COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JOHN SMITH	:	
	:	
v.	:	Case No. PF-C-09-70-E
	:	
BETHEL TOWNSHIP	:	

PROPOSED DECISION AND ORDER

On May 14, 2009, John Smith (Smith or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Bethel Township (Township or Respondent) violated Sections 6(1)(a),(c) and (d) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968.

On June 5, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the matter to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and assigning October 7, 2009 in Harrisburg as the time and place of hearing, if necessary. The hearing was necessary, and was held as scheduled, at which time both parties were afforded an opportunity to present testimony and documentary evidence and cross-examine witnesses.

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

FINDINGS OF FACT

1. That Bethel Township is an employer within the meaning of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968 with its address located at 1082 Bethel Road, Garnet Valley, Pennsylvania 19061.

2. That John Smith was a regular part-time police officer of Bethel Township and an employe within the meaning of the PLRA from 2003 to April, 2009, with his address at 1910 Bergdoll Avenue, Boothwyn, Pennyslvania. 19061. (N.T. 7)

3. That the Township's police force is composed entirely of part-time officers, except for the Chief of Police. At the time of this hearing, there were 36 part-time officers. (N.T. 25, 87)

4. That the Township is governed by a three member Board of Supervisors. (N.T.

5. That in 2008, one of the Supervisors, Michael George, convened a meeting of all the police officers for the purpose of seeing "how some of the officers felt and what's going on" in the words of Smith. (N.T. 9)

6. That George saw union literature at the meeting. George commented that if he was to find out who was responsible for this, that person would be fired and he would "disband the police department." (N.T. 9, 99)

7. That George became the Township Manager in 2009. By taking this position, he was not allowed to continue as a Supervisor, so he resigned the position of Supervisor. (N.T. 86, 95-96)

8. That the Township Manager does not supervise the police department. The position is on the same level as the Chief of Police and like the Chief reports to the Township Supervisors. (N.T. 97)

9. That John Cairo is the Chief of Police. He served as acting Chief from November, 2008 to March, 2009, when the Board of Supervisors named him Chief. The Chief reports to the Board of Supervisors. The (N.T. 85, 97)

10. That Chief Cairo had served as a part-time officer with the Township prior to becoming chief, working anywhere from 20 to 40 hours a month. (N.T. 87)

11. That the former Chief of Police died in November, 2008. (N.T. 92)

12. That Smith was close to the former chief, even going on vacation with him. He was emotional about the chief's death. (N.T. 92)

13. That at about this same time, several other officers left the department. Smith was emotional about that as well. (N.T. 92)

14. That Smith attended the January, 2009 reorganization meeting, at the Township offices in disregard of Chief Cairo's request not to attend but to stay on patrol. (N.T. 114)

15. That after the meeting, Smith left the meeting and slammed the outside door with such force that it came off its hinges. (N.T. 91-2, 101-102, 115)

16. That despite causing the damage the door, Smith was not disciplined either by the Chief or the Township supervisors. (N.T. 92)

17. That in the third week of January, 2009, Smith posted flyers at the Township office building from the International Brotherhood of Teamsters Law Enforcement League. The flyers explained the benefits of Teamsters' representation of the part-time officers. Smith posted the flyers on the front door of the building and in the private offices of the building where only police officers would go. He also placed the flyers in all the police officers' office mail boxes. (N.T. 10, 30, Complainant's Exhibit 1)

18. That the police department is located in a large trailer, with four rooms, a public entry area and a bathroom. The four rooms that are not open to the public are the chief's office, the evidence room, the equipment room and the locker room. (N.T. 30)

19. Chief Cairo did not work against Smith's efforts to organize the police officers. In fact, Chief Cairo gave Smith the personal telephone numbers of the officers. (N.T. 89)

20. Chief Cairo admitted that he removed the flyers from areas of public access, such as the front door of the police offices, because they were a nuisance. He did not remove the flyers from the police officers' private areas. (N.T. 88-89, 105)

21. That in early 2009, Chief Cairo asked Smith if he would be volunteer to update the department's standard operating procedures and policies. Smith said he was not interested in volunteering unless the Chief would promote him to the rank of corporal or sergeant. (N.T. 93)

22. That on April 3, 2009, Smith failed to report to duty on his scheduled shift. (N.T. 21, 94)

23. Chief Cairo called Smith and left a message on his cell phone inquiring why Smith was not at work that night as he had been scheduled. (N.T. 21, 94)

24. That Smith called the chief back and explained that he was on vacation and had not received the schedule. (N.T. 21, 94)

25. That the Chief asked Smith to come into the office to talk with him about this incident and "all the stuff that is going on and try to resolve these issues so that we could put it to bed and move on." (N.T. 21, 94)

26. Smith replied, "Put it in writing. I am not doing anything unless you put it in writing." Smith then hung up on Chief Cairo. (N.T. 94, 104-105)

27. That Smith never came in again to the station to see the chief. (N.T. 94)

28. Two days later, Smith went to the station and found out that his name had been taken off the schedule for April. (N.T. 94-95)

29. That until 2009, Chief Cairo was not aware of any problems with Smith's record of service to the department. (N.T. 100)

30. That Chief Cairo testified that his decision to remove Smith from the schedule had nothing to do with Smith's activities posting the Teamsters' flyers. (N.T. 95)

31. That Smith also works as a part-time police officer at West Nottingham Township approximately 30-36 hours a week. (N.T. 7, 24)

DISCUSSION

John Smith's charge of unfair labor practice against Bethel Township alleges that the Chief of Police removed him from the schedule of part-time police officers as an act of retaliation for his efforts to trying to organize officers into a labor organization represented by the Teamsters.

The Township defends the charge by arguing that the Chief removed Smith from the schedule not because of his union activities but because of Smith's hanging up on him during a call inquiring about Smith's failure to report to duty that day, his refusal to meet with the Chief and Smith's earlier behavior that raised concerns about Smith's ability to accept the Chief's authority. The chief determined that Smith's refusal to meet with him and hanging up on him was insubordination.

The first part of the charge to be addressed is Smith's allegation that the Township violated Section 6(1)(c) of the PLRA. An employer commits an unfair labor practice within the meaning of Section 6(1)(c) if it discriminates against an employe because the employe engaged in activity protected by the PLRA. Camp Hill Borough, 16 PPER ¶ 16054 (Final Order 1986), aff'd, Camp Hill Borough v. PLRB, 507 A.2d 1297 (Pa. Cmwlth. 1986). In order to prove discrimination, the complainant must show that the employe engaged in activity protected by the PLRA, that the employer had knowledge of that protected activity, and that the employer took adverse action against the employe because of the protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977); Camp Hill Borough, supra. The complainant has the burden of proving such a charge by substantial evidence. St.Joseph's Hospital, supra. Substantial evidence requires more than a mere suspicion of the existence of the fact. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

There is no dispute that Smith was engaged in protected activity and that Chief Cairo knew of Smith's activity. The dispute in this case is over the third element, whether Chief Cairo removed Smith from the schedule because of his protected activity. In a charge of discrimination it is an employer's motivation, which creates the offense. Perry County v. PLRB, 364 A.2d 898 (Pa. Cmwlth., 1974).

Smith has not proven that the Chief was motivated by Smith's protected activity when he removed him from the schedule. The complainant presented no direct evidence on the question of motivation such as any anti-union statements by Chief Cairo. Furthermore, the Township presented Chief Cairo's credible testimony that the reason he removed Smith from the schedule was his concerns about Smith's recent behavior, Smith's failure to appear for duty, Smith's refusal to meet with the Chief to discuss the Chief's concerns and Smith's hanging up on the chief during their last telephone call.

Since anti-union animus is often hard to prove with direct evidence, the Board may draw inferences from existing facts of record, such as anti union statements, to conclude that an employer based its decision on union animus. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Final Order, 1978). However, Smith did not produce evidence from which anti -union animus could be inferred as the basis for the decision.

Smith did produce evidence that a former supervisor, Michael George, made an anti-union statement in 2008. However, George's statement was general and not directed at Smith's 2009 efforts. More important, however, the complainant did not show that Supervisor George, who became Township Manager in 2009, had anything to do with Chief Cairo's decision to remove Smith from the schedule. Also, Chief Cairo testified credibly that he reports to the Township Supervisors, not to the Township Manager, the position George currently holds.

Smith also argues that discriminatory motivation can be inferred from the Chief's removal of Teamsters flyers in the Township building. It is true that Chief Cairo removed the Teamsters' flyers from public areas of the Township's trailer office. However, Chief Cairo allowed flyers to remain in the private areas where the police employes could still see them. And Chief Cairo gave Smith the police officers' phone numbers to assist in his efforts to try to organize the employes. It is difficult to draw an inference of anti-union animus from this record.

The next allegation is that the Township violated of Section 6(1)(a) of the PLRA by its conduct in this matter. Section 6(1)(a) of the PLRA makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this Act."

A Section 6(1)(a) violation may be either independent or derivative. McMahon v. Springfield Township, 28 PPER ¶ 28164 (Final Order, 1997). A derivative violation of Section 6(1)(a) occurs when any of the other Sections of 6(1) is violated. An independent violation violation of Section 6(1)(a) will be found when an employer has taken an action which, in light of all of the circumstances, tends to be coercive of the free exercise of employe rights, whether or not employes were shown in fact to be coerced. McMahon v. Springfield Township, supra, City of Scranton, 38 PPER ¶ 104 (Final Order, 2007).

I cannot find on this record, that Chief Cairo's action of removing Smith from the schedule had a tendency to coerce employes in the Township's police department. Chief Cairo's action came only after Smith refused to meet with the chief to discuss concerns that the chief had about recent behavior of Smith unrelated to Smith's protected activity. The Chief's action was a reasonable request by a manager and Smith's answer was not reasonable. In light of all the circumstances of this case, there will be no finding that Chief Cairo's actions had a tendency to coerce employes in the exercise of their rights. Consequently, there will be no finding of a violation of Section 6(1)(a) of the PLRA.

Finally, the complainant alleges that the Township violated Section 6(1)(d) of the PLRA, which makes it an unfair labor practice for an employer [T]o discharge or otherwise discriminate against an employe because he has filed charges or given testimony under this act." 43 P.S. 211.6(1)(d). There is no evidence in this case that the chief removed Smith from the schedule because of Smith having filed charges or given testimony under the PLRA. Accordingly, this charge will be dismissed.

CONCLUSIONS

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

1. Bethel Township is an employer within the meaning of Section 3(c)the PLRA.

2. John Smith is an employe within the meaning of Section 3(d) of the PLRA.

3. The Board has jurisdiction over the parties hereto.

4. Bethel Township has not committed unfair labor practices within the meaning of Sections 6(1)(a),(c) and (d) of the PLRA and 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 of unfair labor practices filed to the above case number is rescinded and the complaint dismissed.

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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirtieth day of November, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner