

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DERRY TOWNSHIP POLICE ASSOCIATION :
:
v. : Case No. PF-C-08-86-E
:
DERRY TOWNSHIP :

PROPOSED DECISION AND ORDER

On July 15, 2008, the Derry Township Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Derry Township (Township) violated sections 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by imposing an action plan on Officer Gregory A. Mowery because "[i]n the Spring of 2008" he "engaged in a protected activity by requesting the assistance of the Association in dealing with a personnel matter, which had arisen with respect to his employment." On August 1, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on September 12, 2008. The hearing examiner subsequently continued the hearing twice, once upon the request of the Township and without objection by the Association and once upon the request of both parties. On January 7, 2009, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On March 5, 2009, the Association timely filed a brief by hand-delivery. On March 6, 2009, the Township timely filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. Since 1992, the Township has compiled statistics on the performance of each of its patrol officers in eleven categories, including criminal and non-criminal calls, to assess their productivity. If the Township deems their productivity to be deficient based on their statistics, it counsels them as to how they might improve their performance. (N.T. 46, 90-92, 94, 113-115)

2. On March 30, 1993, the Board certified the Association as the exclusive representative of a bargaining unit that includes patrol officers, corporals, sergeants and detectives employed by the Township. (Case No. PF-R-93-47-E)

3. Since October 7, 2005, the patrol officers have been subject to general order 35.1.6, which provides as follows:

"A. Employees must be advised in writing when their performance is deemed to be unsatisfactory.

B. Such written notification is to be delivered to the employee at least 90 days prior to the end of the designated annual rating period, or at any time the employee's supervisor determines the employee's job performance is unsatisfactory in a given evaluation criteria.

C. Supervisors must be able to substantiate deficiencies and provide the employee with an action plan to improve their performance."

(N.T. 112; Township Exhibit 10)

4. In July 2007, the Township's chief of police (William D. Smith) reviewed the statistics for the first six months of 2007 and concluded that Officer Mowery had handled the fewest number of criminal and non-criminal calls by its patrol officers. He then reviewed Officer Mowery's statistics for 2005 and 2006 to see if his statistics for the first six months of 2007 were anomalous. He determined that Officer Mowery's statistics declined from 2005 to 2006 and from 2006 through the first six months of 2007. (N.T. 89, 94-98, 113, 119; Township Exhibits 3-5)

5. On September 16, 2007, Chief Smith asked Officer Mowery's immediate supervisor (Sergeant Brian K. Grubb) if he had an explanation for the decline in Officer Mowery's statistics. Sergeant Grubb said that he did not. Chief Smith told Sergeant Grubb that he was going to counsel Officer Mowery. Sergeant Grubb asked Chief Smith for the opportunity to counsel Officer Mowery himself. Chief Smith agreed to Sergeant Grubb's request. (N.T. 59-60, 64-65, 76-77, 102-103, 113, 115)

6. On September 17, 2007, Sergeant Grubb counseled Officer Mowery about the decline in his statistics. (N.T. 6-10, 64-65, 76)

7. Afterwards, Officer Mowery spoke with the Association's president (Officer Garth Warner) about the counseling session. Officer Mowery asked Officer Warner what needed to be done for the Association's board to look into the matter. Officer Warner told him to send a letter to the Association's board. (N.T. 15-16, 43, 137)

8. By letter dated September 21, 2007, Officer Mowery wrote to the Association's board as follows:

"I am writing to request the Derry Township Police Association Board investigate the recent Counseling Session, which I received on 09/17/2007, at approximately 0330 hours. Sgt.[.] Grubb pulled me into his office and advised me that he was told to give me a counseling session, as per Chief Smith and Lt. O'Rourke, due to my 'stats dropping' since 2005. Sgt. Grubb advised me that Chief Smith and Lt. O'Rourke confronted him as to why my 'stats' were dropping and why he (Sgt. Grubb) did not do anything to rectify the problem. Sgt. Grubb advised me that he told Chief Smith and Lt. O'Rourke he did not feel there was a problem and did not believe that I was 'dodging' calls. Sgt. Grubb indicated to me to make attempts to bring up my 'stats' as per the request from Chief Smith and Lt. O'Rourke. Sgt. Grubb asked them, specifically, what 'stats' they were referring to, but was not given a specific answer.

According to General Order 26.1.4(c)(1), 'Counseling shall be provided to employees by their immediate supervisor or the Division Lieutenants when conduct is observed to be unsatisfactory but involves: (1) A minor procedural error, or (2) An action based upon inappropriate judgment that is minor in nature.'

I do not believe this counseling session, as general in nature as it was, meets these requirements, and would request that a grievance be filed, if appropriate, and all documentation of the counseling session be destroyed."

(N.T. 10-16; Association Exhibit 1)

9. By email dated September 30, 2007, Sergeant Grubb wrote to Lieutenant Patrick Michael O'Rourke as follows:

"I spoke to Officer Mowery during the 'B' watch on 9-16-07 concerning the information outlined to me by Chief Smith. Officer Mowery admitted that he has been feeling some frustration in the recent months due to the problems with radio transmissions and the mobile data system. As a result his motivation to perform traffic enforcement has been reduced. He indicated that he has been doing more proactive patrol activity to expand his experiences as an officer. I can verify that both Officers Mowery and Eckenrode have done surveillance using the night vision glasses and thermal imager at the building site on Hope drive and the new residence construction in Legacy Landing. Officer Mowery felt that he has not been avoiding calls or not 'pulling his weight' on the platoon. I can attest that he is generally assigned to a zone and he assists in most calls when he is not the primary officer. I ended our conversation by requesting that he agree to make an effort to increase his traffic enforcement through the end of the year. I advised Officer Mowery that I would make opportunities available for him to do so if necessary. Officer Mowery agreed to this request. If you require any additional information please let me know. Thank you. Sgt. Grubb."

(N.T. 65, 76, 132; Township Exhibit 2)

10. By email dated October 1, 2007, Lieutenant O'Rourke forwarded Officer Mowery's email on to Chief Smith. (N.T. 104; Township Exhibit 2)

11. By October 23, 2007, Chief Smith heard a rumor through "the office grapevine" that Officer Mowery had approached the Association about the counseling session. (N.T. 104)

12. On October 23, 2007, Chief Smith asked Sergeant Grubb to confirm or dispel the rumor that Officer Mowery had approached the Association about the counseling session. Sergeant Grubb told Chief Smith that Officer Mowery had approached the Association about the counseling session. Chief Smith became furious and summoned Sergeant Grubb and Officer Mowery to his office to find out exactly how Sergeant Grubb had conveyed the counseling session to Officer Mowery. Chief Smith met with Officer Mowery, Sergeant Grubb and Lieutenant O'Rourke. Chief Smith asked Officer Mowery if Sergeant Grubb had conveyed to him the purpose behind the counseling session. Chief Smith also asked Officer Mowery why he had approached the Association. Officer Mowery said that he did so to find out if the session was for counseling or discipline. Chief Smith confirmed that the session was for counseling. Chief Smith also explained that the session could have been for discipline if he had wanted it to be for that purpose. (N.T. 17-18, 66-69, 85, 104-106)

13. In January 2008, Chief Smith reviewed the statistics for 2007 and concluded that Officer Mowery had handled the lowest number of criminal and non-criminal calls by the patrol officers for a second year in a row. Chief Smith also determined that Officer Mowery's performance was below the departmental averages for the year. Chief Smith decided that Officer Mowery needed to go on an action plan "based on his deficient productivity" and so informed Lieutenant O'Rourke. In making that decision, Chief Smith did not consider the fact that Officer Mowery had approached the Association about the counseling session. (N.T. 98-100, 106, 111, 133; Township Exhibits 6-7)

14. On January 31, 2008, Sergeant Grubb completed Officer Mowery's performance evaluation for 2007 and forwarded it up the chain of command. (N.T. 70, 77-78; Association Exhibit 2)

15. By memorandum dated February 2, 2008, Chief Smith wrote an addendum to Officer Mowery's performance evaluation for 2007 as follows:

"After the end of six months in 2007, the statistics came out for the first half of the year. I observed data that concerned me. Officer Mowery had the least amount of incidents, (those requiring a DTR), combining both criminal and non-criminal, in the department. I wanted to see if this was an anomaly. Therefore, I looked at his entire statistical performance for all of 2005, 2006 and the first six months of 2007. What I discovered was that Officer Mowery had the least amount of calls in the entire department in 2006. However, in 2005, his probationary year, his call volume and other statistical categories were certainly acceptable. However, he dropped from 286 calls in 2005 to 207 in 2006 and was on par for 178 calls (based on first six months) of 2007.

This was brought to the attention of his sergeant who requested that he be allowed to counsel Officer Mowery and see if there were any concerns that were impacting or causing his drop in productivity. The counseling was conducted. See below:

I spoke to Officer Mowery during the 'B' watch on 9-16-07 concerning the information outlined to me by Chief Smith. Officer Mowery admitted that he has been feeling some frustration in the recent months due to the problems with radio transmissions and the mobile data system. As a result his motivation to perform traffic enforcement has been reduced. He indicated that he has been doing more proactive patrol activity to expand his experiences as an officer. I can verify that both Officers Mowery and Eckenrode have done surveillance using the night vision glasses and thermal imager at the building site on Hope drive and the new residence construction in Legacy Landing. Officer Mowery felt that he has not been avoiding calls or not 'pulling his weight' on the platoon. I can attest that he is generally assigned to a zone and he assists in most calls when he is not the primary officer. I ended our conversation by requesting that he agree to make an effort to increase his traffic enforcement through the end of the year. I advised Officer Mowery that I would make opportunities available for him to do so if necessary. Officer Mowery agreed to this request. If you require any additional information please let me know. Thank you. Sgt. Grubb

I followed up in several weeks in discussion with Officer Mowery and Sergeant Grubb.

At the end of the year, I received the statistical data on all officers. I revisited Officer Mowery's performance. I found that for the second year in a row, he handled the least amount of calls. He handled 211 calls. The next lowest officer for this year handled 242 incidents. I then looked at his statistics for a two year period. In 2006 and 2007, Mowery handled 418 incidents. The next lowest officer in the same time period handled 481 or 63 more than Mowery. The next lowest was 549 calls or 131 more than Mowery in the same time frame. What exacerbates this situation is that the call volume of the officers in 2005 was 5,802. It rose to 6,076 in 2006 and then 6,510 in 2007. The increase in call volume for this two year period is 708 or a 12% increase. Officer Mowery's totals, as reflected above, show a decrease from 286 in 2005 to 207 in 2006 and a slight increase to 211 in 2007 or a difference of 75 calls less or a drop of 26% from 2005 to 2007. The average for the call volume in 2005 was 290 (Mowery 286). It was 303 in 2006 (Mowery's 207) and it was 325 in 2007 (Mowery's 211).

I reviewed his other statistical data to determine if there were any other categories that may have impacted on his time to handle additional calls. There were none. As a matter of fact, I determined that almost all statistical categories were relatively stable from past years except his traffic citations. He issued 260 traffic citations in 2005, dropped to 218 in 2006 and dropped to 138 in 2007. The drop from 2005 to 2007 was 47%. In other words, his traffic citations dropped all but in half in just two years. I can not account, through statistical analysis, any reason for this drop.

I am concerned. He obviously had the ability to do the work as evidenced by his 2005 statistics. Therefore, absent any valid circumstance that could convince me otherwise, I will be directing Officer Mowery and his sergeant to develop a game plan to assist in providing Officer Mowery the tools or training to enhance his deficient productivity especially in relationship to handling his fair share of calls. This action plan will be approved by Lt. O'Rourke. I am also concerned about the drastic drop in citations."

(N.T. 70-71, 79, 107, 119-120; Association Exhibit 2)

16. On April 3, 2008, Sergeant Grubb gave the performance evaluation to Officer Mowery. (N.T. 19-21, 78; Association Exhibit 2)

17. By memorandum dated April 13, 2008, Officer Mowery filed a response to Chief Smith's addendum as follows:

"In conjunction with the additional comments for my evaluation by Chief Smith, I wish to also add additional comments to my evaluation. I certainly cannot disagree with Chief Smith's statement regarding me being the officer with the lowest number of criminal and non-criminal incidents when they are combined. However, I do want to point out that I am not the officer with the lowest criminal and non-criminal incidents, in either category, for the entire department or within my own platoon, when they are looked at separately.

There are many functions of a police officer that do not require a criminal or non-criminal incident number. These functions, such as neighborhood patrols, building and business checks, recreational park checks, civilian mere encounters and an overall visible presence throughout the township, must be delicately balanced throughout each watch. There is obviously a requirement to respond to calls over performing these other tasks. As I stated in my counseling session with Sgt. Grubb on 9-16-07, I do not 'dodge' calls and if I am not the primary officer assigned to the call, I am present on the call unless I am not needed or am tied up on another matter. This statement is supported by Sergeant Grubb and all members on my platoon. I also make it a point to patrol neighborhoods and be a visible presence to the residents of this township and engage in conversation with them in order to create positive police encounters with them. I often use the department night vision goggles and infrared camera on B watch while on patrol. Our platoon is the only platoon that consistently uses that equipment, and it is without direction to do so.

It is also important to point out that in 'police work,' the number of calls an officer handles will fluctuate from year to year. My numbers this year will be different from last year. There is no guarantee that my numbers, as an individual officer, will be lower than last year. There is also no guarantee that my numbers, as an individual officer, will be higher than last year. No one can make a guaranteed prediction on his or her statistics for the upcoming year. I am doing my job as a police officer."

(N.T. 20-21, 79; Association Exhibit 2)

18. By memorandum dated May 9, 2008, Chief Smith wrote to Sergeant Grubb as follows:

"Sgt. Grubb, in addition to any stipulations you have in mind for your supervision of Officer Mowery, I am requesting you also incorporate the following:

- 1) Since Officer Mowery informed me in his comments for his evaluation that 'There is no guarantee that my numbers, as an individual officer, will be higher tha[n] last year', I will include the following. Officer Mowery, no matter what zone he is assigned to, will be assigned to handle the first call received for your shift. You will give him the appropriate amount of time for follow-up and the report. If the first call was a non-criminal incident, he will then handle the next criminal incident received on the shift or if the first call was a criminal call, he will handle the next non-criminal call. You will allow him the appropriate amount of time to do the follow-up and do the report. After he is done with these calls, it is up to you to determine the distribution of calls on the shift.
- 2) At least once every 14 day rotation, he will be assigned to an enforcement detail using the Enradd. He can run the detail by himself or in conjunction with others on the shift. If the latter is the case, he will be a chase car. If for some reason, the Enradds are not available, he can use other speed timing devices. This assignment shall not be included as a call for service, however, he will document this with a DTR.
- 3) Officer Mowery is to complete a Daily Activity Report. He is to document his activity on this report for each shift, i.e. CAD numbers, DTRs, patrol, enforcement details, etc."

(N.T. 72; Association Exhibit 3)

19. On June 2, 2008, Chief Smith presented Officer Mowery with an action plan incorporating the elements of the May 5, 2008, memorandum to Sergeant Grubb. Chief Smith made no mention of Officer Mowery having approached the Association about the counseling session. (N.T. 21-24, 73-75, 81, 109-110, 121, 134)

20. Chief Smith presented the action plan to Officer Mowery without having looked at his statistics for the first three months of 2008 to see if his performance had improved. Chief Smith thought that statistics over a three month period were insignificant. (N.T. 121-123, 125)

21. Chief Smith previously placed at least two other patrol officers on action plans to rectify their specific performance deficiencies. (N.T. 93-94, 115-116)

DISCUSSION

The Association has charged that the Township committed unfair labor practices in violation of sections 6(1)(a) and (c) by imposing an action plan on Officer Mowery because "[i]n the Spring of 2008" he "engaged in a protected activity by requesting the assistance of the Association in dealing with a personnel matter, which had arisen with respect to his employment." As set forth in the specification of charges, the Association avers that the Township was motivated by anti-union animus when it imposed the action plan on Officer Mowery because it "was aware of . . . and commented negatively upon" his

protected activity," because the "action plan being imposed on Officer Mowery mandated employer treatment different from all other bargaining unit members" and because "the Chief of Police repeated that part of the reason an action plan was being imposed was because of Officer Mowery's earlier request for union assistance."

The Township contends that the charge should be dismissed for lack of proof that it imposed the action plan on Officer Mowery because he requested the assistance of the Association. According to the Township, it imposed the action plan on Officer Mowery not because he requested the assistance of the Association but because his statistics showed that his performance was deficient.

An employer commits unfair labor practices under sections 6(1)(a) and (c) if it discriminates against an employee for having engaged in an activity protected by the PLRA as read in pari materia with Act 111. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004). Approaching a bargaining representative for assistance with a personnel matter is a protected activity. Lower Merion Township, 37 PPER 113 (Proposed Decision and Order 2006). An overt display of anti-union animus by the employer will support a finding that it discriminated against the employee for having engaged in a protected activity. Brentwood Borough, *supra*. Close timing between the employee's protected activity and the employer's action coupled with the employer's disparate treatment of similarly situated employees will, too. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005). Any finding of an unfair labor practice must be supported by substantial evidence. Commonwealth of Pennsylvania, PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978). Suspicion is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

In order for the Board to find an employer in violation of sections 6(1)(a) and (c), the charging party must present by substantial evidence during its case-in-chief a prima facie case that an employee engaged in a protected activity, that the employer knew that the employee had engaged in the protected activity and that the employer discriminated against the employee because the employee engaged in the protected activity. Brentwood Borough, 35 PPER 112 (Final Order 2004), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992). The discriminatory motivation creates the offense. *Id.* If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer shows that it would have taken the same action even if the employee had not engaged in the protected activity. Brentwood Borough, *supra*. A valid non-discriminatory reason for the employer's action may rebut any inference that the employer was discriminatorily motivated. Duryea Borough Police Department, *supra*.

The charge must be dismissed because the Association did not present a prima facie case during its case-in-chief.

During its case-in-chief, the Association presented substantial evidence that Officer Mowery engaged in a protected activity by approaching the Association for assistance with a personnel matter in September 2007 (N.T. 15-16; Association Exhibit 1).¹ The Association also presented substantial evidence that the Township knew that Officer

¹ The Township objected to the evidence presented by the Association (N.T. 10-13). The basis for the Township's objection was that the Association's evidence was "outside the four corners of the charge" (N.T. 11). As the Township pointed out, the Association specifically alleged in the charge that Officer Mowery approached the Association for assistance with respect to the personnel matter "[i]n the Spring of 2008," not September of 2007. The hearing examiner overruled the objection (N.T. 15).

In its brief, the Township contends that the evidence should not have been admitted because under Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974), the Board only has jurisdiction to find the unfair labor practices charged. As the Board explained in Youngwood Borough, 17 PPER ¶ 17035 (Order Directing Remand to Hearing Examiner for Further Proceedings 1986), however, its notice pleading requirements are "limited," so the fact that a complainant "may be mistaken or simply does not know precisely [what happened] at the time of the filing of the Charge is not fatal to the cause of action." 17 PPER at 102-103. The evidence was in keeping with the nature of the charge and therefore admissible.

Mowery had approached the Association for assistance with the personnel matter (N.T. 7).² In addition, the Association presented substantial evidence that the Township imposed the action plan on Officer Mowery on June 2, 2008 (N.T. 22-25). As explained below, however, the Association did not present substantial evidence that the Township imposed the action plan on Officer Mowery because he approached the Association for assistance with the personnel matter. Accordingly, the charge must be dismissed.³

In support of the averment in the specification of charges that the Township was motivated by anti-union animus when it imposed the action plan on Officer Mowery because it "was aware of . . . and commented negatively upon" his protected activity, the Association presented testimony by Sergeant Grubb that Chief Smith became "furious" and was "quite upset" when he told Chief Smith that Officer Mowery had approached the Association about the counseling session (N.T. 67). Notably, however, to the extent that Chief Smith's demeanor might be construed as a "comment," it was bereft of any threat or disparagement of the Association. Moreover, Sergeant Grubb testified on cross-examination that Chief Smith had evinced a concern that Officer Mowery misunderstood the nature of the session (N.T. 85). Sergeant Grubb also testified that it was he who had counseled Officer Mowery (N.T. 64-65) and that Chief Smith had questioned him as to whether or not he made clear to Officer Mowery that the session was only for counseling (N.T. 85). Viewing Chief Smith's demeanor in context, then, it would appear that he was "furious" and "quite upset" not because Officer Mowery had approached the Association about the counseling session but because Sergeant Grubb may have misinformed Officer Mowery about the nature of the counseling session. Thus, Chief Smith's demeanor provides an insubstantial basis for finding that the Township "commented negatively upon" Officer Mowery's protected activity.

In further support of the averment, the Association presented testimony by Officer Mowery that when Chief Smith thereafter summoned him and Sergeant Grubb to a meeting Chief Smith said that he "was upset with me. He told me it upset him that I went [to the Association], and that he had every right to discipline me" (N.T. 18). Under Officer Mowery's version of events, Chief Smith expressly linked a reminder that Officer Mowery could have been disciplined to Officer Mowery's protected activity of approaching the Association. A link of that sort is coercive. See City of Scranton, 38 PPER 104 (Final Order 2007)(chief's reminder to police officer who contacted his union about an employment matter that "the "union can't do anything to you, I can" was coercive). The Association, however, also presented testimony by Sergeant Grubb that what Chief Smith said was "that he had the right to monitor performance and that as Chief, he's responsible for employe performance" (N.T. 68). Under Sergeant Grubb's version of events, Chief Smith did not link the exercise of his managerial right and responsibility to monitor employe performance to Officer Mowery's protected activity of approaching the Association. A link of that sort is not coercive. See City of Williamsport, 26 PPER ¶ 26202 (Final Order 1998)(employer's comment that it could not implement an interest arbitration award without adjusting manpower and personnel reflected economic reality and therefore did not coerce employes in the exercise of their right to interest arbitrate); City of Easton, 9 PPER ¶ 9109 (Nisi Decision and Order 1978) (employer's comment that it would have to lay off employes if an interest arbitration award exceeded available funds reflected economic reality and therefore did not coerce employes in the exercise of their right to interest arbitrate). The conflicting testimony of Sergeant Grubb undermines any basis for finding that the Township "commented negatively" on Officer Mowery's protected activity as Officer Mowery testified.

In support of the averment in the specification of charges that the Township was motivated by anti-union animus when it imposed the action plan on Officer Mowery because

² The Township once again objected to the evidence presented by the Association as being "outside the four corners of the charge" (N.T. 66). The hearing examiner once again overruled the objection because the evidence was in keeping with the nature of the charge and therefore admissible. Id.

³ The Association also established that Officer Mowery engaged in a protected activity by approaching it about his performance evaluation in April 2008 (N.T. 21), but the Association does not contend that the Township imposed the action plan on him because he engaged in that protected activity. An argument not presented to a hearing examiner is, of course, waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). In any event, there is no basis for any such contention in that the record does not show that the Township knew that he had engaged in that protected activity. See Mifflin County, 35 PPER 147 (Final Order 2004)(no retaliation found where there was no showing that the employer knew of the employe's protected activity).

the "action plan being imposed on Officer Mowery mandated employer treatment different from all other bargaining unit members," the Association presented testimony by Officer Mowery that he was unaware of any other patrol officer on an action plan like his (N.T. 25-26). He admitted on cross-examination, however, that he did not know if he was the only patrol officer on an action plan (N.T. 46-47). He also conceded that another patrol officer may have been on an action plan (N.T. 51, 53-54). On that record, there is no basis for finding that the "action plan being imposed on Officer Mowery mandated employer treatment different from all other bargaining unit members." See Erie City School District, 40 PPER 12 (Final Order 2009)(retaliation charge dismissed where there was no showing that the employer treated an employe any differently from any similarly situated employe).

In support of the averment in the specification of charges that the Township was motivated by anti-union animus when it imposed the action plan on Officer Mowery because "the Chief of Police repeated that part of the reason an action plan was being imposed was because of Officer Mowery's earlier request for union assistance," the Association presented testimony by Officer Mowery that Chief Smith started the meeting at which he imposed the action plan on him by reiterating how upset he was that Officer Mowery "went to the Association over the counseling session" (N.T. 22), but Sergeant Grubb testified that he could not recall that Chief Smith said any such thing (N.T. 83-84). The conflicting testimony of Sergeant Grubb undermines any basis for finding that "the Chief of Police repeated that part of the reason an action plan was being imposed was because of Officer Mowery's earlier request for union assistance" as testified to by Officer Mowery.

In its brief, the Association additionally contends that support for a finding that the Township was motivated by anti-union animus when it imposed the action plan on Officer Mowery may be found in the fact that Chief Smith immediately summoned Officer Mowery to his office upon being informed by Sergeant Grubb that Officer Mowery had approached the Association about the counseling session. See finding of fact 12. The timing of events alone, however, will not support a finding of anti-union animus. Pennsylvania State Park Officers Association, *supra*.

Even if the Association had presented a prima facie case during its case-in-chief, the result would be the same. Unfortunately for Officer Mowery, who when initially faced with the prospect of an action plan as set forth by Chief Smith in an addendum to his performance evaluation for 2007 eloquently wrote in response that effective police work should be judged by a variety of factors rather than by statistics alone (Association Exhibit 2), the Board in deciding a discrimination charge is not to use the same analysis that an arbitrator might use in determining just cause under a collective bargaining agreement. Bucks County Community College, 36 PPER 84 (Final Order 2005). Rather, the Board is to focus on the motivation of the employer. Brentwood Borough, *supra*. To that end, the Township established that for years it has measured police performance by the number of statistics generated (N.T. 90-92, 94, 113-115). A valid non-discriminatory reason for an employer's action may rebut any inference that the employer was discriminatorily motivated, Duryea Borough Police Department, *supra*, so in and of itself the fact that Chief Smith imposed the action plan on Officer Mowery based on statistics alone is hardly compelling.

In addition, the Township presented testimony by Chief Smith that he identified a decline in Officer Mowery's statistics in July 2007 (N.T. 94-96). It is apparent, then, that Chief Smith targeted Officer Mowery well before he approached the Association for assistance in September 2007. Indeed, Officer Mowery's very reason for approaching the Association for assistance was because Sergeant Grubb counseled him about the deficiency in his statistics as identified by Chief Smith. See finding of facts 6-7. Thus, the timing of events militates against a finding that the Chief Smith's imposition of the action plan on Officer Mowery was discriminatorily motivated. See Delaware County, 28 PPER ¶ 28005 (Final Order 1996)(no anti-union animus found where the genesis of the employer's action predated the protected activity engaged in by the employe).

The Township also presented testimony by Chief Smith that the reason he asked why Officer Mowery had approached the Association about the counseling session was because he was concerned that Officer Mowery had misunderstood the purpose of the session (N.T. 105-106). Although Chief Smith further testified that he told Officer Mowery, "That's exactly what I intended it to be, a counseling, because I was worried about you; however, it could

be discipline if I wanted it to be" (N.T. 106), which is coercive in that he linked the imposition of discipline to Officer Mowery having approached the Association, see City of Scranton, supra, the Township presented additional testimony by him that his motivation in imposing the action plan on Officer Mowery was "deficient productivity" (N.T. 111) and that he previously had placed at least two other patrol officers on action plans when their statistics were deficient (N.T. 93, 116). Moreover, the Township established that Chief Smith's imposition of the action plan on Officer Mowery was consistent with general order 35.1.6, which expressly provides for the imposition of an action plan if deficiencies are substantiated (Township Exhibit 10). On that record, it is apparent that the Township would have imposed the action plan on Officer Mowery even if he had not approached the Association for assistance relative to the counseling session.

The Association contends that Chief Smith's testimony should be discredited because he used Officer Mowery's decline in statistics as a pretext for placing him on the action plan. As the Association points out, in a battle of the statistics, Chief Smith conceded that Officer Mowery's statistics for the second six months of 2007 were improved over his statistics for the first six months of 2007 (N.T. 128-129) and that they improved again over the first three months of 2008 (N.T. 126). According to the Association, Chief Smith nevertheless incredibly imposed the action plan on Officer Mowery without taking into account the improvement in his statistics over those months.

An inadequate explanation for an employer's action will support a finding that it was pretextual, Lehigh Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996), but Chief Smith's testimony does not fit that description, for several reasons. First, he testified that before he imposed the action plan on Officer Mowery he looked at Officer Mowery's statistics from the time of the counseling session through the end of 2007 and found no improvement (N.T. 125-126). The statistics cited by the Association pertain to different periods of time and as such provide no basis for undermining his testimony. Second, the record shows that in a February 2008 addendum to Officer Mowery's performance evaluation Chief Smith broached the subject of imposing an action plan (Association Exhibit 2), so Chief Smith was predisposed to imposing an action plan on Officer Mowery before the statistics for the first three months of 2008 were even available. Given the timing of events, the fact that Chief Smith did not take Officer Mowery's 2008 statistics into account before he imposed the action plan on him in June 2008 is unremarkable. Third, Chief Smith's testimony that he has placed at least two other patrol officers on action plans when their statistics were deficient was un rebutted. Under the circumstances, Chief Smith's testimony was creditworthy.

The statistics, however, do not support Chief Smith's assertion in his addendum to Officer Mowery's performance evaluation that in handling 211 criminal and non-criminal calls in 2007 Officer Mowery had the lowest number of statistics for two years in a row (Association Exhibit 1). Chief Smith wrote that the next lowest number of criminal and non-criminal calls handled by a patrol officer in 2007 was 242, id., but a close review of the statistics for 2007 shows that Officer T. Pavone only handled 142 criminal and non-criminal calls in 2007 (Township Exhibit 6). In light of that statistical discrepancy, Chief Smith's credibility suffered to a degree, but on the record as a whole it was unimpeached, so his testimony was creditworthy nonetheless.

In its brief, the Association contends that the Township violated section 6(1)(a) on an independent basis. A violation of section 6(1)(a) may be independent or derivative. Springfield Township, 28 PPER ¶ 28164 (Final Order 1997). A derivative violation occurs when an employer commits any violation of sections 6(1)(b) through (f). Id. An independent violation occurs when an employer engages in conduct that under the totality of circumstances would have a tendency to coerce a reasonable employe in the exercise of their rights under the PLRA as read in pari materia with Act 111. Millvale Borough, 36 PPER 147 (Final Order 2005).

A close review of the charge does not show that the Association alleged that the District committed an independent violation of section 6(1)(a), however. Thus, the Board has no jurisdiction to find that the Township violated section 6(1)(a) on an independent basis. See Kennett Consolidated School District, 37 PPER 89 (Final Order 2006) (no

independent violation may be found where the charging party did not allege such a violation in its specification of charges).

Even if the Board had jurisdiction to find an independent violation of section 6(1)(a), no such violation is apparent on the record. Imposing an action plan on an employe for deficient performance is not coercive. See City of Philadelphia, 24 PPER ¶ 24112 (Final Order 1993)(employer's discipline of a steward for unsatisfactory performance was not coercive).

CONCLUSIONS

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

1. The Township is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The Association is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Township has not committed unfair labor practices under sections 6(1)(a) or (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 as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint 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 ninth day of April 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner