

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WEST HEMPFIELD POLICE ASSOCIATION :
 :
 v. : Case No. PF-C-05-61-E
 :
 WEST HEMPFIELD TOWNSHIP :

FINAL ORDER

West Hempfield Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on April 7, 2006. The Township's Exceptions challenge a March 21, 2006 Proposed Decision and Order (PDO) finding that it violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) by deciding to impose a hiring freeze after the West Hempfield Police Association (Association) engaged in protected activity. On April 27, 2006, the Association filed a response and brief in opposition to the Township's Exceptions.

The factual background is briefly stated as follows: In 2003, the parties engaged in interest arbitration, where one of the matters in dispute was whether the Township should be permitted to hire civilian aides to assist with police duties and responsibilities, which resulted in an award issued December 23, 2004 for the period from January 1, 2004 through December 31, 2007. (Finding of Fact 2). In December of 2004, the Township adopted a budget for fiscal year 2005 which included \$189,000 for three existing sergeants. The December 23, 2004 interest arbitration award did not include a provision which would allow the Township to hire civilian aides. (Findings of Fact 4 and 5). In January of 2005, one of the sergeants retired and, in March of 2005, the Township Manager, Charles Douts, Jr., told three of the Township Officers that the Township was imposing a hiring and promotional freeze. The Township Manager also stated that, if the Association agreed to the hiring of civilian employees by the April 2005 meeting of the board of supervisors, the freeze would not be necessary and that the retired sergeant's position would be filled and another officer hired as needed. (Finding of Fact 8).

The Association filed a Charge of Unfair Practices on April 11, 2005 claiming that the Township imposed a hiring freeze in retaliation against the Association for engaging in protected activities. A complaint was issued and, following requests for continuation from both sides, a hearing was held on January 31, 2006. In the March 21, 2006 Proposed Decision and Order, the Hearing Examiner rejected the Township's contention that the hiring freeze was motivated solely by financial reasons and found and concluded that the Township violated Section 6(1)(a) and (c) of the PLRA. As a remedy, the Hearing Examiner ordered the Township to fill the retired sergeant's position and to hire another police officer as needed.

The Township argues in its exceptions to the PDO that the Hearing Examiner erred in finding that the hiring freeze was implemented because of a discriminatory motive. The Township also argues that, even if the Hearing Examiner's finding that the Township was motivated by anti-union animus is upheld, the Hearing Examiner exceeded his authority by ordering the Township to fill a sergeant position and hire another officer as needed.

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 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 Township's exceptions is a challenge to the Hearing Examiner's findings and credibility determinations with regard to its 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 making relevant findings of fact, the hearing examiner may choose to credit or discredit any testimony or evidence, in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth, Department of Corrections Pittsburgh SCI, 34 PPER ¶ 134 (Final Order, 2003). 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).

It is undisputed that the Association engaged in protected activity by engaging in collective bargaining with the Township and that the Township was aware of this activity. The only question before the Hearing Examiner was whether the Township engaged in the adverse employment action of imposing a hiring freeze in order to retaliate against the Association for refusing to concede during the collective bargaining process to allow the Township to hire civilian employees to assist the police in performing their duties. The Hearing Examiner's conclusion that the Township was motivated by anti-union animus is supported by substantial evidence. Specifically, the money for three sergeant positions was provided for in the budget for 2005. However, shortly after an interest arbitration award which did not permit the hiring of civilian employees, the Township decided to implement a hiring freeze. It is significant that the Hearing Examiner found that the Township Manager told several police officers that the hiring freeze would not be necessary if the Association agreed to the hiring of civilian employees. The Township argues that the Hearing Examiner "mischaracterized" this testimony because the Township Manager only meant that overall costs would be lower if the Township were allowed to hire civilian employees and, therefore, there would be no need for a hiring freeze. The Hearing Examiner's characterization of the Township Manager's testimony is supported by the evidence when that testimony is viewed in conjunction with the timing of the freeze and the fact that the issue regarding the hiring of civilian employees was a subject of bargaining. Further, although there was testimony that the Township implemented the hiring freeze for budgetary reasons, the Hearing Examiner's decision not to find this testimony persuasive is supported by other evidence in the record.

Finally, the Township argues that the Hearing Examiner exceeded his authority by ordering it to fill the position of the retired sergeant and to hire another police officer. In support of its position, the Township cites Section 1902 of the Second Class Township Code, (Township Code), Act of May 1, 1933, as amended, added by Section 1 of the Act of Nov. 9, 1995, P.L. 350, 53 P.S. § 66902. Section 1902 provides, in relevant part, that: "The board of supervisors shall provide for the organization and supervision and determine the number and the compensation of the police officers." Thus, the Township argues that, pursuant to Section 1902, it has the sole authority to determine whether to appoint police officers and whom to appoint to police officer positions and that, therefore, the Hearing Examiner exceeded his authority.

Section 8(a) of the Pennsylvania Labor Relations Act, 43 P.S. § 211.8(a), provides that:

(a) The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice listed in section six of this act. This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that have been or may be established by agreement, law, or otherwise.

The Hearing Examiner concluded that the Township refused to fill a sergeant position, for which it had already budgeted, in retaliation against the Association for the stance it took during contract negotiations regarding the hiring of civilian employees. In order to remedy the unfair labor practice, the Hearing Examiner ordered the Township to fill the retired sergeant's position and hire another officer "as needed." The PLRB has previously addressed the scope of its remedial authority under the PLRA and Act 111 in circumstances similar to this case where the public employer discriminated

against employees for engaging in protected activity. In Camp Hill Borough, 16 PPER ¶ 16054 (Final Order, 1985), the hearing examiner found that the Borough committed unfair labor practices which resulted in the furlough of two officers and the forced disability of another. As a remedy, the hearing examiner ordered the Borough to offer reinstatement to the three officers. The Borough filed exceptions, maintaining that the police officers' employment was not terminated in retaliation for union activity, but was instead due to budget constraints. The Borough further argued that the PLRB had no jurisdiction over "the subject matter" of the case, that the remedy imposed by the hearing examiner was improper and that the hearing examiner erred by unconstitutionally infringing upon the Borough's legislative powers. The Board rejected the Borough's argument and stated that:

concomitant with the Board's exercise of jurisdiction in the case of an unfair practice is the Board's ability to fashion an appropriate remedy for the unfair practice. In the instant case, the Hearing Examiner ordered the Borough to cease and desist from unfair practices and to offer reinstatement to the affected officers. We find this remedy to be a perfectly sound exercise of the Board's remedial power under the PLRA.

...

... the Borough claims that in his PDO the "Hearing Examiner erred in unconstitutionally infringing upon the Borough's legislative powers." We interpret this to mean an infringement on the Borough's power to hire and fire. However, it is clear that this power is not an unlimited one. There are a number of statutory impingements on the unfettered authority to hire and fire its police employees, among them being PLRA and Act 111. We find that in the instant case, this Board has properly exercised its jurisdiction in order to "further the Act's goal of insuring expeditious and harmonious resolutions of labor disputes involving policemen and firemen." City of Coatesville, 77 Pa. Commonwealth Ct. at, 465 A.2d at 1073.

Id. (footnotes omitted). The Borough appealed to the Commonwealth Court, which affirmed the Board's order and stated that: "The Labor Board in fashioning its remedy under section 8(c) of the Act, 43 P.S. § 211.8(c), in order to carry out the purposes of the Act, ordered the reinstatement with back pay for the three officers ... This kind of remedy is appropriate. Lancaster Yellow Cab & Baggage, Inc., v. Pennsylvania Labor Relations Board, 371 Pa. 49, 88 A.2d 866 (1952)." Camp Hill Borough v. Commonwealth, Pennsylvania Labor Relations Board, 507 A.2d 1297, 1299 (Pa. Cmwlth. 1986), petition for allowance of appeal denied, 516 Pa. 615, 531 A.2d 781 (1987).

Therefore, although Section 1902 of the Township Code gives the Township the power to determine the number and compensation of police officers, it does not follow that Section 1902 insulates the Township from the provisions of the PLRA, which provides that employers are prohibited from engaging in "discrimination in regard to hire or tenure of employment ..." Section 6(1)(c). Because the Township had budgeted for Sergeant Burnett's position for the fiscal year and the Hearing Examiner credited the Association's witnesses that the imposition of the freeze was discriminatorily motivated and discredited the Township's stated economic reasons, the direction to fill the vacant sergeant position was appropriate. Because the Hearing Examiner properly found that the Township violated Section 6(1)(c), the Hearing Examiner also acted properly in fashioning a remedy for that violation. Camp Hill.

However, our review of the direction in the PDO to fill another patrol officer position "as needed" leads to a different result. The Board and the Courts have held that the Board's authority to remedy unfair practices is remedial in nature and is generally limited to make whole type relief. In re Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). The Board lacks authority to direct relief which is speculative in nature. City of Philadelphia v. Pennsylvania Labor Relations Board, 759 A.2d 40 (Pa. Cmwlth 2000). Here, the Hearing Examiner credited testimony that, on March 4, 2005, the Township Manager, Mr. Douts, informed Association members that an additional police officer might be added if the Association relented in its

opposition to hiring civilian aides. Our review of this record leads to the conclusion that directing the Township to hire an additional police officer based on the Township's prospective assessment of "need" is too speculative to create an enforceable order. Assessment of relative need is left to the Township to evaluate and it would be difficult if not impossible to review the Township's assessment of need in any enforcement setting. Accordingly, the relief ordered by the Hearing Examiner on page 8 of the PDO paragraph 3(a) will be modified to delete the requirement that the Township hire another police officer as needed. Accordingly, the Township will only be directed to fill the retired sergeant's position.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss in part and sustain in part the exceptions and affirm the Hearing Examiner's conclusion, as modified herein, that the Township engaged in unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby sustained in part and dismissed in part; and that the Proposed Decision and Order, as modified herein, be and the same is hereby made absolute and final.

IT IS FURTHER ORDERED AND DIRECTED

that paragraph 3(a) of the PDO is hereby vacated and set aside and that the Township shall:

3. Take the following affirmative action:

(a) Fill the position vacated by Sergeant Burnett;

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this sixteenth day of May, 2006. 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
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AFFIDAVIT OF COMPLIANCE

West Hempfield Township (Township) hereby certifies that it has ceased and desisted from its violations of Sections 6(1)(a) and (c) of the PLRA and Act 111; that it has filled the position vacated by Sergeant Burnett; that it has posted a copy of the Proposed Decision and Order and Final Order as directed therein; and that it has served a 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.

Signature of Notary Public