

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UPPER MERION TOWNSHIP POLICE OFFICERS :
 :
 v. : Case No. PF-C-06-80-E
 :
UPPER MERION TOWNSHIP :

PROPOSED DECISION AND ORDER

The Upper Merion Township Police officers (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) on May 22, 2006 alleging that Upper Merion Township (Township) violated Section 6(1)(c) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On July 12, 2006, the Secretary of the Board issued a complaint and notice of hearing wherein a hearing was set for August 11, 2006 in King of Prussia, Pennsylvania. After a series of continuance requests, a hearing was held on December 21, 2006, during which both parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Each party filed a post-hearing brief.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record makes the following findings of fact.

FINDINGS OF FACT

1. The Union is a labor organization.
2. The Township is a political subdivision of the Commonwealth of Pennsylvania.
3. Officer John Caldwell has been employed in the Township's police department beginning in August of 1989. For the last ten years he has been a member of the Union's bargaining committee. He has been chairman of the Union's negotiating committee for the last five years and has served as the Union's representative to the Lodge 14 of the Montgomery Fraternal Order of Police for the last twelve years. (N.T. 6-8).
4. Caldwell has been assigned to the County detectives from 2001 to 2005. This assignment was renewed on an annual basis. Caldwell, during that period, nevertheless remained part of the Union's bargaining unit and an employe of the Township. Caldwell worked with the county detective's drug enforcement team, investigating and prosecuting narcotics violations throughout the County. Caldwell gained many specialized skills not available to the Township's regular police officers. He became highly trained in all aspects of drug enforcement investigation and prosecution. In point of fact, Caldwell became an instructor for the Township's police department, the county district attorney's office and became a certified instructor for the Municipal Police Officers Education Training Commission (MOPETC). Caldwell has been qualified as an expert witness in both the District Court and the Montgomery County Court of Common Pleas. (N.T. 9-14; Union Exhibit 1).
5. In August of 2004 Caldwell filed a grievance pursuant to the parties' collective bargaining agreement challenging the Township's action of giving non-bargaining unit officers a different retirement option than was accepted by the bargaining unit in its then current contract. This grievance went to arbitration on May 16, 2005 and an award was issued on July 10, 2005. The arbitrator denied Caldwell's grievance. (N.T. 20, 22, 23, 28-30; Union Exhibit 2, 3).
6. In August of 2005 Chief Ronald Fonock told Caldwell that as of January 2006 he was being recalled to duty as a patrol officer with the Township's police department, because of manpower and staffing problems. Upon his return, Caldwell was made part of the Township's drug task force. An internal memorandum from Lieutenant James Early to the

chief, written in July of 2005, indicated that additional officers were needed to adequately staff the department and that, *inter alia*, the department needed help with investigations conducted by the Township's drug task force. The lieutenant had written a similar internal memorandum to the chief in 2003. (N.T. 30-35, 162, 163, 164).

7. In April of 2006 three detective positions opened up: one indefinite position and two temporary positions. Indefinite detective positions are essentially permanent jobs, whereas temporary positions are just that, and are usually filled by inexperienced patrol officers for two-year stints. The indefinite detective position was exclusively to investigate white-collar (economic) crime. The two temporary positions were for a rotational detective with general investigative duties, and a juvenile detective. Caldwell was not interested in the juvenile detective position. Temporary positions are generally used by the Township as training positions to train inexperienced patrol officers as detectives. The Township regularly fills indefinite detective positions from the ranks of temporary detectives. (N.T. 33, 40-44, 86, 113, 169, 170-172, 174, 175, 217-219).

8. Caldwell, since his return from the county detectives has conducted training for the Township's police department. These courses include training on drug identification and training about officer safety when serving search warrants, and high-risk warrant entries and takedowns. Additionally Caldwell has attended training through the Pennsylvania Narcotics Officers Association. (N.T. 50, 73, 74).

DISCUSSION

In its charge the Union alleges that the Township, "has committed Unfair Labor Practices on April 11, 2005, when [it] denied the Complainant consideration for the Detective's position applied for. On April 11, 2005, Complainant[,] for the first time[,] was subjected to adverse action against him which was due to the anti-union animus of the Chief of Police."¹

In order to sustain a charge of discrimination under Section 6(1)(c) of the PLRA, as read with Act 111, the Union must prove a prima facie case. The elements of a prima facie case are: (1) that the employe engaged in protected activity; (2) the employer was aware of that protected activity; and (3) that but for the protected activity the adverse action would not have been taken against the employe. Saint Joseph's Hospital, 473 Pa. 101, 373 A.2d 1069(1977). The Union must establish these three elements by substantial evidence. Substantial evidence is more than a mere suspicion. Shive v. Bellafonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). In a charge of discrimination it is the employer's motivation that creates the offense. Perry County v. PLRB, 364 A.2d 898 (Pa

According to the Union, the genesis of this charge occurred in August of 2004, when Caldwell filed a grievance over the fact that non-bargaining unit police employes, in their memorandum of understanding, accepted a different retirement benefit than the Union accepted in bargaining its contract.² In April of 2006, almost two years after Caldwell filed that grievance, the Township did not choose him for either of two open detective positions. The Union highlights a series of intervening events that it asserts establish a prima facie case of discrimination by the Township against Caldwell. The Union's proofs, however, fall short of a prima facie case. This charge is therefore dismissed.

Much of the Union's emphasis in this charge centers around the fact that the arbitration award for the grievance Caldwell filed in 2004, was issued in July of 2005, one month before the Township, in August of 2005, told Caldwell we would be recalled from a five year stint with the county detectives in January of 2006. Referring to the timing

¹ These dates appear to be in error. The viva voce testimony at the hearing indicates that the detective positions opened up in April of 2006. Moreover, if the alleged discrimination actually took place in April of 2005, this charge, filed in May of 2006, would be certainly be untimely.

² In point of fact, the Union was offered and turned down, in contract negotiations, exactly the same deal the non-bargaining unit officers accepted.

of the recall action vis-à-vis the arbitration award's issuance, the Union in its brief states,

The evidence suggests strongly that the recall of Officer Caldwell from the County [detectives] was a sanction directly related to the grievance he filed concerning the [retirement] program. The meeting in which the Chief advised the Complainant of the recall from the [county detectives] was only one month after the conclusion of the grievance arbitration.³ *.*.*.* The timing of the action by the Chief alone is indicative of anti-union animus.

(Union brief at 18). Along with the fact that under Board law timing alone is insufficient to establish a case of union animus, Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004), what the Union also fails to apprehend is that Caldwell lost the arbitration.

Incredibly, the Union argues that the Township retaliated against Caldwell because he lost and the Township won! If the Township were peeved about anything, it was that Caldwell filed the grievance, and certainly not that he lost it. Moreover, what the Union really asks is that I find the Township committed an unfair labor practice in August of 2005 - well beyond the applicable six-week statute of limitations for this charge.⁴ Regardless, an examination of the reasons behind that August recall shows it to be more pedestrian and far less sinister than the Union asserts.

Caldwell's recall from the County detectives to a patrol position with the Township in August of 2005 was precipitated by a July 29, 2005, staffing level memorandum from Lieutenant Early to the chief. That was the second memorandum written by Early to the chief in three years asking for more officers. According to the July 29 memorandum, one of the specific reasons for more officers was to help "[d]rug investigations by our Drug Task Force officers (usually becom[ing] very involved and time consuming and sometimes t[ying] up more than one officer)...." (Township Exhibit 5).

Upon his return, Caldwell was put on the drug task force, thereby using the expertise he had acquired when working with the county detectives. Moreover, Caldwell conducted training for other Township officers. In May of 2006 he developed and conducted training for patrol officers in drug identification. Caldwell also developed and taught an officer-safety training program for executing high-risk search warrants.

Nevertheless, the Union makes much ado about the Township's "incredible misuse of [Caldwell's] training, skills and talent, particularly in light of obvious needs in the Township." (Union brief at 20). What the Union really complains about is that the Township did not use Caldwell as he thought proper: "I feel that putting me in a position where I'm limited to doing what the average patrolman does seems counterproductive, because I can do more." (N.T. 61). Caldwell wanted the Township to create a new drug detective position for him. (N.T. 63, 64). The Township did not create such a position (N.T. 62, 63) and it is the failure to create such a position that is really the basis for Caldwell's dissatisfaction.

The Union also points out a gallimaufry of remote events that it asserts establish discrimination by the Township against Caldwell. They include conversations between the Township's police chief and Caldwell in November 2004; a March 2005 letter from the Township's police chief to Counsel for the Union; and a statement in March 2006, by the Township's police chief that Caldwell was, along with other officers, "undermining" him. The Union offers these incidents to establish the Township's discriminatory motive in denying Caldwell either of two detective positions that opened in April of 2006. These prior incidents, some of which are years old, do not establish that the Township discriminated against Caldwell by denying him either detective position because he participated in protected activity.

³ More specifically, one month after the arbitration award was issued, not as the text insinuates, one month after the arbitration.

⁴ 43 P.S. § 211.9(e)

An examination of how the Township filled those two types of detective positions reveals eminently plausible reasons why Caldwell was not chosen for either. The two types of detective positions are temporary and indefinite. Understanding the difference between the two, and how each is filled, shows why the Township did not discriminate against Caldwell when he was refused both detective positions.

Temporary detective positions are used by the Township as learning positions to train inexperienced patrol officers as detectives. These temporary detective positions are usually posted and patrol officers are given the opportunity to apply. The lieutenant of detectives makes the selection and the chief usually seconds the lieutenant's choice. On April of 2006, two temporary detective positions opened up; one rotational position and one juvenile position.⁵ Caldwell had no interest in the juvenile detective position (N.T. 43, 44) but he did apply for the temporary, rotational detective position. He was not chosen. It is the police department's practice to put less experienced patrol officers in the temporary detective positions and Caldwell had, essentially, five years prior experience as a detective from his stint with the county detectives.

Indefinite detective positions are, essentially, permanent detective jobs. These positions are sometimes posted and sometimes not posted. The police department routinely fills the indefinite detective positions from the ranks of temporary detectives. In April of 2006, the indefinite detective position open involved solely white-collar (economic) crime investigations. An officer from a temporary detective position who had proven experience in white-collar crime filled that position. As described by the lieutenant who recommended him, the successful candidate "had displayed, over the time he had been in investigations an incredible tenacity, attention to detail, ability to organize, and interest in this type of crime. He'd taken retail theft investigations and gone far beyond what many other officers might have done, and I just thought he had the knack for it." (N.T. 217, 218). The Union offered no evidence to show that the successful candidate's experience was other than as described by the lieutenant, and Caldwell offered no testimony that he had any experience investigating white-collar crime.

The Union has not shown that the Township discriminated against Caldwell when it passed him over for either of the two detective positions. Conversely, the Township has proved valid, plausible reasons for why it chose the qualified candidates it did. This charge is, therefore, dismissed.

CONCLUSIONS

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

1. The Township is an employer within the meaning of Section 3(c) of the PLRA.
2. The Union is a labor organization within the meaning of Section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The Township has not committed unfair labor practices in violation of Section 6(1)(c) of the PLRA as read with 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 charge of unfair labor practices filed to the above case number is dismissed and the complaint is rescinded.

⁵ The rotational position involves a twelve-hour rotating shift. The juvenile position is a steady, eight-hour shift. (N.T. 40, 41).

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this third day of May, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner