

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LOWER MERION LODGE 28 :
 :
v. : Case No. PF-C-05-163-E
 :
LOWER MERION TOWNSHIP :

PROPOSED DECISION AND ORDER

On November 16, 2005, the Lower Merion Fraternal Order of Police, Lodge 28 (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Lower Merion Township (Township) had violated sections 6(1)(a) and 6(1)(c) of the Pennsylvania Labor Relations Act (PLRA) by removing Officer Michael Rigby from its emergency response team (ERT) and giving him a disciplinary "caution" for having sought the assistance of the FOP in a sick leave matter. On January 13, 2006, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on March 27, 2006, if conciliation did not resolve the charge by then. The hearing examiner thereafter continued the hearing at the request of the Township and without objection by the FOP. On April 24, 2006, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On July 31, 2006, each party filed a brief.

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

FINDINGS OF FACT

1. The FOP is the exclusive representative of a bargaining unit that includes police officers employed by the Township. (N.T. 17)
2. The Township deploys an ERT comprised of elite police officers for high risk warrant service, barricaded gunmen, hostage rescue and dignitary protection. Capt. Michael McGrath is in charge of the ERT. Lt. Frank Thomas is a commander of the ERT. Police officers appointed to the ERT must be able to exercise good judgment under extreme pressure. (N.T. 70-73, 92-93, 109)
3. In 2004, the Township appointed Officer Rigby and Officer Gerald Chreiman to the ERT. (N.T. 13, 55-57)
4. On September 30, 2005, Lt. Thomas observed four police officers (Sebastian Addalli, Thomas Baumeister, Officer Chreiman and Officer Rigby) at a Dunkin Donuts while they were supposed to be on patrol. (N.T. 22-23, 38-40, 57, 80-86; Respondent Exhibits 5, 7-9)
5. On October 6, 2005, Lt. Thomas met with Officer Addalli and Officer Rigby about the Dunkin Donuts matter. Among other things, Lt. Thomas explained to them that they are assigned to beats to keep them from "bunching up" so their ability to respond to citizen complaints and calls for assistance from other police officers in a timely manner is not compromised and that one of their primary functions is to be on patrol to deter crime by their very presence in a marked police car. After Lt. Thomas did so, Officer Rigby suggested, "How about we have one car go down to Dunkin Donuts in Ardmore and pick up for all the cars in Bala Cynwyd?" Lt. Thomas could not tell if Officer Rigby was being sarcastic or serious. (N.T. 23-24, 27, 41-43, 57-58, 86-90; Union Exhibit 4)
6. On October 6, 2005, Lt. Thomas also met with Officer Baumeister and Officer Chreiman about the Dunkin Donuts matter. After Lt. Thomas explained why they should not be off their beats, Officer Chreiman said, "[I]f I can't go, I can't go, and I won't." (N.T. 57-58, 86-87)

7. On October 7, 2005, Lt. Thomas recommended to Capt. McGrath that Officer Rigby be removed from the ERT. Lt. Thomas thought that Officer Rigby's suggestion that one car pick up at Dunkin Donuts for the others demonstrated that Officer Rigby did not understand what was expected of him as a police officer and therefore could not be trusted as a member of the ERT. Lt. Thomas did not take into account the fact that Officer Rigby sought the assistance of the FOP in a sick leave matter. Lt. Thomas wrote to Capt. McGrath as follows:

"On Thursday, October 6 2005, I met with Officer Rigby regarding an ongoing discipline issue. Refer to incident 0509300035. During this interview, I gained valuable insight into Officer Rigby's decision making process and grasp of basic policing.

Officer Rigby, who has five years experience, indicated that he did not see any problems with four patrol units responsible for covering Bala, Merion, Belmont Hills and Penn Valley being out of their area to get coffee at an Ardmore establishment. When I explained the principles of beats, response time and the public perception of four marked police cars outside a Dunkin Donut, he continued questioning my concerns and offered a suggestion to correct the issue by continuing to violate policy as it was explained to him.

Officer Rigby is currently a member of the Emergency Response Team. His inability to grasp basic concepts and apply them to his decision making process has me concerned. As a member of ERT, Officer Rigby will be placed into situations where immediate decisions need to be made under extreme distress with potentially fatal consequences. He has also been verbally admonished by Sgt. Polo in recent months for failing to participate in clean up duties after a training date.

I recommend that Officer Rigby be removed from the Emergency Response Team. This recommendation is not punitive in nature for the above incident. My recommendation is based upon his grasp of police operations and his decision making process. I would recommend that serious consideration be given to remove Officer Rigby as a Field Training Officer for the same issues."

(N.T. 90-94, 102-104; Respondent Exhibit 11))

8. Lt. Thomas did not recommend to Capt. McGrath that Officer Chreiman be removed from the ERT. Lt. Thomas thought that Officer Chreiman understood what was expected of him as a police officer. (N.T. 96)

9. On October 10, 2005, Capt. McGrath concurred with Lt. Thomas' recommendation to remove Officer Rigby from the ERT. Capt. McGrath agreed that Officer Rigby had displayed a lack of the good judgment required of members of the ERT. Capt. McGrath did not take into account the fact that Officer Rigby sought the assistance of the FOP in the sick leave matter. Capt. McGrath discussed Lt. Thomas' recommendation with the entire command staff. The entire command staff decided to remove Officer Rigby from the ERT. (N.T. 94, 111-112, 115-116; Respondent Exhibit 11)

10. On October 11, 2005, Lt. Thomas informed Officer Rigby of his removal from the ERT. Lt. Thomas explained that he needed to have complete confidence and trust in all of the officers on the ERT and that he did not feel that he could trust Officer Rigby in view of the suggestion Officer Rigby made in the Dunkin Donuts matter. (N.T. 27-28, 94)

DISCUSSION

The FOP has charged that the Township committed unfair labor practices under sections 6(1)(a) and 6(1)(c) by removing Officer Rigby from the ERT and giving him a disciplinary "caution" for having sought the assistance of the FOP in a sick leave matter. In its brief, however, the FOP only "asserts that the Township discriminated against Officer Rigby by removing him from the Emergency Response Team because the FOP voiced opposition to the Township's action regarding Officer Rigby's use of sick time" (brief at 1). According to the FOP, union animus on the part of the Township may be found in statements made by Sgt. Robert Ruggiero and by Lt. Thomas and may be inferred from the

Township's disparate treatment of Officer Rigby, the timing of events and shifting reasons offered by Lt. Thomas for removing Officer Rigby from the ERT.

The Township contends that the charge should be dismissed because the FOP did not present a prima facie case. The Township admits that the FOP established that Officer Rigby engaged in protected activity by seeking the assistance of the FOP in the sick leave matter and that it knew that Officer Rigby had done so but submits that the FOP did not establish that its removal of Officer Rigby from the ERT was motivated by union animus. The Township also contends that the charge should be dismissed because it established that it would have removed Officer Rigby from the ERT even if he had not sought the assistance of the FOP in the sick leave matter. According to the Township, "Officer Rigby was removed from the ERT after he demonstrated poor judgment and a lack of understanding of basic principles of police work through his response to an unrelated investigation initiated by the Department after Officer Rigby and three other patrol officers were seen by a supervisor congregating at Dunkin Donuts in Ardmore, Pennsylvania, far removed from their assigned patrol areas" (brief at 1-2).

An employer commits unfair labor practices under sections 6(1)(a) and 6(1)(c) if it discriminates against an employee for having engaged in activity protected by the PLRA. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996). In order to prove unfair labor practices under those sections, the charging party must present during its case-in-chief a prima facie case that the employee engaged in protected activity, that the employer knew that the employee had done so and that the employer took action against the employee for having done so. Brentwood Borough, 35 PPER 112 (Final Order 2004), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992). The motivation creates the offense. Id. If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer shows that it would have taken the same action even if the employee had not engaged in protected activity. Id. Evidence presented after the charging party concludes its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case. Temple University, 23 PPER ¶ 23033 at n. 5 (Final Order 1992). An argument not presented to the hearing examiner is waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001).

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). A statement reflecting union animus on the part of an employer will support a charge that the employer discriminated against an employee. Brentwood Borough, supra. Close timing between the employee's protected activity and the employer's action coupled with the employer's disparate treatment of similarly situated employees will, too. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). So will close timing between the employee's protected activity and the employer's action coupled with an inadequate explanation for the employer's action. Lehigh Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). The timing of events alone, however, will not. Colonial School District, 36 PPER 88 (Final Order 2005).

There is no dispute that Officer Rigby engaged in protected activity by seeking the assistance of the FOP in the sick leave matter (N.T. 19-20, 62, 76; Union Exhibit 4). There also is no dispute that the Township knew before it removed Officer Rigby from the ERT that he sought the assistance of the FOP in the sick leave matter (N.T. 20, 77, 105, 110; Union Exhibit 7). The dispositive question, then, is whether or not the Township was motivated by union animus when it removed Officer Rigby from the ERT.¹

During its case-in-chief, the FOP did not present a prima facie case that the Township removed Officer Rigby from the ERT because he sought the assistance of the FOP in the sick leave matter. In any event, the Township established that it would have removed Officer Rigby from the ERT even if he had not sought the assistance of the FOP in the sick leave matter. Accordingly, the charge must be dismissed.

¹Because the FOP no longer argues that the Township committed unfair labor practices by issuing the "caution" to Officer Rigby for having sought the assistance of the FOP, that portion the charge is not before the hearing examiner and thus will not be addressed. SSHE, supra.

In support of its contention that union animus on the part of the Township may be found in statements made by Sgt. Ruggiero and Lt. Thomas, the FOP presented during its case-in-chief testimony by Officer Rigby that before the Township removed him from the ERT Sgt. Ruggiero told him that "it was becoming known that I approached the FOP about the sick time issue, and the response was coming back that Lieutenant Frank Thomas was not happy with that" (N.T. 26) and that "Lieutenant Thomas did not know why you guys react like this" (N.T. 27). The FOP also presented testimony by Officer Rigby that upon being informed of his removal from the ERT Lt. Thomas said to him, "[W]hen you have issues, you are to go through your chain of command[,] not by running to the FOP" (N.T. 28). The FOP submits that on that record it is apparent that the Township removed Officer Rigby from the ERT because he sought the assistance of the FOP in the sick leave matter.

By the end of the FOP's case-in-chief, however, the record showed that in a letter Officer Rigby sent protesting his removal from the ERT he made no reference to the statements he attributed to Sgt. Ruggiero and Lt. Thomas. As the Township points out, Officer Rigby only wrote as follows:

"I am writing to you today to request a meeting with the Captain of the Operation Division of the Police Department. The meeting is for me to discuss my termination from the ERT team on 10/11/05 by Lieutenant Frank Thomas. The termination was the result of an incident on 09/30/05 and the subsequent investigation involving purchasing coffee.

I feel the termination is unfair and excessive related to the matter. I also wanted to discuss my status within the Police Department and my future career with the Lower Merion Police Department. The reason given to me for the termination was that Lieutenant Thomas, who is the Commander of the ERT team, did not have 'trust' in me. I feel the issue of trust is at the heart of my integrity and I would like to discuss it further with the Captain if he was available in the near future.

Would you please forward this request through the appropriate chain of command and advise me if a meeting is possible.

Thank you for your time in advance."

(Respondent Exhibit 6). Officer Rigby testified that he made no reference to the statements he attributed to Sgt. Ruggiero and Lt. Thomas because "it just slipped my mind I guess" (N.T. 51), but it strains credulity to suggest that he would have overlooked statements of that nature if made. Officer Rigby's testimony, therefore, was suspect, so even assuming without deciding that the statements he attributed to Sgt. Ruggiero and Lt. Thomas reflect union animus on the part of the Township, by the end of the FOP's case-in-chief, there was no basis for finding that any such statements were ever made.

In addition, the FOP points out that Lt. Thomas admitted that he once told the members of the ERT "as the commander of this unit I would appreciate that any time there's an issue, I would appreciate your giving me a chance to resolve it before [you] go to the FOP" (N.T. 95). The admission by Lt. Thomas occurred after the FOP presented its case-in-chief, however, so even assuming without deciding that the admission reflects union animus on the part of the Township, it provides no basis for finding that the FOP presented a prima facie case during its case-in-chief. Temple University, supra.

In support of its contention that union animus on the part of the Township may be inferred from its disparate treatment of Officer Rigby, the FOP presented during its case-in-chief testimony by Officer Rigby that after investigating why he, Officer Chreiman and two other police officers were at a Dunklin Donuts while they were supposed to be on patrol the Township removed him from the ERT even though he told Lt. Thomas that "We wouldn't intentionally do something that was against policy. Now that we are aware of it, obviously we won't do it" (N.T. 24). The FOP also presented testimony by Officer Chreiman that the Township did not remove him from the ERT even though he told Lt. Thomas during the same investigation that he did not see anything wrong with what he had done (N.T. 58). The FOP submits that on that record it is apparent that the Township treated Officer Rigby differently because he sought the assistance of the FOP in the sick leave matter.

By the end of the FOP's case-in-chief, however, the record did not show that Officer Rigby and Officer Chreiman were similarly situated. As Officer Rigby testified, after Lt. Thomas explained to him why it was not appropriate for police officers to be off their beats, the following exchange occurred:

"[I]t was opened up to a small question and answer. And the one question that popped into my head was would it be possible for, rather than having all four of the Bala Cynwyd cars in Ardmore, at the beginning of the shift, would there be a reasonable -- would it be reasonable for three of the vehicles to go to Bala Cynwyd, one vehicle, grab the coffees and head out. The reasons we gave [were] for the quickness and accuracy, and Lieutenant Thomas' response was no."

(N.T. 24). By contrast, as Officer Chreiman testified, after Lt. Thomas explained to him why it was not appropriate for police officers to be off their beats, he said, "[I]f I can't go, I can't go, and I won't" (N.T. 58). Noticeably absent from Officer Chreiman's testimony was any indication that he made a suggestion demonstrating a fundamental misunderstanding of Lt. Thomas' explanation of the conduct expected of a police officer as Officer Rigby did. Thus, by the end of the FOP's case-in-chief, there was no basis for finding that the Township subjected Officer Rigby to disparate treatment. Adams Township, 36 PPER 162 (Final Order 2005)(no disparate treatment found where police officers were not similarly situated).

In support of its contention that union animus on the part of the Township may be inferred from the timing of events, the FOP presented during its case-in-chief testimony by Officer Rigby that the sick leave matter and the Dunkin Donuts matter occurred simultaneously (N.T. 16-22), by Officer Rigby and by its president (Richard Kramer) that on November 8, 2005, Officer Rigby asked the FOP for "legal assistance" regarding his removal from the ERT (N.T. 30-31, 64-65), by President Kramer that he told the Township's police superintendent (Joseph Daly) that the charge "would be coming" (N.T. 65) and by Officer Rigby that only he had been disciplined for the Dunklin Donuts matter by the time the charge was filed (N.T. 32). The FOP submits that on that record it is apparent that the Township removed Officer Rigby from the ERT because he sought the assistance of the FOP in the sick leave matter.

Timing alone, however, will not support the finding of an unfair labor practice. Colonial School District, *supra*. Moreover, Officer Rigby and President Kramer both testified that the Township in fact disciplined the other three officers involved in the Dunkin Donuts matter (N.T. 50, 64). Thus, the timing of events is of dubious value in any event.

In support of its contention that union animus on the part of the Township may be inferred from shifting reasons offered by Lt. Thomas for removing Officer Rigby from the ERT, the FOP points out that Officer Rigby testified that Lt. Thomas explained to him that he was removed from the ERT because of "the question I asked about getting coffee" (N.T. 28). The FOP also points out that in his letter recommending that Officer Rigby be removed from the ERT Lt. Thomas referenced not only that but also a "verbal admonishment" that Officer Rigby received on another occasion (Respondent Exhibit 11). The letter was only presented by the Township after the FOP had rested its case-in-chief, however, so even assuming without deciding that the letter shows that Lt. Thomas offered shifting reasons for removing Officer Rigby from the ERT, by the end of the FOP's case-in-chief, there was no basis for finding that Lt. Thomas offered shifting reasons for Officer Rigby's removal from the ERT. Temple University, *supra*.

