

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :  
FORT PITT LODGE NO. 1, :  
 :  
 v. : Case No. PF-C-21-68-W  
 :  
 CITY OF PITTSBURGH :

**PROPOSED DECISION AND ORDER**

On July 16, 2021, the Fraternal Order of Police, Fort Pitt Lodge No. 1, (Union or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (PLRB or Board) against the City of Pittsburgh (City or Employer) alleging that the City violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111, when the City failed to promote bargaining-unit members according to the parties' collective bargaining agreement.

By letter dated October 26, 2021, the Secretary of the Board declined to issue a complaint on the charge because the Secretary found that the Union failed to allege sufficient facts for finding a violation under Section 6(1)(a), (c) and (e). The Union filed exceptions to the Secretary's decision in which it clarified its charge. The Board subsequently directed the Secretary to issue a complaint by Order dated January 18, 2022.

On February 9, 2022, the Secretary 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 April 21, 2022, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was continued twice with the consent of the parties and held on September 20, 2022, in Pittsburgh, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. A second day of hearing was held on October 17, 2022, in Pittsburgh. The Union submitted a post-hearing brief on November 8, 2022. The City submitted a post-hearing brief on December 9, 2022.

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

**FINDINGS OF FACT**

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 7).

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 7).

3. The parties are subject to a collective bargaining agreement which is called the Working Agreement and has the effective dates of January 1, 2019 through and including December 31, 2022 ("2019-2022 Working Agreement"). (N.T. 19; Union Exhibit 2).

4. Section 18 N of the 2019-2022 Working Agreement states: "Promotion: When the City determines that it has a vacancy in the rank of Sergeant or Lieutenant that it intends to fill, the City shall promote to fill the position within 90 days." (Union Exhibit 2, page 84).

5. On June 6, 2021, the Union filed a grievance with the City. The grievance states in relevant part:

Lt. Tersak retired on March 10, 2021. The City of Pittsburgh has failed to promote anyone after 90 days have passed [since the retirement of Tersak]. The contract specifically states, "When the City determines there is a vacancy in the rank of Sargent or Lieutenant that it intends to fill, the City shall promote to fill the position within 90 days." This has been a continuing issue. Sgt. Kohnfelder retired on February 26, 2021 and no one has been promoted to fill that vacancy.

REMEDY: Promote those eligible to fill all vacancies created by retirement, resignations, and or termination, as specified in the working agreement between the City of Pittsburgh and FOP Ft Pitt Lodge #1.

(N.T. 20-21; Union Exhibit 3).

6. The Union tracks all promotional opportunities and promotion history relevant to its bargaining unit members. The Union diligently tracks its current membership (including name and rank), which members are out on various forms of leave or otherwise unable to work, which members who left the City or retired, and current job or position openings within the City's Bureau of Police. (N.T. 16-18, 72).

7. At the time of the hearing, the Union believed there were at least 13 open Sergeant positions and 3 open Lieutenant positions which were awaiting action by the City. The positions of Sergeants and Lieutenants are within the bargaining unit. (N.T. 29, 55, 80-81).

8. The City does not notify the Union about the City's intentions for filling vacancies. (N.T. 73).

9. According to the City's public budget, the City had budgeted 30 full-time equivalent (FTE) Police Lieutenant positions in 2021 and 2022. The City had budgeted 102 FTE Police Sergeant positions in 2021 and 2022. The Union relies on the City's published budget to determine what positions in the Police Bureau are unfilled and awaiting promotions or hires. (N.T. 25-26; Union Exhibit 9, page 192).

10. On September 19, 2022, the day before the hearing in this matter, Thomas Stangrecki, Deputy Chief of the Pittsburgh Bureau of Police, notified two Police Officers they would be promoted to lieutenant and thirteen Police Officers that they would be promoted to Sergeant. Stangrecki scheduled the ceremony for these promotions for October 13, 2022. (Union Exhibit 8).

11. Prior to the 2019-2022 Working Agreement, the parties were subject to an interest arbitration award issued by Arbitrator Miller dated July 25, 2016 (The Miller Award). The Miller Award contains the following relevant language:

Supervisory Vacancies and Higher Grade Assignments. Section 18 (N) will be amended to provide as follows: "When the City determines that it has a vacancy in the rank of Sergeant and Lieutenant that it intends to fill, the City shall promote to fill the position within 90 days." The remaining sentence shall be removed from the Agreement. The Working Agreement will be amended to require the City to utilize officers to fill higher grade assignments on a temporary basis from the active promotional eligible list for promotion into that rank. In cases where there is no current or valid promotional list, the City may utilize any officer that it deems qualified to fill the temporary vacancy.

(Union Exhibit 6, page 10).

#### DISCUSSION

The Union argues that the City violated Section 6(1)(a) and (c) of the PLRA because the City's alleged failure to promote was motivated by anti-union animus. In a discrimination claim under Section 6(1)(a) and (c) of the PLRA, the union 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. 7 64 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).

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.

Moving to this matter, the Board has upheld charges of discrimination where the union alleges that the employer discriminated against the entire unit. In West Hempfield Township, 37 PPER ¶ 59 (Final Order, 2006), for example, the Board upheld a hearing examiner's decision finding discrimination against an entire unit of police officers where the employer imposed a unit-wide hiring freeze after the bargaining unit had engaged in protected activity. Under the precedent of West Hempfield Township, supra, I find that the Union here has shown that the entire bargaining unit of Police Officers were subject to adverse employment actions sufficient to meet its prima facie case.

Continuing with the analysis of the Union's prima facie case, the Union must show that the bargaining unit engaged in protected activities. For example, in West Hempfield Township, supra, the protected activity found by the Board was the union's refusal to concede during the collective bargaining process to allow the Township to hire civilian employees to assist the police in performing their duties.

In this case the Union negotiated along with the City the 2019-2022 Working Agreement and engages in concerted activities for the purposes of mutual aid and protection. Additionally, prior to the 2019-2022 Working Agreement the Union and City had contentious negotiations over, among other issues, the language of 18 N. The wording of 18 N ultimately had to be set by the Miller Award. This evidence shows the Union has been actively pursuing the issue of promotions with the City for many years. I find the record supports this aspect of the Union's prima facie case.

Moving to the next part of the analysis, the Union has shown that the City is aware of the Union's protected activities. This issue is not contested.

Next, the Union has shown that the City took adverse action against the bargaining unit members and that the City was motivated by the Union engaging in protected activity. I find that the City has been taking adverse action against the Union's bargaining unit members by failing to promote them within 90 days of a vacancy in the rank of Sergeant or Lieutenant. I also find that this adverse action was based on anti-union animus.

Under an analysis of an unfair labor practice based on discrimination I am empowered to consider the whole record and to make inferences therefrom. Based on this record, especially the through the analysis of the City's budget by the Union and the timing of the Deputy Chief's notice of promotions one day prior to the hearing, I infer that the City knew it had vacancies in the ranks of Lieutenant and Sergeant that it always intended to fill and that it did not do so within 90 days as per the language in Section 18 N of the 2019-2022 Working Agreement. The animus by the City is inferred due to the

fact City presented no explanation at all from management through testimony at the hearing as to the timing of its promotions. That is, the City has failed to adequately explain its action against the adversely affected employees. This fact, the lack of explanation by the City, is the most important element in my determination that the City acted with animus. Animus is also inferred from the effect of the employer's adverse action on other employees and protected activities. I infer animus because the City's failure to timely promote, when I infer it always intended to promote, adversely affects the bargaining unit members who should have been promoted earlier in time and therefore enjoy higher wages and benefits starting from their promoted rank from an earlier point in time. I also infer animus because the City's unexplained failure to promote pursuant to the 2019-2022 Working Agreement has a negative effect on the Union as a whole as it undermines the authority of the Union with its own members and the importance of bargaining over terms and conditions of employment.

As the Union has met its prime facie case, and the City has offered no credible nondiscriminatory reason for its actions on the record, the City has violated Section 6(1) (a) and (c) of the PLRA and Act 111 by failing to promote pursuant to section 18 N of the 2019-2022 Working Agreement.

The Union in this case also argues that the City's failure to promote to the positions of Sergeant and Lieutenant within 90 days is a repudiation of the 2019-2022 Working Agreement between the parties and previous arbitration awards concerning the parties and therefore an unfair labor practice under Section 6(1) (a) and (e) of the PLRA as read with Act 111. As I have found a violation of 6(1) (a) and (c) which disposes of this matter, I will not address the Union's claims under Section 6(1) (a) and (e).

#### **CONCLUSIONS**

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

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Union 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 City has committed an unfair labor practice 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 Hearing Examiner

#### **HEREBY ORDERS AND DIRECTS**

that the City shall:

1. Cease and desist from interfering with, restraining or coercing employees 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 which the Hearing Examiner finds necessary to effectuate the policies of the PLRA and Act 111:

(a) Immediately promote to fill all vacancies at the rank of Sergeant and Lieutenant that were vacant more than 90 days on the date of the hearing (September 20, 2022) and immediately make all promotions to Lieutenant and Sergeant made under the 2019-2022 Working Agreement, including promotions that have already been made prior to the date of this Proposed Decision and Order, retroactive effective to no later than 90 days after their respective vacancies;

(b) Immediately pay the promoted Sergeants and Lieutenants and make them whole for all lost wages and benefits they would have earned as Sergeants and Lieutenants had they been promoted no later than 90 days after their respective vacancies, including but not limited to wage increases received by the bargaining unit during the backpay period and any other lost benefits, medical and dental payments and co-payments or accoutrements and terms and conditions of employment enjoyed by Sergeants and Lieutenants, including any differentials in holiday pay, overtime and the accrual of sick and vacation time, as well as pension contributions during the backpay period;

(c) Immediately pay the promoted Sergeants and Lieutenants interest at the rate of six percent *per annum* on the outstanding backpay owed to them;

(d) 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;

(e) 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

(f) 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 ninth day of February, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

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Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :  
FORT PITT LODGE NO. 1, :  
v. : Case No. PF-C-21-68-W  
CITY OF PITTSBURGH :

AFFIDAVIT OF COMPLIANCE

The City of Pittsburgh 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 immediately promoted to fill all vacancies at the rank of Sergeant and Lieutenant that were vacant more than 90 days on the date of the hearing (September 20, 2022) and that it immediately made all promotions to Sergeants and Lieutenants made under the 2019-2022 Working Agreement, including promotions that have already been made prior to the date of this Proposed Decision and Order, retroactive effective to no later than 90 days after their respective vacancies; that it immediately paid the promoted Sergeants and Lieutenants and made them whole for all lost wages and benefits they would have earned as Sergeants and Lieutenants had they been promoted no later than 90 days after their respective vacancies, including but not limited to wage increases received by the bargaining unit during the backpay period and any other lost benefits, medical and dental payments and co-payments or accoutrements and terms and conditions of employment enjoyed by Sergeants and Lieutenants, including any differentials in holiday pay, overtime and the accrual of sick and vacation time, as well as pension contributions during the backpay period; that it immediately paid the promoted Sergeants and Lieutenants interest at the rate of six percent *per annum* on the outstanding backpay owed to them; 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.

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Signature of Notary Public

