

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JOHN CALDWELL, and :
UPPER MERION TOWNSHIP POLICE OFFICERS¹ :
 :
v. : Case No. PF-C-06-80-E
 :
UPPER MERION TOWNSHIP :

FINAL ORDER

On May 23, 2007, John Caldwell (Complainant) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Decision and Order (PDO) issued by the Board's Hearing Examiner on May 3, 2007. The PDO dismissed a Charge of Unfair Labor Practices alleging that Upper Merion Township (Township) violated Section 6(1)(c) of the Pennsylvania Labor Relations Act (PLRA). The Township filed a brief in response to the exceptions.

The Hearing Examiner's Findings of Fact (FF) are summarized as follows. The Complainant has been a police officer for the Township since 1989. For the past decade, the Complainant has been a union representative for the Upper Merion Township Police Officers (Union) and a member of the Union's bargaining committee. (FF 3). Starting in 2001, the Complainant was assigned to the Montgomery County Detective Bureau's drug enforcement team. This assignment was renewed annually until 2005. While working with the county detectives, the Complainant remained employed as a police officer by the Township and continued in his capacity as a Union representative. (FF 4). In August 2004, the Complainant filed a grievance on behalf of the Township police officers challenging the Township's decision to extend a five-year Deferred Retirement Options Program (DROP) to non-bargaining unit officers, where the collective bargaining agreement provided for a three-year DROP. The grievance proceeded to arbitration, and an award denying the grievance was issued on July 10, 2005. (FF 5).

In August 2005, the Township's Chief of Police, Ronald Fonock, advised the Complainant that he was being recalled from his assignment with the county detectives, and would return to his police officer duties with the Township effective January 2006. (FF 6). In April 2006, two temporary and one indefinite detective positions opened within the Township. The Complainant was not interested in one of the temporary positions (a juvenile detective position). The Township did not select the Complainant for the indefinite detective position, which exclusively involved investigating white-collar (economic) crime, or for the other temporary position, which was a rotational detective with general investigative duties. Temporary positions are generally used by the Township to train inexperienced patrol officers as detectives. The Township regularly fills indefinite detective positions from the ranks of temporary detectives. (FF 7).

The Complainant argues in his exceptions that the Hearing Examiner erred in concluding that the Township's failure to assign him to one of the available detective positions was not motivated by anti-union animus in violation of Section 6(1)(c) of the PLRA. To establish a claim of discrimination in violation of Section 6(1)(c) of the PLRA, the complainant must show that the employe engaged in protected activity, that the employer was aware of that activity, and that the employer took adverse action against the employe because of union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). It is the employer's motive which creates the offense. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969).

Fundamentally, the Complainant takes issue with the Hearing Examiner's decision to credit the Township's explanation for its failure to assign the Complainant to a detective position with the Township in April 2006. Because the hearing examiner is present to observe the manner and demeanor of the witnesses during their testimony, it is

¹ The caption has been amended to indicate that both John Caldwell and the Upper Merion Township Police Officers were identified as Complainants in the Charge of Unfair Labor Practices.

the function of the hearing examiner, and not the Board, to resolve conflicts in evidence and decide issues of credibility. Crestwood School District v. Crestwood Education Association, 32 PPER ¶132050 (Final Order, 2001). The Board will not disturb the credibility determinations of its hearing examiners absent the most compelling of circumstances, which would necessitate a reexamination of the issue of credibility. Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). Conflicting evidence is the basis for credibility findings, and is not justification for their reversal. E.B. Jermyn Lodge No. 2, Fraternal Order of Police v. City of Scranton, 38 PPER ____, No. PF-C-05-131-E (Final Order, July 17, 2007).

The Complainant takes issue with the Hearing Examiner's crediting of Chief Fonock's testimony. In this regard, the Complainant asserts that the Hearing Examiner failed to appreciate that the Chief 1) gave the Complainant five out of a possible ten points on a subjective portion of a promotional examination; 2) referred to the Complainant as "untrustworthy"; 3) used the word "undermining" during a meeting; and 4) expressed concerns that the Union would serve as a "war chest" for grievances. The Complainant also asserts that the Chief's response to memoranda in 2003 and 2005, addressing the Township's ongoing need for more patrol officers, undermines the Chief's credibility.² The Hearing Examiner accepted the testimony and explanations of Chief Fonock as not evidencing an unlawful union animus. Upon review of the record, there is no compelling reason warranting reexamination of the issue of the Chief's credibility.

The Complainant also argues that the Hearing Examiner improperly noted that the Complainant had not prevailed in the arbitration over the DROP grievance. The Complainant asserts that the allegations of discrimination were not based on losing the arbitration, but on the Township's displeasure with the Complainant's having filed the grievance over the DROP in the first place in August 2004. However, taken in context, the Hearing Examiner appropriately considered that had the filing of the grievance in 2004 been the basis for the alleged discriminatory treatment in April 2006, the delay between the protected conduct and the alleged discriminatory action militates against the finding of an unlawful motive. Likewise, the Township's prevailing on the grievance through an arbitration award in August 2005 would, on this record, tend to undermine the claim that the Township had a retaliatory motive.

The Complainant asserts that although the Township had indeed placed the Complainant on its Drug Task Force, it failed to utilize his full potential and expertise gained while working with the county detectives. The Hearing Examiner's findings that the Township placed the Complainant on its Drug Task Force, and utilized the Complainant to train Township officers (FF 6 and 8), are supported by substantial evidence in the record and will not be disturbed. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Here, the fact that the Township does not have the willingness or the means to utilize the Complainant in the manner in which the Complainant would prefer does not support a finding of union animus.

The Complainant also avers that the Township's reasons for failing to assign him to the temporary detective position are pretextual. The Complainant points to the fact that Sergeant Andrew Andreyko served three times as a temporary detective as evidence that the Township's alleged policy to assign patrol officers who lacked training as a detective into the temporary detective positions was a mere pretext to mask an unlawful discriminatory motive. However, Chief Fonock testified that generally, if there are no patrol officers with more than three years seniority that apply for the detective position, an officer who had previously served may be selected again for a temporary detective position. (N.T. 214). With regard to the vacancies in April 2006, Captain John Hellebush, Jr. testified that four officers, each with more than three years on patrol,

² To the extent that the Complainant argues that the 2003 and 2005 memoranda should not be relied upon to dismiss the Charge of Unfair Labor Practices, the memoranda and the Chief's response thereto are irrelevant to the alleged violation of the PLRA. The charge in this case is not based on the Complainant's recall from the county detective assignment, as such a charge would not be timely. 43 P.S. §1101.1505. The Complainant's timely charge is limited to the Township's failure to assign him a detective position in April 2006. The memoranda addressing the Township's ongoing need for more patrol officers supported the Complainant's recall from the county in January 2006, but are not relevant to the Complainant's timely allegations regarding the detective assignment.

had applied for two available temporary detective positions. Of the four who applied, two patrol officers had no prior experience as detectives, and those officers were assigned the temporary detective positions. (N.T. 219). Captain Hellebush indicated that in reviewing the candidates for the temporary detective positions, he believed that the Complainant had obtained the basic detective training while on assignment with the county. Therefore, since two inexperienced officers had also applied, the Complainant was not assigned to the detective position. (N.T. 220).

As regards the indefinite detective position that was also available in April 2006, that position involved investigations of white-collar economic crimes. Captain Hellebush testified that he technically considered every officer in the department for the position, but recommended an officer who had been in a temporary detective position and while in that position had shown the ability and interest to engage in white-collar criminal investigations. (N.T. 217-218). Captain Hellebush testified that he believed that the Complainant would be more suitable in another area of investigation. (N.T. 225). The Hearing Examiner accepted the testimony of Chief Fonock and Captain Hellebush explaining the Township's lawful reasons for not assigning the Complainant a detective position. Based upon these credibility determinations, the Hearing Examiner rejected the alleged inference of unlawful motive on the part of the Township.

Upon review of the record, the Hearing Examiner's Findings of Fact and credibility determinations are supported in the record. Based on those Findings, the Hearing Examiner did not err in concluding that the Complainant failed to prove that the Township was motivated by union animus in failing to assign him to a detective position in April 2006. Accordingly, after a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the PDO final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by John Caldwell are hereby dismissed, and the May 3, 2007 Proposed Decision and Order be and the same is hereby made absolute and final.

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 twenty-first day of August, 2007. 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.