

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MANOR TOWNSHIP POLICE ASSOCIATION :
 :
 v. : Case No. PF-C-10-63-E
 :
 MANOR TOWNSHIP :

PROPOSED DECISION AND ORDER

On April 30, 2010, the Manor Township Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Manor Township (Township) violated sections 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by laying off Officers Charles Snyder, Wayne Smoker and Justin Kinard "in retaliation for the Association's invocation of Act 111 Interest Arbitration" and by denying them requested union representation at an April 28, 2010, meeting.¹ On May 14, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on September 22, 2010. On May 26, 2010, the Township filed an answer and affirmative defenses alleging that the charge should be dismissed because it lawfully laid off Officers Snyder, Smoker and Kinard for budgetary and operational reasons after it lost a long-standing contract to provide police services to a neighboring borough and because the April 28, 2010, meeting was not an investigatory interview implicating the right to union representation. On July 9, 2010, the hearing examiner continued the hearing upon the request of the Township and without objection by the Association. On November 4, 2010, the hearing examiner held the hearing and afforded the parties a full opportunity to present evidence and to cross-examine witnesses. On December 22, 2010, the Township filed a brief by deposit in the U.S. Mail. On December 27, 2010, the Association filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. The Township has recognized the Association as the exclusive representative of a bargaining unit that includes police officers employed by the Township. (N.T. 37-38)
2. Effective January 1, 2005, the Township and the neighboring Borough of Mountville (Borough) entered into a five-year extension of a long-standing contract under which the Township had been providing police services to the Borough in exchange for yearly payments by the Borough. (N.T. 23, 32-33, 45-46, 136, 201, 253-255; Employer Exhibits 8-9)
3. On September 9, 2008, the Association demanded of the Township "binding arbitration for the contract period beginning January 01, 2009." The Association had not demanded arbitration during the previous 25 years. The Township's manager (Barry Smith) did not consider laying off police officers at the time. (N.T. 38-39, 115-116, 243-244, 246-248; Employer Exhibit 6)
4. On October 1, 2009, an interest arbitration panel held a hearing. The Township did not consider laying off police officers at the time. (N.T. 16, 122, 135, 250, 252-253, 278, 323, 330)
5. By letter dated November 3, 2009, the Township proposed to the Borough another five-year extension of their long-standing contract. The Township based the proposal on a study by its chief of police (Todd A. Graeff), who determined that the Borough had accounted for 14.6% of police calls requiring paperwork in 2008 and that the yearly cost

¹ The Association also filed the charge under section 6(1)(e) of the PLRA. The Association withdrew that portion of the charge at the hearing (N.T. 11), however, so it is no longer before the Board.

of providing police services to the Borough on a per capita basis was about \$250,000.00. (N.T. 13-15, 32-34, 255-266, 303-307; Employer Exhibits 10-11)

6. On November 10, 2009, Mr. Smith read in the newspaper that the Borough was going to be contracting with another township for police services. At a staff meeting later that day, he broached the subject of police lay offs for the first time. (N.T. 253, 268-270, 273-274; Employer Exhibit 12)

7. Based on Chief Graeff's study and based on his own knowledge that the average yearly cost of a police officer was \$80,000.00, Mr. Smith calculated that three police officers would have to be laid off to cover the loss of revenue from the Borough. Mr. Smith did not recommend laying off any police officer at the time because the contract for the police was "open" and he did not know what the cost for police services were going to be in 2010. (N.T. 255-257, 274-277; Employer Exhibit 10)

8. By letter dated November 23, 2009, the Borough gave notice to the Township that it was going to be contracting with another township for police services beginning January 1, 2010. (N.T. 14-16, 271-273; Employer Exhibit 13)

9. On December 1, 2009, the Township's partial arbitrator (Patrick Harvey) upon the direction of Mr. Smith attempted to have the interest arbitration panel deliberate with due regard for the loss of revenue from the Borough. Mr. Harvey's attempt failed. (N.T. 31, 85-86, 278-279, 317-318, 324-331, 334, 344-346; Employer Exhibit 16)

10. In December 2009 or January 2010, a member of the board of supervisors (John S. May) told the Association's president (Sgt. James Alexander) that the Township would wait to see what happened in arbitration before laying off any police officers. (N.T. 13, 47, 81-82)

11. For 2010, the Township received no revenues from the Borough and transferred \$735,000.00 from its capital reserves to cover operating costs for the year. The Township had been funding its capital reserves to cover major long-term capital expenditures. (N.T. 212, 214-215, 217-221; Employer Exhibits 4-5).

12. In March 2010, the interest arbitration panel issued an award. (N.T. 17, 280, 332)

13. On April 5, 2010, Mr. Smith recommended to the board of supervisors that three police officers be laid off because the award did not cover the loss of revenue from the Borough. Mr. Smith did not base his recommendation on the fact that the Association had demanded interest arbitration. The board of supervisors accepted Mr. Smith's recommendation. Three of the five members of the board of supervisors (Mr. May, Alan Kreider and Richard Bauder) did so because the termination of the Township's long-standing contract with the Borough left the Township with reduced revenues and responsibilities for the police. They did not do so because the Association had demanded interest arbitration. (N.T. 13-22, 34, 36, 49-50, 141, 149-152, 157-161, 169, 280-284, 291-292; Association Exhibit 8)

14. On April 21, 2010, the parties held an impact bargaining session after which they agreed on a severance package of six months pay and medical benefits for the three police officers to be laid off. (N.T. 51-53, 86-92, 96-101, 284-290, 336-344; Employer Exhibit 1)

15. On April 28, 2010, the Township met with its three least senior police officers (Officers Snyder, Smoker and Kinard) to lay them off and to inform them of the severance package. The officers requested union representation. The Township explained to them that the meeting was not disciplinary in nature and denied their requests. (N.T. 53-54, 94-95, 98, 185-187, 189-191, 291-293, 347-348)

16. Except for calls for assistance, the Township no longer provides police services to the Borough. (N.T. 136, 159)

DISCUSSION

The Association has charged that the Township committed unfair labor practices in violation of sections 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111 by

laying off Officers Snyder, Smoker and Kinard "in retaliation for the Association's invocation of Act 111 Interest Arbitration" and by denying them requested union representation at an April 28, 2010, meeting. According to the Association, support for the retaliation charge may be found in (1) the timing of events, (2) an insubstantial explanation for the lay offs, (3) overt displays of anti-union animus by the Township and (4) disparate treatment of the laid off police officers.² In the Association's view, support for the union representation charge may be found in (1) the fact that the April 28, 2010, meeting involved an employment action, (2) the fact that the Township denied requested union representation by the officers and (3) the fact that union representatives were available.

The Township contends that the charge should be dismissed because it lawfully laid off Officers Snyder, Smoker and Kinard for budgetary and operational reasons after it lost a long-standing contract to provide police services to a neighboring borough and because the April 28, 2010, meeting was not an investigatory interview implicating the right to union representation.

The retaliation charge

An employer commits unfair labor practices under sections 6(1)(a) and (c) if it discriminates against an employee for having engaged in an activity protected by the PLRA as read in pari materia with Act 111. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004). One such activity is demanding Act 111 interest arbitration. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order 2010). If the charging party presents a prima facie case during its case-in-chief, a charge under sections 6(1)(a) and (c) is to be sustained unless the employer shows that it would have taken the same action even if the employee had not engaged in the protected activity. Brentwood Borough, 35 PPER 112 (Final Order 2004), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992). The discriminatory motivation creates the offense. Id. A valid non-discriminatory reason for the employer's action may rebut any inference that the employer was discriminatorily motivated. Duryea Borough Police Department, supra.

Any finding of an unfair labor practice must be supported by substantial evidence. Commonwealth of Pennsylvania, PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978). An overt display of anti-union animus by the employer will support a finding that the employer discriminated against an employee for having engaged in protected activity. Brentwood Borough, supra. Close timing between an employee's protected activity and an employer's action coupled with an inadequate explanation for the employer's action will, too. Lehigh Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). So will close timing between an employee's protected activity and an employer's action coupled with the employer's disparate treatment of similarly situated employees. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005).

A close review of the record shows that the Township laid off Officers Snyder, Smoker and Kinard not because the Association invoked interest arbitration but for a valid non-discriminatory reason: because a neighboring borough's decision not to renew a long-standing contract under which the Township had been providing police services to the borough in exchange for yearly payments by the borough left the Township with reduced revenues and responsibilities for the police. See findings of fact 2, 8 and 13. Thus, even assuming without deciding that the Association presented a prima facie case during its case-in-chief, the charge must be dismissed because it is apparent that the Township would have laid off the three police officers even if the Association had not invoked interest arbitration.

² In its brief at 9-10, the Association contends that even if no retaliation in violation of sections 6(1)(a) and (c) is found an independent violation of section 6(1)(a) nonetheless should be found because the lay offs and a number of actions taken by the Township against the Association's president (Sgt. Alexander) would have the tendency to discourage employees from engaging in protected activity. The Association has not charged an independent violation of section 6(1)(a), however, nor has it charged unfair labor practices with respect to the Township's treatment of Sgt. Alexander. Thus, no independent violation of section 6(1)(a) may be found. See Kennett Consolidated School District, 37 PPER 89 (Final Order 2006) (no independent violation may be found where the charging party did not allege such a violation in its specification of charges); Iroquois School District, 37 PPER 167 (Final Order 2006) (the Board only has jurisdiction to find the unfair labor practices charged).

None of the Association's contentions in support of the charge has merit.

The Association initially contends that the timing of events supports the charge. As the Association points out in its brief, the Township knew in November 2009 that it was losing the revenues and responsibilities associated with the contract with the borough and was contemplating lay offs as early as December 2009, see findings of fact 8 and 10, but did not lay off the three police officers until after the award resulting from the Association's invocation of interest arbitration for the first time in 25 years was issued in March 2010. See findings of fact 2, 3, 12 and 15.

The timing of events alone will not support a retaliation charge, however. Pennsylvania State Park Officers Association, supra. Moreover, the Township presented a plausible explanation for why it did not lay off the three officers until after the award was issued: because it could not be sure of the cost for its police services until the award was issued. See finding of fact 7. Furthermore, the record shows that the Township did not consider lay offs when the Association demanded arbitration or when the arbitration hearing was held, see findings of fact 3-4, and only broached the subject of lay offs after it read that the borough would not be renewing the long-standing contract under which the Township had been providing police services to the borough. See finding of fact 6. Thus, if anything, the timing of events militates against a finding that the Township was discriminatorily motivated.

The Association next contends that an insubstantial explanation for the layoffs supports the charge. As the Association points out in its brief, despite the loss of revenues from the borough, the Township negotiated a severance package of six months pay and benefits for the three police officers it laid off. See finding of fact 14. As the Association also points out, the Township has balanced its operating budget by transferring funds from its capital reserves in the past (N.T. 215), had \$4,078,832.00 in unrestricted capital funds at the end of 2008 (N.T. 122-124, 234; Association Exhibit 9), has yet to spend some of its capital funds as intended (N.T. 229-230), is debt free (N.T. 24, 124), has not raised taxes in a number of years (N.T. 25, 41-42, 75-76, 124), has not imposed an emergency services tax (N.T. 124), did not order an independent study of its manpower needs (N.T. 21-22), is a growing community (N.T. 42), has experienced a 17% increase in calls from within the Township itself (N.T. 55-56, 353; Association Exhibit 11) and has a comparatively low millage rate (N.T. 124-125).

Given that the severance package was short-term and that the loss of revenues from the borough was open-ended, however, the fact that the Township negotiated the severance package despite the loss of revenues from the borough is hardly noteworthy. Moreover, the record shows that to fund its operating budget for 2010 the Township transferred \$735,000.00 from its capital reserves. See finding of fact 11. Although the Township may well have been able to secure additional monies for the police department by further depleting its capital reserves, by raising taxes and by imposing an emergency services tax, the fact that it did not do so is unexceptional given the loss of responsibilities from the termination of its contract with the borough. Furthermore, although better public policy may have been to maintain a full complement of police and to order an independent study of its manpower needs, given the loss of revenues and responsibilities from the termination of its contract with the borough and given its own internal calculations, see findings of fact 5 and 7, the fact that the Township chose to lay off three police officers is unexceptional as well.

The Association next contends that overt displays of anti-union animus by the Township support the charge. As the Association points out in its brief, one of the members of the Township's board of supervisors (Mr. May) said on May 3, 2010, that "the Union had their way for so long and the Police would not negotiate anything" (N.T. 27-30; Association Exhibit 1), that Mr. May testified that he "really felt that over the course of the years the Supervisors always conceded to the Union. We never went to arbitration, and it was more give and no take on our part, and I still feel that way" (N.T. 30), that another member of the board of supervisors (Mr. Bauder) said on March 1, 2004, "in comparison with other townships we are still over staffed with police" and that "we have one of the most lucrative benefit packages in the County" (N.T. 162-163; Association Exhibit 4) and that Mr. Bauder said on April 5, 2004, that "[t]he purchase of [truck

scales] represents an expansion of our Police Department, which is already over-staffed and more costly than that of comparable municipalities. The generous terms of our current Collective Bargaining Contract with the Police will be a budget buster for years" (N.T. 164-166; Association Exhibit 5).³ The Association also points out that the Township did not honor a request by the Association's president (Sgt. Alexander) for a certificate and \$100.00 for 25 years of service as it had for other police officers in the past (N.T. 56-57), was unhappy that he granted a television interview about public safety following the layoffs and wanted to fire him for that (N.T. 60-64), intimated that the police department would be disbanded (N.T. 65-68), denied a request by him for training (N.T. 57-60; Association Exhibit 2) and denied him a promotion (N.T. 69-70).

Neither Mr. May's nor Mr. Bauder's statements were coercively phrased, however. As a matter of free speech, a non-coercively phrased statement by an employer is not evidence of anti-union animus. City of Williamsport, 26 PPER ¶ 26202 (Final Order 1998); City of Easton, 9 PPER ¶ 9109 (Nisi Decision and Order 1978). Moreover, Mr. Bauder's statements were made six years before the lay offs. Displays of anti-union animus that are remote in time are of dubious relevance. Cameron County School District, 37 PPER 45 (Final Order 2006). Thus, Mr. May's and Mr. Bauder's statements provide no basis for finding that the Township's lay off of the three police officers was motivated by anti-union animus.⁴ In addition, there is no apparent nexus between the Township's treatment of Sgt. Alexander and its lay off of the three police officers, so there is no basis for finding the Township's treatment of Sgt. Alexander to be proof of anti-union animus relative to the lay offs either.

The Association finally contends that disparate treatment of the laid off police officers supports the charge. As the Association points out in its brief, the Township did not replace all of the police officers who left its employment in 2005 (N.T. 44, 300) yet replaced a road crew employe who retired in 2009 (N.T. 301-303, 315-316; Association Exhibit 10). The Association also points out that the Township used attrition rather than lay offs to reduce the employe complement in other departments when a road crew employe died in 2009 (N.T. 211, 228, 237) and an assistant manager resigned in 2008 (N.T. 211, 228, 237).

The record shows, however, that the responsibilities of the road crew did not change when the employe resigned in 2009 (N.T. 315-316). By contrast, the responsibilities of the police changed by the time the Township laid off the three police officers in that except for calls for assistance the Township was no longer providing police services to the borough as it had in the past. See findings of fact 2 and 16. Moreover, the record does not show that any responsibilities changed when the Township reduced the employe complement in other departments by attrition. Thus, the three police officers were not similarly situated with any other employes, and no disparate treatment may be found. See Erie City School District, 40 PPER 12 (Final Order 2009) (retaliation charge alleging disparate treatment dismissed where there was no showing that the employer treated the alleged discriminatee any differently from any similarly situated employe).

The union representation charge

An employer commits an unfair practice under section 1201(a)(1) if it denies an employe requested union representation at an investigatory interview that the employe reasonably believes may result in the imposition of discipline. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007), citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). Employes, however, do not have the right to union representation at every meeting with their employer. AFSCME, Council 13 v. Commonwealth of Pennsylvania, PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986). As the Board explained in Sayre Area School District, 36 PPER 54 (Final Order 2005), a "meeting

³ At the hearing, the Association presented other statements by Mr. Bauder (N.T. 170-175; Association Exhibits 1 and 7) and statements by a third member of the board of supervisors (Mr. Kreider) (N.T. 142-148; Association Exhibits 4, 6 and 7). The Association does not reference those statements in its brief, however, so any argument based upon them is waived. See SSHE, 32 PPER ¶ 32118 (Order Denying Application for Supersedeas 2001) (an argument not presented to a hearing examiner is waived).

⁴ Even if the Board were to consider them, the statements referenced in footnote 3 provide no better basis for such a finding as they also were not coercively phrased and/or were remote in time.

must have been calculated to form the basis for taking disciplinary or other job affecting actions against [employees] because of past misconduct" in order for the meeting to be an investigatory interview implicating the right to union representation. Id. at 153.

A close review of the record shows that the April 28, 2010, meeting was to inform Officers Snyder, Smoker and Kinard of their lay offs and of their severance package. See finding of fact 17. Thus, the meeting was not an investigatory interview implicating the right to union representation. The Township's denial of the officers' requests for union representation was, therefore, lawful.

The Association cites no authority providing otherwise.

CONCLUSIONS

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

1. The Township is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The Association is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Township has not committed unfair labor practices under sections 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 as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this tenth day of January 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner