

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On April 11, 2005, the West Hempfield Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that West Hempfield Township (Township) had violated sections 6(1)(a), 6(1)(c) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) by refusing to fill vacancies in its police department because during the parties' negotiations for their current collective bargaining agreement the Association would not agree to the Township's proposal to transfer bargaining unit work to non-members of the bargaining unit. On June 2, 2005, 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 July 25, 2005, if conciliation did not resolve the charge by then. The hearing examiner thereafter continued the hearing on three occasions, first at the request of the Township and over the objection of the Association, next at the request of the Association and without objection by the Township and then at the request of both parties when they entered into a tentative settlement of the charge. On October 21, 2005, the Association informed the hearing examiner that the parties had been unable to consummate their tentative settlement of the charge and requested the hearing examiner to reschedule the hearing. On October 26, 2005, the hearing examiner rescheduled the hearing to January 6, 2006. The hearing examiner thereafter continued the hearing at the request of the Association and without objection by the Township. On January 31, 2006, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On March 3, 2006, each party filed a brief.

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

FINDINGS OF FACT

1. On April 21, 1983, the Board certified the Association as the exclusive representative of a bargaining unit comprised of "all full-time and regular part-time police employes [of the Township] including but not limited to officers; and excluding the chief of police and other management level employes." (Case No. PF-R-83-6-E)
2. In 2003, the parties submitted to an interest arbitration panel an impasse in their negotiations for a successor collective bargaining agreement. The Township listed the following among its issues in dispute: "The Township shall be permitted to hire civilian aides to assist with police duties and responsibilities." The Township considered that issue to be among its top five and spent a substantial amount of time prosecuting that issue before the interest arbitration panel. (N.T. 15-16, 56-59, 84-85; Complainant Exhibit 1)
3. In 2004, the Township's budget for its police department was \$1,598,000.00. (N.T. 122)
4. In early to mid-December 2004, the Township adopted a budget for 2005. Included in the budget was \$189,000.00 for three sergeants. (N.T. 120, 125)
5. On December 23, 2004, the interest arbitration panel issued an award "effective for a period of four (4) years, from January 1, 2004 through December 31, 2007." The award did not include a provision permitting the Township to hire civilian aides to assist with police duties and responsibilities. (N.T. 65; Joint Exhibit 4)

6. During 2004, the Township spent \$1,557,000.00 of its budget for the police department and ended the year with a surplus in its general fund. (N.T. 80, 122)

7. In January 2005, one of the Township's three sergeants (Walter Burnett) retired effective at the end of the month. (N.T. 21-22, 69, 90-91, 137)

8. On March 4, 2005, Mr. Douts told three of the Township's police officers (Officers Bruce, Draper and Villano) that effectively immediately the Township was imposing a hiring and promotion freeze for budgetary reasons and that Sergeant Burnett's position would be filled and another police officer hired as needed if by the April 2005 meeting of the board of supervisors the Association agreed to the hiring of civilian aides. (N.T. 5, 18-21, 62-63, 72-73, 143, 149-150, 166)

DISCUSSION

The positions of the parties

The Association has charged that the Township committed unfair labor practices under sections 6(1)(a), 6(1)(c) and 6(1)(e) of the PLRA by refusing to fill vacancies in its police department because during the parties' negotiations for their current collective bargaining agreement the Association would not agree to the Township's proposal to transfer bargaining unit work to non-members of the bargaining unit. The Association submits that support for the charge may be found in the fact that the Township imposed a hiring and promotion freeze shortly after it unsuccessfully sought the Association's agreement to its proposal, in a statement by the Township's manager (Mr. Douts) explaining that the freeze was for budgetary reasons and that the position of a sergeant who retired (Sergeant Burnett) would be filled and another police officer hired as needed if the Association agreed to its proposal and in the lack of any economic reason for the freeze.¹

The Township contends that the charge should be dismissed because it has the inherent managerial prerogative to decide whether and when to fill vacancies in its police department and because it lawfully refused to fill Sergeant Burnett's position for economic reasons. The Township submits that the timing of events militates against a finding that it imposed the freeze because the Association would not agree to its proposal, that the statement by Mr. Douts was not coercive and that financial considerations prompted it to impose the freeze.

The applicable law

A violation of section 6(1)(a) may be independent or derivative. Springfield Township, 28 PPER ¶ 28164 (Final Order 1997). A derivative violation of section 6(1)(a) occurs when an employer commits a violation of section 6(1)(c). Id.

An employer commits unfair labor practices under sections 6(1)(a) and 6(1)(c) if it discriminates against its employees 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 employees engaged in protected activity, that the employer knew that they had done so and that the employer took action against them for having done so. Brentwood Borough, 35 PPER 112 (Final Order 2004), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992)(construing analogous provisions of the Public Employe Relations Act (PERA)). 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 employees had not engaged in protected activity. Id. The motivation creates the offense. Id.

Negotiating over the transfer of bargaining unit work to non-members of the bargaining unit is a protected activity. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). A discriminatory motive may be found where an employer links an employment

¹ In its brief, the Association does not contend that support for the charge also may be found in a 1998 agreement of the parties that there will be four sergeants in the police department at all times. Accordingly, no attempt has been made to resolve the conflicting evidence presented by the parties as to existence or non-existence of any such agreement.

action to a protected activity. Mt. Lebanon School District, 35 PPER 98 (Final Order 2004)(construing analogous provisions of the PERA). A discriminatory motive also may be found where the employer has an inadequate explanation for its action. Brentwood Borough, supra. An employer has the inherent managerial prerogative to determine the level of police services it provides. IAFF v. City of Scranton, 429 A.2nd 779 (Pa. Cmwlth. 1981). An employer also has the right to comment on the impact an arbitration award will have on employe job security so long as the comment reflects economic reality and contains no threat of reprisal or promise of benefit. City of Williamsport, 26 PPER ¶ 26202 (Final Order 1998). An employer does not violate sections 6(1)(a) and 6(1)(c) if it takes an employment action for an economic reason. City of Chester, 18 PPER ¶ 18084 (Final Order 1987).

An employer commits an unfair labor practice under section 6(1)(e) if it "refuse[s] to bargain collectively with the representatives of his employes[.]" 43 P.S. § 211.6(1)(e).

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).

The charge under sections 6(1)(a)² and 6(1)(c)

During its case-in-chief, the Association presented a prima facie case of discrimination by showing that in 2003 the parties submitted to an interest arbitration panel an impasse in their negotiations for a successor collective bargaining agreement, that the Township listed the following among its issues in dispute: "The Township shall be permitted to hire civilian aides to assist with police duties and responsibilities," that the Township considered that issue to be among its top five and that the Township spent a substantial amount of time prosecuting that issue before the interest arbitration panel (finding of fact 2); that in early to mid-December 2004 the Township adopted a budget for 2005 that included \$189,000.00 for three sergeants (finding of fact 4); that on December 23, 2004, the interest arbitration panel issued an award that did not include a provision permitting the Township to hire civilian aides to assist with police duties and responsibilities (finding of fact 5); that the Township ended 2004 under budget for its police department and with a surplus in its general fund (findings of fact 2 and 6); that in January 2005 one of the Township's three sergeants (Sergeant Burnett) retired effective at the end of the month (finding of fact 7); and that on March 3, 2005, Mr. Douts told three of the Township's police officers (Officers Bruce, Draper and Villano) that effectively immediately the Township was imposing a hiring and promotion freeze for budgetary reasons and that Sergeant Burnett's position would be filled and another police officer hired as needed if by the April 2005 meeting of the Township's board of supervisors the Association agreed to the hiring of civilian aides (finding of fact 8).

Given that employes have the right to negotiate over the transfer of bargaining unit work to non-members of the bargaining unit, City of Allentown, supra, it is apparent that the Township's police officers engaged in protected activity when the Association refused to agree to its proposal to hire civilian aides. See Commonwealth of Pennsylvania, Department of Transportation, 19 PPER ¶ 19048 (Proposed Decision and Order 1988), rev'd on other grounds, 19 PPER ¶ 19137 (Final Order 1988)(employes engaged in activity protected under analogous provisions of the PERA when their union refused to agree to the transfer of bargaining unit work to non-members of the bargaining unit); see also City of Pittsburgh, 35 PPER 122 (Proposed Decision and Order 2004)(employes engaged in protected activity when their union refused to waive their right to file grievances); Commonwealth of Pennsylvania, Department of Revenue, 18 PPER ¶ 18054 (Proposed Decision and Order 1987)(employes engaged in activity protected by analogous provisions of the PERA when their union refused to agree to a change in their pay scheme).

² In its brief, the Association does not contend that the Township committed an independent violation of section 6(1)(a); rather, the Association points out that "[a] finding of a Section 6(1)(c) violation will result in a finding of a derivative Section 6(1)(a) violation" (brief at 7). Thus, whether or not the Township committed an independent violation of section 6(1)(a) is not before the Board and will not be considered. See SSHE, 32 PPER ¶ 32118 (Final Order 2001)(any argument not presented to the hearing examiner is waived).

Given that the Township knew that the Association refused to agree to its proposal to hire civilian aides, that the Township imposed the freeze even though it was under budget for the police department in 2004, finished 2004 with a general fund surplus and budgeted for three sergeants in 2005 and that in spite of the freeze Mr. Douts said that Sergeant Burnett's position would be filled and another police officer hired as needed if the Association agreed to the hiring of civilian aides, it also is apparent that the Township imposed the freeze because the Association refused to agree to its proposal to hire civilian aides. See Borough of Geistown, supra (employer's explanation that it subcontracted police services for economic reasons was insubstantial where the employer was not economically distressed, ended the fiscal year with a balance of over \$100,000.00 and had no economic difficulties in the three years before the subcontract); Mt. Lebanon School District, supra (employer's discharge of an employee was discriminatory where the employer linked the discharge to the employee's protected activity); Auburn Borough, 27 PPER ¶ 27221 (Final Order 1998)(employer's explanation that it laid off a police officer for economic reasons was insubstantial where the employer had a budgetary surplus at the time of the lay off and had budgeted for the police officer who it laid off).

Thus, under the analysis set forth in Brentwood Borough, supra, unless the Township showed that it would have imposed the freeze even if the Association had not refused to agree to its proposal to hire civilian aides, the charge under sections 6(1)(a) and 6(1)(c) must be sustained.

The Township contends that the timing of events militates against a finding that it imposed the freeze because the Association would not agree to its proposal to hire civilian aides. As the Township points out, Mr. Douts' statement about the freeze occurred over two months after issuance of the arbitration award. If anything, however, given that the Township adopted its 2005 budget before the arbitration award was issued (findings of fact 4-5), that the Township included in its 2005 budget monies for three sergeants (finding of fact 4) and that the Township only imposed the freeze after the arbitration award was issued (findings of fact 5 and 8), the timing of events supports a finding that the Township imposed the freeze because the Association would not agree to its proposal to hire civilian aides.

The Township also contends that nothing Mr. Douts said to Officers Bruce, Draper and Villano provides support for the charge because he never referenced the arbitration award and because he never threatened to take adverse action in the event the Association chose not to bargain over the hiring of civilian aides. The Township submits that the Board found substantially similar comments not to be coercive in City of Williamsport, supra, and in City of Easton, 9 PPER ¶ 9109 (Nisi Decision and Order 1978). The Township's reliance on those cases is misplaced. The comments in those cases addressed the likely impact of interest arbitration awards on employee job security. The Board found them not to be coercive because they reflected economic reality and made no mention of the employees' exercise of their right to interest arbitrate. Although Mr. Douts did not reference the arbitration award, given that the Township was under budget for the police department in 2004, finished 2004 with a general fund surplus and budgeted for three sergeants in 2005, it is apparent that his statement about the freeze being imposed for budgetary reasons did not reflect economic reality. Given that he also said that Sergeant Burnett's position would be filled and another police officer hired as needed if the Association agreed to the hiring of civilian aides, it also is apparent that he implicitly if not explicitly threatened that the freeze would remain in effect unless the Association agreed to the hiring of civilian aides. Thus, City of Williamsport and City of Easton are distinguishable on the facts.

As further support for its contention that nothing Mr. Douts said to Officers Bruce, Draper and Villano provides support for the charge, the Township points out that the parties subsequently bargained, albeit unsuccessfully, over the hiring of civilian aides (N.T. 31, 35-36, 78, 83-84, 104; Township Exhibits 1-3, 9) and that the Association subsequently filed grievances (N.T. 129-130; Township Exhibits 10-11). According to the Township, Mr. Douts' statement cannot be found to be coercive under the circumstances. A statement may be coercive even though no employee was actually coerced by it because coercion is measured not from the perspective of an individual employee but from the perspective of a reasonable employee. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order

2002). A reasonable employe would be less likely to support their union's refusal to agree to the transfer of bargaining unit work to non-members of the bargaining unit if their union's refusal to do so would result in a hiring and promotion freeze. See Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 121 (Final Order 2005)(subjecting a supervisor to potential discipline for testifying on behalf of an employe was coercive because a reasonable employe would be hesitant to call the supervisor as a witness under the circumstances); City of Pittsburgh, supra (refusing to recall employes from layoff unless they agreed not to file grievances was coercive because a reasonable employe would be less likely to exercise their right to file grievances if recalls from layoff would not occur if they did so). Thus, neither the fact that the parties subsequently bargained over the hiring of civilian aides nor the fact that the Association subsequently filed grievances supports the Township's contention.

The Township finally contends that the charge should be dismissed because financial considerations prompted it to impose the freeze on a Township-wide basis. The Township points out that Mr. Douts testified that since 2000 it has used more than \$1,000,000.00 of its savings to balance its budgets (N.T. 80, 107-108), that upon adopting its 2005 budget its board of supervisors adopted a wait-and-see attitude about filling vacancies pending receipt of the final revenue figures for 2004 (N.T. 63-64), that in 2005 it raised its real estate taxes by the maximum allowed by law (N.T. 75, 108-109), that it would save money in the long term if the Association agreed to the hiring of civilian aides (N.T. 76-77), that in 2006 it imposed an emergency and municipal services tax (N.T. 75) and that in 2006 it had to show why it should not be considered a distressed community for having used its savings to balance its budgets over the last three years (N.T. 109-110, 118-119). Notably, however, the record shows that the Township budgeted for three sergeants in 2005 (finding of fact 4). Moreover, the record does not show that the Township lacked the financial resources to maintain three sergeants throughout 2005 or at any time thereafter. Indeed, as Mr. Douts also testified, the Township still has approximately \$1,000,000.00 in savings (N.T. 80). Thus, the Township's contention finds no support in the record. Accordingly, the Township must be found in violation of sections 6(1)(a) and 6(1)(c) as charged.

The charge under section 6(1)(e)

The charge does not state a cause of action under section 6(1)(e). As noted in Borough of Geistown, supra, an employer commits unfair practices under sections 6(1)(a) and 6(1)(c) when, as here, it discriminates against employes for having engaged in protected activity. The charge as filed under section 6(1)(e), therefore, must be dismissed.

The remedy

The Association contends that an order to fill Sergeant Burnett's position and to hire another police officer as needed would be appropriate to remedy the Township's unfair labor practices because a hearing examiner ordered the hiring of police officers under substantially similar circumstances in Commonwealth of Pennsylvania, 17 PPER ¶ 17183 (Proposed Decision and Order 1986), and that a back pay award would be appropriate as well because the hearing examiner ordered back pay under substantially similar circumstances in Commonwealth of Pennsylvania, Department of Revenue, supra. An order to fill Sergeant Burnett's position and to hire another police officer as needed is appropriate because it is apparent that the Township would have done just that if it had not violated the PLRA. See Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998)(Board's remedial powers are properly exercised to put employes in the same position they would have been in had no unfair labor practices been committed). The record does not show who would have filled Sergeant Burnett's position or been hired as needed if the Township had not committed unfair labor practices, so no back pay award is appropriate. See Bellefonte Borough, 27 PPER ¶ 27257 (Final Order 1996)(no back pay relief is appropriate when the record does not show that a particular employe lost pay). In Commonwealth of Pennsylvania, Department of Revenue, supra, the record showed who lost pay as the result of the employer's unfair practices. That case is, therefore, distinguishable on the facts.

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 within the meaning of section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties.
4. The Township has committed unfair labor practices under sections 6(1)(a) and 6(1)(c) of the PLRA.
5. The Township has not committed an unfair labor practice under section 6(1)(e) 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 Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA.
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. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PLRA:
 - (a) Fill Sergeant Burnett's position and hire another police officer as needed;
 - (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 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-first day of March 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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717-783-6025

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March 21, 2006

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WEST HEMPFIELD TOWNSHIP
Case No. PF-C-05-61-E

Enclosed is a copy of the proposed decision and order that I have issued this date.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: West Hempfield Township
Patrick J. Harvey, Esquire
Arlene J. Angelo, Esquire