA. Indeed, the record clearly shows that Complainant engaged in protected activity by serving as president of the Association and FOP, filing numerous grievances protesting the Borough’s actions, negotiating CBA’s with the Borough, presenting on behalf of the Association during Act 111 interest arbitration proceedings, testifying at grievance and interest arbitration proceedings, and speaking publicly at Borough Council meetings in his capacity as president of the Association and/or FOP. Likewise, the record shows that the Borough was aware of Complainant’s protected activity. As the Complainant points out, the manner in which he engaged in protected activity, including presentations at public meetings, testifying during arbitration proceedings, presenting at interest arbitration on behalf of the Borough’s police officers, filing grievances, and negotiating contracts, establishes that the Borough had knowledge of his protected activity. In fact, the record shows that Kulesa, Wert, and Gallen were present for the public meeting in March 2008. (Exhibit C-8). The record also shows that Wert, Heckler, Kulesa, Hutcheson, and Gallen were present for the public meeting in July 2011. (Exhibit C-11). The record further shows that Complainant negotiated directly against Wert in collective bargaining negotiations. (N.T. 369-372). As a result, the issue in this case is whether the Borough took adverse employment action against the Complainant because of his protected activity.

The Complainant has presented a compelling case supporting an inference of unlawful motive. Indeed, the record shows that Complainant scored highest on the civil service examination for the sergeant position and was recommended by Chief Powell for the position; however, the Borough Council voted to promote Officer Phillips instead, even though he was discharged from the position on January 24, 2012 for the alleged misuse of a Taser, (See Exhibit C-5), and then subsequently demoted from the position on September 18, 2012 after an arbitrator reinstated him and provided the Borough with the discretion to determine his rank. In addition, the record shows that Complainant spoke at a Borough Council meeting in March 2008 in opposition to proposed layoffs and/or budgeting cuts to the police department, during which he accused two Council members, including Doyle and Gallen, of being anti-law enforcement. Gallen responded that night by stating it was ludicrous and inaccurate for Complainant to suggest he was anti-law enforcement. What is more, Gallen was so incensed by Complainant’s remarks that he wrote a letter to the editor of the Reading Eagle, describing Complainant’s conduct as “outrageous, improper, and scurrilous.” Further, Councilman Carl Garman testified convincingly that Gallen was predisposed against Complainant for the promotion and had even mentioned the 2008 meeting as a reason why Garman should not support Complainant. (N.T. 251-253). Gallen even called Garman prior to the Council vote and tried to persuade Garman not to vote for Complainant. (N.T. 251-253). Significantly, Gallen did not testify in this proceeding to refute or contradict any of this evidence.²

The record further demonstrates that the Borough lacked an adequate explanation for why it chose to promote Phillips instead of Complainant. As set forth directly above, Gallen who was president of the Borough Council at the time of the May 2014 vote on the promotion did not testify or offer any reason for why he chose Phillips. Nor did Hutcheson testify to explain her reasons for choosing Phillips. Instead, the Borough presented the testimony of Wert, Heckler, and Kulesa in support of its position.

Wert testified that he voted for Phillips because he was impressed with Phillips’ professionalism during a ride along six or seven years ago, in which he accompanied the officer on his overnight shift. (N.T. 332-333). Wert also testified that Phillips had done a good job working on his previous problems and had taken advantage of the second chance he had since being reinstated. (N.T. 334-335). However, this testimony is not accepted as credible.

² The Borough made a motion to dismiss the unfair labor practice charges at the close of Complainant’s case-in-chief on the basis that Complainant failed to establish a prima facie case of discrimination. (N.T. 267-268). The Borough’s motion to dismiss is denied. The evidence discussed in the preceding paragraph was all entered into the record during Complainant’s case-in-chief and is more than sufficient to support a prima facie case, especially in light of the fact that there was absolutely no justification admitted during the Complainant’s case-in-chief which could even purport to explain the reasons why the Borough selected a seemingly less qualified individual who had previously been terminated and then subsequently demoted from the very position for which he was now applying.

On cross examination, Wert described how he knew that Phillips was doing a good job since being reinstated and indicated that Chief Powell was providing the Borough Council with monthly reports. (N.T. 351-352). Wert acknowledged that the Borough voted to demote Phillips from the sergeant position in September 2012 following his reinstatement by an arbitrator and that he voted to promote Phillips to sergeant again in May 2014, which was about 20 months later. (N.T. 348-349). However, Wert conceded that during this period, the Borough was without a police chief from about September 2012 until October 2013 when Chief Powell was hired. (N.T. 351-352). Thus, Wert admitted that it was only about a seven month period in which Council was receiving these reports on Phillips, and not the entire 20 month period. (N.T. 353). Perhaps most importantly, however, Wert claimed that Complainant was within his rights when he addressed the Borough Council in March 2008, but then readily conceded that he took Complainant's March 2008 presentation to Borough Council into account in deciding to vote for Phillips over Complainant for the sergeant position. (N.T. 354-356).

The testimony of Heckler and Kulesa was even less convincing. Heckler testified that he she voted for Phillips because he had been a sergeant before and that he did not have any problems serving as a patrolman after he was demoted. (N.T. 302). When asked during cross-examination, however, why she would vote for Phillips, who was fired and then demoted from the sergeant position following his reinstatement by an arbitrator, over the Complainant, who scored higher on the civil service examination and who was recommended by Chief Powell, Heckler replied that she did not even remember that Phillips was fired and claimed that he was simply demoted at one point.³ (N.T. 307-308, 312-313).

Kulesa, meanwhile, offered shifting reasons for why she voted for Phillips over the Complainant. At first, she testified that Phillips had done a good job after his demotion, and she thought Complainant would be happiest in his position as a detective, notwithstanding the fact that he had applied for the sergeant position. (N.T. 275-276, 279). She also claimed that she voted for Phillips because he was a people person. (N.T. 276, 278). Later in her direct testimony, Kulesa indicated that she used the SafeCity Solutions synopsis of each candidate to arrive at her decision, despite her earlier assertion that testing scores did not matter to her. (N.T. 277-278, 284). When confronted with these discrepancies on cross-examination, Kulesa was evasive and for the first time asserted that Phillips had also undergone training to redeem himself. (N.T. 294). However, she was unable to identify any training that Phillips purportedly underwent following his demotion. (N.T. 294-296). In fact, the record is devoid of any evidence of training Phillips had during this period. As a result, I am unable to credit the Borough's proffered reasons for why it chose to promote Phillips over the Complainant for the sergeant position in May 2014.

On this record, I must conclude that the Borough would have promoted the Complainant to the sergeant position in May 2014 had it not been for his protected activity. Therefore, the Borough has violated Section 6(1)(a) and (c) of the PLRA and Act 111. Accordingly, the Borough will be directed to promote the Complainant to the rank of sergeant and make him whole for any losses he sustained as a result of the Borough's unlawful conduct effective immediately.⁴

CONCLUSIONS

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

³ Notably, Heckler had been on the Borough Council for approximately six years, meaning she was on Council when Phillips was discharged in January 2012. (N.T. 299).

⁴ The Borough argues in its brief that the Board does not have the authority to order such a remedy based on **Lancaster Yellow Cab & Baggage, Inc. v. PLRB**, 88 A.2d 866 (Pa. 1952). However, that case stands for the narrow proposition that the Board does not have authority to order an employer, who has violated Section 6(1)(a) and (e) of the PLRA, but who was not charged with violating subsection (c), to reinstate without back pay discharged employees. In this case, the Complainant has charged the Borough with violating Section 6(1)(a) and (c) of the PLRA. As such, **Lancaster Yellow Cab** is not controlling. Further, the Board has specifically approved a remedy ordering the employer to award a promotion where the record shows that "but for" the protected activity, the employee would have been awarded the promotion. **Police Ass'n of Falls Township v. Falls Township**, 44 PPER 65 (Proposed Decision and Order, 2012), 44 PPER 93 (Final Order, 2013); **Fraternal Order of Police, Lodge 7 v. City of Erie**, 39 PPER 60 (Proposed Decision and Order, 2008), 41 PPER 149 (Final Order, 2008); **Fraternal Order of Police, Lodge 9 v. City of Reading**, 33 PPER ¶ 33112 (Proposed Decision and Order, 2002). As such, the Borough's argument in this regard is rejected.

1. The Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Complainant is an employe 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.

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) Immediately make an unconditional offer to promote Joseph Brown to the position of sergeant and make him whole for all wages and benefits, plus six percent per annum interest, that he would have earned as sergeant, beginning with the date the Borough promoted Phillips to the sergeant position through the date the Borough promotes Brown to the position;
 - (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 30th day of December, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JOSEPH BROWN

v.

WEST READING BOROUGH

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Case No. PF-C-14-72-E

AFFIDAVIT OF COMPLIANCE

West Reading 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