

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STEVEN OWENS AND LIAM PYSKATY :
 :
 :
 v. : Case No. PF-C-18-61-E
 :
 LANSDALE BOROUGH :

PROPOSED DECISION AND ORDER

On May 14, 2018, Steven Owens and Liam Pyskaty (Complainants) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA or Act), as read with Act 111, alleging that Lansdale Borough (Borough) violated Section 6(1)(a) and (c) of the PLRA. The Complainants specifically alleged that the Borough refused to promote them to vacant sergeant positions because they were on the negotiating team for the Lansdale Borough Police Benevolent Association (Union or Association).

On June 12, 2018, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October 17, 2018, in Harrisburg, Pennsylvania. The matter was continued twice at the request of the parties, and ultimately rescheduled for May 20, 2019. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. At the end of the hearing, I granted the Borough's motion to dismiss and directed the parties not to file post-hearing briefs.

The examiner, based upon witness testimony, admitted documents and all matters of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision pursuant to Act 111 and the PLRA. (N.T. 7-8)
2. The Complainants are public employees and police officers employed by the Borough and covered by Act 111 and the PLRA. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 7-8, 11-12, 53-54)
3. Officer Steven Owens has been an acting sergeant at the Lansdale Borough Police Department (Department) since 2013. A sergeant is a squad supervisor. An acting sergeant performs all the duties that a sergeant would perform. The Department has four squads supervised by four sergeants. There is also a detective sergeant position and a sergeant in charge of community service, for a total of six sergeant positions. Only two sergeant positions are filled; three patrol sergeant positions and the detective sergeant position are vacant. (N.T. 11-13)
4. Officer Owens has been a member of the collective bargaining committee for the Association for the past four contract negotiation cycles, including the last round of negotiations for the current collective

bargaining agreement (CBA). The CBA is effective 2018 through 2021. Borough Council ratified the CBA in mid-April 2018. (N.T. 14-16, 45, 111)

5. Officer Liam Pyskaty has been a patrol officer with the Borough since July 2, 2001. He has been an acting sergeant since 2017. He has been on the Union's bargaining committee with officers Owens and Freed. Officer Pyskaty has been on the bargaining committee for the past three contract cycles. (N.T. 53-55, 57-58)

6. Ryan Devlin is a Lieutenant at the Borough's Department. He was promoted to Lieutenant from sergeant in April 2018. (N.T. 36, 79)

7. Officers Owens and Pyskaty took the written and oral Civil Service Examination for sergeant in January 2016. The Borough's Civil Service Commission (Commission) certified the results, pursuant to Section 7-6 of the Commission's rules, which were posted on February 23, 2016. The list contains six names in order from highest score to lowest, pursuant to Section 7-6(A) of the Commission's rules. The list of names is as follows: Adrienne Gori, Steven Owens, Liam Pyskaty, Christine Cohen, Jeffrey Mallozzi and Nicholas Oropeza. (N.T. 20-21, 53-54; Joint Exhibit 1; Association Exhibit 1)

8. Under the Commission's rules, Borough Council "shall notify the Commission of any vacancy which is to be filled and shall request the certification of three names from the list of eligibles." "If three names are not available, then the Commission shall certify the name(s) remaining on the list." The Borough Council then "shall make an appointment from one of the three names certified with reference to the merits and fitness of the candidates." (Joint Exhibit 1, § 7-6(B)(2)(a)-(c))

9. The eligibility list is valid for one year, and the Commission can vote to extend the validity of the list for an additional year, but it absolutely expires after twenty-four months. The Commission may also, in its sole discretion, void an eligibility list at any time for any reason. (N.T. 21-23, 117-118, 137; Joint Exhibit 1, § 7-6(A))

10. At all times relevant hereto, Officer Adrienne Gori, now Sergeant Gori, has been the Union President. She attended bargaining sessions for past negotiations and for negotiations for the current CBA. Officer Gori was first on the certified sergeant eligibility list, and she was promoted to the rank of sergeant on April 16, 2016, after the Commission certified the top three candidates to the Borough Council. She was promoted before negotiations for the current CBA. (N.T. 21-23, 36-37, 47-48, 50, 74, 76-77, 122; Association Exhibit 1) (N.T. 36-37, 47-48, 50, 74, 122)

11. After Officer Gori was promoted, Officers Owens and Pyskaty were the top two names on the sergeant eligibility list. No other promotions were made from this list even though there were openings for three sergeants and a detective sergeant. (N.T. 21-23)

12. Michael Trail is the Chief of Police. He was promoted from sergeant to Acting Chief of Police on August 1, 2017, after former Chief McDyre retired. He was appointed Chief of Police on February 22, 2018. Chief Trail at all times insulated himself from collective bargaining negotiations. He did offer his opinion on staffing and overtime issues out of concern over the Police Department's operating budget. (N.T. 23-24, 57, 113-116, 119-120)

13. Former Chief McDyre told Officer Owens on multiple occasions that the Borough would promote him to sergeant from the February 23, 2016 eligibility list. Acting Chief Trail also told Officer Owens that he would be promoted off that list. (N.T. 24)

14. John Ernst is the Borough Manager. He represents the Borough at contract negotiations with the Borough's three unions. In June of 2017, Mr. Ernst received a letter of intent from the Union to begin contract negotiations. The Borough and the Union began negotiations in the fall of 2017, around late October or early November. (N.T. 100-102)

15. At no time did Mr. Ernst inform the Borough Council members of the identities of the officers who were negotiating for the Union. (N.T. 102-103)

16. On November 29, 2017, after approximately four bargaining sessions, Officer Owens was in Lieutenant Devlin's office when Devlin said: "The Borough is not going to promote unless the contract is done, completed, settled." Officer Owens responded that he was just a representative and that he had no control over contract settlement. (N.T. 19, 40)

17. Officer Owens understood Lieutenant Devlin's remarks to mean that the Borough was not happy with the progress of contract negotiations and wanted to expedite a settlement and that, if Officer Owens wanted a promotion to sergeant, he had better get the contract settled. (N.T. 28)

18. In November or December 2017, in the Police Department's locker room, Officer Pyskaty told Lieutenant Devlin that negotiations were going well, to which Devlin purportedly responded: "That's not what I hear because from what I understand you guys are going to be hearing from certain people on Council. . . . They're not happy with you guys and you're asking for too much." (N.T. 58-59)

19. Lieutenant Devlin does not recall telling Officer Pyskaty that he had heard that negotiations were not going well. Lieutenant Devlin does not recall telling Officer Pyskaty that Pyskaty has no idea of the power that Council has over the Police Department. Lieutenant Devlin was not privy to the status of contract negotiations and did not have any conversations with anyone from Borough Council regarding Police Department negotiations. (N.T. 84-89)

20. Lieutenant Devlin credibly testified that, when he told Officers Owens and Pyskaty that the Borough would not act on the promotions until the contract was settled, he was just giving his own personal opinion. Lieutenant Devlin also credibly testified that his opinion was not based on any discussions that he had with anyone from Borough Council, the Commission or the Chief. (N.T. 82-83, 86-87, 90)

21. The Borough reached a tentative agreement with the Union in January 2018. At this time, Union President Sergeant Gori told Borough Manager Ernst that she would take the agreement back to the rank and file for discussion. In Mid-February, Sergeant Gori told Mr. Ernst that the Union attorney was reviewing the tentative agreement and that there was a concern over promotions. Mr. Ernst asked the Borough's labor counsel to contact the Union's attorney and learn about the issue regarding promotions. Mr. Ernst did not discuss any promotion matters with Acting Chief Trail. (N.T. 104-106, 110)

22. During contract negotiations, no members from Borough Council were present. The Borough's negotiating team consisted of Attorney Scott Blissman, Borough Manager John Ernst, Finance Director John Ramey and Human Resources Director Nancy Shaw. (N.T. 37-38, 73, 106-107)

23. Mr. Ernst later learned from Attorney Blissman that the issues regarding the tentative agreement related to sergeant promotions and body cameras. (N.T. 110-112)

24. On February 19, 2018, Acting Chief Trail sent an email to the individuals whose names appear on the February 23, 2016 eligibility list and Lieutenant Devlin. The email states, in relevant part, as follows:

I realize the date on the calendar and am fully aware of the promotional list's expiration. I will work with council at the March 7, 2018 work session on my plan to rebuild the LPD's command staff and first line supervisors. I am confident we will promote from the current lists before expiration and ask for your patience as we move forward.

(Association Exhibit 2)

25. Then-Acting-Chief Trail also held a Department meeting during which he explained his plan for promoting officers to sergeant from the February 23, 2016 eligibility list. Acting Chief Trail also told Officer Pyskaty that he would make it his business to ensure that Pyskaty was promoted to sergeant from the February 23, 2016 list. The Chief does not have the authority to promote officers. The Borough Council promotes from a certified Commission eligibility list. (N.T. 42-43, 46, 57-58, 63, 115; Joint Exhibit 1)

26. Acting Chief Trail was appointed Chief of Police on February 22, 2018. Also on that date, Chief Trail sent a letter to Borough Council President Denton Burnell. (N.T. 113-114, 119-120; Borough Exhibit 1)

27. The letter stated the following:

As Chief of the Lansdale Police Department, I am asking you to contact the Lansdale Borough Civil Service Commission to request they update the current Civil Service Eligibility list for Police Lieutenant and Police Sergeant to fill current vacancies in the police department.

(Borough Exhibit 1)

28. The Commission returned a list with only the names of Officers Owens and Pyskaty; It was not the February 23, 2016 list. The Chief responded that the list needs three names and that the two-name list was not a valid list. The Chief never received a valid, certified eligibility list from the Commission. (N.T. 120-123, 125, 129, 137)

29. The Chief wanted the Commission to remove Sergeant Gori's name from the February 23, 2016 eligibility list. He also requested that they provide Cohen with due process to have her name removed from the list (because she was now ineligible due to the lapse in her police certification)

and requested a list with at least three names by bringing up the name below Cohen, Officer Jeff Mallozzi. (N.T. 122-124)

30. The Commission and its solicitor were unsure how to remove Cohen's name from the list. The Commission's solicitor, who is wholly separate from the Borough and the Borough's solicitor, gave legal advice to the Commission opining that advertising for a hearing for Cohen, holding the hearing, taking evidence and allowing time for an appeal was too cumbersome and that the 2016 list should be allowed to expire instead of risking litigation. The Borough did not have any decision-making authority in letting the list expire. It was the decision of the Commission and its solicitor. If the Borough Council does not receive a list of three eligible candidates certified by the Commission, it cannot act on promoting or hiring. (N.T. 125-129, 139-140)

31. The Commission's solicitor wrote an opinion letter to the Chief and the Commission members. The solicitor's letter stated as follows:

I understand that the police training commission has decertified Officer Coh[e]n.

However, the Civil Service Commission must take public action to remove any candidate from the list of eligible candidates.

Given the time constraints is [sic] not worth the effort in this case if the list will expire as of April 5, 2018.

This is assuming no action will have been taken as to hiring for the Sergeant's position prior to the expiration date.

Commissioner[]s I would argue to just let the list expire if that is the case. The expiration of the list will negate the need for any hearing or appeal for any candidate.

(Borough Exhibit 3)

32. At the time he authored his opinion letter, the Commissioner's solicitor had no knowledge that the Borough was negotiating with the Union. He had no knowledge of the status of negotiations with the Union. He did not know the identity of the individuals who were negotiating for the Union. (N.T. 141)

33. At a March 12, 2018 Department meeting, Chief Trail explained to Officer Owens that there was a problem with the fourth person on the eligibility list, Christine Cohen. Three names must be certified from the eligibility list for promotion by Borough Council. After Sergeant Gori's name, the next three names were Officers Owens, Pyskaty and Cohen, i.e., numbers two, three and four on the eligibility list. Officer Cohen had been on disability leave for two years and was no longer certified to be a police officer. The Chief, at this point, told Officer Owens that the list was about to expire. (N.T. 29-31, 44, 49, 113-114, 130-131)

34. At about this time, Chief Trail also explained to Officer Pyskaty that he would not honor the list, and it would be allowed to expire because Christine Cohen's ineligibility would delay the process. Chief Trail directed that no one should contact Ms. Cohen. (N.T. 64-65, 130-131)

35. Officer Pyskaty contacted Ms. Cohen and informed her that her ineligibility was delaying the promotion process for him and Officer Owens. On March 13, 2018, Ms. Cohen sent an email to then-Sergeant Devlin informing him that she was withdrawing her name from the February 23, 2016 eligibility list. Chief Trail had seen Ms. Cohen's March 13, 2018 email, and he was disappointed that Officer Pyskaty contacted her. (N.T. 31-33, 65-66, 68-69; Association Exhibits 1 & 3)

36. The February 23, 2016 eligibility list expired on April 5, 2018, when there were three sergeant vacancies. At no time during negotiations did any member of Borough Council express frustration with the pace of negotiations or discuss promotion issues or personnel matters during executive sessions with Mr. Ernst. Mr. Ernst is unaware of the reasons why the eligibility list was permitted to expire. (N.T. 34-35, 107-109, 111, 131; Borough Exhibit 3)

37. Chief Trail and Lieutenant Devlin have praised Officer Pyskaty for his performance as an acting sergeant. (N.T. 58)

DISCUSSION

In a discrimination claim under Section 6(1)(c) of the PLRA, the claimant has the burden of proving that the employe(s) engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employe(s) that was motivated by the employe's 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). Fraternal Order of Police, Lodge No. 7 v. City of Erie, 39 PPER 60 (Proposed Decision and Order, 2008). Moreover, the Board has consistently held that a public employer's managerial prerogative does not insulate the employer from the statutory obligation to exercise that authority without discrimination. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994); Twin Valley Educational Support Professionals Association v. Twin Valley School District, 49 PPER 72 (Proposed Decision and Order, 2018)

In PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board stated that it evaluates the entire background of the case and considers several factors when determining whether an adverse employment action resulted from anti-union animus. These factors include 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 presence of shifting reasons for explaining such action, 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. Centre County, 9 PPER at 380. The close timing of an employer's adverse action alone is insufficient to infer animus, but 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); 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); 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).

Following the Union's case-in-chief during the hearing, the Borough moved to dismiss the complaint and charge. The Borough argued that the Complainants did not establish a prima facie case of discrimination. I deferred my ruling on the motion and the Borough presented its defense case. At this time, I agree with the Borough that the Complainants did not establish a prima facie case of discrimination, and I have granted the Borough's motion to dismiss.

Borough Council is responsible for selecting and promoting police officers from an eligibility list certified by the Commission. The record does not contain substantial, competent evidence establishing a nexus between Borough Council or any of its members and the refusal to promote Officers Owens and Pyskaty to the vacant sergeant positions. The entire background of the Complainants' case does not yield the slightest inference that any members of Borough Council, the Borough Manager, the Chief of Police or the members of the Commission delayed or refused promotions to Officers Owens and Pyskaty because of their involvement in contract negotiations. Indeed, the record establishes that when Borough Council received a valid list of eligible candidates in 2016, they immediately promoted the first candidate on the eligibility list, Officer Adrienne Gori, to sergeant while she was Union president and had participated in negotiations for the prior contract. Also, the evidence establishes that no one on the Commission or Borough Council knew the identity of the Union's bargaining team members.

The two-year-old list was allowed to expire. During their case-in-chief, the Complainants did not identify who was responsible for allowing it to expire. Indeed, the Complainants did establish that Officers Owens and Pyskaty were aware that Cohen's ineligibility for promotion created problems in certifying a new list of three eligible candidates, as required by the Commission's Rules, and that Cohen's situation complicated and delayed the process, while the Chief was trying to push for their promotions.

The Complainants offered evidence of statements made by Lieutenant Devlin that made Officers Pyskaty and Owens believe that Borough Council was dissatisfied with the pace of negotiations and how much the Union was seeking in negotiations. Lieutenant Devlin, however, credibly testified during the Complainants' case that he was just giving his own general opinion that Council would not act on the promotions until the contract was settled and that his opinion was not based on any discussions he had with any Borough Council members, the Commission members or the Chief. Lieutenant Devlin also did not recall making any statements that he had heard that negotiations were not going well or that Pyskaty did not understand the power that Borough Council has over the Police Department. I credit the conflicting testimony of Lieutenant Devlin over the Complainants' testimony that he heard that negotiations were not going well. Furthermore, Lieutenant Devlin was not at all privy to the status or nature of contract negotiations, and he is not in any way involved in the promotion process.

Under the totality of the circumstances as presented by the Complainants, there simply is no evidence from which to infer unlawful motive by anyone in a position to affect the promotions of Officers Owens and

Pyskaty. The record does show that the Commission must, first and foremost, certify a valid list of three eligible candidates for each position. The record further shows that Borough Council, after promoting Sergeant Gori, never received a certified list from the Commission, thereby shackling Council.

Two other factors contributed to the delay. Cohen was on disability leave since about the time the 2016 list was initially posted. Also, retiring Chief McDyre wanted the new Chief to be appointed when the promotions were made. The proximate cause of the failure to promote Officers Owens and Pyskaty was the delay of former Chief McDyre and the infirmity of the eligibility list, resulting from the disqualification of Cohen, and the Commission's decision to cure that infirmity by allowing the list to expire. The Commission is the responsible actor here, and the Complainants failed to establish that the Commission members had any knowledge of Officer Owens' and Officer Pyskaty's Union activities or that the Commission's decision was in any way based on animus toward those two officers.

At the end of its defense case, the Borough again moved to dismiss the Complainant's discrimination claims based on the entire record. I have granted the Borough's second motion to dismiss, predicated on the Borough's uncontradicted evidence that credibly explained the Borough's lack of involvement in the failure to promote Officers Owens and Pyskaty before the list expired in April 2018.

None of the Borough Council members were on the Borough's negotiating committee and none of them knew the identity of the Union's bargaining committee members. The timeline for bargaining was not unreasonable and the parties reached a tentative agreement as early as January 2018, after bargaining had only begun in late October or early November 2017. Thereafter, the parties negotiated two remaining issues pertaining to body cameras and promotions and the Borough ratified the contract by April 15, 2018. At no time during negotiations did any member of Borough Council express any frustration with the pace of negotiations. None of the Council members discussed promotion issues or personnel matters during executive session with Borough Manager Ernst.

As late as February 19, 2018, the Chief went on record to inform the eligible officers that he planned on working with Borough Council to move forward with promotions and that he was aware that the list was about to expire. At this point, there had been bargaining for about three months; a tentative agreement had been in place; and the new Chief had been trying to use his position to move the Commission and Council to promote Officers Owens and Pyskaty. Additionally, during this time Chief Trail and Lieutenant Devlin have been praising Officer Pyskaty for his performance as an acting sergeant.

However, the Commission did not, and believed it could not, certify a valid list of three eligible candidates for each position of sergeant because Cohen was third on the list and she was not eligible. The Commission decided that its rules did not permit Cohen to simply withdraw her name from the list in an email without giving her a due process hearing. The Commission also concluded that it would be easier and less risky to permit the list to expire, begin the examination process over and develop a new list. The Commission acted independently from Borough Council based on the legal advice of its solicitor who had no interaction with anyone on Borough Council. Borough Council was eliminated from making any decisions about promotions because a valid certified list of three eligibles was never presented to it for action on the promotions. The Commission's solicitor had no knowledge of

the identity of the Union's bargaining team or that the Borough was involved in negotiations with the Union.

Moreover, the Commission members were not involved with bargaining or aware of the identities of anyone involved in bargaining. The Commission's inaction and its ultimate decision to allow the 2016 list to expire prevented Borough Council from acting on the promotions. There simply is no evidence of any animus from anyone involved in the decision to permit the expiration of the list (i.e., Commission members), and it was that decision that resulted in the inability of Council to promote Officers Pyskaty and Owens before the list expired.

More importantly, however, the Complainants failed to establish any knowledge on the part of any members of Council, i.e., the Borough, that Officers Owens and Pyskaty were involved in protected activity of negotiating a new contract. The Borough affirmatively proved that Council members lacked any knowledge about the officers' protected activities. Absent knowledge, there can be no unlawfully motivated employment action, and the Complainant's claims must be dismissed as a matter of law. Due to the Commission's inaction, Council was unable to act on promotions or control the delay. Accordingly, although the record shows that Officers Owens and Pyskaty were engaged in protected activity, the Complainants failed to establish any knowledge on the part of Council, the Chief, the Commission or the Manager, unlawful motive by any individuals or governing bodies or adverse employment action by the employer.

CONCLUSIONS

The hearing 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 a political subdivision of the Commonwealth within the meaning of the PLRA as read in pari materia with Act 111.
2. The Complainants are public employes and police officers employed by the Borough and covered by Act 111 and the PLRA. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The Borough has not committed unfair labor practices within the meaning of Section 6(1) (a) or (c) 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 and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the Borough's Motions to Dismiss the charge are granted, the charge is dismissed, the complaint is rescinded and that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this second day of July, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner