

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WEST SHORE REGIONAL POLICE :
ASSOCIATION :
 :
v. : Case No. PF-C-15-49-E
 :
LEMOYNE BOROUGH AND WORMLEYSBURG :
BOROUGH, ACTING BY AND THROUGH WEST :
SHORE REGIONAL POLICE COMMISSION :

PROPOSED DECISION AND ORDER

On July 2, 2015, the West Shore Regional Police Association (Association or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Lemoyne Borough and Wormleysburg Borough, both of which are represented by the West Shore Regional Police Commission (Commission, Department or Employer), alleging that the Commission violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On July 22, 2015, 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 August 21, 2015, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary. The Association requested a continuance and, without objection, the request for a continuance was granted. A hearing was held on October 30, 2015, in Harrisburg, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. By letter dated November 2, 2015, the Hearing Examiner incorporated the transcripts and exhibits from related matters PF-C-15-50-E and PF-C-15-54-E into the record of this matter.¹ The Association submitted a post-hearing brief in support of its charge on February 12, 2016. The Commission submitted a post-hearing brief in support of its position on March 28, 2016.

The Hearing Examiner, based on all matters of record, makes the following:

FINDINGS OF FACT

1. Lemoyne Borough and Wormleysburg Borough, as represented by the the West Shore Regional Police Commission, are public employers and political subdivisions under Act 111 as read *in pari materia* with the PLRA. (N.T. 6).
2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 6).
3. On June 18, 2016, Officer Stoley placed a series of four grievances (the June 18th Grievances) in Chief Michael Hope's (Hope) inbox. (N.T. 6-7; Association Exhibit 1).
4. Officer Timothy Rine (Rine) is a patrol officer with the Commission. He is also president of the Association. (N.T. 8).
5. Rine authorized the filing of the June 18th Grievances regarding overtime. Rine worked the next day on June 19th from 6:00 PM to 6:00 AM. (N.T. 8-9).
6. These were among the first grievances to be filed by the Association in a few years. (N.T. 15).

¹ The transcript for this matter, PF-C-15-49-E, will be referred to as "N.T." and the exhibits from this matter will be referred to as "Association Exhibit" or "Employer Exhibit". References to the transcripts and exhibits of PF-C-15-50-E and PF-C-15-54-E will include "(50-E)" or "(54-E)" in the reference as appropriate.

7. On June 19, 2015, Hope and Detective Friel (Friel) went into the Department's locker room and discovered that Rine's locker was not locked. The locker contained Rine's duty belt, ammunition, and an AR-15 ("patrol rifle" or "long gun"). (N.T. (54-E) 97-98).

8. When Hope cleared out Rine's locker, he put Rine's belongings, including Rine's duty belt, ammunition, and AR-15, in his office but not in a secure locker or in a manner to sufficiently secure the material. (N.T. (54-E) 112).

9. Hope was aware of the June 18th Grievances when he found Rine's locker unlocked. (N.T. 26).

10. When Rine arrived at the station before his shift at 6:00 PM he found his locker unlocked. Rine's weapons and duty gear were not in his locker. Specifically, Rine's duty belt, ammunition and an AR-15 were missing. (N.T. 9; N.T. (54-E) 15).

11. Rine notified Hope, and shortly after this notification, Hope arrived at the Department and summoned Rine to his office. As Rine entered Hope's office, he noticed that his gear was in Hope's office and that Hope already had a departmental corrective notice printed up. Hope provided Rine the Departmental corrective notice for an infraction. Specifically, the Departmental corrective notice was a "written reprimand with possibility of suspension." (N.T. 10; N.T. (54-E) 16-17; Association Exhibit 2).

12. The Departmental corrective notice had the following description of the infraction: "Patrol Rifle, Ammunition, Taser, Loaded Magazines and other weapons were found in your unsecured locker in Direct Violation of Departmental Directives 2011-010 (Securing of Weapons and Ammunition) and 2013-009 (Long Gun Locker)". (Association Exhibit 2).

x. It has been Departmental rule since at least September 7, 2011, that no weapons will be "placed in, left unattended or otherwise left unsafe in unsecured lockers, desks, or other areas inside the Department." Additionally, it has been Departmental rule since at least August 30, 2013, that "all the Department's Long Guns will be stored in the locker that has been placed at the entrance to the locker rooms." (N.T. (54-E) 35-36, Employer Exhibits (54-E) 1, 2).

13. When Hope handed Rine the Departmental corrective notice, Rine asked Hope if the Departmental corrective notice was in retaliation for the June 18th Grievances. During this conversation, Hope said to Rine that he was going to change shifts back to eight hours, make the police officers perform written daily logs, and angrily said "You want a war, you got a fucking war." (N.T. 11-12, 14, 31; N.T. (54-E) 19).

14. Hope viewed the June 18th Grievances as a challenge to his authority as, in his opinion, he has the authority to grant overtime. (N.T. 31).

15. Hope stated that, after the filing of the June 18th Grievances, he was no longer going to informally negotiate with the Association on work issues but strictly comply with the collective bargaining agreement. (N.T. 34).

16. The bargaining unit members are not currently required to complete written logs as their activity is logged on a computer. (N.T. 13).

17. The change from written reports to computer reports was made because Hope determined the substantive content of the written reports could be put on the computers and making the bargaining unit members do both was, in effect, doubling the work. (N.T. (50-E) 80).

18. The bargaining unit members currently work twelve-hour shifts. Previously, the bargaining unit members worked eight-hour shifts and the Association negotiated to change it to twelve hours. (N.T. 13).

19. Hope told Rine that he would switch them back to eight-hour shifts and make them do logs because: "I, did, because they were not performing their job duties and they

came to me in regard to the 12 hour shifts. And I gave into them and allowed them to switch to 12 hour shifts. I tried to work with them and tried to accommodate them to make working conditions for them better." (N.T. (50-E) 72).

20. Prior to June 25, 2015, all Departmental ammunition not currently assigned to officers was stored in a separate locker room, called "the female locker room". Prior to June 25, 2015, the lockers or cabinets in the female locker room did not have locks. (N.T. (54-E) 79-80).

DISCUSSION

The Association argues that the Employer violated Section 6(1)(a) and (c) of the PLRA when it disciplined Rine. In this discrimination claim under Section 6(1)(a) and (c) of the PLRA, the Association has the burden of proving that an employee engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employee that was motivated by the employee engaging in that known protected activity. **Duryea Borough Police Department v. PLRB**, 862 A.2d 122 (Pa. Cmwlth. 2004); **FOP, Lodge 5 v. City of Philadelphia**, 38 PPER 184 (Final Order, 2007). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented, or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. **Borough of Geistown v. PLRB**, 679 A.2d 1330 (Pa. Cmwlth. 1996).

The Board will weigh several factors upon which an inference of unlawful motive may be drawn. In **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor." **Id.** at 380. These factors include 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 employee, the effect of the employer's adverse action on other employees and protected activities, and whether the action complained of was "inherently destructive" of important employee rights. **Centre County**, 9 PPER at 380. Close timing combined with another factor can give rise to the inference of anti-union animus. **PLRB v. Berks County**, 13 PPER ¶ 13277 (Final Order 1982); **City of Philadelphia, supra**; **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). Evidence that the employer has failed to adequately explain its adverse actions or that it has set forth shifting reasons for an adverse action can support an inference of anti-union animus and may be part of the union's prima facie case. **Stairways, supra**; **Teamsters Local 312 v. Upland Borough**, 25 PPER ¶ 25195 (Final Order, 1994); **Montgomery County Geriatric and Rehabilitation Center**, 13 PPER ¶ 13242 (Final Order, 1982), **aff'd, Montgomery County v. PLRB**, 15 PPER ¶ 15089 (Court of Common Pleas of Montgomery County, 1984).

In this matter, the record is clear and there is no dispute that Rine engaged in protected activity and that the Employer was aware of this activity. Rine engaged in protected activity by authorizing and causing the June 18th Grievances to be filed and Hope was aware of the grievances. Also, the record in this matter is clear that the Employer took adverse action against Rine through the discipline Rine received on June 19th.

The dispute thus turns to whether the Employer was motivated by anti-union animus when Hope disciplined Rine on June 19th. I find that the Association has carried its burden and made its *prima facie* case. The record shows that the Employer clearly displayed anti-union animus in relation to Hope's disciplining of Rine. During his conversation with Rine on June 19th, **one day** after the Association filed the June 18th Grievances, Hope said to Rine that he was going to change shifts back to eight hours, make the police officers perform written daily logs, and angrily said "You want a war, you got a fucking war." These statements are clear expressions of Hope's anti-union animus at the time Rine was disciplined. Hope's characterization of the filing of the grievances, a protected activity, to be a "war" clearly shows his state of mind to

include anti-union animus. Hope's anger and statements during the conversation with Rine show that Hope considered himself to be in a battle with the Association. He told Rine that he was going to make the bargaining unit members complete daily written logs and switch to eight-hour shifts, two changes which would be regressions in the terms and conditions of employment for the bargaining unit members. Indeed, Hope admitted that, in cooperation with the Association, he had previously stopped the written report requirement because it was unnecessary doubling of work. Further, Hope admitted he approved 12 hour shifts to make working conditions better, but now threatened to go back to 8 hour shifts because the bargaining unit members were "not performing their job duties." Additionally, while testifying, Hope admitted that he viewed the June 18th Grievances as a personal challenge to his authority as, in his opinion, he has the sole authority to grant overtime. Further, during his testimony, Hope admitted that, after the filing of the June 18th Grievances, he was no longer going to informally negotiate with the Association on work issues but strictly comply with the collective bargaining agreement. These statements, taken together, show that Hope's state of mind at the relevant time was that he was at odds with the Association and that he was taking an antagonistic and aggressive stance towards the Association.

In its brief, the Employer argues that the statements by Hope discussed above have "nothing do with the locker discipline and only arose after Ofc. Rine raised a separate and distinct set of issues with the Chief." (Employer's Brief at 12-13). However, the conversation with Rine clearly demonstrate Hope's state of mind at the time he made the decision to discipline Rine. As discussed above, that state of mind shows clear anti-union animus. I do not find it relevant that, if in the precise structure of Rine and Hope's conversation, the anti-union statements by Hope were made in a section which dealt specifically with the grievances rather than the Rine's discipline. The change of topics happened in mere moments, were all part of the same conversation, and, as discussed above, Rine's discipline was partially a reaction to the June 18th grievances.

In its brief, the Employer correctly notes that pursuant to **Department of Labor and Industry, supra**, timing between an employee's protected activity and the employer's adverse action may be a factor in forming the basis of a discrimination charge; however, close timing alone is insufficient to support a basis for discrimination. The Employer argues that "the timing here was not associated with the overtime grievances, but rather, with the recent violation of the policies concerning the safety and security of departmental weapons." (Employer's Brief at 13-14). The Employer argues that similar discipline issued for an incident nine days previous to June 19th shows that Hope's discipline of Rine was not related to the June 18th Grievances. **Id.** This argument would be more persuasive if proximity in time, alone, supported the conclusion that Hope was motivated by anti-union animus. However, as discussed above, close timing is only one factor which supports the conclusion. The conclusion reached above is supported by the content of Hope's statements made at the time of the discipline, his statements made at the Hearing, and the compelling and convincing temporal nexus of protected activity and discriminatory discipline in this matter.

Notwithstanding the finding of anti-union animus in this matter, in discrimination cases, the employer has a defense even if the union proves discriminatory motive. Once the burden of a prima facie case has been met, the employer may rebut a prima facie case of discrimination by proffering a credible nondiscriminatory reason for its actions.. **Deputy Sheriffs Association of Chester County v. Chester County**, 46 PPER 22 (Final Order 2014); **see, Wright Line, Inc.**, 251 NLRB 1083, 105 LRRM 1169 (1980), **enforced**, 662 F.2d 899 (1st Cir. 1981), **cert. denied**, 455 U.S. 989, 102 S.Ct. 1612 (1982). Once the employer establishes a nondiscriminatory reason for its actions, the burden shifts back to the complainant to prove that the employer's asserted reasons were a mere pretext for the discipline imposed. **Chester County, supra.**

In this matter the Employer has thoroughly provided evidence at the Hearing to establish the credible, non-discriminatory reasons for Hope's discipline of Rine. The record is clear that Hope found Rine's locker unsecured on June 18th and that the locker contained Rine's duty gear, ammunition and an AR-15. The record is clear that the state of Rine's locker on June 18th was a violation of Departmental directives issued in 2011

and 2013. And, the record is clear the discipline issued to Rine was related to these violations.

However, the Association has provided sufficient evidence to show by preponderance of the evidence that the non-discriminatory reasons for discipline were pretextual. Hope's manifest statements of anti-union animus most strongly support the finding of pretext. I find that, absent Hope's anti-union animus in this matter, he would not have disciplined Rine. This finding is further supported by the extremely close timing between the protected activity and the issued discipline. Further, Hope's non-discriminatory justifications for disciplining Rine are undercut by the fact that it had been Department practice to keep ammunition in unsecured lockers at the department in apparent violation of its own policies. In addition to department-wide practice of not securing ammunition, Hope also did not secure Rine's weapons, ammunition and gear in his own office after he confiscated these items from Rine's locker.

Thus, I find that the justifications for discipline provided by the Employer are pretext. Accordingly, since the Association has successfully rebutted the Employer's justification for its decision to discipline Rine, I am compelled to conclude that the Employer has violated Section 6(1)(a) and (c) of the PLRA.

CONCLUSIONS

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

1. Lemoyne Borough and Wormleysburg Borough, as represented by the West Shore Regional Police Commission, are public employers and political subdivisions 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. Lemoyne Borough and Wormleysburg Borough have committed unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Lemoyne Borough and Wormleysburg 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) Revoke and rescind the Departmental Corrective Notice issued to Officer Timothy Rine, dated June 19, 2015;
 - (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

employees 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 Association.

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 27th day of April, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WEST SHORE REGIONAL POLICE :
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AFFIDAVIT OF COMPLIANCE

Lemoyme Borough and Wormleysburg Borough hereby certify that they have ceased and desisted from their violations of Section 6(1)(a) of the Pennsylvania Labor Relations Act; that they have complied with the Proposed Decision and Order as directed therein; they have revoked and rescinded the Departmental Corrective Notice issued to Officer Timothy Rine, dated June 19, 2015; that they have posted a copy of the Proposed Decision and Order as directed therein; and that they have served an executed 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