Even if the FOP had presented a prima facie case during its case-in-chief, the charge would have to be dismissed nevertheless because the Township established that it would have removed Officer Rigby from the ERT even if he had not sought the assistance of the FOP in the sick leave matter. As set forth in findings of fact 4-5, the Township presented testimony by Lt. Thomas that during his investigation of why Officer Rigby, Officer Chreiman and two other police officers were at a Dunklin Donuts while they were supposed to be on patrol he explained to them that they are assigned to beats to keep them from "bunching up" so their ability to respond to citizen complaints and calls for assistance from other police officers in a timely manner is not compromised and that one of their primary functions is to be on patrol to deter crime by their very presence in a marked police car. As set forth in finding of fact 5, the Township presented testimony by Lt. Thomas that Officer Rigby thereafter suggested, "How about we have one car go down to

Dunkin Donuts in Ardmore and pick up for all the cars in Bala Cynwyd?" As set forth in finding of fact 7, the Township presented testimony by Lt. Thomas that he recommended the removal of Officer Rigby from the ERT not because Officer Rigby sought the assistance of the FOP in the sick leave matter but because he thought that Officer Rigby's suggestion that one car pick up at the Dunkin Donuts for the others demonstrated that Officer Rigby did not understand what was expected of him as a police officer and therefore could not be trusted as a member of the ERT. As set forth in finding of fact 8, the Township presented testimony by Lt. Thomas that he did not recommend the removal of Officer Chreiman from the ERT because nothing Officer Chreiman said in the Dunkin Donuts matter betrayed a lack of understanding of what was expected of him as a police officer. As set forth in finding of fact 10, the Township presented testimony by Capt. McGrath that he concurred with Lt. Thomas' recommendation regarding Officer Rigby not because Officer Rigby sought the assistance of the FOP in the sick leave matter but because he lost his trust in Officer Rigby for the same reason Lt. Thomas did. Given that the Township further established that police officers on the ERT are required to exercise good judgment under extreme pressure (finding of fact 2), the testimony of Lt. Thomas and Capt. McGrath was wholly believable and has been credited accordingly.

The Township also presented testimony by Lt. Thomas that, contrary to Officer Rigby's testimony, he did not make any reference to the FOP when he informed Officer Rigby of his removal from the ERT (N.T. 95). Again, Lt. Thomas' testimony was wholly believable. Indeed, given the nature of Officer Rigby's suggestion during the Dunkin Donuts matter, it seems highly unlikely that Lt. Thomas would reference any other reason for removing Officer Rigby from the ERT. Moreover, nothing in Lt. Thomas' demeanor indicated otherwise. Furthermore, Officer Rigby's credibility suffered for the reasons set forth above. Lt. Thomas' testimony has been credited accordingly.

The FOP contends that Lt. Thomas' testimony was not credible because he offered shifting explanations for the removing Officer Rigby from the ERT. As the FOP points out, Officer Rigby testified that Lt. Thomas explained to him that he was removed from the ERT because of "the question I asked about getting coffee" (N.T. 28) yet in his letter recommending Officer Rigby's removal from the ERT Lt. Thomas referenced not only that but also a "verbal admonishment" that Officer Rigby received on another occasion. As the FOP also points out, Officer Rigby testified that the Township never disciplined him on that other occasion (N.T. 123). Although embellished to the extent that it references the "verbal admonishment" of Officer Rigby, Lt. Thomas' recommendation to remove Officer Rigby from the ERT was largely in keeping with the reason he gave to Officer Rigby for removing him from the ERT. There is, therefore, no basis for discrediting Lt. Thomas' testimony because he offered shifting explanations for removing Officer Rigby from the ERT.

The FOP also contends that Lt. Thomas' testimony was not credible because he admitted that he once told the members of the ERT "as the commander of this unit I would appreciate that any time there's an issue, I would appreciate your giving me a chance to resolve it before [you] go to the FOP" (N.T. 95). Be that as it may, Lt. Thomas' testimony was wholly believable for the reasons set forth above.

The FOP contends that Capt. McGrath's testimony was not credible because Officer Rigby and Officer Chreiman submitted the same reports about the Dunkin Donuts matter (N.T. 103, 117) yet only Officer Rigby was removed from the ERT. The FOP overlooks, however, that Officer Rigby and Officer Chreiman were not similarly situated, as explained above. There is, therefore, no basis for discrediting Capt. McGrath's testimony either.

CONCLUSIONS

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

1. The Township is an employer under section 3(c) of the PLRA.
2. The Association is a labor organization under section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties.

4. The Township has not committed unfair labor practices under sections 6(1)(a) and 6(1)(c) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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 twenty-fifth day of August 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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August 25, 2006

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LOWER MERION TOWNSHIP
Case No. PF-C-05-163-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Lower Merion Township