

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TAMAQUA BOROUGH POLICE DEPARTMENT :  
 :  
 v. : Case No. PF-C-08-37-E  
 :  
 TAMAQUA BOROUGH :

**PROPOSED DECISION AND ORDER**

On March 20, 2008 the Tamaqua Borough Police Department (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Tamaqua Borough (Borough) violated Section 6(1)(a),(c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111.

On April 10, 2008, the Secretary of the Board issued a complaint and notice of hearing setting a hearing for June 9, 2008 in Harrisburg. By joint request of the parties, the hearing was continued for settlement discussions. When settlement did not occur, the hearing was rescheduled to August 19, 2008, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

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

1. That the parties stipulated and agreed that the Tamaqua Borough Police Department is a labor organization within the meaning of the PLRA. (N.T. 6)

2. That the parties stipulated and agreed that Tamaqua Borough is an employer within the meaning of the PLRA. (N.T. 6)

3. That the parties stipulated and agreed that the Union and the Borough are parties to a collective bargaining agreement for the period of January 1, 2004 to December 31, 2006 and an interest arbitration award for the term January 1, 2007 to December 31, 2009. (N.T. 7, Joint Exhibits 1 and 2)

4. That at the time of the hearing, the Borough's police force had six (6) full-time police officers, including the Chief of Police. The police bargaining unit consists of all full-time officers, excluding the Chief of Police and part-time officers. (N.T. 9, 11)

5. When Mayor Chris Morrison took office in 2006, Charles Hartung was the Chief of Police. The work schedule (also referred to as the "old schedule") that had been in place since 2001 or 2002 was as follows:

Days on	Days off	Days on	Days off
7	2	8	4

or

Days on	Days off	Days on	Days off
7	4	8	4

(N.T. 10, 40, Respondent Exhibit 1)

6. That this schedule provided for a four-day weekend off every third week. Also, all employees rotated dayshift, middle shift, and the nightshift. (N.T. 12, 27, Respondent Exhibit 1)

7. That the old schedule of a four day weekend every three weeks permitted officers additional time to decompress from the stress of police work. It also benefited the officers by allowing them time to schedule family events. (N.T. 27)

8. That Mr. Hartung retired in February 2006 and the Borough hired Dave Mattson as its Chief of Police in May 2006. (N.T. 145)
9. The above schedule remained in place until March 9, 2008. (N.T. 40)
10. That on February 5, 2008, Officer Henry B. Woods, the union's main liaison with the Borough, attended Borough Council's regular meeting. He was joined with other officers. They discussed management issues the officers were having with Chief Mattson. At the meeting, the entire Borough Council was present, as was Chief Mattson and Mayor Morrison. (N.T. 13-18)
11. That rather than hearing the officers' issues in open session, Borough Council met with the officers in an executive session. At the end of the executive session, Borough Council referred the officers to its police committee. (N.T. 18)
12. That during the February 5, 2008 meeting, Mayor Morrison was furious that the officers did not bring their issues to his attention first. (N.T. 16)
13. That sometime shortly after the after the February 5, meeting Mayor Morrison expressed his frustration at the situation and let Chief Morrison and Borough Council President Micah Gursky know that if he had to he would get rid of the entire police department. (N.T. 89-90, 94)
14. That neither the union nor Morrison raised any issues regarding the police schedule during the February 5, 2008 meeting. (N.T. 17-180)
15. The Council's police committee met on February 13, 2008. According to Woods, Chief Mattson met with the officers before the police committee meeting in an attempt to work out certain issues. Mayor Morrison was present during this meeting and stated that he would speak with Chief Mattson "about changing some of the things that were being done." (N.T. 19)
16. That the issue of scheduling did not come up during the February 13, 2008 meeting. (N.T. 19, 20)
17. That on February 19, 2008, without warning and without stating a reason, Morrison posted a new work schedule, effective March 9, 2008. (N.T. 20)
18. The new schedule eliminated the union members' four day weekends off and eliminated the possibility of Officers Woods and Whitehead having a Friday or Saturday off. (N.T. 20, 23, Complainant's Exhibit 1)
19. That Mayor Morrison testified that his reason for the new schedule was to be fair to senior officers by giving them preferred day shifts, to avoid putting a probationary employe on a shift with a part-time employe and to achieve better supervision. (N.T. 109-113)
20. That the part-time officers are not without experience. For example, Officer Stanell worked ten years as a police officer in an another department. Officer Harig is a part-time office. He has ten years' experience with the Pennsylvania State Police. (N.T. 56-57, 135)
21. That some of the probationary officers had experience in other departments. For instance, Officer Rodgers was a probationary employe with this Borough, but he had three years experience as a part-time office with this department. (N.T. 56-57)
22. That despite the Mayor's contention that the new schedule would achieve better supervision on the weekend shifts, Corporal Weaver and Corporal Hacker were now off every Friday night. (N.T. 35, Complainant's Exhibit 1)
23. That Mayor Morrison insisted that any part-timer, including someone like Officer Harig, should not be a supervisor on a shift. (N.T. 135-136)
24. After Mayor Morrison posted the new schedule, the union met with Morrison and voiced its disapproval. At no time prior to this meeting, or during this meeting, did Mayor Morrison provide reasons for changing the schedule. (N.T. 26-27)
25. That the union filed the present unfair labor practice on March 20, 2008.

26. On or about June 6, 2008, Chief Mattson reinstated the old schedule over the protest of Mayor Morrison. (N.T. 33, 124)

27. On June 6, 2008, Mayor Morrison suspended Chief Mattson for ten days for failing to follow the new schedule. (N.T. 42)

28. During a Borough Council meeting following Mattson's suspension, Morrison turned and looked at every one of the officers present at the meeting and gave a direct order to follow the new schedule he had posted. He also went on to state that "anyone who doesn't follow those orders will be charged with insubordination, even if it means suspending you all, one by one." (N.T. 45-46)

29. Mayor Morrison admitted in the hearing that he told Corporal Weaver that he would be suspended if he did not follow orders for changing the schedule. (N.T. 124)

#### DISCUSSION

The Union's charge of unfair labor practices alleges that the Borough violated the Pennsylvania Labor Relations Act and Act 111 when the mayor unilaterally changed the police department's work schedule.

A public employer commits an unfair labor practice in violation of the PLRA and Act 111 when it unilaterally changes shift schedules for police officers. Township of Upper Saucon v. Pennsylvania Labor Relations Board, 620 A.2d 71 (Pa. Cmwlth. 1993); Indiana Borough v. Pennsylvania Labor Relations Board, 695 A.2d 470 (Pa. Cmwlth. 1997)

Since 2001 or 2002, the Department worked under a schedule that provided union members with a four day weekend every third week. In addition, the union members rotated equally between the day, middle and night shifts. The old schedule provided the obvious benefit to officers of longer periods of time for personal and family reasons. The four-day weekend also provided time for the officer to decompress.

The Borough raises several defenses to the charge. The first defense is that the Borough Code gives the scheduling authority exclusively to the mayor. The Borough Code provides that "the mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which the chief of police and police force shall perform their duties, except that council shall fix and determine the total weekly hours of employment that shall apply to the policemen." 53 P.S. § 46121. The Borough also attached to its brief a decision of the Court of Common Pleas of Schuylkill County on December 27, 2007 finding that the Mayor had scheduling prerogatives that had preference over the collectively bargained schedules.

The Borough Code does not give the Mayor scheduling prerogatives which have preference over the duty to bargain schedule changes for the entire unit. In Indiana Borough, supra the Commonwealth Court, noting that Upper Saucon established that shift schedules were a mandatory subject of bargaining, went on to say that "broad language in a management rights clause would not support a union waiver of the issue" and "broad statements in the Borough Code...regarding the general powers of the mayor and chief of police" would not affect the duty to bargain. Indiana Borough, at 475.

The Borough argues that this case is different from Upper Saucon in that the Borough has demonstrated that the Mayor's change in the scheduling furthers a managerial policy that substantially outweighed any impact the issue will have on employees, and is therefore managerial prerogative. Although Act 111 does not expressly provide for the reservation of management rights, the Commonwealth Court has recognized that Act 111 does not remove all police regulation from the scope of a municipality's managerial decision-making process; any regulation which might be considered essential for the proper and efficient functioning of a police force may remain subject to municipal management. International Ass'n of Fire Fighters v. City of Scranton, 429 A.2d 779 (Pa. Cmwlth. 1981). For an issue to be deemed a managerial prerogative and, thus, not a mandatory subject of bargaining, "a managerial policy concern must substantially outweigh any impact an issue will have on the employees." Upper Saucon, supra at 74.

The Borough contends that the managerial policy concern of the Borough was better police coverage, specifically by putting a "senior officer" on every shift. The Mayor defined senior officer as one of the six full time officers. Under the old schedule, there were a number of times in which one of these full-time senior officers was not on a shift. Instead a part-time officer would be on the shift with a probationary officer. The Mayor then went on to contend that on some shifts there were questions as to who was "in charge" because a senior officer with supervisory status, a corporal, was not working. The Borough contends that as opposed to these managerial policy concerns, the impact of the new schedule on the employees was minimal. The shifts remained the same length, eight hours. Officers continued to work five shifts in a week. The employees simply had to adjust to a schedule of the same two days off each week.

The Borough's argument that it was advancing valid managerial policy concerns is not persuasive. The Borough did not present convincing evidence that the new schedule added experienced officers when they were supposedly most needed. The term "senior officers" lacks meaning in regard to experience. Some of the part-time officers had years of experience at this municipality and others. The Mayor's new schedule did not necessarily improve supervision; on the busy weekend shifts, corporals with supervisory status were not assigned to Friday night shifts.

On the other side of the balance scale, the new schedule's impact on the employees is significant. The Union's testimony revealed that the new schedule eliminated the four day weekend every three weeks, which allowed the officers additional time for personal and family reasons and to decompress from the stress of police work. Even if the above stated managerial policy concerns are accepted as true and were achieved by the new schedule, the Borough's managerial policy concerns do not significantly outweigh the new schedule's impact on the employees.

Since the police schedule that was unilaterally changed is a mandatory subject of bargaining, the Borough will be found to have violated Section 6(1)(e) of the PLRA and be ordered to offer to bargain over this subject.

There is the additional issue of whether the refusal to bargain charge should be dismissed as moot, since the chief reinstated the old schedule after the charge was filed. However, because of the particular facts of the case, the merits of the refusal to bargain charge should be addressed. The Mayor's threat to fire the chief for not following the new schedule and his eventual ten day suspension of the chief indicates that there is likelihood of a schedule change being repeated. These facts fall within the exception to the mootness doctrine as expressed in Jersey Shore Area School District v. Jersey Shore Educ. Ass'n, 519 Pa. 398, 548 A.2d 1202 (1988). (The merits of an appeal should be heard if the issue it raises is one of important public interest, capable of repetition, which is apt to elude review.)

The Union also contends that Morrison's posting of the new work schedule also violated Section 6(1)(c) of the PLRA, which prohibits employers from discriminating against employees to encourage or discourage membership in any labor organization.

In a discrimination claim under Section 6(1)(c) of the PLRA, the claimant has the burden of proving that the employee engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employee that was motivated by the employee's engaging in that known protected activity. Camp Hill Borough v. Pennsylvania Labor Relations Board, 507 A.2d 1297 (Pa. Cmwlth. 1986); City of Reading v. Pennsylvania Labor Relations Board, 568 A. 2d. 715 (Pa. Cmwlth. 1989). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). 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). City of Reading, supra.

In this case, the Union has met its burden of proving that the employees engaged in protected activity and that the employer had knowledge of the protected activity. In an open meeting of Borough Council, Officer Woods and other members of the bargaining unit addressed Borough Council regarding issues they were having with Chief Mattson. The meetings continued into executive session.

The issue is whether the Mayor's later action of changing the schedule was motivated by the union's appearance at the council. The Borough argues that there is no evidence of anti-union motivation. The Borough argues that the Mayor's action was taken as a sincere effort to better manage the police department for the public's benefit.

Recognizing that an employer will rarely admit to anti-union animus, the Board will give weight to several factors upon which an inference of unlawful motive may be drawn. In PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board declared that such factors as the entire background of the case, including any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employee, the effect of the employer's adverse action on other employees and protected activities, and whether the action complained of was "inherently destructive" of important employee rights could be grounds to infer animus. Centre County, 9 PPER at 380. Also, the close timing of an employer's adverse action, when combined with other factors, can give rise to the inference of anti-union animus. PLRB v. Berks County, 13 PPER ¶ 13277 (Final Order 1982); 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).

In the present case, the union has presented facts from which it may be inferred that anti-union animus motivated the Mayor's decision to change the police department's schedule. First there is the close timing between the exercise of protected activity and the Mayor's order changing the schedule. Just six days after the final meeting regarding the union's issues with the Chief of Police, Mayor Morrison posted the new work schedule that eliminated the possibility of every bargaining unit member having regularly scheduled four-day weekends off. The new schedule came as a surprise to the union since the issue of scheduling had not been raised before as a problem to the Borough.

Second, there is the factor that the failure to adequately explain the reason for the change. The Mayor contended that the change was to provide better police protection. This was rebutted by the chief, who is not a bargaining unit member and therefore may be presumed to be free of biased testimony. He testified that the protection would not be improved and that the schedule change was retaliation for the members raising complaints. The Borough Council president also testified that new schedule did not cure any deficiencies in the department. Also, as discussed above, it is unclear what appreciable differences in police performance would result from the schedule change. It is unclear that the term "senior officer" has any correlation to any meaningful measure of providing better police coverage. Some weekend nights had no corporals on duty to provide supervision.

Finally, the testimony of Woods, Mattson, Gursky and Morrison provides compelling evidence as to Morrison's state of mind and propensity toward anti-union animus. Woods testified that Morrison was furious about the union approaching Borough Council about the Chief of Police. In a public discussion about the schedule, after Chief Mattson was suspended for not following the new schedule, Morrison gave a direct order to follow the new schedule. Morrison looked at every one of the officers who was present and stated, "[A]nyone who doesn't follow those orders will be charged with insubordination. Even if that means suspending you all, one by one." Mattson testified that Morrison "fully expressed frustration of what was going on in the executive session," and sometime after the February 5, 2008 meeting, Morrison "expressed that he was upset and if he had to, he would fire the whole department." Micah Gursky, Borough Council President, corroborated Chief Mattson's testimony. Mayor Morrison admitted in the hearing that he told Corporal Weaver that he would be suspended if he did not follow orders for changing the schedule. All of this evidence of Morrison's conduct reflects the state of mind of an official who was motivated by anti-union animus.

In light of these factors, it is clear that an inference can be drawn from the facts of record that the posting of the new schedule was in retaliation for the union's actions, was directly motivated by the employees' exercise of protected activity and was, therefore, motivated by anti-union animus. The complainant has satisfactorily proven all three elements of the Section 6(1)(c) charge.

This retaliatory conduct also constitutes a violation of Section 6(1)(a) of the PLRA. Camp Hill Borough, supra; Borough of Geistown, supra.

Order

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

1. That Tamaqua Borough is an employer within the meaning of the PLRA and Act 111.
2. That the Tamaqua Borough Police Department is a labor organization within the meaning of the PLRA and Act 111.
3. That the Board has jurisdiction over the parties hereto.
4. That the Borough has committed unfair labor practices in violation of Sections 6(1)(a),(c) and (e) of the PLRA and Act 111.

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 Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.
2. Cease and desist from discriminating against employes to encourage or discourage membership in any labor organization;
3. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in an appropriate unit, including but not limited to discussing of grievances with the exclusive representative.
4. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the Act:
  - (a) Rescind the March, 2008 police department schedule change and restore the prior schedule;
  - (b) Offer to bargain with the Tamaqua Borough Police Department over any changes to the schedule;
  - (c) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
  - (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance.

It is Hereby Further Ordered and Directed

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventh day of April, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

\_\_\_\_\_  
THOMAS P. LEONARD, Hearing Examiner