

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 7 :
 :
v. : Case No. PF-C-08-162-W
 :
CITY OF ERIE :

PROPOSED DECISION AND ORDER

On December 15, 2008, the Fraternal Order of Police, Lodge No. 7 (Union or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Erie (City) violated Section 6(1)(c), (d) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111. In its specification of charges, the Union alleges that the City discriminated against Detective Sergeants John and Pam Barber when Chief Stephen Franklin transferred them from their offices at City Hall to the Children's Advocacy Center (CAC). The Union alleges that the Chief transferred the Barbers because Detective John Barber and Lieutenant Christopher Lynch questioned Chief Franklin concerning the alleged lack of an internal investigation of Deputy Chief Joseph Emerick according to department policy and procedure.

By letter dated January 8, 2009, the Secretary of the Board informed the Union that the Board would not process the charge in its current form and enclosed an amended charge with the direction to sign and notarize the form and provide reasons why an internal investigation of Deputy Chief Emerick was necessary. On January 28, 2009, the Union timely filed an amended charge alleging that an internal investigation of Deputy Chief Emerick was required because he allegedly discharged his weapon at the scene of an incident and allegedly denied it. The amended charge also included an additional allegation that, on December 19, 2008, the Chief served a disciplinary notice upon Detective John Barber for raising his voice to a City employe after engaging in the protected activity of filing the original charge on December 15, 2008.

On March 4, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on June 17, 2009, in Pittsburgh. After one continuance, two days of hearing were held on October 7 and 8, 2009. During both days of hearing, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. During the second day of hearing, the Union withdrew its cause of action under Section 6(1)(e) of the PLRA and Act 111. 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 of the Commonwealth under Act 111 as read in pari materia with the PLRA. (N.T. 4).
2. The Union is a labor organization under Act 111 as read in pari materia with the PLRA. (N.T. 4).
3. In 2005, Maggie Kuhn and Rick Marino relocated to offices at the CAC. Currently, the CAC is located approximately two miles from City Hall. Maggie Kuhn retired in August 2007. The City of Erie Police Department (EPD) subsequently eliminated her position. (N.T. 29, 32-33, 199-200).
4. Detective Sergeant John Barber has worked in the Criminal Investigations Division (CID) at EPD, focusing on sex crimes since November 2000. (N.T. 20-21).
5. Detective John Barber has held various offices within the Union. From February 2006 to August 2008, Detective John Barber was the Union President. From August

2008 to March 2009, he was the Union Past President and from March 2009 to the present, he has been the Union Vice President. (N.T. 22-23).

6. Detective Sergeant Pam Barber is the wife and EPD partner of Detective John Barber. From February 2006 until March 2009, Detective Pam Barber was the Union Secretary. Detective Pam Barber's focus was adult and child sex crimes in CID. Until the summer of 2009, the Barbbers were the only two officers in the EPD to investigate sex crimes. (N.T. 149-152, 158, 406-407).

7. The City had sent Detectives Pam and John Barber for training for investigating sex crimes against children. Detective Pam Barber attended a course in Huntsville, Alabama that was given by National Children's Advocacy. She attended another sexual assault seminar in Miami. Detective John Barber attended the Huntsville program twice and has been to three courses for investigating sex crimes. (N.T. 92-93, 157).

8. On August 26, 2008, Detective John Barber filed a complaint with the Union against Chief Franklin. A three-member Union panel investigated the complaint. By letter dated September 12, 2008, the Union president, Lieutenant Christopher Lynch informed Chief Franklin that, on September 10, 2008, the Union Executive Committee voted to expel the Chief from the Fraternal Order of Police. The Chief did not appeal the expulsion, as was his right. (N.T. 26, 113-115, 188-189, 190-192, 394-395; Union Exhibit 2).

9. Detective Pam Barber was on the Executive Board of the Union that voted to expel Chief Franklin from the FOP. (N.T. 152).

10. In September, 2008, Connie Cook, Human Resources Manager, was walking down the hallway near her office in Human Resources (HR) when Detective John Barber blocked her path in a manner that caused Ms. Cook to walk backwards into her office until she was backed into the counter in the front of the HR office. Detective John Barber raised his voice and became intense in the presence of two other people. (N.T. 318-319, 321-322, 337).

11. On the night of October 29, 2008, and the early morning of October 30, 2008, fifteen officers were assigned to a stake-out detail to apprehend the perpetrators of a rash of convenience store robberies. This was the fifth such detail. That night, Deputy Chief Emerick, Inspector James DeDionisio, Lieutenant Mike Nolan and Sergeants Don Dacus and Barry Snyder responded to a robbery at the Circle K convenience store on Pine Avenue. (N.T. 45-46, 348-351; Union Exhibit 9, Defense Exhibit 11).

12. The robbery suspects attempted to flee the scene. All three suspects were apprehended. The driver struck Lieutenant Nolan with the escape vehicle after Lieutenant Nolan ordered the suspect to stop. During the confrontation with the robbery suspects, several shots were fired by EPD officers. (Union Exhibit 9; Defense Exhibit 11).

13. Both Chief Franklin and District Attorney Brad Foulk arrived on the scene shortly after the incident and the apprehension of the suspected robbers. After conferring with the Chief at the scene, District Attorney Foulk decided to have an investigation of the incident performed by someone in his office because high ranking EPD officers were involved. Under the CBA, officers must be investigated by higher ranking officers. The Chief was not involved in the investigation. (N.T. 110, 349, 396-397; Union Exhibit 9; Defense Exhibit 11).

14. The District Attorney contacted County Detective Anthony Bozich and directed him to the scene. While at the scene on the night of the robbery, the District Attorney assigned the investigation to Detective Bozich. Also at the scene, two nine millimeter and six .45 caliber casings were retrieved. Bozich took the service weapons of Lieutenant Nolan (.45 caliber Glock), Sergeant Dacus (.45 caliber Glock), and Sergeant Snyder (9 mm Glock), but not Deputy Chief Emerick. (N.T. 353; Defense Exhibit 11).

15. On the night of the robbery, Deputy Chief Emerick did not know that he discharged his 9mm Glock, and he, thereafter, did not recall discharging his weapon. A Pennsylvania State Police ballistic analysis of the casings retrieved from the scene established that Deputy Chief Emerick indeed fired his weapon. Deputy Chief Emerick did not

at any time deny discharging his weapon. Detective Bozich concluded that the use of force by all officers was appropriate. (N.T. 352, 357; Union Exhibit 9; Defense Exhibit 11).

16. Tammy Smith is the secretary of the Civil Service Board and attends Civil Service Board meetings. She is also the administrative assistant in HR. She works with Colleen Faytak, the benefits coordinator, and reports to Connie Cook. On November 26, 2008, Detective John Barber approached Ms. Smith in the HR office with rapid questioning and an irate demeanor waiving a notification of the hiring of a new police officer. He was complaining that the officer was not properly hired. Ms. Smith became visibly upset and expressed fear to Ms. Faytak that Detective John Barber would return. Detective John Barber's voice was raised and agitated. Ms. Smith was nervous and frustrated. (N.T. 168-176, 187, 193, 257, 305-307, 310-312, 315, 325-326; Union Exhibits 10 & 11).

17. Also on November 26, 2008, Detective John Barber and Lieutenant Lynch entered the Chief's office and met with him and Deputy Chief Emerick. Detective John Barber accused the Chief of covering up Deputy Chief Emerick's weapon discharge at the robbery on the night of October 29 and morning of October 30, 2008. The Union leaders requested that the Chief investigate whether Deputy Chief Emerick discharged his weapon without filing a report, relinquishing his weapon or taking three days of leave as required by EPD rules. Lieutenant Lynch and Detective Barber also expressed concern over Deputy Chief Emerick's fitness for duty since he could not remember discharging his weapon. The Chief explained that there was already an independent investigation being conducted by the District Attorney's office and County Detective Bozich. (N.T. 47-49, 51-52 106, 183-185, 399-400; Union Exhibit 8).

18. After Connie Cook informed the Chief of the November 26, 2008 incident involving Detective John Barber and Tammy Smith, the Chief directed Inspector DeDionisio, the head of internal affairs, to investigate whether Detective John Barber engaged in conduct unbecoming an officer regarding his dealings with Tammy Smith. Detective John Barber was previously disciplined, in the form of a verbal warning, for confronting Lieutenant Emberline. Inspector DeDionisio submitted his report and conclusions to the Chief at the beginning of January, 2009. (N.T. 177, 273-281, 325-326, 338, 424-425; Joint Exhibit 4).

19. Upon learning that Rick Marino was retiring, Chief Franklin conferred with District Attorney Foulk about child abuse investigations at the CAC. He also contacted two detectives about replacing Marino and taking over the child abuse and sex crimes cases. Additionally, he asked Captain Kwitowski, supervisor at CID, to poll the detectives for volunteers at a time when child abuse cases were continuing to be referred to the EPD. In the fall of 2008, Captain Kwitowski recommended to the Chief that the Barbers replace Rick Marino. (N.T. 199-202, 402-404, 417).

20. During the fall of 2008 before Marino retired, the Chief contemplated terminating an EPD presence at the CAC, and he directed Captain Kwitowski to instruct Marino to move out of the CAC. After meeting with District Attorney Foulk on December 1, 2008, the Chief decided to honor Foulk's request to maintain detective assignments at the CAC. (N.T. 201, 405-406, 446).

21. The Chief decided to assign the Barbers to the CAC to assume the child sex crimes and abuse cases because there were no qualified volunteers and the Barbers were the only detectives trained in that discipline. There was an influx of cases and an immediate need for detectives to continue the work. The Chief did not post the CAC position because there were no qualified candidates in the EPD and the interview process takes at least twenty-five days. (N.T. 157, 406-409, 414-417).

22. On December 3, 2008, at the Chief's direction, Captain Kwitowski informed the Detectives Barber that he was being transferred to the CAC. The Barbers met with the Chief on December 9, 2008, and asked the Chief to work the child abuse cases from City Hall rather than the CAC. On December 8, 2008, the Barbers moved out of City Hall. Captain Kwitowski advised the Barbers that the CAC assignment was temporary; he did not mention that it was a special-duty assignment. (N.T. 27-28, 68, 164, 199, 201-202, 408-409; Defendant's Exhibit 4).

23. On December 3, 2008, Detectives Pam and John Barber met with the Chief and expressed concerns that the CAC facility was not well maintained, i.e., carpets and parking areas were not well maintained. (N.T. 154-155, 206, 382).

24. Chief Franklin was unaware of any mice problems when he transferred the Barbers to the CAC. He first learned of the problem in January 2009 and not before. (N.T. 419-420, 439, 453-454).

25. Chief Franklin was unaware of ongoing computer connectivity problems at the CAC until December 8, 2008 after he transferred the Barbers. The Chief contacted Stephen Benson, the information technologist, who reported to the Chief that the problem was with the wiring at the CAC. The Chief sent the Barbers a new printer as soon as he heard they did not have one at the CAC. (N.T. 418).

26. On December 15, 2008, the Union filed the unfair labor practice charge alleging that the Barbers were transferred to the CAC for discriminatory purposes. On December 19, 2008, the Chief issued a written reprimand to Detective John Barber for raising his voice to Tammy Smith in HR on November 26, 2008. This discipline was progressive discipline following a prior verbal reprimand for confronting Lieutenant Emberline. The Chief was unaware of the original unfair labor practice charge until January, 2009. (N.T. 73-74, 127, 251, 281, 428-430).

27. Detective John Barber grieved his December 19, 2008 written reprimand and, on February 3, 2009, Ms. Cook denied the grievance under the parties' CBA. (N.T. 74-76, 329-330; Joint Exhibit 1, Article 3, Section H, Union Exhibit 12).

28. The Barbers complained to Kristen McQuone, the administrative assistant at the CAC, about rodent problems. On January 29, 2009, Detective John Barber e-mailed Deputy Chief Emerick and Captain Kwitowski about the rodent problem. On January 30, 2009, Deputy Chief Emerick responded and indicated that an exterminator would be hired to eradicate the rodents at the CAC. Captain Kwitowski contacted Kristen McQuone who in turn contacted the CAC board director. On January 30, 2009, Ms. McQuone contacted a pest control firm to exterminate the rodents. The pest control company placed poison and traps in the affected areas. After the Barbers returned from a vacation, they placed a dead mouse on Ms. McQuone's office chair. The mouse, which had been dead for some time, smelled badly. (N.T. 36, 206-208, 366, 379-381; Union Exhibit 4).

29. In January 2009, Captain Kwitowski became aware of problems that the Barbers were having with computer connections to the police department. Captain Kwitowski also contacted Stephen Benson to fix the computer and networking problems at the CAC. The Barbers could not access or input police reports from the CAC as they could from their offices at City Hall. The computer problems remain to some extent. (N.T. 41-45, 119, 121, 209-210, 381).

30. Throughout January, February and March of 2009, the Barbers raised issues regarding rodents and mold problems at the CAC. Mice were leaving fecal matter on the Barbers' desks and mice were chewing on their reports. The Barbers would use disinfectant to clean their desks every morning. (N.T. 36, 122, 206).

31. On February 12, 2009, Detective John Barber complained again to Captain Kwitowski of the rodent problem and attached pictures showing dead mice in traps. (N.T. 38-39; Union Exhibit 5).

32. On March 18, 2009, Ms. McQuone e-mailed Captain Kwitowski informing him that the CAC was addressing the rodent problems. (N.T. 212; Defense Exhibit 7).

33. On March 26, 2009, Captain Kwitowski e-mailed Dr. Snow at the CAC and informed him that the Barbers were still experiencing rodent problems and that the police department would have to remove their officers from the CAC if it was not remedied. (N.T. 213; Defense Exhibit 8).

34. On March 26, 2009, Detective John Barber sent an e-mail to Deputy Chief Emerick complaining that the unhealthy environment created by the rodent infestation in

his office at the CAC has not changed since they were assigned to the CAC. In that e-mail, Detective John Barber also requested a transfer. (N.T. 40-41; Union Exhibit 6).

35. On July 17, 2009, the Barbers informed Chief Franklin that investigating child abuse cases was causing them distress and they requested that they be transferred away from those types of cases immediately. On August 6, 2009, Captain Kwitowski informed the Detectives Barber that, after conferring with the Chief and Deputy Chief Bowers, he was transferring them back to City Hall and that they were to immediately stop investigating child abuse cases. (N.T. 421; Defense Exhibits 1 & 3).

DISCUSSION

In its post-hearing brief, the Union argues that the Chief transferred the Detectives Barber to the CAC and reprimanded Detective John Barber in retaliation for engaging in protected activity. Specifically, the Union contends that the Chief retaliated against the Barbers because Detective John Barber filed a complaint against the Chief and the Union voted to expel him from the FOP. The Union also claims that the Chief retaliated against the Barbers because Detective John Barber and Christopher Lynch challenged the Chief's handling of the investigation into Deputy Chief Emerick's weapon discharge on the night of October 29th, 2008 and questioned Emerick's fitness for duty given his claim of being unaware of the weapon discharge. The Union additionally claims that the Chief reprimanded Detective John Barber under the pretext of raising his voice at Tammy Smith, in retaliation for filing the original unfair labor practice charge against the City wherein the Union complained of the alleged discriminatory transfer to the CAC.

In FOP, Lodge No. 7 v. City of Erie, 39 PPER 60 (Proposed Decision and Order, 2008), I articulated the legal analysis for a discrimination claim in the following manner:

In a discrimination claim under Section 6(1)(c) [and 6(1)(d)] 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 PLRB v. Child Development Council of Centre County, 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 anti-union animus was a factor in the [adverse action against] the Complainant." Id. at 380. These factors include 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 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. Centre County, 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. PLRB v. Berks County, 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. Upland Borough, supra. West Shore Sch. Dist., supra; Teamsters Local Union No. 32 v. Washington Township Mun. Auth., 20 PPER ¶ 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); Lehigh Area School District v. PLRB, 27 PPER ¶ 27001 (Pa. Cmwlth., 1996).

City of Erie, 39 PPER at 204-205.

1. MOTION TO DISMISS

The City moved to dismiss the charge at the conclusion of the Union's case-in-chief, for failing to establish a prima facie case of discrimination. (N.T. 314). In the interest of administrative economy, I deferred my ruling on the motion, and the City presented its rebuttal case. However, in considering a motion to dismiss, I am limited to evaluating whether the Union has established a prima facie case, during its case-in-chief, with substantial, competent evidence that I have credited. Brock v. Lincoln University Chapter, American Ass'n of University Professors, 22 PPER ¶ 22158 at 351 (Final Order, 1991). Accordingly, I will first evaluate the Union's discrimination claim without considering any of the evidence elicited during the City's case. The motion forces a slight departure from the analysis. Normally, inadequate, pretextual or shifting explanations by the respondent can support a union's prima facie case of discrimination. Where a motion to dismiss limits the focus to evidence elicited during a union's case-in-chief, only the inadequate, pretextual or shifting explanations elicited during that part of the case may be considered and not those that may have been elicited during the City's case-in-chief.

The City does not dispute that the Detectives Barber were engaged in protected Union activity or that the City was aware of their protected activity. During its case-in-chief, the Union established that Detective John Barber, as Union President, successfully sought the expulsion of Chief Franklin from the FOP in September 2008. The Union also established that Detective John Barber and Christopher Lynch confronted the Chief and Deputy Chief Emerick, in their capacities as Union officials, about the failure to launch an investigation of Deputy Chief Emerick for discharging his weapon during the night of the Circle K robbery in October 2008, when the Deputy Chief, along with Inspector DeDionisio, Lieutenant Nolan and Sergeants Dacus and Snyder bravely confronted three dangerous felons who were wreaking havoc on the community. During that meeting in November 2008, Lieutenant Lynch and Detective John Barber accused the Chief of a cover-up. This constitutes protected activity of which the City (the Chief) knew. Accordingly, the first two prongs of the Union's discrimination claim have been satisfied.

On December 3, 2008, Captain Kwitowski, at the direction of the Chief, transferred the Barbers to the CAC. The Barbers made known that they did not want to go to the CAC. Detectives Pam and John Barber are husband and wife. As a courtesy to the Barbers, the Chief has permitted them to remain partners. On December 15, 2008, the Union filed the unfair labor practice charge against the City alleging a discriminatory transfer of the Barbers to the CAC. On December 19, 2008, the Chief disciplined Detective John Barber for yelling at Tammy Smith. On January 28, 2009, the Union filed an amended charge alleging that the Chief unlawfully disciplined Detective John Barber for filing the original charge. Although the Union claims that the Barbers' transfer to the CAC and Detective John Barber's discipline was discriminatory, the Union failed to establish that the Chief was unlawfully motivated.

In considering the entire background of the case, the Union's case-in-chief is devoid of evidence of unlawful statements by the Chief that could demonstrate an unlawful state of mind. Also, the Union failed to demonstrate an inability for the Chief and command staff to adequately explain the reasons for the complained-of actions and failed to establish shifting reasons for the same. The Chief's expulsion from the FOP, the confrontation over the investigation of Deputy Chief Emerick and the filing of the unfair labor practice charge on one side of the equation are close in timing to the Barbers' transfer and Detective John Barber's discipline on the other side, yet the timing alone is insufficient to infer animus here.¹ Indeed, as part of its case-in-chief, the Union called Inspector DeDionisio who investigated Detective John Barber's behavior towards Tammy Smith on November 26, 2008, and he credibly testified that Detective John Barber did engage in conduct unbecoming an officer warranting discipline. The Union, therefore, established that the Chief disciplined Detective John Barber for legitimate reasons.

I therefore conclude that the Union did not establish a prima facie case of discrimination regarding the actions of which it complained and I am granting the City's motion to dismiss.

Although the burden did not shift to the City, I will address the City's case, in the alternative, to avoid a remand in the event that exceptions are filed and the Board disagrees with my ruling on the motion.

2. LEGITIMATE BUSINESS REASONS

The City established with credible and corroborative evidence that the Chief's motivations for transferring the Barbers and for disciplining Detective John Barber were legitimate. Maggie Kuhn and Rick Marino were assigned to the CAC since 2005. When Maggie Kuhn retired in 2007, her position was eliminated leaving only Rick Marino at the CAC to investigate child abuse and sex crimes cases. In 2008, Rick Marino retired, and the City needed a detective to assume responsibility for Rick Marino's past and future cases. Unfortunately, the child abuse cases continued to be referred to EPD, and Chief Franklin desperately needed a detective equipped to immediately investigate those cases. Understanding that child abuse and sex crimes cases are taxing and stressful to detectives, the Chief initially sought qualified volunteers to assume Marino's position. However, no one volunteered. Faced with the influx of cases, the Chief was forced to assign a qualified detective to those cases, and the Barbers were the only detectives in the EPD who were trained and qualified to immediately begin investigating those cases. Moreover, had there been other qualified candidates, the posting and interviewing process takes about a month. Pursuing that process, given the influx of cases, would have interfered with the operational needs of the EPD. Although the EPD only needed one detective to replace Rick Marino, the Barbers were a husband-and-wife team who worked together as police partners. As a courtesy to the Barbers, the Chief decided to keep them

¹ The Union submitted a previous discrimination case involving the same parties at Joint Exhibits 2 & 3, which are the proposed decision and order and the final order at Case No. PF-C-07-110-E. In that case, the Chief selected another officer for a position and promoted him to lieutenant. When an arbitrator gave the position to Christopher Lynch, the Chief refused to promote him. Based on the Chief's prior statements that the rank of Lieutenant went with the position, the Board affirmed my determination that Chief Franklin refused to promote Lynch because he received the position through arbitration. My determination in that case, however, was extremely narrow. I do not consider that case to be part of the background of this case, nor do I consider it as probative of the Chief's motive in this case.

together as a team, especially since they were both qualified and trained in the type of detective work necessary for the CAC assignment.

At the time of his decision to transfer the Barbers, the Chief was unaware of any ongoing computer or rodent problems at the CAC. He did not consider the transfer to be a negative assignment since the Barbers were specialists in child abuse cases and were already investigating those types of cases. The Chief initially considered eliminating the EPD's presence at the CAC when Rick Marino retired. Chief Franklin only decided to maintain the satellite office after conferring with District Attorney Foulk who requested that the EPD maintain that office. The selection of the Barbers for child abuse cases and their transfer to the CAC had everything to do with the business needs of the EPD and nothing to do with Detective John Barber's Union activity.

As far as any rodent or computer problems that existed at the CAC, the City did not have operational control of the CAC facilities, which were owned by a private condominium association. When the Chief and Captain Kwitowski learned of the rodent and computer problems they contacted the CAC administrator, Ms. McQuone, to pursue remediation of the rodent problem. They also immediately contacted Mr. Benson, the City's information technologist, to remedy the computer connectivity issues. The Chief also ordered a new printer for the Detectives Barber when he learned they did not have printing capabilities. After three months of dealing with the rodent problem, Captain Kwitowski contacted Dr. Snow at the CAC and threatened to remove EPD offices from the CAC due to the unhealthy environmental hazard created by the rodent problem, if the problem was not remedied.

The Chief did not know of the problems before he transferred the Barbers; when he was notified of the problems, he and Captain Kwitowski pursued fixing them as best they could, although not quickly enough for the Detectives Barber. Also, as soon as the Barbers notified the Chief that investigating child abuse cases was causing them distress, the Chief immediately ordered them transferred back to City Hall and assigned them to investigate non-violent cases. If the Chief was at all interested in punishing the Barbers he would not have responsibly heeded their emotional and psychological needs and well-being. The record is simply full of corroborating evidence that the Chief made his decisions as a result of operational necessities and not due to Detectives John or Pam Barber's Union activities.

As far as Detective John Barber's discipline is concerned, the Union did not establish any nexus between the discipline and either the Deputy Chief Emerick matter or the Chief's expulsion from the FOP. Also, the Chief credibly testified that he had no knowledge of the filing of the original unfair labor practice charge in this case when he issued discipline to Detective John Barber. Therefore, as a matter of law, the Union failed to satisfy the second necessary element of its retaliation claim for the discipline.

Moreover, the Chief based the written reprimand on an independent investigation conducted by Inspector DeDionisio. That investigation was launched by the Chief because Connie Cook complained about Detective John Barber's conduct. Not only did Inspector DeDionisio verify that Detective John Barber raised his voice to and intimidated Tammy Smith, which constituted conduct unbecoming an officer warranting discipline for the November 26, 2008 incident, but the Chief had already verbally warned Detective John Barber about such conduct regarding an incident with Lieutenant Emberline. Detective John Barber had also engaged in similar intimidating behavior towards Ms. Cook in September 2008. Indeed, the record shows that Detective John Barber has exhibited a pattern of becoming escalated when circumstances beyond his control frustrate his plans or desires. Another example of such an episode occurred when he placed a dead mouse on Ms. McQuone's office chair. Accordingly, the discipline was unrelated to Union activity and a legitimate exercise of managerial authority to improve and deter unwanted conduct in the workplace.

Accordingly, the City met its burden of proving, on this record, that it possessed legitimate business reasons for all the actions complained of in both the charge and the amended charge, and both charges are hereby 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 of the Commonwealth 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 has not committed unfair labor practices within the meaning of Section 6(1)(c) or (d) of the PLRA as read in pari materia with Act 111.

5. The Union withdrew its cause of action under Section 6(1)(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 hearing examiner

HEREBY ORDERS AND DIRECTS

That the City's Motion to Dismiss the charge is granted, the charge is dismissed, the complaint is rescinded and 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 twelfth day of August, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner