

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 OF THE :
FRATERNAL ORDER OF POLICE :
 :
v. : Case No. PF-C-05-131-E
 :
CITY OF SCRANTON :

FINAL ORDER

The City of Scranton (City) filed exceptions with the Pennsylvania Labor Relations Board (Board) on March 19, 2007. The City challenges a Proposed Decision and Order issued on March 1, 2007, in which the Hearing Examiner concluded that the City violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111. The Secretary of the Board granted the City's request for an extension to file a brief in support of its exceptions, which was timely filed on April 19, 2007. The E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police (FOP) has not filed a responsive brief. After a thorough review of the record, the Board makes the following:

AMENDED FINDING OF FACT

25. That Captain Carl Graziano reiterated to Police Officer Kyle Kemp that the Chief gave him a direct order to post the bid department-wide and that he should follow the order. Officer Kemp felt that he would be punished if he did not post the bid as the Chief demanded and feared for his job. Therefore, he reposted the bid. (N.T. 38, 55; Deposition of Captain Graziano at 15).

DISCUSSION

The FOP filed a Charge of Unfair Labor Practices asserting that the City violated the PLRA and Act 111 by threatening Officer Kyle Kemp with discipline for his conduct as a "bid officer" for the FOP. In the Proposed Decision and Order, the Hearing Examiner found that as a "bid officer", Officer Kemp was responsible for posting job vacancies, collecting employe bids on the position, and forwarding the bid of the most senior officer to the chief of police. (FF 5, 7 - 12). Consistent with the parties' collective bargaining agreement, postings for bids are department-wide unless previously done otherwise. (FF 6 and 14).

Officer Kemp was the bid officer on the "B" shift when a vacancy arose on September 13, 2005. (FF 14). Unsure whether to post the vacancy department-wide or only for his shift, Officer Kemp consulted with the FOP President, Ann Marie Stulgis, who advised Officer Kemp that the vacancy was temporary and should be posted only for the "B" shift. (FF 14 - 17). After the vacancy was successfully bid on by an employe on the "B" shift, Lieutenant Martin Crofton and Captain Carl Graziano questioned whether the vacancy should have been posted department-wide. (FF 19). Lieutenant Crofton, Captain Graziano and Officer Kemp then met with Chief David Elliott regarding the issue. (FF 20). After a brief discussion about the vacancy posting, Chief Elliott stated that the posting should have been department-wide, and directed Officer Kemp to repost the vacancy. (FF 21). Officer Kemp advised Chief Elliott that the FOP President had directed him to post the vacancy for the "B" shift only and that any disagreement over the posting was between the Chief and the FOP President. (FF 21 and 22). Chief Elliott then stated that the "union can't do anything to you, I can. I'm ordering you to re-post the bid ... department wide." (FF 23). The Chief further stated that "[e]ven if a grievance is filed on the bid, it'll be a new bid year by the time it's resolved anyway." (FF 24). Captain Graziano cautioned Officer Kemp that the Chief had given him a direct order to repost the bid department-wide. (FF 25). Officer Kemp then reposted the bid department-wide, and notified FOP President Stulgis that he was ordered to do so. (FF 25, 27 and 28). Fearing that Officer Kemp would be disciplined, FOP President Stulgis removed Officer Kemp as the "B" shift bid officer. (FF 27).

After the vacancy was reposted department-wide, the dispute over the posting of the vacancy was ultimately settled by an agreement between the City and the FOP. The employee who had successfully bid on both the shift and department-wide postings received the job. (FF 28 and 29).

The Hearing Examiner found that Chief Elliott's comment that he could discipline Officer Kemp, but the union could not, was coercive of Officer Kemp's right to assist the FOP as a bid officer, and violated Section 6(1)(a) of the PLRA. The Examiner also concluded that because Officer Kemp met with the Chief in the capacity of a union bid officer when the statement was made, the Chief's statement was discriminatory in violation of Section 6(1)(c). The Examiner further concluded that because posting of vacancies is a mandatory subject of bargaining, and Chief Elliott stated that the FOP's filing of a grievance would be in vain, the City violated its statutory bargaining obligation under Act 111 and Section 6(1)(e) of the PLRA.

The City argues that several of the Hearing Examiner's Findings of Fact are not supported by substantial evidence of record. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufmann Department Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942). A hearing examiner's findings are not rendered unsupported simply by the existence of conflicting evidence. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981); Wilson Education Association v. Wilson School District, 24 PPER ¶24068 (Final Order, 1993).

We have reviewed the Hearing Examiner's Findings of Fact and have determined that Finding of Fact 25 should be amended to indicate that Captain Graziano, rather than Lieutenant Crofton, made the statement to Officer Kemp regarding the obligation to follow the Chief's directive. Upon review of the record, we have determined that the other material findings by the Hearing Examiner are supported by substantial evidence of record. Accordingly, the City's exceptions to the Hearing Examiner's Findings of Fact are dismissed.

The City primarily takes issue with Findings of Fact 23 and 24, wherein the Hearing Examiner found that Chief Elliott told Officer Kemp the "union can't do anything to you, I can..." and "even if a grievance is filed on the bid, it'll be a new bid year by the time it's resolved anyway." The City argues that "the Chief of Police, Lieutenant Martin P. Crofton ... and Captain Carl Graziano ... all adamantly and unequivocally refuted the statement of Officer Kemp, a statement credited by the Hearing Examiner... To accept the Hearing Examiner's Findings is tantamount to holding that three senior officers of the City of Scranton police department testified falsely under oath." (City's Brief in Support of Exceptions at 9).

In making its argument, the City urges the Board to re-examine its policy of deferring to the Hearing Examiner's credibility determinations. The Board has long recognized that it is the function of the hearing examiner, who is present to observe the manner and demeanor of the witnesses while testifying, to resolve conflicts in testimony and decide issues of credibility. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The existence of conflicting testimony among witnesses is the reason for credibility determinations, and is not justification for reversing a hearing examiner's credibility findings. Wilson School District, *supra*. Accordingly, 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 issues of credibility." Mt. Lebanon School District, *supra*.

The Hearing Examiner expressly noted that his credibility determinations were based on his observance of the witnesses while testifying. (PDO at 4).¹ The Board finds no compelling reason to disturb the Hearing Examiner's credibility determinations. Therefore, Findings of Fact 23 and 24 will not be set aside.

¹ Moreover, Chief Elliott, Lieutenant Crofton, and Captain Graziano were not asked whether the Chief made the statements that were testified to by Officer Kemp. Instead, the City's witnesses were asked whether the Chief stated to Officer Kemp that "the union can't do anything to you for honoring the contract, but I can," (N.T. 37, 49, Deposition of Captain Graziano at 13), or bragged that "by the time the grievance process was completed the Chief would have his way anyway." (N.T. 38, 49, Deposition of Captain Graziano at 14). The responses to the questions that were posed to these witnesses do not undermine Findings of Fact 23 and 24.

The City argues that even if Findings of Fact 23 and 24 stand, the Chief's statement to Officer Kemp that the "union can't do anything to you, I can..." was not coercive of employe rights in violation of Section 6(1)(a) of the PLRA. Section 6(1)(a) provides that it is an unfair labor practice for an employer "[t]o interfere with, restrain or coerce employes in the exercise of rights guaranteed in this act." The rights guaranteed to employes are set forth in Section 5 of the PLRA and include providing assistance to the union and engaging in concerted activities for mutual aid or protection. An independent violation of Section 6(1)(a) for interference or coercion with an employe's protected rights arises where:

the action of the employer, in light of the totality of the circumstances in which the particular act occurred, tends to coerce employes in the exercise of their protected rights, regardless of whether the evidence shows that the individual employe(s) involved ... have been shown to have been coerced.

Wattsburg Education Association v. Wattsburg Area School District, 35 PPER 54 (Final Order, 2004) (*quoting AFSCME, Local 394 v. City of Philadelphia*, 24 PPER ¶24112 (Final Order, 1993)). The employer's motive or intent is irrelevant under Section 6(1)(a). Montgomery County Community College v. PLRB, 16 PPER ¶16156 (Court of Common Pleas, 1985). Indeed, alleged purity of heart is no defense, as even an inadvertent act may violate Section 6(1)(a) of the PLRA. Northwestern Education Association v. Northwestern School District, 24 PPER ¶24141 (Final Order, 1993). Thus, when a violation of Section 6(1)(a) is alleged, the pertinent inquiry is whether the employer's actions, when viewed within the totality of the circumstances, would tend to influence a reasonable employe's choice in assisting, or seeking assistance from, the union, or pursuing some other statutorily-protected activity. Northwestern School District, *supra*.

The circumstances here surrounding Chief Elliott's statement are that the "B" shift vacancy was already successfully bid upon. Lieutenant Crofton and Captain Graziano thought the posting should have been department-wide, not just for employes on the "B" shift. Officer Kemp, along with Lieutenant Crofton and Captain Graziano, sought out Chief Elliott to discuss the "B" shift vacancy posting. There was a brief discussion, during which Officer Kemp advised the Chief that FOP President Stulgis believed the vacancy was temporary and should be posted only for the shift. Lieutenant Crofton and Captain Graziano expressed their opinion that the posting should be department-wide. Upon hearing both sides, the Chief agreed with Lieutenant Crofton and Captain Graziano. Officer Kemp stated that the Chief's directive was not consistent with the FOP President's position on the issue. The Chief however directed Officer Kemp to post the "B" shift vacancy department-wide, adding that the "union can't do anything to you, I can..."

At the time of the Chief's statement that the "union can't do anything to you, I can...", Officer Kemp merely had expressed the FOP's disagreement with the Chief's interpretation of the contract provisions regarding posting requirements. There is no indication on this record that Officer Kemp had any intention to refuse the Chief's directive to repost the vacancy, or that Officer Kemp was otherwise insubordinate in any way. Under these circumstances, the Chief's statement sends the message that because employes must follow his directives or be disciplined, inquiring into the union's interpretation of the contract is pointless. However, the right of an employe to seek out the assistance of the union in matters involving contract interpretation is a right guaranteed under Section 5 of the PLRA. Accordingly, because Chief Elliott's statement would tend to coerce a reasonable employe from engaging in statutorily protected activities, the Hearing Examiner did not err in finding that the City violated Section 6(1)(a) of the PLRA.

The Hearing Examiner also found that because Chief Elliott's statement was directed at Officer Kemp as a result of his protected union activity as bid officer, the Chief's statement was discriminatory in violation of Section 6(1)(c) of the PLRA. Section 6(1)(c) of the PLRA prohibits an employer from taking adverse employment action against an employe because of union animus. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004). However, there is no record evidence of an adverse employment action here. While Chief Elliott may have threatened Officer Kemp in a coercive manner in violation of Section 6(1)(a), on this record, the threat alone is not a separate violation of Section 6(1)(c) of the PLRA.

The Hearing Examiner further concluded that the City violated Section 6(1)(e) of the PLRA by indicating that it would be futile to pursue a grievance. Chief Elliott stated to Officer Kemp that "even if a grievance is filed on the bid, it'll be a new bid year by the time it's resolved anyway." This statement, indicating that the filing of a grievance would be futile, further supports the Hearing Examiner's finding that the City violated Section 6(1)(a) of the PLRA. However, with regard to the alleged violation of Section 6(1)(e), there is no dispute that the disagreement over posting of the "B" shift vacancy involves conflicting interpretations of the collective bargaining agreement. "The law is well established that where the collective bargaining agreement covers the item of dispute and the employer and union disagree regarding proper interpretation of their agreement, the Board will not enter the dispute to determine which interpretation is correct." Police Employees of Silver Spring Township v. Silver Spring Township, 35 PPER 148, at 455 (Final Order, 2004); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER ¶18117 (Final Order, 1987). We do not agree that by his statement, the Chief was refusing to process such a grievance in violation of Section 6(1)(e) of the PLRA. Moreover, as the Hearing Examiner found, "the dispute over the scope of the bidding for a temporary vacancy was eventually settled by an agreement between the union and the city." (Finding of Fact 29). On these facts, the City has not violated Section 6(1)(e) of the PLRA.

After a thorough review of the exceptions, the brief in support of exceptions, and all matters of record, the Board shall dismiss the City's exceptions in part, sustain the exceptions in part, and affirm the Hearing Examiner's conclusion that the City committed unfair labor practices in violation of Section 6(1)(a) of the PLRA and Act 111.

CONCLUSIONS

CONCLUSIONS numbers 1 through 3, inclusive, as set forth in the Proposed Decision and Order, are hereby affirmed and incorporated herein by reference and made a part hereof. CONCLUSION number 4 is hereby amended to state that the City committed unfair labor practices in violation of Section 6(1)(a) of the PLRA and Act 111, but did not violate Section (6)(1)(c) or (e).

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 to the Proposed Decision and Order by the City of Scranton are hereby dismissed in part and sustained in part, that Paragraphs 2 and 3 of the Order on Page 6 of the Proposed Decision and Order are vacated, and the March 1, 2007 Proposed Decision and Order, as amended herein, 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 seventeenth day of July, 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 OF THE :
FRATERNAL ORDER OF POLICE :
 :
v. : Case No. PF-C-05-131-E
 :
CITY OF SCRANTON :

AFFIDAVIT OF COMPLIANCE

The City of Scranton hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) of the PLRA and Act 111; that it has posted the final order and proposed decision and order as directed; and that it has served an executed copy of this affidavit on the E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police.

Signature/Date

Title

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

Signature of Notary Public