

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF :  
FIREFIGHTERS, LOCAL 840 :  
 :  
v. : Case No. PF-C-05-34-E  
 :  
EDWARDSVILLE BOROUGH :

**PROPOSED DECISION AND ORDER**

On February 14, 2005, the International Association of Firefighters, Local 840 (Union or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Edwardsville Borough (Borough or Respondent) alleging that the Borough violated Sections 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968.

On May 26, 2005, the Secretary of the Board issued a complaint and notice of hearing in which the matter was assigned to a conciliator for resolution of the matters in dispute and assigned to a hearing on July 7, 2005 in Wilkes-Barre, if necessary. The hearing was necessary, and held before Thomas P. Leonard, a hearing examiner of the Board, but continued to July 29. The hearing was held on the new date, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The examiner, on the basis of the evidence presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That Edwardsville Borough is an employer within the meaning of Section 3 (c) of the Pennsylvania Labor Relations Act with its address located 470 Main Street, Edwardsville, Pennsylvania. 18704 (N.T. 11)

2. That Edwardsville Firefighters Local 840, IAFF, is a labor organization within the meaning of Section 3(f) of the Pennsylvania Labor Relations Board with its address located at 121 S. Broad Street, Suite 1100, Philadelphia, PA 19107. (N.T. 11)

3. That Edwardsville Firefighters Local 840, IAFF is the exclusive bargaining representative of the firefighters employed by the Borough. (N.T. 15, Union Exhibit 1)

4. That the Union and the Borough have negotiated several collective bargaining agreements for the firefighters' wages, hours and terms and conditions of employment. (N.T. 15, Union Exhibit 1)

5. That the Borough is governed by a seven-member council and a mayor. Councilman Leonard Nareski is responsible for the fire department. The borough also employs a manager, Charles Szalkowski, who was hired in 2004. (N.T. 95, 102, 104-105)

6. That the Borough employs three full time employes in the fire department. There are two firefighter/engineers: George Tomasak and Jack Bonczewski, and one chief engineer, Richard Konefal, who is a supervisor. (N.T. 14, 16, 17, 72, Union Exhibits 1, 2(A) and 2(B)).

7. That Tomasak is the Union president, having completed over ten years in that position. (N.T. 39)

8. That Tomasak usually works either the 3:30 p.m. or 11:30 p.m. shift. (N.T. 60)

9. That Konefal works the 7:30 a.m. to 3:30 p.m. shift. On his shift, he performs the same duties as the firefighter/engineers but he also directs them and assigns them

tasks to perform. Konefal has recommended the termination of at least one firefighter. (N.T. 73, 89)

10. That in his capacity as Union president, Tomasak has been an active representative of the Union's interests. He has filed grievances on behalf of the Union and appeared as a witness in an unfair labor practice case against the Borough. On July 22, 2004 he filed one grievance alleging the mayor harassed him. That grievance was settled after Konefal and Councilman Leonard Nareski talked to Tomasak. On August 13, 2004, he filed three additional grievances against the Borough. At least one of the grievances proceeded to arbitration. (N.T. 24-27, 31, 33, 34, 35 Union Exhibits 9, 10 11 and 12)

11. That the Borough's firehouse contains an engine bay, the chief's office and an office outside the engine bay area. There is also an upstairs office for volunteer firefighters. The Borough recently completed a remodeling of the firefighter office, the first remodeling in almost twenty (20) years. The office contains the fire department radios, a desk, a television, a television monitor of an adjacent cellblock, a CD player and several chairs. (N.T. 36, 38, 53)

12. That in August, 2004, in the midst of the remodeling, Konefal informed Tomasak that the Borough Council authorized Tomasak to purchase two La-Z-Boy reclining chairs. In order to save the borough money, Tomasak instead acquired two used La-Z-Boy recliners through donations. Each chair was less than one year old. (N.T. 37, 55-57)

13. That the chairs were used by the firefighters while on duty, when their chores were completed. The chairs were positioned to allow the firefighters to watch both the commercial television set and the closed circuit monitor for the prison cellblock. (N.T. 38-39, 59).

14. That on January 25, 2005, Konefal unilaterally removed the La-Z-Boy chairs, without notice to the union. Konefal removed the chairs on the order of borough council. (N.T. 38, 40)

15. That Leonard Nareski, the councilman responsible for the fire department, explained that the reason for the council's order removing the recliners was concern that the recliners were serving as an attraction for non-firefighters to congregate in the office. (N.T. 106, 109-110)

16. That before removing the recliners, neither Nareski, nor the fire chief, nor the chief engineer Konefal informed the firefighters to restrict people from congregating in the office. (N.T. 109)

17. That councilman Nareski and fellow councilmen Jim Hanke and Luke Sowchick have taken the opportunity to enjoy the comforts of the fire department offices, including sitting in the La-Z-Boy recliners. (N.T. 111-112, 113)

18. That when Tomasak discovered that the chairs were removed, he asked Konefal what happened. Konefal said they were removed on the order of Council and taken to an upstairs room used by the volunteers. Konefal then went on to say, "This is your f----- room. You'll sit in that f----- chair for eight hours." (N.T. 120)

19. That the chair Konefal was pointing to was a broken desk chair with a high back. The chair was tilted, making it uncomfortable to use. (N.T. 39-41, Union Exhibits 14, 16)

20. That on February 7, 2005, Tomasak filed a grievance with Konefal over the order to sit in the chair. (N.T. 43, Union Exhibit 15)

21. That when Konefal was handed the grievance, he denied he ordered Tomasak to sit in the chair for eight (8) hours and he claimed he did not know the chair was broken. He also went on to say that if Tomasak kept filing grievances, that the Borough would "get rid of me." (N.T. 44, 120)

22. That Tomasak informed Borough Council president, Jim Hanke, that the chair was defective, but chair remained in the office. (N.T. 62)

23. That on February 8, 2005, Konefal ordered directed Tomasak to collect approximately 75 fire hoses that had been taken off a rack and placed on the floor to allow painters to have access to the wall of the firehouse. He directed Tomasak to roll them up and place them on a rack that was at least 6 feet high, requiring a ladder to do so. The hoses ranged from 25 to 100 feet in length and 1 and ½ inches to five inches in diameter. The weights of the hoses varied from 21 to 43 pounds. The job was usually a two-person job, but Konefal told Tomasak to do it himself this time. Tomasak completed the job on his shift. (N.T. 78, 115 Borough Exhibits 1 and 2)

24. That Konefal issued the order at that time because a painting crew made up of county prisoners had just completed painting the walls, a job requiring that the fire hose rack be moved away from the wall and the hoses taken off the rack. Konefal was going off his shift and did not want to stay to help Tomasak because his staying would burden the Borough with overtime costs. (N.T. 73-77)

#### DISCUSSION

The union's charge of unfair labor practice alleges that the Borough took three separate actions against the Union and its president that violated the PLRA and Act 111.

The first part of the charge is that the Borough, acting through chief engineer Konefal, unilaterally removed two La-Z-Boy reclining chairs from the firefighters' offices, as an act of interference and discrimination and as a unilateral change of a term and condition of employment, in violation of Section 6(1)(a), (c) and (e) of the PLRA. This part of the charge will be sustained, but only with regard to the Section 6(1)(e) allegation. The Borough explained in a credible fashion that its removal of the chairs was not retaliatory or done for anti-union reasons.

An employer commits unfair labor practices within the meaning of sections 6(1)(e) of the PLRA if the employer unilaterally changes a term and condition of employment for employes. Plumstead Township v. PLRB, 713 A.2d 739 (Pa. Cmwlth. 1998) A matter is a term and condition of employment over which an employer must bargain if it is specifically listed as such in Act 111 or if it is rationally related to employe duties and the employes' interest in it is not substantially outweighed by the employer's. *Id.* If, however, the employer's interest in it substantially outweighs that of the employes, then the matter is a managerial prerogative over which the employer need not bargain. *Id.*

Section 1 of Act 111 identifies six different terms and conditions of employment subject to mandatory bargaining, including "compensation, hours, working conditions, retirement, pensions and other benefits." 43 P.S. 217.1. Since Act 111 does not specifically identify recliners as one of these conditions, even though it falls within the broader category of working conditions or benefits, the law is well settled that the Board must apply a "rational relationship" test to determine whether such an issue is deemed bargainable or is an issue of managerial prerogative. See Fraternal Order of Police, Lodge No. 5, 727 A.2d 1187, at 1190; Township of Upper Saucon v. Pennsylvania Labor Relations Board, 620 A.2d 71 (Pa. Cmwlth. 1993). Under this test, an issue is deemed bargainable if it bears a rational relationship to the employees' duties. Fraternal Order of Police, No. 5; Township of Upper Saucon. On the other hand, "[f]or an issue to be deemed a managerial prerogative and thus not a mandatory subject of bargaining, the managerial policy must substantially outweigh any impact an issue will have on the performance of the duties of the police or fire employees." Fraternal Order of Police, Lodge No. 5, *id.* at 1190.

In this case, it must be concluded that recliners are rationally related to the duties of the firefighters. When firefighters are not fighting fires, they spend the vast majority of their time in the station, either in the work bay or the office. When all their assigned chores are done, the firefighters are still required to remain in the fire station, prepared to respond to the next fire alarm. Waiting to respond to the next fire alarm is an inherent part of their duties. No one testified that the firefighters are expected to remain standing during the entire shift. In fact, during the remodeling of the firehouse, the Borough recognized the reality of firehouse down time by offering the firefighters the benefit of recliners.

Under the balancing test set forth in Fraternal Order of Police, Lodge No. 5, supra, it is difficult to discern any managerial concern that would substantially outweigh the employees' interests. The Borough removed the recliners because the council members believed they were an attraction for non-firefighters to gather in the offices, not because the firefighters' use of the recliners hampered the performance of their duties. The concern about visitors, certainly valid on its face, could have been satisfied by a simple, more narrowly tailored order to restrict visitors from loitering in the office. The Borough has not presented managerial concerns about the recliners that would substantially outweigh the firefighters' interests in having the recliners.

The Employer's unilateral removal of the chairs constitutes the unilateral removal of a benefit a violation of the duty to bargain in violation of Section 6(1)(e) of the PLRA and Act 111.

The second part of the charge deals with what occurred when Tomasak protested the removal of the reclining chairs. The Union alleges that Konefal, the chief engineer, when questioned by Tomasak over the removal of the chairs, angrily ordered Tomasak to remain in the fire engineers' room throughout his tour of duty, and to sit on an uncomfortable straight-backed chair. The Union alleges that this order was retaliation for Tomasak's questioning his supervisor over a matter of concern to the unit, and therefore violated Sections 6(1)(a) and (c) of the PLRA and Act 111.

The burden of proving an unfair labor practice is on the Complainant to prove each element of its charge by substantial and legally credible evidence. Pennsylvania Labor Relations Board v. Kaufman Dept. Stores, 345 Pa. 398, 29 A.2d 90 (1942).

An employer commits an unfair labor practice within the meaning of section 6(1)(a) of the PLRA if it "takes action that, in light of the totality of circumstances, tends to be coercive of employees in the exercise of their rights, regardless of whether the employees in fact have been coerced." City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002).

Having observed the testimony of the two participants in this exchange, I must conclude that Tomasak testified credibly that Konefal issued the order to sit in the tilted chair. Konefal admitted the chair was tilted to one side. Konefal issued the order using a hostile voice, laced with profanity. It also appears that that the Borough tried to weld the break in the chair, which does not change the fact that it was tilted and uncomfortable. Konefal followed his order with a threat of dismissal if further grievances were filed. I can find no other explanation other than retaliation as the motivation for Konefal's order. The Union has proven that Konefal's order violates Sections 6(1)(a) of the PLRA because, to any reasonable observer, it had a tendency to coerce employees in the exercise of their rights.

In order to prove a Section 6(1)(c) charge that an employer has discriminated against an employee for having engaged in activity protected by the PLRA, the charging party must present a prima facie case that the employee engaged in activity protected by the PLRA, that the employer knew that the employee engaged in the activity and that the employer took action against the employee for having engaged in activity. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER P. 33011 (Final Order 2001), citing PLRB v. Stairways, Inc. 425 A. 2d 1172 (Pa. Cmwlth. 1981). Camp Hill Borough, 16 PPER ¶ 16054 (Final Order 1986), aff'd, Camp Hill Borough v. PLRB, 507 A.2d 1297 (Pa. Cmwlth. 1986). If the charging party presents a prima facie case, then 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 activity protected by the PLRA. Sugarloaf Township, 33 PPER ¶ 33023 (Final Order 2001), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992).

The Union proved the first element of the discrimination charge, that Tomasak engaged in protected activity. Tomasak is the local union president and has been an active defender of the union members' rights under the collective bargaining agreement. He has been responsible for the Union filing grievances and unfair practices on behalf of members. He filed four grievances in July and August of 2004. He questioned Konefal about the removal of the chairs, questions that were raised on behalf of the Union. Tomasak then filed a grievance over the same issue. Finally, the union satisfied the third prong

of the test for proving a discrimination charge by presenting convincing evidence that the only reason for the retaliatory order was because Tomasak had protested the removal of the reclining chairs. Accordingly, it will be concluded that the order violated Section 6(1)(c) of the PLRA.

The third part of the charge is that on February 8, 2005, chief engineer Konefal ordered Tomasak to replace 75 fire hoses on racks, an order that the Union alleges was also retaliatory and not for a legitimate business reason. The Union alleges that Konefal discriminated against Tomasak by ordering him to singly perform a task that was normally a two person task.

The Union has satisfied its burden of proving the first two elements of a discrimination charge for this part of the charge. There is no dispute that Tomasak engaged in protected activity. The filing of grievances is an activity protected by the PLRA and Act 111. Ellwood City Borough, 29 PPER ¶ 29213 (Final Order, 1998). Also, there is no dispute that the employer knew of his protected activity.

The dispute is over the third element of proving a discrimination charge. Was Konefal motivated by Tomasak's exercise of protected activity when he ordered Tomasak to put the fire hoses back in their place? In a charge of discrimination, it is an employer's motivation, which creates the offense. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993). Because anti-union animus is rarely shown by direct evidence, the Board will allow a complainant to prove anti-union motivation by inferences drawn from the facts of record, from such factors as the entire background of the case including any anti-union activities by the employer, statements by the discharging supervisor tending to show the supervisor's state of mind, the failure of the employer to adequately explain the discharge or layoff of the adversely affected employe and the effect of the discharge on unionization activities. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Evidence of disparate treatment can also be a factor to infer animus. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). Another factor is close timing of an employer's adverse personnel decision to the exercise of protected activity, which, when combined with another factor, can be the basis for inferring anti-union animus was the motivation for an adverse employe action. Commonwealth of Pennsylvania (Department of Labor and Industry), 16 PPER ¶ 16020 (Final Order 1984). The Board has also found a discriminatory motivation where a contributing factor to inferring animus was the Employer's insubstantial, shifting or incredible explanation for an adverse personnel decision. See, e.g. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982), aff'd, Montgomery County v. PLRB, 15 PPER ¶ 15089 (Court of Common Pleas of Montgomery County, 1984).

The Union advances three factors to infer that anti-union animus motivated the order: the singling out of Tomasak to do a job normally done by two persons, the close timing of the order on the day after Tomasak's February 7 grievance and the Borough's failure to adequately explain the reason and timing of the order.

In its defense, the Borough has presented convincing evidence that Konefal would have given Tomasak the same order even if Tomasak not engaged in protected activity the day before. The Borough has presented sufficient evidence to rebut the inferences of disparate treatment, suspicious timing and inadequate explanation for the order. Konefal testified credibly that he assigned the job to only Tomasak that day because Konefal was going off shift just as the painters, who had removed the hoses, had finished their work. It is understandable that the firehouse floor cannot be covered with disorganized fire hoses. Given the exigencies in the firehouse on that particular afternoon, it cannot be said that the Borough has failed to explain the reasons or the timing of the order. Having produced a plausible explanation for giving the task to Tomasak, I must conclude that in this particular instance the borough did not unfairly single out Tomasak so as to support a finding of discrimination and retaliation.

#### CONCLUSIONS

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

1. That Edwardsville Borough is an employer within the meaning of the PLRA and Act 111.
2. That Edwardsville Firefighters, Local 840, IAFF, is a labor organization within the meaning of the PLRA and Act 111.
3. That the Board has jurisdiction over the parties.
4. That the Borough has committed unfair labor practices within the meaning of Section 6(1)(a), (c) and (e) of the PLRA and Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the examiner

HEREBY ORDERS AND DIRECTS

that the Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.
2. Cease and desist from discriminating in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization.
3. Cease and desist from refusing to bargain with the Union over mandatory subjects of bargaining.
4. Take the following affirmative actions, which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:
  - (a) Offer to the Union to purchase two (2) new La-Z-Boy recliners to replace the recliners that the Borough removed on January 25, 2005;
  - (b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
  - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) with twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED from Harrisburg, Pennsylvania this first day of May, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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THOMAS P. LEONARD, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF :  
FIREFIGHTERS, LOCAL 840 :  
 :  
v. : Case No. PF-C-05-34-E  
 :  
EDWARDSVILLE BOROUGH :

**AFFIDAVIT OF COMPLIANCE**

Edwardsville Borough hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a), (c) and (e) of the PLRA and Act 111, that it has offered to the union to purchase two (2) new La-Z-Boy recliners to replace the La-Z-Boy recliners that were removed on January 25, 2005; that it has posted a copy of this decision and order as directed and that it has served an executed copy of this affidavit on the International Association of Firefighters, Local 840 at its current address.

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Signature/Date

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Title

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

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Signature of Notary Public

April 25, 2006

Thomas H. Kohn, Esquire  
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EDWARDSVILLE BOROUGH  
Case No. PF-C-05-34-E

Enclosed please find a copy of the proposed decision and order issued in the above-captioned matter.

Sincerely,

THOMAS P. LEONARD  
Hearing Examiner

Enclosure

cc: William T. Finnegan, Jr. Esquire  
Edwardsville Borough