# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 955

:

v. : Case No. PF-C-09-6-W

:

CITY OF UNIONTOWN :

## PROPOSED DECISION AND ORDER

On January 20, 2009, the International Association of Fire fighters, Local 955 (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Uniontown (City) violated Section 6(1)(a), (c), (d) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111. In its specification of charges, the Union alleges that, on or about January 13, 2009, the City unlawfully demoted Fire Chief Myron Nypaver, removing substantial duties and reducing his pay, in retaliation for his supporting the Union and for engaging in other protected activities. The Union further alleges that the City engaged in such conduct without bargaining with the Union.

On February 13, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on March 9, 2009 in Somerset, Pennsylvania. As a result of a scheduling error, I rescheduled the hearing for March 30, 2009. After several continuances due to the requests of the parties and the Commonwealth budget impasse, the hearing was held on December 30, 2009. During the hearing, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

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

#### FINDINGS OF FACT

- 1. The City is a public employer and political subdivision under  $Act\ 111$  as read in pari materia with the PLRA. (N.T. 8).
- 2. The Union is a labor organization under Act 111 as read in  $\underline{\text{pari}}$   $\underline{\text{materia}}$  with the PLRA. (N.T. 8).
- 3. Myron Nypaver began employment with the City's Fire Department on February 14, 1989. He was promoted from Assistant Chief to Fire Chief on February 4, 2004. (N.T. 115-116, 118).
- 4. Since 2002, Mr. Nypaver performed code enforcement duties for the City. At that time, Nypaver was the Assistant Fire Chief. He is a certified building code official, and his duties in code enforcement were performed through his position with the Fire Department. (N.T. 117-118, 122, 151-152, 221).
- 5. From 2002 until February 2004, Mr. Nypaver received approximately \$5,800 per year for his code enforcement duties. When the City promoted Nypaver to Fire Chief, it maintained his Assistant Fire Chief Salary and eliminated the extra pay for code enforcement duties. Nypaver lost income when he was promoted. (N.T. 100, 122-125, 151-152).
- 6. Gary Crozier has been a member of City Council since 1993. Each council member is assigned to direct a different department within City government, and those assignments can change. Mr. Crozier was the City's Director of Public Safety (which includes the Fire Department) between 2000 and 2009. (N.T. 110, 143-144, 173-174).
  - 7. Daniel Webster was the City's Solicitor from May 1996 to December 2007. (N.T. 87-88).
- 8. In November of each year, the Director of Accounts and Finance submits a budget to the mayor and City Council for the following calendar year. The City Solicitor

 $<sup>^{1}</sup>$  The Director of Accounts and Finance is one of the City council members assigned to manage that department.

prepares a notice of publication for the local newspaper providing the date when the budget will be read for the first time. After the first reading, notice of a special meeting of City Council is placed in the local newspaper for the purpose of adopting the budget for the following year. At the special meeting, the budget is either adopted or rejected. If the budget is adopted, the budget ordinance is forwarded to the Pennsylvania Department of Community and Economic Development for approval. (N.T. 87-88).

- 9. The City's budgets for both 2007 and 2008 were passed and approved as ordinances. Mr. Webster personally observed that the budget process for those years occurred properly. The City has properly passed budget ordinances during the entire time that Mr. Webster was City Solicitor. (N.T. 89, 91, 96).
- 10. The salary of a City employe is established by ordinance unless the salary is adjusted or the employe is promoted sometime during the year when the salary may be established by resolution. (N.T. 90, 94, 112).
- 11. Robert Cerjanec was a council member and the Director of Accounts and Finance in 2006 and 2007. He was responsible for preparing and reviewing all budget line items. Other council members approached Mr. Cerjanec to adjust Mr. Nypaver's salary in late 2006 for 2007. To accomplish Nypaver's salary increase, Mr. Cerjanec readjusted an old resolution by including a raise as well as cost-of-living and longevity increases that elevated Nypaver's salary to a figure that satisfied the council members. The majority of city council voted to give Nypaver a raise of \$10,000 in the 2007 budget year for his code enforcement duties and his promotion to Fire Chief. Mr. Cerjanec placed Nypaver's raise in the budget. (N.T. 98, 100-101, 107-108).
- 12. Mr. Crozier did not participate in the city Council vote that approved Nypaver's receipt of an extra \$10,000 per year for code enforcement work because he is Nypaver's father-in-law. (N.T. 180).
- 13. The \$10,000 salary increase was a separate designation on Nypaver's biweekly paycheck as \$381.61. Paychecks must be signed by four City officials (Director of Finance, Treasurer, Controller and department head). Four council members and the mayor comprise City government. At least three of the five elected officials approved of Mr. Nypaver's raise for 2007. council member Cerjanec signed off on Nypaver's \$10,000 pay for code enforcement in the pay ledger as the Director of Accounts and Finance. (N.T. 96, 101-102, 126; Union Exhibits 6, 12, 13).
- 14. Edward Fike was elected mayor in late 2007, and he took office in January 2008. At that time, Mayor Fike appointed his daughter, Kimberly Marshall, to the position of City Clerk. As the City Clerk, Ms. Marshall records the minutes at City Council meetings, prepares agendas for those meetings, schedules meetings for the Mayor Fike, oversees payroll and answers correspondence. Ms. Marshall is also the Deputy Director of Accounts and Finance and, in that capacity, participates in the preparation of the City budget and the payment of bills. (N.T. 18, 199).
- 15. In reviewing budget proposals in late 2008 for 2009, Mr. Crozier noticed a line item for \$10,000 for code enforcement. He told Ms. Marshall that code enforcement should be itemized under the Fire Department. This recommendation was a housekeeping measure not a cost savings measure. Mr. Crozier did not at any time tell Ms. Marshall that Nypaver should not be receiving that money for code enforcement. (N.T. 175-176).
- 16. At the October 7, 2008 City Council meeting, the Council passed a resolution to layoff six of the City's thirteen firefighters. Nypaver attended that meeting and publicly spoke on behalf of the firefighters and the Union, communicating with both Mayor Fike and City Council. He raised safety concerns for the Fire Department and the citizens of the City if six firefighters were laid off. As a result of an October 12, 2008 negotiation session in Council chambers, only three of the firefighters were laid off. (N.T. 128-129, 157; Union Exhibit 7).
- 17. At a special public City Council meeting on November 22, 2008, Council again wanted to layoff three additional firefighters. Nypaver attended that meeting and again

publicly opposed the additional layoffs. Nypaver again raised safety concerns for the firefighters and the citizens of the City. (N.T. 129-130, 160).

- 18. The volunteer firefighters also attended the November 22, 2008 special Council meeting to unite in protest against the layoffs. There were seven or eight volunteer firefighters at the meeting. (N.T. 131-132, 158).
- 19. Nypaver did not direct any paid or volunteer firefighter to attend any of the City Council meetings. (N.T. 159).
- 20. On November 28, 2008, Nypaver received a memo, dated November 26, 2008, from Ms. Marshall. The Marshall memo stated that "per Mr. Palumbo, Director of Accounts and Finance, you [Nypaver] will not receive the additional \$384.61 that is listed as 'other earnings' on your paycheck unless or until this matter is resolved." (N.T. 132-133; Union Exhibits 1 & 6).
- 21. At no time did Ms. Marshall, Mayor Fike or anyone else in City government try to contact Mr. Webster to learn how Nypaver received his code enforcement pay. At no time did Ms. Marshall contact Mr. Cerjanec to learn how Nypaver received his code enforcement pay. (N.T. 95, 98).
- 22. On December 2, 2008, Nypaver filed a formal grievance complaining that the City's withholding of the \$384.61 that he received bi-weekly for his code enforcement duties violated the collective bargaining agreement (CBA). In the grievance, Nypaver stated that he "explained to her [Marshall] that this [raise] was done in February 2007 by Mayor and Council, and her reply to me was that if I could produce a resolution to prove the increase my salary would be reinstated." Nypaver further wrote in the grievance that, by giving him the raise, "Council was simply reinstating monies [he] lost when promoted to Fire Chief, and they evaluated and adjusted [his] wages based on [his] overall duties as Fire Chief/Building Code Official for the City of Uniontown. (N.T. 133; Union Exhibit 8).
- 23. After Nypaver filed the December 2, 2008 grievance, he was summoned to Mayor Fike's office where Mayor Fike read a prepared oral reprimand to Nypaver. The mayor does not supervise or manage the Fire Department. The council member appointed to direct Public Safety supervises the Fire Department. (N.T. 114, 134-135, 163, 175).
- 24. Mayor Fike's oral reprimand disciplined Nypaver for standing and speaking at the November 22 2008 special council meeting on behalf of the firefighters and their safety concerns and for allowing volunteer and on-duty firefighters to attend the public meeting as against City policy. (N.T. 135).
- 25. During the November 22, 2008 meeting, all of the City's fire stations were staffed. The firefighters who attended the meeting were the same individuals who were to be laid off. The firefighters in attendance were on-duty with radios and a fire truck. Off-duty firefighters covered for the on-duty firefighters so the on-duty firefighters could attend the meeting. Nypaver was unaware of any City policy prohibiting on-duty firefighters from leaving the fire station to come to City Hall. In the past, on-duty firefighters did go to City Hall for various matters. City Hall is approximately one hundred yards from the fire station. There is no City policy prohibiting off-duty firefighters from covering for on-duty firefighters. (N.T. 135-137, 203).
- 26. On December 30, 2008, Nypaver filed another grievance complaining that Mayor Fike improperly reprimanded him. In the grievance, Nypaver noted that he believed that Mayor Fike acted in violation of the administrative code and City ordinances. He also alleged that Mayor Fike cited a policy of which Nypaver was unaware and alleged that Mayor Fike failed to have the council member in charge of the Fire Department present at the reprimand. (N.T. 141; Union Exhibit 9).
- 27. On January 13, 2009, Nypaver was demoted, without notice, from Fire Chief to Assistant Chief and his code enforcement duties were taken away. As a result of the demotion, Nypaver's base salary was reduced. Nypaver continued to perform code enforcement duties. (N.T. 143-144, 146-147, 164-165, 168; Union Exhibits 12 & 13).

- 28. A City resident has a daughter who is confined to a wheelchair. The resident received county funding to build a wheelchair lift and porch. The initial contractor failed to obtain a building permit. The resident contacted the City to complain about the contractor, but the City had no record of the work being done because no one had applied for a permit. After receiving the complaints and conducting an inspection, Nypaver determined that the structure was in danger of collapse and sought the City's engineer's opinion. The original contractor abandoned the project and still no one applied for a permit. The engineer's report went to the code enforcement office after the secretary there had been laid off by the City, and Nypaver was unaware that it had arrived. When the resident hired a new contractor, that contractor properly obtained the proper permits and Nypaver's office followed up on the inspections. (N.T. 138-139).
  - 29. Article IV of the parties' CBA provides as follows:

SECTION 1: Salaries.

The salary of each firefighter shall be increased during the term of this agreement on the following basis:

- (a) For the calendar year beginning January 1, 2008, an amount equal to four (4) percent of the base salary established and paid during the year 2007.
- (b) For the calendar year beginning January 1, 2009, an amount equal to four (4) percent of the base salary established and paid during the year 2008.
- (c) For the calendar year beginning January 1, 2010, an amount equal to four (4) percent of the base salary established and paid during the year 2009.

(Union Exhibit 5 at 4-5).

#### **DISCUSSION**

The Union argues that the City unlawfully retaliated and discriminated against Myron Nypaver for supporting the Union and the safety of Union firefighters at a public meeting when Mayor Fike orally reprimanded Nypaver, when the City eliminated his additional compensation for code enforcement work and when they demoted Nypaver from Fire Chief to Assistant Fire Chief and reduced his salary. The Union also argues that the City's reasons for taking such actions are transparently pretextual and that the close timing between Nypaver's protected activity and the adverse employment action taken against him by the City further supports the claim of unlawful discrimination.

The City defends against the discrimination claims arguing that the Union failed to establish a <u>prima facie</u> case that Nypaver's demotion and pay reduction was the result of union animus and that the City's reasons for taking such action against Nypaver were not pretextual as argued by the Union. The City further maintains that even if its actions were not wise or correct, as long as those actions were not motivated by animus, the City did not engage in unfair practices.

#### CREDIBILITY

## 1. Kimberly Marshall

As an initial matter, I am disregarding the entire testimony of City Clerk Kimberly Marshall as not credible, except for some foundational and background facts relating to her position and job duties. I base this determination on Ms. Marshall's appearance, general bearing, conduct on the stand, demeanor, manner of testifying, candor and frankness during cross-examination. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994); Keystone Education Center Charter School Education Association v. Keystone Education Center, Inc., 30 PPER ¶ 30167 (Final Order, 1999)(opining that the hearing examiner is free to accept or reject the testimony of any witness, in whole or in part, based on the witness's credibility).

Ms. Marshall testified in a manner that repeatedly conflicted, not only with the testimony of other witnesses, but also with her own testimony. Her testimony seemed contrived. To illustrate, at a point in the hearing when Mr. Crozier was not present and it appeared as though he would not be testifying, she repeatedly testified that Mr. Crozier told her in November 2008 that Nypaver should not be receiving an extra \$10,000 for his code enforcement work because he was already receiving an extra \$6,000 as part of his Fire Chief salary. (N.T. 24-25, 43, 48, 64). Not only did three other witnesses (Webster, Cerjanec and Crozier) expressly refute that testimony, but Mr. Crozier testified that, as Nypaver's father-in-law, he did not and would not want his son-inlaw's salary reduced. I believe the three other witnesses. Also, the other record evidence belies the allegation that Nypaver was already receiving \$6,000 for his code enforcement as part of his Fire Chief salary.

Ms. Marshall also testified that the City did not pass a budget ordinance in twelve years (N.T. 27-28, 44) but later testified that she could not remember what was in the budgets for 2007 or 2008. (N.T. 27-28). Also, Mr. Webster, the City's solicitor credibly testified that the City properly passed a budget ordinance every year including 2007 and 2008. (F.F. 8 & 9; N.T. 89). He testified from personal knowledge that Ms. Marshall's claims about the budgets were "[a]bsolutely not" true. (N.T. 89). Moreover, the Director of Accounts and Finance testified that Ms. Marshall did not at any time contact him to investigate the Nypaver's wage increase of \$10,000. Ms. Marshall also testified that she eliminated Mr. Nypaver's code enforcement compensation because there was no resolution authorizing it, but she did not question the Director of Finance who had first-hand knowledge that a previous resolution was amended to authorize Nypaver's code enforcement compensation. (N.T. 98). Ms. Marshall also testified that, when she spoke with Nypaver about the \$10,000 in late November 2008, he gave conflicting answers about how much money he was supposed to be receiving. (N.T. 51-52). However, Nypaver credibly testified that he never contradicted himself or at any time indicated to Marshall that he should receive anything less than an additional \$10,000 per year for his code enforcement work. (N.T. 150). Ms. Marshall also indicated that she spoke to two other council members on Council at the time that Nypaver's raise would have been approved and she claimed that they had no recollection of approving it and that there was a 2003 resolution giving him about \$5,900 included in his Fire Chief Salary for code enforcement. (N.T. 52-54). This testimony is uncorroborated hearsay on which I am unable to rely. 2 Kaolin Mushroom Farms v. PLRB, 702 A.2d 1110 (Pa. Cmwlth. 1997) (applying the evidentiary rule enunciated in Walker v. UCBR, 367 A.2d 366 (Pa. Cmwlth. 1976)). Furthermore, the record belies this testimony emphasizing the dangers and unreliability of hearsay.3

Given the multitude of inconsistencies, inaccuracies and contradictions in her testimony, as well as her behavior on the witness stand, I am constrained to disregard Ms. Marshall's testimony in its entirety, which includes her testimony when called as on cross by the Union and when called on direct examination by the City. Ms. Marshall's testimony is not evidence capable supporting findings of fact in this case.

## 2. Mayor Edward Fike

I am also disregarding Mayor Fike's testimony in its entirety because, based on his appearance, general bearing, conduct on the stand, demeanor, manner of testifying, candor and frankness during cross-examination, Mid Valley Sch. Dist., supra, Keystone Educ. Center, supra, I am unable to credit his testimony. For example, Mayor Fike's hearsay testimony (that three of the council members told Mayor Fike that they do not remember voting for Nypaver's raise), (N.T. 215), conflicts with the admissible facts of record. Mr. Cerjanec credibly testified that a majority of council members voted in favor of Nypaver's raise. Since the mayor has a vote and Mr. Crozier abstained from the vote that means that at least three of the five voters (i.e. the mayor and four council members) voted in favor of the raise. At a minimum, two council members must have voted in favor

 $<sup>^2</sup>$  Mayor Fike testified that three other council members told him that the raise never came before Council, but this too is hearsay and cannot be used to corroborate Ms. Marshall's testimony and, as will be explained infra, I have concluded that Mayor Fike's testimony is not credible.

<sup>&</sup>lt;sup>3</sup> Nypaver was not Fire Chief in 2003. Nypaver did receive \$5,800 for code enforcement as Assistant Chief since 2002. Although Ms. Marshall could have simply misspoken on this point, it is just another cog in the wheel of inconsistent testimony.

of the raise to get the minimum of three votes. Only Blair Jones and Mr. Crozier remained as council members after the election, which means that the two new council members were not involved in the approval of Nypaver's raise. Mr. Crozier testified that he remembered the vote but abstained from it. Therefore, aside from the inadmissibility of Mayor Fike's testimony as hearsay, it is not credible because, excluding Mr. Crozier, there is only one council member who would have had first hand knowledge of such a vote, not three.

There were instances on cross-examination when Mayor Fike avoided the question that was asked, answering only after the question was repeated a second or third time. He offered unsolicited statements about Nypaver's wife to distract from the line of questioning. (N.T. 211). He testified that he talked to Nypaver at different times about complaints received by City Hall about Nypaver's code enforcement work and the inability of residents to obtain permits and inspections. (N.T. 209-211). However, when pressed on cross-examination about whether Mayor Fike discussed these complaints with Nypaver throughout 2008, Mayor Fike confusedly answered as follows: "when we'd get a complaint, if I didn't send it to— when Judy was upstairs— we'd have somebody from City Hall call down there." (N.T. 211). The answer that he had someone "call down" to the code enforcement office contradicts prior testimony that Mayor Fike maintained a dialogue with Nypaver about the complaints.

Also, Mayor Fike testified that the reason for Nypaver's demotion was because he received a pay raise without approval of Council and because his father-in-law was the department head which created a conflict of interest. (N.T. 213-214). However, after stating that as a reason, Mayor Fike admitted that he was unaware of the fact that Nypaver's father-in-law abstained from voting for the pay raise. He also testified that he never discussed the matter with Mr. Crozier, which is suspect since Mr. Crozier is one of only two council members who knew about the manner in which the pay raise was given to Nypaver. Accordingly, based on Mayor Fike's inconsistent testimony, his demeanor on the stand, his evasive and unresponsive answers on cross-examination, I am disregarding his testimony in its entirety. Nothing in Mayor Fike's testimony constitutes substantial evidence to support factual findings.

### DISCRIMINATION CLAIM

In <u>Fraternal Order of Police, Lodge No. 7 v. City of Erie</u>, 39 PPER 60 (Proposed Decision and Order, 2008), I expressed the legal analysis for a discrimination claim under Act 111 and the PLRA as follows:

In a discrimination claim under Section 6(1)(c) of the PLRA, the claimant has the burden of proving that the employe engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employe that was motivated by the employe's engaging in that known protected activity. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004); FOP, Lodge 5 v. City of Philadelphia, 38 PPER 184 (Final Order, 2007). 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).

The Board will give weight to several factors upon which an inference of unlawful motive may be drawn. In <u>PLRB v. Child Development Council of Centre County</u>, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether antiunion animus was a factor in the [adverse action against] the Complainant." <u>Id.</u> at 380. These factors include the entire background of the case, including any antiunion 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 employe, the effect of the employer's adverse action on other employes and protected activities, and whether the action complained of was "inherently destructive" of important employe rights. <u>Centre County</u>, 9 PPER at 380. The close timing of an employer's adverse action alone is not enough to infer animus, but when combined with other factors can give rise to the inference of anti-union animus. <u>PLRB v. Berks County</u>, 13 PPER ¶ 13277 (Final Order 1982); City of Philadelphia, supra; Teamsters Local No. 764 v. Montour

County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984). Evidence that the employer has failed to adequately explain its adverse actions or that it has set forth shifting reasons for an adverse action can support an inference of anti-union animus and may be part of the union's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982), aff'd, Montgomery County v. PLRB, 15 PPER ¶ 15089 (Court of Common Pleas of Montgomery County, 1984). However, mere suspicion is insufficient to sustain a discrimination charge. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

Only if the union establishes a prima facie case that an employer's adverse action against an employe was motivated by the employe's protected activity does the burden shift to the employer. West Shore Educ. Ass'n v. West Shore Sch. Dist., 23 PPER ¶ 23031 (Final Order, 1992). In such instances, the employer may rebut the union's prima facie case in one of two ways: (1) an employer may prove that the action complained of was taken for legitimate business reasons and not unlawful motive; or (2) the employer may prove that, despite evidence of unlawful motive, the employer would have taken the same action anyway because the legitimate business reason was the overriding, proximate cause of the adverse employment action and not the unlawful motive.  $\underline{\text{Upland Borough}}$ ,  $\underline{\text{supra}}$ ,  $\underline{\text{West Shore Sch. Dist.}}$ ,  $\underline{\text{supra}}$ ;  $\underline{\text{Teamsters Local Union No. 32 }}$   $\underline{\text{V. Washington Township Mun. Auth.}}$ , 20 PPER  $\P$ 20128 (Final Order, 1989). The latter is otherwise known as a "dual motive" case. Indiana Area Educ. Ass'n v. Indiana Area Sch. Dist., 34 PPER 133 (Final Order, 2003). In either defensive posture, an employer's insubstantial or pretextual explanation for adverse action coupled with close timing of that adverse action to protected activity can establish a prima facie case and a sufficient evidentiary of basis to find a violation of Section (6)(1)(c). Colonial Food Service Educ.

Personnel Ass'n v. Colonial Sch. Dist., 36 PPER 88 (Final Order, 2005); Lehighton Area School District v. PLRB, 27 PPER ¶ 27001 (Pa. Cmwlth. 1996).

## City of Erie, 39 PPER at 204-205.

The Union has established that the City discriminated against Myron Nypaver when it withheld his code enforcement compensation, demoted him from the position of Fire Chief to Assistant Chief, eliminated his code enforcement duties and reprimanded him. Nypaver engaged in protected union activities for mutual aid and protection when he openly and publicly stood at a public meeting on October 7, 2008, and at a special meeting on November 22, 2008 before council members and Mayor Fike with fellow Union firefighters and volunteer firefighters to protest firefighter layoffs in the interest of firefighter safety. Employe activity may be protected even though it may violate a policy, work rule or chain of command. Teamsters Local 249 v. Millvale Borough, 36 PPER 147 (Final Order, 2005). In Millvale Borough, the Board stated the following:

. . [A]ctivity may be statutorily protected even though the activity may be perceived by the employer to violate its chain of command. Section 5 of the PLRA contains protected activities and provides that "[e]mployes shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." 43 P.S. § 211.5 (emphasis added). In PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978), our Supreme Court endorsed a liberal statutory construction of what constitutes "protected activity". The Fabrication Specialists Court concluded that "a meeting of employees to plan a course of action for dealing with their employer is an activity protected from employer interference by Section 6." Fabrication Specialists, 383 A.2d at 807.

In <u>Fraternal Order of Police</u>, <u>Lodge No. 10 v. City of Allentown</u>, 26 PPER P. 26143 (Final Order, 1995), the union president, who was also an officer, was given a suspension and transfer for going outside the chain of command by contacting the district attorney to investigate possible misuse of another officer's medical authorization form. The Allentown Board relied on the United States Supreme Court's

decision in <u>Eastex</u>, <u>Inc. v. NLRB</u>, 437 U.S. 556, 98 S.Ct. 2505 (1978), and concluded that Section 5 of the PLRA, like Section 7 of the NLRA, "protects employe action beyond the immediate employe-employer relationship." <u>Allentown</u>, 26 PPER at 333. In <u>Allentown</u>, the Board also relied on <u>Washington Aluminum</u>, <u>supra</u>, and concluded that protected activity is not rendered unprotected merely because the employes involved have breached a work rule. <u>Allentown</u>, 26 PPER at 333. Although the record clearly establishes that the chain-of-command work rule was not breached in this case, this Board and the Supreme Court have already concluded that such a breach will not, by itself, remove the protective cloak of Section 5.

Millvale, 36 PPER at 430. The uncontradicted evidence of record demonstrates that Nypaver publicly stood with and supported the Union and Union firefighters and challenged the City's proposed layoffs, citing safety concerns, at two public meetings with City Council and Mayor Fike in attendance. Therefore, the first two prongs of Duryea Borough, supra, have been satisfied because the City officials had knowledge of Nypaver's protected activities. Moreover, the close timing of the adverse action against Nypaver coupled with inadequate, shifting and pretextual explanations as well as a lack of substantial evidence to support those pretextual explanations supports the inference that the City's adverse actions against Nypaver were unlawfully motivated. Nypaver had been Fire Chief for almost five years and code enforcement officer for almost seven years without incident. It was not until Nypaver publicly supported the Union and opposed the layoffs for safety reasons with other paid and volunteer firefighters that the City suddenly perceived a problem with his code enforcement duties, eliminated his pay, issued a reprimanded and demoted him. Having established a prima facie case of discrimination, the burden shifted to the City to establish that it was motivated by legitimate business reasons. The City, however, failed to meet that burden of proof.

The City argues that it eliminated Nypaver's biweekly code enforcement pay of 384.61 because Ms. Marshall testified that she did not know that he was receiving it until she was informed by Mr. Crozier on or about November 14, 2008, that his son-in-law should not be receiving that extra pay. (City's Brief at 5-6). The City maintains that, upon learning of the so-called discrepancy from Mr. Crozier, Ms. Marshall launched an all out investigation which revealed no authorization or justification for Nypaver's \$10,000 code enforcement pay. (City's Brief at 6). The City further argues that, when Ms. Marshall contacted Nypaver, he could not explain why he was entitled to the extra money for code enforcement and he neglected to meet with her about the matter. (City's Brief at 6). The City contends that all of this occurred before the November 22, 2008 meeting so there was no discrimination.

The City's arguments, however, have no support in the record. First, the City relies on Ms. Marshall's testimony, which I have discredited. Therefore, Ms. Marshall's testimony cannot support any factual findings. Second, the record contradicts all of the City's claims. Mr. Crozier did not at any time inform Ms. Marshall that his son-in-law should not be receiving \$10,000 per year in addition to his Fire Chief salary. The City's claim that Ms. Marshall "launched a thorough and detailed investigation into the matter," (City's Brief at 6), is also belied by the record. Ms. Marshall did not interview Mr. Webster, the former solicitor who has first-hand knowledge of the City's budget processes during the relevant time period. She did not question Mr. Cerjanec who specifically noted the increase in the official ledger as modifying a prior resolution. There is no evidence on this record that Ms. Marshall consulted the official ledger kept by the Director of Accounts and Finance. The record also lacks evidence that she questioned Mr. Crozier about the authorization for Nypaver's wage increase.

The City argues that Ms. Marshall testified that Nypaver could not clarify the matter. However, Nypaver credibly testified that he did not at any time indicate to Ms. Marshall that he should be receiving anything other than \$10,000 for code enforcement duties. Although the City claims that an investigation into and subsequent removal of the extra pay arose on or about November 14, 2008, before Nypaver's involvement with the November 22, 2008 public meeting, it did not precede the October 7, 2008 public meeting where Nypaver initially challenged the City's plans for firefighter layoffs on behalf of the Union and the firefighters. Also, the City's timeline relies on Ms. Marshall's testimony which has been discredited. The record is devoid of substantial evidence to support the conclusion that the City credibly perceived that Mr. Nypaver's code enforcement compensation was illegal or improper.

The City further argues that its demotion of Nypaver from Fire Chief to Assistant Chief was not unlawfully motivated. In support of this argument, the City relies on the testimony of Mayor Fike where the Mayor denied that his involvement in the demotion was in any way retaliation for Nypaver's support of the Union and his firefighters at the two public meetings. (City's Post-hearing Brief at 11-12). The City also relies on Mayor Fike's testimony that Nypaver was demoted because the City believed that Nypaver received an illegal pay raise and the appearance of impropriety resulting from Nypaver's fatherin-law overseeing the Fire Department. (City's Post-hearing Brief at 12). Again, I do not credit Mayor Fike's testimony. Also Mayor Fike's testimony, that he was not retaliating against Nypaver for his Union support at the public meetings, constitutes a legal conclusion by a witness and not facts to support such a conclusion.

The City also defends against the removal of Nypaver as code enforcement officer by relying on the testimony of Ms. Marshall and Mayor Fike that Nypaver's performance in that role was unsatisfactory. (City's Post-hearing Brief at 12). The City maintains that Ms. Marshall testified that she received numerous weekly and sometimes daily complaints against Nypaver about his code enforcement performance sometimes from the same individual. (City Post-hearing Brief at 12). Ms. Marshall, the City argues, testified about one repeat caller who needed a wheel chair ramp for his daughter and that Nypaver defended the delay by stating that he was awaiting the engineer's report, which Marshall later discovered he received two months earlier. This argument is flawed for several reasons.

First, the testimony that complaints were received is hearsay offered to establish that Nypaver allegedly was not performing his code enforcement duties properly. However, there was no way to test the content, nature and extent of those alleged complaints. Also, the argument is not supported by the record because I do not credit Ms. Marshall's testimony. The City's reference to the repeated complaints concerning the wheelchair ramp disingenuously explains only half the story. The City's argument neglects the credible contradicting testimony of Mr. Nypaver who explained that the delay in issuing a permit and providing inspections was the fault of the resident and his contractor, and not Nypaver. Indeed, although Nypaver thought he did not receive the engineer's report until much later, he explained that due to the layoff of the code enforcement secretary, code enforcement administration suffered and he was unaware that the engineer's report had arrived. However, the engineer's report did not hold up approval and inspection of the ramp; that delay was the fault of the homeowner and his contractors. (F.F. 27).

The City also defends its removal of Nypaver as code enforcement officer by relying on Mayor Fike's testimony that the City received complaints about the code enforcement office both before and after the layoffs. (Post-hearing Brief at 13). However, as with the City's reliance on Ms. Marshall's testimony in support of the same argument, I do not credit Mayor Fike's testimony. Additionally, I cannot rely on the hearsay testimony that unidentified individuals complained that Nypaver was not issuing permits or performing inspections without corroboration from non-hearsay, reliable evidence, which is lacking on this record. The unidentified hearsay complainants, to which Mayor Fike and his daughter conveniently refer as a basis for removing Nypaver's code enforcement duties, are particularly suspect given the overall lack of credibility of these two witnesses.

Although the City does not separately explain the justification of Mayor Fike's reprimand of Nypaver for permitting on-duty firefighters to attend a meeting at City Hall, I note that the City failed to produce the alleged policy upon which Mayor Fike claimed he based his reprimand and which allegedly forbids such behavior. Producing the alleged policy is especially necessary since Nypaver testified that he was unaware of such a policy and since the City's past practice of permitting uniformed firefighters on duty to go to City Hall belies the existence of such a policy. The City also failed to explain why Mayor Fike issued the reprimand without the Director of Public Safety present, especially since the mayor is not in charge of the Fire Department.

## BARGAINING VIOLATION

The Union additionally claims that the City violated the parties' CBA by implementing a new pay rate for Nypaver during the term of the CBA. (Union's Post-hearing

Brief at 11-12). The Union cites Article IV of the CBA in support of this argument. 4 The City argues that it did not implement a new rate of pay for Nypaver, but restored him to the base salary to which he was entitled. (City's Post-hearing Brief at 13). Although I do not agree with the City's argument, the Union did not establish a bargaining violation in this case. The contract provision cited by the Union unambiguously guarantees the firefighters four percent wage increases to their base salaries per year during the contract term. That provision does not preclude the adjustment of base salaries resulting from either lawful or unlawful demotion. A firefighter could be demoted with a pay reduction and still receive his four percent annual increase to his base salary and the City would be in compliance with Article IV. Although wages constitute a mandatory subject of bargaining, the pay reduction resulted from the unlawful demotion and removal of code enforcement pay and duties. In other words, the wage reduction is a consequence of discriminatory behavior, and it is not a separate cause of action. For example, when an employe is unlawfully suspended without pay, the wage loss does not constitute a bargaining violation; rather it is considered in fashioning appropriate make-whole relief as part of the losses suffered as a result of the unlawful suspension. Similarly, here, Nypaver's lost wages flow from the discriminatorily motivated demotion and removal of code enforcement pay and duties. Those wage losses will be restored as part of the remedy for the unlawful discrimination in demoting Nypaver and removing his code enforcement compensation and duties. Also, the Union has not offered substantial evidence on this record that the City violated Section 6(1)(d) of the PLRA and Act 111. Therefore, that claim is also dismissed.

## CONCLUSIONS

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

- 1. The City is a public employer and a political subdivision within the meaning of Act 111 as read in pari materia with the PLRA.
- 2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.
  - 3. The Board has jurisdiction over the parties hereto.
- 4. The City of Uniontown has committed unfair labor practices within the meaning of Section 6(1)(a) and (c) of the PLRA as read in <u>pari</u> <u>materia</u> with Act 111.
- 5. The City of Uniontown has  $\underline{\text{not}}$  committed unfair labor practices within the meaning of Section 6(1)(d) or (e) of the PLRA as read in pari materia with Act 111.

#### ORDER

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

## HEREBY ORDERS AND DIRECTS

that the City of Uniontown shall

- 1. cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA.
- 2. cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.
- 3. take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:

 $<sup>^4</sup>$  The Union's Post-hearing Brief contains a typographical error and refers to this as Article VI.

- (a) immediately reinstate Myron Nypaver to the position of Fire Chief of the City of Uniontown;
- (b) immediately pay Myron Nypaver and make him whole for all lost wages and benefits that he would have earned as Fire Chief and head code enforcement officer, from the date of his demotion and the date the City eliminated his code enforcement compensation respectively, to the date of the City's unconditional offer of reinstatement to the position of Fire Chief and code enforcement officer, including but not limited to wage increases received by the bargaining unit during the backpay period and any other lost benefits, medical and dental payments and copayments or accourtements and terms and conditions of employment enjoyed by officers of the rank of Fire Chief and Supervising Code Enforcement officer, including any differentials in holiday pay, overtime and the accrual of sick and vacation time, as well as pension contributions during the backpay period.
- (c) immediately expunge any and all records of Mayor Fike's oral reprimand of Myron Nypaver.
- (d) pay interest at the simple rate of six percent per annum on any and all backpay, including differentials in holiday, overtime and vacation pay as well as vacation accruals, due to Myron Nypaver from the date of his demotion and elimination of code enforcement pay until the date of unconditional offer of reinstatement to Fire Chief and the unconditional offer of reinstatement to code enforcement officer;
- (e) 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
- (f) 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 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 twenty-fourth day of June, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 955

:

v. : Case No. PF-C-09-6-W

:

CITY OF UNIONTOWN :

#### AFFIDAVIT OF COMPLAINCE

The City of Uniontown hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act as read in pari materia with Act 111; that it has reinstated Myron Nypaver to the position of Fire Chief of the City of Uniontown; that it has paid Myron Nypaver and made him whole for all lost wages and benefits that he would have earned as Fire Chief and head code enforcement officer, from the date of his demotion and the date the City eliminated his code enforcement compensation respectively, to the date of the City's unconditional offer of reinstatement to the position of Fire Chief and code enforcement officer in accordance with Paragraph 3(b) of this Order; that it has expunged any and all records of Mayor Fike's oral reprimand of Myron Nypaver; that it has paid interest at the simple rate of six percent per annum on any and all backpay, including differentials in holiday, overtime and vacation pay as well as vacation accruals, due to Myron Nypaver in the manner directed by Paragraph 3(d) of this Order; that it has posted a copy of the Decision and Order in the manner prescribed in Paragraph 3(e) of the Order; and that it has served a copy of this affidavit on the Union at its principal place of business.

	Signature/Date
	Title
SWORN AND SUBSCRIBED TO before me	
the day and year first aforesaid.	
Signature of Notary Public	