

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
BLACK DIAMOND LODGE 80 :
 :
v. : Case No. PF-C-08-128-E
 :
PINE GROVE BOROUGH :

PROPOSED DECISION AND ORDER

On October 1, 2008 the Fraternal Order of Police, Black Diamond Lodge 80 (Complainant or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Pine Grove Borough (Respondent or Borough) violated Sections 6(1)(a),(b),(c),(d) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111.

On November 25, 2008, the Secretary of the Board issued a complaint and notice of hearing assigning the case to a conciliator to resolve the matters in dispute by mutual agreement of the parties and setting a hearing for February 23, 2009, in Harrisburg, if necessary.

The conciliator did not resolve the dispute, so a hearing was necessary. At the hearing, 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 Fraternal Order of Police Black Diamond Lodge #80 is a labor organization within the meaning of the PLRA as read in pari materia with Act 111 of 1968 (Act 111). (N.T. 12, Association Exhibit 1)
2. That Pine Grove Borough is an employer within the meaning of the PLRA as read in pari materia with Act 111. (N.T. 12, Association Exhibit 1)
3. That Morris Williams has served as the Mayor of Pine Grove Borough for the last 7 years. (N.T. 13)
4. That among his duties as Mayor, Williams was responsible for oversight of the operation of the Borough's police department. (N.T. 13-14)
5. That Joshua Reager is the chief of police. He began in that position in January, 2007. (N.T. 117)
6. That when Chief Reager was hired, the department employed the chief, one other full-time officer and a number of part-time employees who worked as many as 40 hours a week. (N.T. 119)
7. That Chief Reager was not a member of the FOP in January, 2007, when he began employment with the Borough. In May, 2008, he decided to join the FOP and began the process of applying for membership. His reasons for joining at that time was because he believed his relationship with the Borough was deteriorating and he wanted to have the protection of the FOP. (N.T. 120, 122)
8. That on or about July 11, 2008, Chief Reager entered the Borough Council offices, removed papers from the desk of the council president Timothy Peters and copied them without permission. (N.T. 40, 125- 127, Complainant's Exhibit 1)
9. That the desk was Council President Peters' private desk and was located in office unit for Borough Council. (N.T. 84-86)

10. That on August 15, Mayor Williams issued a written warning notice to Chief Reager for the July 11 2008 incident. As for "type of violation" on the Employee Warning Notice, the Mayor checked off the box for "Inappropriate Behavior." For the section on the form for description of violation, the Mayor stated, "Removed paperwork from desk in office for unauthorized use. A petition was removed and copied." (N.T. 25, 182, Complainant's Exhibit 1)

11. That on or about August 2, 2008 Chief Reager drove a Borough police vehicle to Pottsville without permission and appeared on a live radio call-in show. (N.T. 25, 182, Complainant's Exhibit 2)

12. That Pottsville is 18 miles from Pine Grove Borough. (N.T. 41)

13. That on August 19, 2008, the Mayor issued a written warning notice to Chief Reager for the August 2, 2008 incident, for "Inappropriate Behavior" The description of the violation was "Live media call in show and use of police vehicle without proper authorization. (N.T. 25, 182 Complainant's Exhibit 2)

14. That Officer Reager did not obtain Mayor Williams' approval to travel to Pottsville and to speak on the radio call-in show. (N.T 41, 186-187)

15. That on August 20, 2008, Joseph Leskin, Jr. Treasurer of FOP Black Diamond Lodge 80 sent a letter to "To Whom it May Concern" that Chief Reager has joined the FOP Black Diamond Lodge 80 and requesting that his \$20 monthly dues be deducted from each bi-weekly pay and then monthly to the FOP sent to it. Chief Reager hand delivered the letter to Margaret C. Davenport, the Borough's Secretary-Treasurer. (N.T. 56, 132, 182, Complainant Exhibit 6)

16. That on or about September 2, 2008, Mayor Williams issued an employe warning notice to Chief Reager, checking the box for "Other: Conduct unbecoming of a supervisor of a police department." The Mayor described violation as "Conduct unbecoming of a supervisor of a police department concerning myspace.com, underground skateboard company photo albums." The discipline was a suspension "for 10 working days, with pay, pending investigation. Starting 9-2-08 through 9-15-08." (N.T. 30, 182, Complainant's Exhibit 3)

17. That Chief Reager's myspace.com page for his side business, Underground Skateboard Company, included 31 photographs of women in various stages of undress holding skateboards (N.T. 41. 188, Respondent's Exhibit 1)

18. That on September 4, 2008, Pine Grove Area School District Superintendent Terrence Maher wrote a letter to Borough Council taking exception to Chief Reager's "method of using women in various stages of dress in his advertisements." Superintendent Maher requested "that until this matter is resolved that Chief Reager not respond to any issues involving the school district." (N.T. 42, 188, Respondent Exhibit 2)

19. That the unpaid suspension included an order to Chief Reager to return his keys to the gun cabinet, his keys to the evidence locker, badge and computer password. The mayor also requested that all personal unpaid bills had to be paid immediately or any wages due him would be deducted from the unpaid balance. (N.T. 141, 182, Complainant's Exhibit 7)

DISCUSSION

At the hearing, the FOP withdrew the allegations that Pine Grove Borough violated Sections 6(1)(d) and (e) of the PLRA as read in pari materia with Act 111.

Of the remaining charges left for resolution, the first to be discussed is the allegation that the Borough violated Section 6(1)(c) of the PLRA, which makes it an unfair practice "for an employer..by discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization" 43 P.S. 211.6 (1)(c).

The FOP alleges that the Mayor's issuance of two warnings and a 10 day paid suspension to Chief Reager constituted evidence of discrimination for the exercise of his protected activity for joining the FOP.

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 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*.

Chief Reager engaged in protected activity when he joined the FOP. The Borough had knowledge of his protected activity when the FOP hand delivered notice to the Borough on August 20, 2008 that Chief Reager was now a member of the FOP and that the Borough should begin to deduct his dues from his paycheck.

The dispute in this case is over the third element: Was Mayor Williams motivated by Chief Reager's joining the FOP when he disciplined him?

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). Camp Hill Borough, *supra*.

In the present case, the FOP argues that a discriminatory motive for the mayor's discipline of the chief can be inferred from the entire background of the case, the close timing of the discipline to the chief's joining the FOP and the failure of the employer to adequately explain the Mayor's discipline.

As for the background of the case, the FOP points to anti-union statements of Councilwoman Phyllis Hesser, made in December, 2007, when she was a member of Borough Council. She said it would not be in the Borough's interest to have the police become civil service or affiliated with the FOP because of the cost it would add to the Borough's budget.

Putting aside the question of whether Ms. Hesser's statement was evidence of anti-union animus, it is difficult to give weight to Ms. Hesser's statement as a factor to infer animus for these actions. Her council term ended at the reorganization meeting in January, 2008, before the discipline that is the subject of this charge of unfair labor practices. Furthermore, the Mayor, not Ms. Hesser, issued the discipline, following his own observations. There is no evidence that the Mayor was influenced by Ms. Hesser in reaching his decisions.

As for the next factor of close timing to the protected activity, the FOP argues that because the discipline came so shortly after Chief Reager started the process of joining the FOP that it is reasonable to infer that the discipline was caused by the protected activity.

The two warnings were issued about two months after Chief Reager decided to join the FOP. It is unclear if at that time anyone in the Borough had knowledge of Chief Reager's desire to join the FOP. However, the ten day paid suspension was issued 13 days after the FOP delivered a "to whom it may concern" letter to the Borough that Chief Reager was joining the FOP. Therefore, knowledge can be found under the "small plant doctrine." Williamsport Area School District, 14 PPER ¶ 14235 (Proposed Decision and Order, 1983); Temple University, 23 PPER ¶ 23033 at 64. (Final Order, 1992) The short period of time between the letter and the issuance of the ten day suspension does raise suspicions. But timing alone is not a sufficient basis to infer animus. AFSCME, Council

The FOP contends that a third factor, "failure to adequately explain" the discipline, is the additional factor from which it can be inferred that Chief Reager's exercise of protected activity was motivation for the Mayor's issuance of the discipline. In prior cases, the Board has found this as a factor to infer animus. See, e.g. Black Diamond Lodge No. 80, FOP v. Auburn Borough, 27 PPER ¶ 27221 (Final Order, 1996). The FOP contends that the two warnings and the ten day unpaid suspension were simply a pretext to retaliate against a new FOP member and could not pass the "failure to adequately explain" standard.

Having reviewed the evidence of record offered by the FOP to support its argument that the three instances of discipline were a pretext and not adequately explained, I must conclude that FOP's argument is not persuasive. The Mayor testified credibly that the reasons for his discipline of Chief Reager were for what he perceived to be actual incidents of misconduct. Under the Borough Code, the Mayor is in charge of the police department. 53 P.S. § 46121. The Mayor's reasons did not appear to be without foundation. The Mayor gave specific, substantive reasons why he issued the three disciplines.

Furthermore, even if these factors were given weight to use as the basis to infer animus, and the Board was to conclude that the FOP made a prima facie case of a Section 6(1)(c) violation, the Borough persuasively rebutted the argument that it was motivated by anti-union animus in issuing the discipline at issue. Mayor Williams testified credibly that the reasons for his discipline were not related to Chief Reager's attempt to join the FOP.

There are two remaining charges left for resolution. The first is the FOP's allegation that the Borough violated Section 6(1) (a) of the PLRA by disciplining Chief Reager in a manner that interfered with, restrained or coerced Chief Joshua Reager in the exercise of his rights in the PLRA. The Board will find that an independent violation of Section 6(1)(a) of the PLRA has occurred where, in light of the totality of the circumstances, the employer's action has a tendency to coerce a reasonable employe in the exercise of protected rights. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police v. City of Scranton, 38 PPER ¶ 104 (Final Order, 2007). Camp Hill Borough, supra; Borough of Geistown, supra.

When considering all of the facts of this case, in light of the totality of the circumstances, it must be concluded that the Mayor's actions did not coerce Chief Reager in the exercise of his rights. Mayor Williams testified credibly that his actions were unrelated to Chief Reager's joining the FOP. Chief Reager may have seen these actions as retaliation for his joining the FOP, but a reasonable person could also view the Mayor's actions as legitimate exercise of his authority. Accordingly, this charge will be dismissed.

Finally, the FOP's third charge is the allegation that the Borough violated Section 6(1)(b) of the PLRA, which makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or material support to it." There is no evidence that the Borough engaged in such conduct. Accordingly, this charge will be dismissed.

CONCLUSIONS

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

1. That Pine Grove Borough is an employer within the meaning of the PLRA and Act 111.
2. That the Fraternal Order of Police, Black Diamond Lodge 80 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 not committed unfair labor practices in violation of Sections 6(1)(a), (b), (c), (d) and (e) 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 examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices is rescinded and the complaint dismissed.

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 twenty-first day of January, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner