

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 7 :
 :
v. : Case No. PF-C-07-110-W
 :
CITY OF ERIE :

FINAL ORDER

On April 29, 2008, the City of Erie (the City) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued by a Board Hearing Examiner on April 9, 2008. In the PDO, the Hearing Examiner concluded that the City violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act, as read in pari materia with Act 111 of 1968. The Fraternal Order of Police, Lodge No. 7 (FOP) filed a timely response to the exceptions on May 19, 2008. The Hearing Examiner's Findings of Fact relevant to the disposition of the exceptions are summarized as follows.

Lieutenant Stephen Franklin was promoted to Chief of Police on May 1, 2006, leaving a vacancy in his prior position as the Auto Theft Investigator/Grant Coordinator (ATIGCO). During the contractual posting period to permanently fill the position, Chief Franklin temporarily assigned Detective Sergeant John Ayers to the ATIGCO position. A panel of commanding officers, not including Chief Franklin, conducted interviews of three officers who bid for the ATIGCO position, including Ayers and Detective Sergeant Christopher Lynch. On May 19, 2006, Chief Franklin announced that Ayers was permanently appointed as the new ATIGCO effective June 1, 2006. Chief Franklin, with the approval of the Mayor, makes assignments and promotes officers within the department. Since inception of the ATIGCO position, all officers permanently assigned to the position were Lieutenants. On May 23, 2006, Chief Franklin announced the promotion of Ayers to Lieutenant.

Sergeant Lynch filed a grievance over the selection of Ayers as the ATIGCO. Separately, Lynch requested a promotion to the rank of Lieutenant in his current position as the administrative head of the crime scene identification unit. Chief Franklin denied Lynch's request for a promotion by telling him that there were too many Lieutenants in the police department and that precedent dictated that he had no choice but to promote Ayers to Lieutenant as the new ATIGCO. Chief Franklin also informed Detective Sergeant John Michael Barber, Union President, that he was required to immediately promote Ayers to Lieutenant because it has been a past precedent that a Lieutenant run the ATIGCO Unit. Chief Franklin did not indicate to either Barber or Lynch any other reason why Ayers received a promotion to Lieutenant or why Lynch did not.

On April 24, 2007, the grievance arbitrator ordered the City to award the ATIGCO position to Lynch, and the City thereafter assigned Lynch to the position. However, when Lynch requested a promotion to the rank of Lieutenant as the new ATIGCO, Chief Franklin denied the request.

In the PDO, the Hearing Examiner concluded that the FOP established a prima facie case of discrimination under Section 6(1)(c) of the PLRA. The City contends on exceptions that the Hearing Examiner erred in rejecting the Chief's testimony regarding his alleged non-discriminatory reasons for not promoting Sergeant Lynch to Lieutenant.

To establish unlawful discrimination under Section 6(1)(c) of the PLRA, the complainant must show that the employe was engaged in protected activity, that the employer was aware of that activity, and that the employer took action against that employe because of union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). There is no dispute in this case that Lynch was involved in protected activity in pursuing the grievance over his non-selection for the ATIGCO position. Furthermore, the City was aware of that protected activity as it had placed Lynch in the ATIGCO position as the result of an arbitrator awarding Lynch the position. The only issue in this matter is whether the City had a discriminatory motive for refusing to promote Lynch to Lieutenant after he had won the ATIGCO position through arbitration.

Since an employer's motives are rarely overt, union animus is often found based on reasonable inferences drawn from the totality of the circumstances. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Circumstantial evidence such as timing, disparate treatment, and the employer's offer of shifting reasons to explain its course of conduct can support a finding of a discriminatory motive and a prima facie violation of Section 6(1)(c) of the PLRA. Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 37 PPER 21 (Philadelphia Court of Common Pleas, 2005). Upon the finding of a prima facie case of discrimination, in the absence of a credible, non-discriminatory reason for the employer's action, a violation of Section 6(1)(c) has occurred. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993).

In assessing the employer's alleged reasons for refusing to promote an employee, the Board recognizes that a promotional decision is managerial prerogative that requires the exercise of the employer's good faith discretionary judgment. Bellefonte Police Officers Association v. Bellefonte Borough, 27 PPER ¶27257 (Final Order, 1996). However, the fact that the employer's decision to promote an employee is discretionary and subjective does not obviate the employer's statutory obligation to exercise that authority in the absence of union animus. Fraternal Order of Police, Lodge No. 9 v. City of Reading, 33 PPER ¶33112 (Proposed Decision and Order, 2002). Balancing the employer's managerial discretion over a decision to promote an employee with the statutory prohibition on discrimination, the Board will infer an unlawful motive, and find a violation of Section 6(1)(c) of the PLRA, where the evidence indicates that "but for" the union activity, the employee would have been awarded the promotion. Uniontown Area Education Association (DeFino) v. Uniontown Area School District, 26 PPER 26204 (Final Order, 1995) affirmed sub nom., Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000); Martinez v. Pennsylvania Human Relations Commission, 22 PPER 22131 (Final Order, 1991).

The City raises exceptions that challenge the Hearing Examiner's conclusion that Sergeant Lynch would have been promoted to Lieutenant "but for" his successful grievance arbitration awarding him the ATIGCO position. In this regard, three of the City's exceptions point to evidence that allegedly establishes that the rank of Lieutenant was not automatic with the ATIGCO position, that officers were informed during the interview process that a promotion to Lieutenant was not guaranteed, and that the rank of Lieutenant was not necessary to perform the duties of the ATIGCO position.

However, the Hearing Examiner's findings of fact to the contrary are based on substantial evidence in the record. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. PLRB v. Kaufmann Dept. Stores, Inc., 345 Pa. 398, 400, 29 A.2d 90, 92 (1942). In addition, the credibility determinations of the Hearing Examiner, upon which those findings of fact are based, will generally not be disturbed by the Board on exceptions, because the Hearing Examiner, not the Board, was able to view and assess the manner and demeanor of the witnesses during their testimony. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

The Hearing Examiner accepted as credible the testimony of Sergeant Lynch and Union President Barber that Chief Franklin informed them that he had no choice but to promote Ayers to Lieutenant as the new ATIGCO, because it has been a past practice that a Lieutenant run the ATIGCO Unit. The Hearing Examiner also noted that immediately upon Ayers' appointment to the ATIGCO position, Chief Franklin promoted him to Lieutenant. This is substantial evidence of record, credited by the Hearing Examiner, that establishes that appointment to the ATIGCO position was sufficient for promotion to Lieutenant.

The City also contends in four exceptions that the Hearing Examiner erred in rejecting the City's testimony that the decision to promote Ayers and not Lynch was based on their work performance and qualifications, and that appointment as the ATIGCO did not necessarily include promotion to Lieutenant.¹ However, as noted above, credibility

¹ In its exception No. 8, the City alleges that the Hearing Examiner ruled before the hearing that it could not introduce evidence of Lynch's performance after his appointment to ATIGCO. However, neither an offer of proof, nor the Hearing Examiner's alleged pre-hearing ruling was made a part of the record. Matters not preserved before the Hearing Examiner are deemed waived for purposes of exceptions to the Board. 34 Pa. Code §95.98(a)(2) (no reference may be made in the statement of exceptions to any matter not contained in the record of the case).

determinations are for the Hearing Examiner, who had the opportunity to observe the witnesses. Mt. Lebanon Area School District, *supra*. In this case, the Hearing Examiner rejected Chief Franklin's vague assertion that Lynch "did not bring anything that I would consider as promotional," as a credible justification for refusing Lynch a promotion to Lieutenant upon his appointment to the ATIGCO position. (N.T. 56). The Hearing Examiner further discredited the Chief's alleged reliance on Lynch's work performance as one of six officers in the auto theft unit eight years earlier to justify his present non-promotion to Lieutenant. The Hearing Examiner accepted the testimony that at the time Lynch requested his promotion to Lieutenant as the new ATIGCO, the Chief did not assert that Lynch was being denied the promotion due to his skills, qualifications, or past work performance. Notably, the Hearing Examiner credited testimony that when Ayers was promoted to Lieutenant, Chief Franklin did not offer any reason other than the appointment to ATIGCO to justify why Ayers received the promotion.

The Hearing Examiner noted that the timing of the Chief's denial of Lynch's request for promotion came immediately on the heels of the FOP's successful grievance arbitration awarding Lynch the ATIGCO position. In addition, despite Ayers' appointment to the ATIGCO position that, according to Chief Franklin, required his promotion to Lieutenant, Lynch was treated disparately when Chief Franklin denied him the same promotion upon his appointment as ATIGCO. Further, the Hearing Examiner noted that Chief Franklin offered shifting reasons concerning his promotion of Ayers and denial of a promotion for Lynch. When Ayers was appointed to the ATIGCO position, the Chief stated that his appointment alone required promotion to Lieutenant. However, when Lynch obtained the ATIGCO position through grievance arbitration, the Chief denied him a promotion without reason, and asserted, after the fact, that his decision to promote Ayers and not Lynch was based on differences in their work performance.

This circumstantial evidence of close timing between the successful arbitration award and the denial of the promotion, the disparate treatment of Lynch with regard to promotion upon attaining the ATIGCO position, and the Chief's shifting reasons regarding the promotions of Ayers and the denial of a promotion for Lynch, warrant the inference of an unlawful discriminatory motive. Philadelphia Housing Authority, *supra*. Further, substantial, credible evidence of record establishes that before Lynch was successful in grievance arbitration, the appointment as ATIGCO, not past work performance, was the determinative factor for Chief Franklin in deciding whether to promote an ATIGCO to Lieutenant. Thus, "but for" Lynch's protected activity in successfully pursuing a grievance, Lynch's attaining the ATIGCO position would have included a promotion to Lieutenant. City of Reading, *supra*. As such, the Hearing Examiner did not err in concluding that the City violated Section 6(1)(a) and (c) of the PLRA by discriminatorily denying Lynch a promotion to Lieutenant.²

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the City violated Section 6(1)(a) and (c) of the PLRA, as read in *pari materia* with Act 111. Accordingly, the City's exceptions shall be dismissed in part, and sustained in part, and the PDO made absolute and 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

² The City also filed an exception asserting that the Hearing Examiner erred in finding that Chief Franklin's friendship with Ayers would tend to coerce FOP members from engaging in protected activities. Generally, an independent violation of Section 6(1)(a) of the PLRA may arise where, apart from a discriminatory motive, the totality of the circumstances of an employer's actions would have a tendency to coerce reasonable employees in the exercise of protected rights. Pennsylvania Labor Relations Board v. Montgomery County Community College, 15 PPER ¶15038 (Final Order, 1984), *aff'd*, 16 PPER ¶ 16156 (Montgomery County, 1985). However, where the facts support a discriminatory motive and violation of Section 6(1)(c), the same facts also support a derivative or generic violation of Section 6(1)(a), PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978), and render a finding of an independent violation unnecessary. Auburn Borough, 27 PPER 27221 (Final Order, 1996); Springfield Township, 28 PPER ¶28164 (Final Order, 1997). Accordingly, on this record, because the City has been found to have violated Section 6(1)(c) the PLRA, and thus 6(1)(a) derivatively, the City's exception to the Hearing Examiner's finding of an additional independent violation of Section 6(1)(a) of the PLRA, is sustained.

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of Erie are hereby dismissed, and the April 9, 2008 Proposed Decision and Order, as amended herein, be and hereby is made absolute and final.

SIGNED, SEALED, DATED and MAILED this seventeenth day of June, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

L. DENNIS MARTIRE, CHAIRMAN

ANNE E. COVEY, MEMBER

JAMES M. DARBY, MEMBER

