

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JESSUP BOROUGH POLICE DEPARTMENT :
EMPLOYEES :
 :
 v. : Case No. PF-C-02-2-E
 :
 JESSUP BOROUGH :

FINAL ORDER

On August 26, 2002, the Borough of Jessup (Borough) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) from an August 6, 2002 Proposed Decision and Order (PDO) in which the hearing examiner concluded that the Borough violated Act 111 of 1968 (Act 111) and Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) by limiting the part-time hours for Officers Robert Santarelli and Victor Santarelli to 32 hours per week. Following the grant of an extension of time, the Borough timely filed its brief in support of the exceptions on September 5, 2002, and the Jessup Borough Police Department Employees (Union) filed its responsive brief on September 26, 2002.

On January 3, 2002, the Union filed a Charge of Unfair Labor Practices with the Board alleging that the Borough violated Section 6(1)(a), (b),¹ (c) and (e) of the PLRA and Act 111. The Union claimed that the Borough committed unfair labor practices when it limited the hours for all part-time police officers to 32 hours per week because Officers Robert and Victor Santarelli retained labor counsel and filed a Petition for Representation with the Board. The hearing examiner found that Officers Robert Santarelli and Victor Santarelli were part-time officers working 80 hours per bi-weekly pay period until December 21, 2001 when the Borough issued a memorandum limiting all part-time officers to 32 hours per week. The hearing examiner noted that the Borough's stated reasons for issuing the memorandum on December 21, 2001 were pretextual, and concluded that the Borough acted with anti-union animus in reducing the officers hours in violation of Section 6(1)(a) and (c) of the PLRA. The hearing examiner also concluded that because "hours" is a mandatory subject of bargaining, the Borough violated Section 6(1)(a) and (e) of the PLRA by unilaterally changing its policy of allowing Officers Robert Santarelli and Victor Santarelli to work more than 32 hours per week.

A claim of discrimination under Section 6(1)(c) of the PLRA requires establishing that employees were engaged in protected activity, that the employer was aware of the activity, and that an adverse employment action was taken because of the employer's anti-union animus. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). For a claim of discrimination, "the motive creates the offense." Stairways, Inc., 425 A.2d at 1175 (quoting PLRB v. Ficon, 424 Pa. 383, 388, 254 A.2d 3, 5 (1969)). Even where there is no direct evidence of anti-union

¹ The hearing examiner did not address the Union's charge of interference under Section 6(1)(b) in the PDO, and the Union has not filed exceptions.

animus, the Board may draw an inference of unlawful motive from the facts presented. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993).

At the core of the Borough's exceptions is a challenge to the findings and credibility determinations with regard to the employer's anti-union animus. Generally, however, the findings of the hearing examiner will be sustained if they are supported by substantial evidence. Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942) (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938)). In addition, absent compelling reasons in the record, the Board will not disturb the hearing examiner's credibility determination. Fraternal Order of Police, Lodge No. 85 v. Commonwealth of Pennsylvania, 18 PPER ¶18093 (Final Order, 1987).

There is no dispute that Officers Robert and Victor Santarelli were engaged in protected activity. The uncontested testimony of record establishes that they sought to organize the police officers of the Borough and petitioned the Board for representation.²

The Borough argues that there was no adverse employment action because the Borough's policy prior to December 21, 2001, was to limit part-time police officers to 32 hours per week. The Borough alleged that time worked in excess of 32 hours per week could be attributable to court time or drug task force work, which were not included in the calculation of the 32 hours. Moreover, to support the existence of the policy, the Borough offered into evidence a "waiver" form signed by Officer Victor Santiarelli and other part-time officers in 1992 in which the officers acknowledge that they are part-time regardless of the number of hours worked.³

² The petition for Representation was filed with the Board on September 4, 2001 at PF-R-01-137-E.

³ The "waiver" form states:

I, the undersigned, do hereby state that I am completely aware of and agree to the following provisions with respect to my employment with the Jessup Borough Police Department:

a) That my status as a Police Officer in the Borough of Jessup will be considered part-time and in no respect shall be considered full-time;

b) That my part-time status as a Police Officer within the Borough of Jessup shall remain part-time regardless of the number of hours that I may work in any given pay period;

c) That my pay as a part-time Police officer in the Borough of Jessup shall always be my base pay as a part-time Police Officer in the Borough of Jessup regardless of the number of hours actually worked;

Substantial, credible evidence however supports the hearing examiner's finding that prior to December 21, 2001, Officers Robert and Victor Santarelli worked in excess of 80 hours per bi-weekly pay period. Every witness, even Chief Patrick Kane for the Borough, testified that prior to December 21, 2001 Officers Robert and Victor Santarelli worked more than 32 hours per week. The payroll records, submitted as Joint Exhibit-1, refute the assertion the hours in excess of 32 per week were the result of court time and work with the drug task force since the payroll records have separate columns where these hours are accounted for and there are several weeks where Officers Robert and Victor Santarelli worked in excess of 32 hours without court time or special duties. Moreover, the alleged "waiver" form does not support that part-time officers were limited to 32 hours per week. Officer Victor Santarelli and Chief Kane both testified that the Borough instituted the "waiver" form as a condition to allowing part-time officers to work 40 or more hours per week. Furthermore, officers hired since 1992 were not required to sign a "waiver".

Accordingly, there is substantial evidence in the record that Officers Robert and Victor Santarelli worked 80 hours during a bi-weekly pay period before December 21, 2001, notwithstanding any purported existing policy of limiting all part-time officers to less than 32 hours per week. As such, there is substantial evidence in the record that Officers Robert and Victor Santarelli suffered an adverse employment action because their hours were reduced to 32 hours per week pursuant to the December 21, 2001 memorandum.

There is also substantial evidence of record supporting that the adverse employment action taken against Officers Robert and Victor Santarelli was premised on the Borough's anti-union animus. Officers Robert and Victor Santarelli, Officer Roland Alunni and Officer William Hazelton, each testified that on January 7, 2002, in a public meeting of the Borough Council, the Council President, James Brunozzi, stated that the reason the officers' hours were reduced is because of the petition for representation filed with the Board.⁴ The four officers'

d) That at no time will I be granted any special duty pay or overtime pay;

e) That I understand that I am not eligible to participate in the Jessup Borough Police Pension Fund;

f) That my employment with the Jessup Borough Police Department shall not be such so as to entitle me to any civil service protection in the event the Jessup Borough Police Department shall consist of three or more full-time members.

(Exhibit R-1).

⁴ While the Borough attempts to limit this statement into a reference to ongoing civil litigation between the Mayor and Borough Council, the hearing examiner accepted the officers' testimony as credible, and there is no compelling reason to reverse of this finding. See Fraternal Order of Police, Lodge No. 85, supra.

testimony alone is substantial evidence supporting the finding that the Borough harbored anti-union animus because Officers Robert and Victor Santarelli engaged in protected activity.

In addition, there is circumstantial evidence that supports the hearing examiner's determination of anti-union animus. For instance, on December 19, 2001 and December 20, 2001 the parties filed a stipulation outlining the composition of the bargaining unit for purposes of the representation election to be held January 9, 2002. Immediately following that stipulation the Borough sent out its December 21, 2001 memorandum limiting part-time police officers to 32 hours per week.

While timing of the adverse employment action standing alone may not be sufficient to establish anti-union animus, coupled with the lack of non-pretextual reason for the action, anti-union animus may be inferred. Teamsters Local #429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶32006 (Final Order, 2000). As noted above, there is no basis for the Borough's assertion that the December 21, 2001 memorandum was merely a restatement of an existing policy to limit part-time officers to 32 hours per week, since part-time Officers Robert and Victor Santarelli were, prior to December 21, 2001, working approximately 80 hours per bi-weekly pay period, not including court time or drug task force duties and consistent with the Borough's "waiver" forms. Given the timing of the issuance of the December 21, 2001 memorandum, and the pretextual nature of the Borough's proffered reasons, there is ample circumstantial evidence supporting the hearing examiner's finding that the Borough harbored anti-union animus in issuing the memorandum that limited the police officers' part-time hours.

The Borough further argues that the hearing examiner erred in finding a violation of Section (6)(1)(e) of the PLRA. The Borough maintains that the bargaining process had not begun and the Union had not been certified to represent the employees when the memorandum limiting the officers' hours was issued.

Section 6(1)(e) of the PLRA provides that it shall be an unfair labor practice for an employer "[t]o refuse to bargain collectively with the representatives of his employees, subject to the provisions of section seven (a) of this act." Section 7(a) of the PLRA provides, in relevant part, that

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

Under Section 6(1)(e), the employer has a duty to bargain with the exclusive representative of the employees. Roof Garden Lodge No. 98 v. Paint Township, 27 PPER ¶27022 (Final Order, 1995), affirmed, 685 A.2d 658 (Pa. Cmwlth. 1996). While an employer may agree to recognize a bargaining representative of its employees under Act 111, no such

concession has been made by the Borough.⁵ See, Paint Township, 27 PPER at 48. Thus, here, the representative must be selected by a majority of the employees in an appropriate unit in accordance with section 7(a).

The representation election scheduled for January 9, 2002 had not been held as of December 21, 2001 when the Borough issued the memorandum. Accordingly, no duty to bargain under Section 6(1)(e) had arisen as of December 21, 2001 since there was no exclusive representative selected by a majority of the employees at the time. Because there was no exclusive representative at the time, the Borough could not have violated Section 6(1)(e) of the PLRA when it issued the memorandum. See Pennsylvania Labor Relations Board v. McKeesport Area School District, 13 PPER ¶13185 (Proposed Decision and Order, 1982).

Having thoroughly reviewed the exceptions and all matters of record, the Board will dismiss the Borough's exceptions in part, and sustain them in part. The hearing examiner's findings as to the discrimination charge are supported in the record and there was no error in concluding that the Borough violated Section 6(1)(a) and (c) of the PLRA. However, because no duty to bargain arose as of December 21, 2001, the Borough could not have violated Section 6(1)(e), and therefore, the Borough's exception to the finding of a bargaining violation will be sustained.

CONCLUSIONS OF LAW

CONCLUSIONS number 1 through 3, as set forth in the Proposed Decision and Order, are affirmed and incorporated herein by reference and Conclusion number 4 is vacated.

5. That the Borough has committed unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA.

6. The Borough has not committed an unfair labor practice within the meaning of Section 6(1)(e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 of 1968 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order of August 6, 2002 are hereby dismissed in part, and sustained, in part. The Proposed Decision and Order, as amended herein, is hereby made absolute and final.⁶

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and

⁵ The evidence established only that the Borough stipulated to those employees eligible to vote to elect representation.

⁶The Board's dismissal of the Section 6(1)(e) charge does not affect the remedial relief directed on page 6 of the PDO, and accordingly that portion of the PDO is made final herein.

L. Dennis Martire, Member, this fifteenth day of October, 2002. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JESSUP BOROUGH POLICE
DEPARTMENT EMPLOYEES

v.

JESSUP BOROUGH

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Case No. PF-C-02-2-E

AFFIDAVIT OF COMPLIANCE

Jessup Borough hereby certifies that it has ceased and desisted from its violation of section 6(1)(a) and (c) of the PLRA and Act 111; that it has returned Victor Santarelli and Robert Santarelli to a schedule of working forty (40) hours per week; that it has made Victor Santarelli and Robert Santarelli whole for the hours lost due to the reduction in their schedule; that it has posted the proposed decision and order and final order as directed; and finally, that it has served an executed copy of this affidavit on the Union at its current address.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public