COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE WYOMING VALLEY LODGE NO. 36	:	
v.	:	Case No. PF-C-03-7-E
WYOMING BOROUGH	:	

FINAL ORDER

Wyoming Borough (Borough) filed timely exceptions and a supporting brief on September 30, 2003, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued September 12, 2003. In the PDO, the Hearing Examiner concluded that the Borough had committed unfair labor practices within the meaning of Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) by discriminating against three (3) members of the bargaining unit represented by the Fraternal Order of Police, Wyoming Valley Lodge No. 36 (Union). The Union's Brief in Response was filed on October 16, 2003.

The Borough sets forth forty-eight (48) exceptions, which may be summarized as follows. The Hearing Examiner erred by: (1) failing to find that the Borough laid off three (3) full-time police officers because of legitimate financial considerations; (2) failing to find that the Wyoming Borough Council's (Council) actions were legally permissible in its role as the Borough's financial administrators; (3) determining generally that the Union established a *prima facie* claim of unfair labor practices under Section 6(1)(a) and (c) of the PLRA, and specifically, that the Union established the officers participated in a protected activity or that the Council's anti-union animus motivated its decision; (4) characterizing the statements made by councilmen as threats as opposed to good faith predictions and misapplying Mon Valley Towing, Inc. v. NLRB, 421 F.2d 1 (3rd Cir. 1969) with regard to this issue; (5) characterizing the councilmen's statements as official acts of the Borough as opposed to personal, unauthorized statements; and (6) ordering the Borough take action pursuant to an erroneous determination of an unfair labor practice. The Board will discuss each group of exceptions successively.

After a thorough review of the Borough's exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

16. The bargaining unit represented by the FOP consists of all full-time and regular part-time police officers of Wyoming Borough, including, but not limited to, the three police officers hired in 1998 pursuant to the federal COPS grant. (N.T. 50).

DISCUSSION

The Hearing Examiner's unchallenged findings of fact are as follows. On October 14, 1992, the Board certified the Union as the exclusive representative of a bargaining unit of police officers employed by the Borough. In 1998, the Borough employed three (3) police officers (John Broda, Alex Burda and Michael P. Fuller, Jr.) on a full-time basis under the terms of a federal grant that was not scheduled to terminate until December 2002. In 2001, the parties began negotiations for a successor collective bargaining agreement to succeed the then current grant due to expire in December 2001. During the negotiations, the Borough presented a proposal for contract. The primary issue in the negotiations was salaries to be paid to the three (3) police officers. By letter dated August 27, 2001, the Union notified the Borough of its intention to proceed to binding arbitration.

In early 2002, a member of the Borough's Council (Joseph Scrobola) and Officer Burda spoke about the prospects of the three police officers having their jobs beyond 2002. Councilman Scrobola told Officer Burda that they would retain their jobs beyond 2002 if they accepted the Borough's proposal for a contract, and that they would not have their jobs beyond 2002 if they invoked Act 111 interest arbitration. In August 2002, a member of Council (Robert Guilford) told Officer Broda that jobs would be cut if the Borough's proposals were rejected. In August 2002, a member of Council (Joseph Scaltz) repeated this threat to Officer Broda. In August 2002, Councilman Scrobola told Officer Broda and another police officer employed by the Borough (Christopher R. Mercavitch) that one, two or all three of the police officers would be laid off if they proceeded to arbitration. Prior to September 9, 2002, Councilman Scrobola told Officer Fuller that the three (3) police officers would be laid off if they invoked arbitration. On September 9, 2002, the parties appeared before an arbitrator. On December 30, 2002, Council passed a motion to eliminate the positions held by the three (3) police officers. As of December 30, 2002, the arbitrator had not yet issued an award.

As of December 31, 2002, the Borough had a general fund balance of $125,619.05, payroll fund balance of $3,123.76 and an investment account balance of $72,185.50. The Borough did not layoff any of its part-time police officers for 2003, and it increased its manager's pay by 20 percent for 2003.

Initially, the Borough asserts that the Hearing Examiner erred by failing to make numerous findings of fact regarding the Borough's financial status. The Borough asserts that these findings of fact are necessary to reach the proper conclusion that the police officers were laid off due to financial considerations and not in retaliation for the officers' choice to proceed to binding arbitration. The Board finds that the Hearing Examiner's conclusion that the Borough laid off the police officers in retaliation for proceeding to arbitration is well supported by the record, and therefore, these additional findings of fact are superfluous to reaching a final disposition.

The Hearing Examiner is obligated only to set forth those findings necessary to support his conclusion. He is not required to summarize the evidence, make unnecessary findings of fact or make findings that would support another conclusion, regardless of the

existence of substantial evidence to support such findings. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975); Ford City Borough, 19 PPER ¶ 19117 (Final Order, 1988); AFSCME v. Dep't Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). Therefore, the Board dismisses these exceptions.

In its second group of exceptions, an adjunct to its first exceptions, the Borough argues that the Council was acting within its purview as the Borough's financial administrators when they laid off the three (3) officers. The Borough cites Almy v. Borough of Wilkinsburg, 416 A.2d 638 (Pa. Cmwlth. 1979), in support of this assertion. Almy states that,

> Municipal officials are presumed to have properly performed their duties and to have taken all steps necessary to give validity to their official acts. A party alleging bad faith on the part of a borough official bears the burden of producing evidence of that bad faith sufficient to rebut the presumption that the officials acted with regularity.

Almy v. Borough of Wilkinsburg, 416 A.2d at 644.

The Board finds that the evidence in the record meets this requisite burden of proving bad faith sufficient to rebut any presumption that Borough officials acted with regularity. In this regard, the Hearing Examiner credited the testimony of the three (3) officers, indicating that several councilmen told the officers that if they accepted the contract offered they would retain their jobs beyond 2002, however, if they chose arbitration, then their positions would be eliminated. (N.T. 30, 33, 41-42, 53, 72, 73, 74). Additionally, the Borough's willingness to retain the officers under the Borough's proposed contract terms indicates that the Borough's true motivation for laying off the police officers was in retaliation for invoking binding arbitration under Act 111. Furthermore, the Borough's surpluses in its various accounts, its 20 percent pay increase to its manager, and its maintenance of all part-time police officers for 2003 support the conclusion that the elimination of the police officers' positions was not fiscally motivated. Therefore, the Board dismisses the Borough's exceptions that it was acting in a legally permissible manner as financial administrators.

In their third category of exceptions, the Borough asserts that the Union failed to establish a *prima facie* claim for violations of Section 6(1)(a) and (c) of the PLRA generally, and specifically, that the Union failed to establish that the Borough retaliated against these employes because they invoked their rights under Act 111. The Board finds no merit to these exceptions, as the evidentiary and testimonial record establishes a *prima facie* case for these violations.

To establish that an employer has discriminated against employes for engaging in activity protected by the PLRA and Act 111, the charging party has the burden of proving by substantial evidence that the employes (a) engaged in protected activity, (b) that the employer knew that they engaged in protected activity, and (c) that the employer took action against the employes because they engaged in protected activity. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER ¶ 33011 (Final Order, 2001), citing, PLRB v. Stairways, Inc., 425

A.2d 1172 (Pa. Cmwlth. 1981). If the charging party does not present a *prima facie* case in that regard, the charge is to be dismissed. Cleona Borough, 28 PPER ¶ 28065 (Final Order, 1997).

The Union met each of the aforementioned elements, and consequently, established a *prima facie* case of violations under Section 6(1)(a) and (c) of the PLRA and Act 111. As established in the credited findings of fact, the record indicates that after the parties began negotiations for a successor collective bargaining agreement during which the Borough offered a proposal for a new contract, the Union notified the Borough of its intention to proceed to binding arbitration by letter dated August 27, 2001. (PDO pp.3-4). Therefore, the Board finds that the Union was participating in a protected activity and the Borough had actual notice that they engaged in the activity. Consequently, the Union has established elements one and two of a *prima facie* case.

In establishing the third element of unfair labor practices under Section 6(1)(a) and (c) of the PLRA, the Board is permitted to draw inferences of unlawful motive from the facts. Shohola Falls Trails v. Zoning Hearing Board, 679 A.2d 1330, 1335 (Pa. Cmwlth. 1996), citing, City of Reading v. Pennsylvania Labor Relations Board, 568 A.2d 715 (Pa. Cmwlth. 1989). The Board credits the Union's testimonial and documentary evidence with regard to this issue, and finds that there is substantial evidence to support the inference that the motivation behind the Borough's decision to lay off the three (3) police officers was anti-union animus. Most important to this conclusion is the Borough's failure to deny Councilman Scrobola's various statements to Officer Broda, Officer Mercavitch, Officer Burda and Officer Fuller that the three police officers would be laid off if they invoked Act 111 interest arbitration. (PDO p.2). Therefore, the Board dismisses these exceptions.

In their fourth group of exceptions, the Borough contends that the statements of Councilmen Scrobola, Yurerk, Gilford and Scaltz were good faith predictions dictated by the economic situations of the Borough. The Borough further contends that the Hearing Examiner misapplied Mon River Towing, Inc. v. National Relations Board, 421 F.2d 1 (3rd Cir. 1969), in conjunction with this issue.

Mon River Towing, Inc. establishes that an employer may make a prediction as to the precise effects he believes the protected union activity will have on the Borough. However, the case limits this rule to a narrow set of criteria.

> The prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Mon River Towing, Inc. v. NLRB, 421 F.2d at 27, citing, NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

The actions taken by the Borough discredits the assertion that the statements made by the councilmen to the various police officers were carefully phrased predictions. The Borough extended contract offers to the police officers, indicating that funds were present to retain the officers. The councilmen's statements never refer to these funds or why they were insufficient to retain at least one or two of them. Furthermore, the Borough acted prior to receiving the award derived from the interest arbitration and evaluating its consequence on the bargaining unit. It is significant that the Borough did not express an intent to lay off the officers because the grant was expiring. The Borough offered to retain the officers following expiration of the grant's provisions, but only on terms of employment offered by the Borough. It was only when they exercised their right to arbitration under Act 111 that the Borough decided to furlough them. Any fiscally responsible action regarding these police officers' position would necessarily take into account the circumstances under which the Borough would be required to retain them. Additionally, the councilmen's inability to properly explain the Borough's budgetary surpluses and other financial actions discredit their assertion that their decision was motivated by economic considerations.

Finally, as it says in Mon River Towing, Inc.,

> The courts have often said that whether warnings of adverse economic consequences constitute threats for reprisal may depend in part on whether these consequences are within the control of the employer. If the employer has the power to bring about the results projected, the language is deemed to contain an illegal implied threat.

Mon River Towing, Inc. v. NLRB, 421 F.2d at 25 (citations omitted). The councilmen had the present ability to layoff the police officers.

For all of the aforementioned reasons, the Board finds that the statements were not good-faith predictions, but rather, were overt threats evidencing their anti-union animus, and dismisses these exceptions.

In their fifth group of exceptions, the Borough asserts that the Hearing Examiner erred in characterizing the councilmen's statements as official acts of the Borough as opposed to personal, unauthorized remarks. The Borough contends that because these statements were not made during official meetings of the Council, they do not qualify as official acts of the Borough. The law is well settled that individual members of a public body may express anti-union animus that may then be ascribed to the employer.

The Board may impute animus to the Borough through an anti-union statement by one or several of its Council members. See, Upper Merion Area Education Association v. Upper Merion Area School District, 30 PPER ¶ 30091 (Final Order, 1999); City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989); Wilson School District, 24 PPER ¶ 24068 (Final Order, 1993). The decision to ascribe statements of individual members of a council to the body as a whole must be made on a case-by-case basis. Here, the Hearing Examiner properly imputed the statements of the individual Borough councilmen to the Borough as a whole. In

addition to the above stated reasons, the anti-union statements were made by several councilmen and primarily took place on Borough property. The police officers recognized and identified the councilmen as members of the Council and the conversations did not take place in a social atmosphere. (N.T. 33, 43, 46, 55, 85-86, 95, 106). Therefore, the Board finds that these statements were made by the councilmen while acting in their official capacity. Accordingly, the Board dismisses this group of exceptions.

The remaining exceptions set forth by the Borough involve the order of the Hearing Examiner to remedy the unfair labor practices. In this case, the remedies issued by the Hearing Examiner are the same or equivalent to those issued in similar cases. See Plumstead Twp. v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1997). As the Board agrees with the Hearing Examiner that the Borough committed unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA and Act 111, and the remedies issued are not extraordinary, these exceptions lack merit and are therefore dismissed.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions filed by the Borough and make the Proposed Decision and Order as amended herein final.

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 above case number be and the same, are hereby dismissed, and the Proposed Decision and Order as amended herein is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member, and Anne E. Covey, Member, this eighteenth day of November, 2003. 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.