

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CAPITAL CITY LODGE NO. 12, :
FRATERNAL ORDER OF POLICE :
v. : Case No. PF-C-07-82-E
CITY OF HARRISBURG :

AMENDED PROPOSED DECISION AND ORDER

On May 15, 2007, the Capital City Lodge No. 12, Fraternal Order of Police (Union) filed a charge of unfair labor practices (Charge) with the Pennsylvania Labor Relations Board (Board) alleging that the City of Harrisburg (City) independently violated Section 6(1)(a) & (c) of the Pennsylvania Labor Relations Act (PLRA) and Act 111. In its specification of charges, the Union alleges that the City intimidated and coerced employees and discriminated against Corporal Lydell Muldrow when it delayed Cpl. Muldrow's backpay and reinstatement to the rank of Corporal, pursuant to a grievance arbitration award, issued him a badge in poor condition and when it named Cpl. Muldrow as a suspect in the theft of a fellow police officer's sunglasses, as retaliation for exercising his statutory right to arbitrate his demotion and discipline.

On June 8, 2007, the Secretary of the Board issued a complaint and notice of hearing directing a July 31, 2007 hearing in Harrisburg, Pennsylvania. After two continuances at the request of the City and without objection from the Union, the hearing was held on October 19, 2007.¹ During the hearing, both parties in interest were afforded a full opportunity to present testimony and documentary evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The City is a public employer and political subdivision under Act 111 as read in pari materia with the PLRA. (N.T. 4).

2. The Union is a labor organization under Act 111 as read in pari materia with the PLRA. (N.T. 5).

3. By letter dated March 26, 1999, Chief Charles Kellar discharged Cpl. Muldrow for reasons that are not relevant to this case. Cpl. Muldrow grieved his discharge, which was processed through the grievance procedure and culminated in arbitration. On May 21, 2000, the grievance arbitrator issued an award reinstating Cpl. Muldrow with backpay for all but thirty days of his time off. Chief Kellar had actual knowledge of the arbitration and the award. (N.T. 14-15, 67-72; Union Exhibit 1).

4. As a result of an incident that occurred on October 24, 2003, Chief Kellar issued a 120-day disciplinary suspension to Cpl. Muldrow and demoted him from the rank of Corporal to the rank of patrol officer. The facts related to that incident are not relevant to this case. (N.T. 16-17, 69; Union Exhibit 2).

5. Patrol Officer Muldrow again grieved his discipline, which was processed through the grievance procedure and culminated in arbitration. On March 13, 2007, the arbitrator issued an award (Award) reinstating Officer Muldrow to the rank of Corporal and awarded backpay for the pay differential. Also the 120-day suspension was converted to a thirty-day suspension. (Union Exhibit 2).

¹ The City requested the second continuance request because it did not receive the notice of hearing setting the new hearing date as a result of the first continuance.

6. The Award was mailed to the attorneys for the parties on Friday, March 16, 2007. The attorney for the City received the Award on Monday, March 19, 2007. Chief Kellar was notified of the Award "a couple of days" after March 19, 2007, when the City's attorney raised the issue of appealing the award. Approximately one week later, on March 28th or 29th, 2007, the City's attorney informed the Chief that an appeal of the Award was not viable. Cpl. Muldrow was reinstated on Friday, March 30, 2007, eleven days after the City's attorney received the Award and approximately one or two days after the City's attorney determined that an appeal was not viable. (N.T. 27-29, 71, 84-85; City Exhibit 3).

7. Upon reinstatement to Corporal, Cpl. Muldrow was given a corporal's badge that was worn, dented and faded with a loose clasp; it was in poor condition generally. That badge was the only remaining unassigned corporal's badge in the City Police Department at the time. On April 5, 2007, Cpl. Muldrow complained about the condition of the badge to Captain Ritter, via "INTER-DEPARTMENTAL COMMUNICATION," who immediately made unsuccessful efforts to locate another badge in good condition.² On April 7, 2007, unable to locate another badge, Capt. Ritter brought a copy of the Inter-Departmental Communication to the Chief, who was previously unaware of the poor condition of the badge. On that same date, the Chief immediately ordered Cpl. Muldrow a new badge. (N.T. 20-21, 31-33, 89-90; City Exhibit 4).

8. On March 22, 2007, Officer Clark Godusky approached his shift supervisor, Lieutenant Brown, to complain that his sunglasses were stolen by fellow police officers from a police vehicle. At some point, an irate Officer Godusky was loud and using profanity with Lt. Brown. Lt. Brown directed Godusky to describe the incident in an Inter-Departmental Communication. Lt. Brown then informed Chief Kellar. On March 22, 2007, Officer Godusky completed and filed the Inter-Departmental Communication and therein implied that either Officer Deleon or then Officer Muldrow stole his sunglasses from a police vehicle that they used on March 21, 2007, following Officer Godusky's assignment to that vehicle for the three-to-eleven shift the night before on March 20, 2007. (N.T. 42-44, 72, 134-138, 145-146; City Exhibit 1).

9. Prior to the sunglasses incident, multiple other items were stolen from Officer Godusky on various occasions, such as his walking shoes, flashlight, water bottle and personal shackles. As a result of these prior experiences, Officer Godusky was very upset at the prospect that his sunglasses may have been stolen. Officer Godusky and Chief Kellar spoke on the telephone of the incident. During the phone conversation, Godusky was adamant that either Muldrow or Deleone stole his sunglasses, and Godusky wanted the Department to make every effort to find and return his glasses, including prosecution. An irate Officer Godusky yelled while talking to Chief Kellar. Officer Godusky interviewed Officer Deleone, but he did not talk to Cpl. Muldrow because Cpl. Muldrow has had confrontations with other officers within the Department. Officer Godusky and Cpl. Muldrow have had a strained relationship since Officer Godusky testified unfavorably at Cpl. Muldrow's suspension arbitration. It is not uncommon to list someone as a suspect in a crime report without first interviewing the suspect. (N.T. 42-44, 56, 72-73, 83, 94, 126-129, 139-141, 101, 142, 145-146, 156-157).

10. Following the Chief-Godusky phone conversation, Chief Kellar directed Lt. Brown to complete an initial crime report (ICR). On March 26, 2007, Brown completed the ICR. Completing an ICR is necessary anytime there is a citizen complaint of a crime or a police officer's reporting of a crime. Officer Godusky's complaint of the stolen sunglasses is the type of incident that could trigger an ICR. This is not the first time that a police officer reported a crime by and among police officers within the City Police Department that triggered an ICR. In 2000, Officer Hammaker reported that his work boots were stolen from the police locker room. An initial crime report was entered into the computer system as with the theft of the sunglasses. Chief Kellar also referred the theft of the sunglasses to internal affairs to investigate the stolen sunglasses internally. Subsequently, the internal investigation concluded that the allegations against Cpl. Muldrow were not sustainable. (N.T. 44-45, 57-58, 75, 77, 95-97, 102; Union Exhibit 3; City Exhibit 3).

² An "INTER-DEPARTMENTAL COMMUNICATION" is a written narrative on a form of the same name that documents complaints, interactions and other communications within the Department through the chain of command.

11. Generally, when a police officer is accused of a crime, the matter is reported through the chain of command with an Inter-Departmental Communication up to the Chief who may refer the matter to Internal Affairs. Officer Deleon and Cpl. Muldrow were accused of the crime of stealing Officer Godusky's sunglasses. The general procedure was followed. Historically, thefts within the Department without suspects have been handled differently based on solvability factors. Allegations of serious offenses are referred to outside agencies for investigations, such as the State Police or Dauphin County, to preserve independence. Chief Kellar did not refer the sunglasses incident to an outside agency because he wanted to protect the Police Department from embarrassment and it was not serious. An ICR is the beginning of a criminal investigation, but an actual criminal investigation was never done on the sunglasses caper. No detective was assigned to investigate. The Chief ordered the ICR because Godusky was pressing very hard, he was very upset, he had a suspect, and he was willing to prosecute. The Chief would initiate an ICR for any petty case with suspects and solvability factors. (N.T. 61, 79, 80-81, 95-96, 103-105, 156).

12. At the time Officer Godusky complained of his allegedly stolen sunglasses on or about March 22, 2007, Chief Kellar knew of the result of the March 13, 2007 arbitration award. (N.T. 72).

13. Sometime after the alleged theft of Officer Godusky's sunglasses, pretzel sandwiches belonging to Officer Waller and Cpl. Muldrow were also allegedly stolen. Officer Waller was ordered to complete an ICR by her lieutenant. The pretzel sandwich matter was not criminally investigated or referred to Internal Affairs at any time. One day after Officer Waller entered the ICR into the Department computer system for the pretzel sandwich theft, it was removed by someone other than Officer Waller. (N.T. 7-11, 24-25).

14. When Chief Kellar learned that ICR's were being generated for pretzel sandwiches, he ordered the ICRs for the pretzel sandwiches and the sunglasses removed from the Department's computer system because they were increasing his crime statistics, and he did not want ICRs generated for every accusation of theft within the Police Department. (N.T. 81-82, 99, 103-104).

15. Once the Chief ordered reinstatement of Cpl. Muldrow, the City's Human Resources Department received a copy of the March 13, 2007 grievance award and was ordered by the Chief to reinstate Officer Muldrow to the rank of Corporal. Human Resources then sent the backpay calculation to the payroll department, which issued the backpay check. (N.T. 85-86).

16. Chief Kellar was not in sole control over the payment of Cpl. Muldrow's backpay. The "Payroll Action Form," authorizing Cpl. Muldrow's backpay, required the signatures and approval of the Chief, the Department of Administration representative, the Budget Office representative and the Mayor. Sometime after Cpl. Muldrow's reinstatement on March 30, 2007, Chief Kellar was made aware that Cpl. Muldrow had not received his backpay. In response to this news, Chief Kellar again demanded that the City immediately pay Cpl. Muldrow's backpay. Prior to this notification, Chief Kellar was unaware that Cpl. Muldrow had not received his backpay. As a result, Cpl. Muldrow received his backpay sometime during the week of May 20, 2007. (N.T. 25-26, 87; City Exhibit 5).

17. Beginning in late 2006, the City experienced financial deficits. Consequently, the City laid off police officers and, in 2007, the City had one of the lowest complements of officers in recent City history. The City was not paying its vendors and other creditors. Given the City's financial woes, the Chief was not surprised that Cpl. Muldrow had not been paid quickly, yet he personally made sure that Cpl. Muldrow received his backpay. The Chief did not at any time withhold or interfere with Cpl. Muldrow's backpay. (N.T. 42-43, 64-66, 87-88).

18. Cpl. Muldrow complained to the Union Grievance Chairperson about the delay in his reinstatement at least ten times during the between March 19, 2007 when the Award was received by the parties and the March 30, 2007 reinstatement of Cpl. Muldrow. (N.T. 29, 71-72, 84, 107-108).

DISCUSSION

In its charge of unfair labor practices, the Union alleges that the City intimidated and coerced bargaining unit members when it delayed Cpl. Muldrow's backpay and his reinstatement to the rank of Corporal, as ordered by the Award, by issuing him a worn and tarnished Corporal badge and by initiating a criminal investigation that implied that Cpl. Muldrow and Officer Deleon were suspects in the theft of another police officer's sunglasses. The Union claims that the City's actions constituted retaliation for engaging in the protected activity of grieving and arbitrating two disciplines imposed by the Chief, both of which provided favorable results for Cpl. Muldrow, i.e., reinstatement to his former position with backpay.

As an initial matter, the Charge is untimely with respect to the March 30, 2007, reinstatement of Cpl. Muldrow. The record shows that Cpl. Muldrow complained to the Union Grievance Chairperson about the delay in his reinstatement at least ten times between March 19, 2007, when the Award was received by the parties, and the March 30, 2007 reinstatement of Cpl. Muldrow. The record also demonstrates that the Union's Grievance Chairperson met with Chief Kellar three times during that same period. Accordingly, the Union and Cpl. Muldrow had actual knowledge of the complained of delay prior to March 30, 2007. The Charge was filed on May 15, 2007. Using the latest date of March 30, 2007, the charge was filed more than six weeks beyond the known reinstatement of Corporal Muldrow. Section 9(e) of the PLRA expressly provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than six weeks prior to the filing of the petition or charge." 43 P.S. § 211.9(e).

Also, the date that Lt. Brown entered the ICR into the Department's computer system was March 26, 2007. May 15, 2007, is more than six weeks beyond the date that the ICR was generated and input into the computer system. Moreover, the record does not contain other evidence indicating when Cpl. Muldrow or the Union received notice of the ICR to support the timeliness of the Charge. The Union Grievance Chairperson testified that he learned of the criminal investigation from the joking among other police officers.³ However, the examiner will consider Cpl. Muldrow's reinstatement and the ICR as secondary, alternative support for the conclusions reached herein.

Independent 6(1)(a)

In its post-hearing brief, the Union specifically argues that the City independently violated Section 6(1)(a) of the PLRA when it "initiated a criminal investigation in this matter through an initial crime report that implicated Muldrow after receiving the arbitration award" in which the Chief was disappointed. (Union Brief at 7). The Union contends that, rather than simply report the theft of Godusky's sunglasses to internal affairs, the Chief, disappointed by the Award reinstating Officer Muldrow to Corporal, delayed Officer Muldrow's reinstatement, issued Cpl. Muldrow a worn badge and maliciously placed Cpl. Muldrow's name in the Department's computer system, which was accessible by virtually the entire Department resulting in ridicule of Cpl. Muldrow. (Union Brief at 5-6). The Union further maintains that the message sent by the City to other employees "is that there is a price to be paid for prevailing in a grievance arbitration, and that the City will use anything, even something completely ridiculous, to exact that price." (Union Brief at 6).

Section 6(1)(a) provides that it shall be an unfair labor practice for an employer "[t]o interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act." 43 P.S. § 211. 6(1)(a). In Upper Gwynedd Township Police Ass'n v. Upper Gwynedd Township, 33 PPER ¶ 33133 (Final Order, 2002), the Board stated the following:

The Board will find an independent violation of this provision if the actions of the employer, in light of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employes have been shown, in fact, to have been coerced. The standard for

³ The examiner will use the April 5, 2007 date that Cpl. Muldrow initially complained about his corporal's badge for purposes of timeliness and jurisdiction, however, it is unclear whether Cpl. Muldrow knew and complained to the Union about the condition of the badge sometime between his reinstatement on March 30, 2007 and April 5, 2007. Notice prior to April 5, 2007, would make the Charge untimely with respect to the badge complaint.

determining the existence of a Section 6(1)(a) violation does not require proof of anti-union motivation and even an inadvertent act by an employer may interfere with, restrain or coerce employees in the exercise of protected rights.

Upper Gwynedd, 33 PPER at 306. (citations omitted). The Board has also stated that "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 employee's choice in assisting, or seeking assistance from, the union or pursuing some other statutorily-protected activity." E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police v. City of Scranton, 38 PPER 104 (Final Order, 2007)(citing Wattsburg Educ. Ass'n v. Wattsburg Area Sch. Dist., 35 PPER 54 (Final Order, 2004) and AFSCME, Local 394 v. City of Philadelphia, 24 PPER ¶ 24112 (Final Order, 1993)(holding that the same standard applies under the Public Employee Relations Act)). The test is an objective one and does not involve a determination of the employer's motives. Transportation Workers' Union of Philadelphia, Local 234 v. SEPTA, 17 PPER ¶ 17038 (Final Order, 1986). As aptly noted in Brentwood Police Ass'n v. Brentwood Borough, 32 PPER ¶ 32113 (Proposed Decision and Order, 2001), "the test here is whether a reasonable employe would be intimidated by the employer's actions, regardless of the employer's real motive since a Section 6(1)(a) violation is a strict liability offense and a bad motive is unnecessary." Id. at 294.

The record supports the conclusion that a reasonable police officer in the bargaining unit would not tend to be intimidated or coerced by the City's reinstating Cpl. Muldrow to the rank of Corporal on March 30; by initially providing him with a badge in poor condition; by issuing a check for his backpay during the week of May 20, 2007; and by generating an initial crime report for the alleged theft of the sunglasses without talking to Cpl. Muldrow, soon after the Award. The bargaining unit members are police officers. A reasonable police officer would recognize the complained of events for what they are, i.e., a series of random events that were immediately addressed and rectified by the Chief and others to accommodate the requests and needs of Cpl. Muldrow and fellow officers. Indeed, the record shows that Chief Kellar executed his statutory and contractual obligations to Cpl. Muldrow with deliberate dispatch and not animus or intimidation.

Chief Kellar reinstated Muldrow to the rank of Corporal only eleven days after his attorney received the Award ordering the reinstatement and backpay. There is a thirty-day appeal period for appealing Act 111 grievance arbitration awards. The Chief's attorney in the arbitration case wanted to evaluate and assess the viability of a successful appeal given the unfavorable outcome of the Award. Chief Kellar received actual notice of the Award on or about March 22, 2007. The City's attorney informed the Chief that he will get back to him after evaluating the viability of an appeal. One week later, on or about March 29, 2007, the City's attorney informed the Chief of his opinion that an appeal of the Award would not likely be successful and advised against it. Chief Kellar reinstated Cpl. Muldrow the next day. The immediate reinstatement to Corporal was within Chief Kellar's control, which he exercised by immediately reinstating Muldrow within one day of the decision not to appeal the award. Certainly, it was obvious to any reasonable police bargaining unit member that the City was not intimidating or coercing employees in the exercise of their protected rights by considering whether to appeal an unfavorable award for one week. The City was entitled to take as long as thirty days to consider the viability of that appeal. Indeed, the Board will not enforce an arbitration award in an unfair labor practice charge case for failure to comply with such an award until the appeal period has expired. East Hempfield Township Police Ass'n v. East Hempfield Township, 38 PPER 138 (Final Order, 2007). Muldrow was reinstated immediately upon the determination that no appeal would be taken.

Also, a reasonable City police officer would also conclude that the Chief and other City officials did not intimidate or coerce bargaining unit members given the circumstances surrounding Cpl. Muldrow's backpay. Cpl. Muldrow testified that he received his backpay during the week prior to Memorial Day Weekend, 2007, which was five weeks after the appeal period expired. The police employees in the bargaining unit had first-hand knowledge of the City's financial problems because City police officers were laid off and City vendors and creditors were not being paid. Also, the backpay was not in the sole control of the Chief or the Police Department, as was the reinstatement. Indeed, Cpl. Muldrow's backpay required

the approval and signatures of the Mayor, a representative from the City Administrator's Office, the City's Budget Office and the Chief of Police after the matter was cleared and approved by Human Resources and the City's Payroll Department. There is no evidence that the Chief had control over obtaining Cpl. Muldrow's backpay any sooner. Moreover, the Chief was without knowledge of the delays for some time. When Chief Kellar was informed of delays in Cpl. Muldrow's backpay, he immediately pressed the matter.

The City did not violate Section (6)(1)(a) by initially providing Cpl. Muldrow a Corporal's badge that was in poor condition. This badge was the only unassigned Corporal badge in the Department at the time of Cpl. Muldrow's reinstatement. Moreover, immediately upon Cpl. Muldrow's complaints about the condition of the badge, Captain Ritter made efforts to locate another badge. When Captain Ritter brought the matter of the badge to the attention of Chief Kellar on April 7, 2007, before which the Chief was unaware of the badge complaints, the Chief immediately ordered Muldrow a new badge that day. Under the totality of the circumstances, a reasonable police officer in the bargaining unit would conclude that Police Department administrators, such as the Chief and Captain Ritter, made every possible effort to immediately remedy the badge situation for Cpl. Muldrow in a timely manner. Therefore, a reasonable police officer in the unit would not be intimidated or coerced.

The Union further claims that the Chief ordered Lt. Brown "to commence a criminal investigation with Muldrow as the suspect and enter it into the computer," immediately following the Award, in violation of 6(1)(a). (Union's Brief at 5). The Union argues that "[t]he message that was sent to other employees here is that there is a price to be paid for prevailing in a grievance arbitration, and that the City will use anything, even something completely ridiculous, to exact that price." (Union Brief at 6).

However, given and despite the numerous thefts among police officers within the Police Department, a reasonable police officer, who makes a career of enforcing the laws of the Commonwealth, would expect and favor a full investigation into the alleged stolen property of a fellow police officer, with the full resources of the Police Department. A reasonable police officer would not only appreciate, but also expect that if a theft was alleged among the police officers, that a criminal investigation would ensue. Indeed, Chief Kellar testified that he believed that he had no choice in the matter of initiating a crime report given that Officer Godusky wanted to have an investigation actively pursued, after having had other personal items allegedly stolen, and that there were solvability factors and potential suspects. Moreover, the record shows that Godusky and Muldrow disliked each other because Godusky testified against Muldrow in the arbitration over his suspension and demotion. A reasonable officer in the bargaining unit would realize that this entire incident involving the accusations, crime reports, referrals to internal affairs and the lack of interviewing Muldrow about the incident before any official action had been taken resulted from personal animosity between Godusky and Muldrow. The Chief was only trying to satisfy Godusky's requests and investigate the irate accusations of one police officer regarding the alleged criminal conduct of another police officer.

Moreover, Cpl. Muldrow's employment history is scarred with disciplines for misconduct. Cpl. Muldrow is also known for having confrontations with fellow officers within the Department. A reasonable police officer in the unit, therefore, would conclude that Cpl. Muldrow may have engaged in conduct that yet again invited trouble upon himself. Also, as the Union emphasizes in its brief, Cpl. Muldrow's and Officer Deleon's names on the ICR "was the source of joking and mockery," (Union Brief at 6). The lightheartedness shows that the officers in the unit were not feeling very coerced or threatened in the exercise of their rights as a result of the post-Award ICR regarding the sunglasses. Accordingly, when viewed within the totality of the circumstances, a reasonable police officer in the bargaining unit would not be negatively influenced in exercising his/her choice in assisting, or seeking assistance from, the union or pursuing some other statutorily-protected activity where Cpl. Muldrow found himself in trouble, yet again, albeit soon after an arbitrator reinstated him to Corporal and reduced his suspension. A reasonable police officer in the bargaining unit would not tend to be intimidated or coerced by the City's reinstating Cpl. Muldrow to the rank of Corporal on March 30, initially providing him with a badge in poor condition, issuing a check for his backpay during the week of May 20, 2007, or generating an ICR for the theft of the sunglasses.

Discrimination

In its post-hearing brief, the Union argues that the City discriminated against Cpl. Muldrow and violated "Act 111 and Sections 6(1)(c) and (d) of the PLRA" by having the suspicion of Cpl. Muldrow's alleged involvement in the alleged theft of the sunglasses investigated as a crime instead of privately referring it to internal affairs and interviewing Cpl. Muldrow.⁴

In a discrimination claim under Section 6(1)(c) of the PLRA, the claimant has the burden of proving that the employe engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employe that was motivated by the employe's engaging in known protected activity. FOP, Lodge 5 v. City of Philadelphia, 38 PPER 184 (Final Order, 2007); Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Also, the Board will not infer an unlawful motive solely from the timing of events. City of Philadelphia, supra; Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employees Union v. City of York, 29 PPER ¶ 29235 (Final order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra. Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). A pre-eminent factor in sustaining a charge of discrimination is a determination that the employe in question was the victim of disparate treatment by the employer. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). Only if the union establishes a prima facie case that an employer's adverse action against an employe was motivated by the employe's protected activity does the burden shift to the employer to prove that the action complained of would have been taken even in the absence of protected activity. West Shore Educ. Ass'n v. West Shore Sch. Dist., 23 PPER ¶ 23031 (Final Order, 1992); Teamsters Local Union No. 32 v. Washington Township Mun. Auth., 20 PPER ¶ 20128 (Final Order, 1989).

The Union did not establish a prima facie case of discrimination. The City concedes and there is no dispute that the City had actual knowledge that Cpl. Muldrow engaged in the protected activity of grieving and arbitrating his grievance to a favorable conclusion and that the City received the Award. However, the Union did not establish that the actions complained of in this case were unlawfully motivated by union animus. The only evidence of unlawful motive presented by the Union is timing, and the Board has repeatedly held that timing alone is insufficient to carry a claimant's burden in a discrimination case. City of Philadelphia, supra.

The Union relies on the testimony of Detective Lau who testified that he has not seen an officer listed as a suspect in a crime report for something so minor. (Union Brief at 9). However, Detective Lau's personal observations are obviously limited and contradict the record, which shows that there is precedent for filing ICRs for petty crimes by and between police officers within the Police Department. City Exhibit Two is a computer printout of an initial crime report for the initiation of a criminal investigation within the police Department for the theft of Officer Hammaker's work boots from within the Department in 2000. Soon after the ICR involving Officer Godusky's sunglasses, an ICR was also generated for the theft of Officer Waller's pretzel sandwiches. The record establishes, therefore, that the Department, which is the business of investigating crimes does initiate crime reports for "minor" thefts among and between police officers. Also, Godusky credibly testified that all of his prior thefts were handled differently, indicating that there is not an established protocol for investigating police-on-police thefts within the Police Department. Therefore, the record lacks substantial evidence to support a finding that the issuance of the ICR in this case constitutes disparate treatment of Cpl. Muldrow.

⁴ The Union did not charge a violation of Section 6(1)(d). Accordingly, that cause of action is not under consideration here. Also, as previously concluded herein, the criminal investigation as a basis for the discrimination charge or the independent 6(1)(a) charge is untimely.

The Union's post-hearing brief limits its discrimination claim to the crime report incident. The brief excludes previous claims that the City unlawfully delayed Cpl. Muldrow's backpay and his reinstatement to the rank of Corporal, as ordered by the Award, and issued him a worn Corporal badge. However, the Union combined these claims in both causes of action in its charge. Therefore, those claims will be considered here as bases for the Union's discrimination claim, secondary to the legal conclusion that Cpl. Muldrow's reinstatement and criminal investigation claims are untimely.

The examiner concludes, however, that the Union has not established unlawful motive regarding any of its claims. As previously concluded, the City reinstated and paid Cpl. Muldrow as soon and practicable under the circumstances. The worn Corporal's badge was the only unassigned Corporal's badge in the Department that could be issued to Cpl. Muldrow at the time. The undisputed evidence of record clearly establishes that Chief Kellar immediately ordered a replacement once he was informed of the incident. There is no evidence showing an unlawful state of mind on the part of the Chief or anyone else, and no negative inferences can be drawn from the background of the case. Rather than discriminate against Cpl. Muldrow for his activity or coerce him and others in exercising their protected rights, this record shows that Chief Kellar made an extensive effort to fulfill his obligations to Cpl. Muldrow while responding to the feuding and thieving officers on the City's Police Force. Accordingly, although the burden never shifted to the City to explain that it would have taken the complained of actions in the absence of protected activity, because the Union did not establish a prima facie case of discrimination, if the burden had shifted to the City, this examiner would conclude that the City met its burden that it possessed a legitimate business reason for each and every action complained of by the Union and Cpl. Muldrow.

The Union also contends that the City's claimed retaliation against Cpl. Muldrow on the heels of receiving a grievance arbitration award favoring Cpl. Muldrow is "inherently destructive" of important employe rights. Proof of unlawful motive is unnecessary to establish a discrimination claim where the employer's actions are "inherently destructive." Chester County Deputy Sheriffs Ass'n v. Chester County, 27 PPER ¶ 27077 (Proposed Decision and Order, 1996), aff'd, 28 PPER 28045 (Final Order, 1997). In Chester County, the examiner aptly noted that "[i]nherently destructive conduct by employers is conduct that creates `visible and continuing obstacles to the future exercise of employe rights.'" Chester County, 27 PPER at 171 (quoting Portland Willamette Company v. NLRB, 534 F.2d 1331, 1334 (9th Cir. 1976)). Also, "[w]hether or not an employer's specific actions are inherently destructive is a factual determination made on a case-by-case basis." Id. (citation omitted). As already determined herein, the record belies the characterization that the actions complained of in any way constitute "visible and continuing obstacles to the future exercise of employe rights," either to Cpl. Muldrow or the bargaining unit police officers, which is a necessary condition precedent to a determination that an employer's actions were "inherently destructive."

CONCLUSIONS

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

1. The City is a public employer and a political subdivision within the meaning of Act 111 as read in pari materia with the PLRA.
2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The City of Harrisburg has not committed unfair labor practices within the meaning of Section 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 thirteenth day of March, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner