

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE 9 :
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 v. : Case No. PF-C-09-49-E
 :
CITY OF READING :

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 v. : Case No. PF-C-09-59-E
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PROPOSED DECISION AND ORDER

On April 16, 2009, the Fraternal Order of Police, Lodge 9 (FOP or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board), docketed to PF-C-09-49-E, alleging that the City of Reading (City or Respondent) violated Sections 6(1)(a) and (c) of the Pennsylvania Labor Relations Act, 43 P.S. §§ 211.1-13 (PLRA) as read in pari materia with Act 111 of 1968, 43 P.S. §§ 217.1-10 (Act 111).

On May 4, 2009, the Secretary of the Board issued a complaint and notice of hearing in which the matter was scheduled for a hearing on June 30, 2009, in Reading.

On May 4, 2009, the FOP filed a charge of unfair labor practices with the Board, docketed to PF-C-09-59-E, alleging that the City violated Sections 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111.

On May 18, 2009, the Secretary of the Board issued a complaint and notice of hearing in which the matter was scheduled for a hearing on July 30, 2009, in Reading.

The cases were consolidated for hearing.

The hearing was continued to September 24, 2009 and again to November 10, 2009, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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

FINDINGS OF FACT

1. That the City of Reading (City) is an employer within the meaning of Section 3(c) of the Pennsylvania Labor Relations Act.
2. That the Fraternal Order of Police, Lodge 9 (FOP) is a labor organization within the meaning of Section 3(f) of the Pennsylvania Labor Relations Act.
3. That the FOP is the exclusive bargaining representative of police officers employed by the City.
4. That the City and the FOP are parties to a collective bargaining agreement (CBA) covering the wages, hours and terms and conditions of employment of the police officers of the City of Reading for the period of 2007 to 2011. (N.T. 38, 177 City Exhibit 1)

5. That the CBA covers all police employees except for the Chief of Police, Deputy Chief of Police and Inspectors. (N.T. 38, 177, City Exhibit 1)
6. That Sergeant Michael Fizz is a police officer employed by the City of Reading. He has been employed as an officer since 1991, achieving the rank of sergeant in 2000. (N.T. 90)
7. That in January, 2006, Chief Charles Broad appointed Sergeant Fizz to the position of administrative assistant to the chief. (N.T. 90-91)
8. That the primary responsibility of the administrative assistant to the chief is to support the chief in processing important paperwork involving the officers' employment and to make sure that all officers' personnel records are kept current, including litigation against the officers and grievances and litigation on behalf of the officers. (N.T. 43, 98, 130, 177, City Exhibit 2)
9. In the words of current Chief Michael Heim, the position is similar to an executive officer in the military, carrying out the orders and desires of the chief. (N.T. 46)
10. That the work requires initiative on the part of the assistant so that the chief does not have to ask where the status of the discipline or the grievances over the discipline. (N.T. 133)
11. That the duties of the assistant includes receiving FOP grievances filed with the chief and monitoring the timeliness of the chief's answers to them. (N.T. 98)
12. That in February, 2006, the city appointed Michael Heim to replace Chief Broad. (N.T. 4-5)
13. That Sgt. Fizz continued to serve as administrative sergeant during chief Heim's tenure. (N.T. 5-7)
14. That on February 19, 2008, Chief Heim gave Sgt. Fizz a passing evaluation for his 2007 performance, but noted that in 2008 the Chief expected Sgt. Fizz to prioritize his work, especially in regard to timely attention to commendations, discipline and personnel matters. Also, the Chief noted that he expected Sgt. Fizz to organize personnel files and make sure that all grievances, disciplines, lawsuits, commendations are completed, filed and retrievable. (N.T. 7-8,91-92, FOP Exhibit 1)
15. That in November 2008, Sgt Fizz met with Chief Heim and Deputy Chief Mark Talbot to discuss deficiencies in his performance and ways for him to improve his organizational and administrative skills. (N.T. 47, 96)
16. That at the end of 2008, Chief Heim asked Sgt. Fizz whether he wanted to stay in the position for the next year, 2009. Sgt. Fizz said he did, but the Chief did not make a commitment. (N.T. 96-97)
17. That on January 16, 2009, Sgt. Fizz went on disability leave for surgery. He was on leave until April 6, 2009. (N.T. 140)
18. That Sgt. Fizz is also a member of the Police Pension Board as the representative of active FOP members. In addition to Sgt. Fizz, there are five other members of the Board: a retiree, the City Auditor, Chief of Police, Finance Director and Mayor. (N.T. 61-62, 92, 99)
19. That during Sgt. Fizz' term on the Pension Board, Officer Bobby Lee Moser's widow sought death benefits from City. (N.T. 92)
20. That Sgt. Fizz agreed with the widow's claim. Chief Heim disagreed due to his belief that because Officer Moser had been terminated from the police department before his death, his widow was not eligible for a pension. (N.T. 93-94)

21. That Sgt. Fizz, while he was on disability leave, attended a February 12, 2009 pension board meeting for the Moser case. That the disagreement between Chief Heim and Sgt. Fizz over the Moser case reached a climax on February 12, 2009, during an executive session of the Pension Board when the two men engaged in a debate over the claim. (N.T. 94, 99, 140)

22. That while Sgt. Fizz was on leave, his replacement as administrative assistant to the chief was Sgt. Elizabeth Delewski. (N.T. 129)

23. That while Sgt. Delewski was in that position, she found numerous errors in his work and a considerable backlog of paperwork. In this PLRB hearing, she indicated that the stack of unprocessed paperwork was six inches high. (N.T. 135)

24. That the errors in Sgt. Fizz' work included incorrect data bases for the officers' personnel files, incomplete personnel jackets (which failed to show the officer's training certificates, disciplines and evaluations), missing use of force reports and missing "Lightning Bolt Awards," commendation to officers for taking a gun off the streets of Reading. (N.T. 135, 136-37)

25. That Sgt Delewski also discovered approximately 25 disciplines (oral and written reprimands) to officers by Chief Heim that the Chief had instructed Sgt. Fizz to send to the respective officers but that he had never sent. (N.T. 139)

26. That because these disciplines were never sent to the officers, Sgt Delewski and Chief Heim had to go through the disciplines a second time. Because of the delay involved in sending them a second time, approximately 90% of the disciplines were dismissed for untimeliness. (N.T. 140-142)

27. That Sgt. Delewski also discovered that Sgt. Fizz had failed to notify new officers of the availability of the hepatitis shots. (N.T. 142)

28. That Sgt. Delewski considered Sgt. Fizz a friend, so she did not want to get him in trouble. She first went to Deputy Chief Marc Talbot, who advised her to tell Chief Heim. She then went to Chief Heim, advised him of what she found. He told her to take care of the problems she discovered. He mentioned nothing about Fizz' union activities. (N.T. 144-145)

29. That it took Sgt. Delewski at least six months to correct Sgt. Fizz' errors. (N.T. 145)

30. That on March 10, Chief Heim telephoned Sgt. Fizz at home. Chief Heim informed Sgt. Fizz that he was not returning to the administrative position. Chief Heim told Sgt. Fizz that he was responsible for mishandling three disciplinary actions that were found to be untimely and had to be dismissed because of Fizz' inaction. (N.T. 101, 112)

31. That in mid March, Chief Heim offered Sgt. Delewski the position of administrative assistant to the chief. (N.T. 146)

32. That on March 27, 2009, Chief Heim authored a Specification of Charges alleging that Sgt. Fizz violated General Order #0408, Neglect of Duty, for failing to follow up on three disciplines against police officers. The Chief recommended that the level of discipline for Sgt. Fizz for these infractions be a written reprimand. (N.T. 24, 127, FOP Exhibit 4)

33. That on April 6, 2009 Sgt. Fizz returned to work on the B Platoon (7:00 a.m to 3:00 p.m.) (N.T. 105-106)

DISCUSSION

Case No. PF-C-09-49-E

In this case, the FOP charges the City with violating the PLRA and Act 111 in two separate actions that Chief William Heim took against Sergeant Michael Fizz. The FOP alleges that the Chief's actions were done in a discriminatory and retaliatory fashion because of

Fizz's exercise of his protected rights. First, the FOP alleges that on March 10, 2009 Chief William Heim removed Sergeant Michael Fizz from the position of administrative assistant and transferred him to the B Platoon (7:00 am to 3 p.m. shift). Second, the FOP alleges that Chief Heim refused to allow Sgt. Fizz to bid on a "jumper position" in the A Platoon.

The City defends this charge by arguing that the Chief's decisions were not discriminatory or retaliatory for Fizz' protected activity but rather were legitimate and valid management decision made in furtherance of the operational needs of the police department.

The allegations will be discussed separately.

The transfer of Sgt. Fizz from the Administrative Assistant Position

The first action to be discussed is the allegation that the City transferred Fizz from the administrative assistant position as an act of discrimination and retaliation against Sergeant Fizz for his protected union activity of advocating for Officer Moser's widow in her pension claim.

In a discrimination claim under Section 6(1)(c) of the PLRA, the complainant 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. 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.

The FOP has proven the first two elements required for proving a Section 6(1)(c) charge. There is no dispute that Sgt. Fizz engaged in protected activity when he spoke up for Officer Moser's widow at the pension board hearing. Also, there is no dispute that the Chief knew that Sgt. Fizz was engaged in this activity since Chief Heim was at the same pension board meeting.

The issue is the employer's motivation for transferring Sgt. Fizz. The FOP contends that the Chief's decision was pure retaliation for the Sgt. Fizz' advocacy for the widow's pension claim.

The City contends that the Chief's transfer decision was not related at all to Sgt. Fizz' protected activity but was directly related to legitimate and non-discriminatory reasons in furtherance of the chief's responsibilities for managing the police department.

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 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 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.

The FOP's argument that anti union animus motivated Chief Heim's decision is based on inferences that it contends can reasonably be drawn from these two facts: the Chief's failure to adequately explain the decision and the close timing of the decision to Sgt. Fizz' speaking in favor of the widow's pension claim.

The FOP argues that the Chief's explanation that poor work performance was the basis for his decision to transfer Sgt. Fizz is not plausible because the chief had never before discussed these problems with Fizz in performance evaluations before Sgt. Fizz left on disability leave. The FOP also contends that in a November, 2008, meeting the Chief gave Sgt. Fizz no reason to believe he was not going to be asked back for 2009. The FOP argues that the Chief's assertion that poor performance was the reason for the transfer decision strains credulity.

The City, however, has presented substantial, credible evidence that Chief Heim's decision was based on actual problems that caused difficulties in administering the department. Chief Heim had counseled Sgt. Fizz before he went on disability about the need to improve his work. The Chief never gave a commitment to Sgt. Fizz in the November 2008 meeting that the job was his for 2009. Chief Heim testified credibly that he learned the extent of Sgt. Fizz' errors while he was on disability leave when another sergeant, Elizabeth Delewski, a fellow FOP member and friend of Sgt. Fizz brought them to the chief's attention.

As set forth in the findings of fact above, Sgt. Delewski discovered problems with the databases, about 6 inches worth of unprocessed paperwork on subjects such as removal of weapons from the streets, the use of force incidents and, most significantly, the discovery of disciplinary actions that were not processed after Chief Heim had made initial decisions on action.

The FOP's argument does raise suspicions about the validity of the chief's actions. However, the City's evidence is simply more compelling. Accordingly, I must conclude that it was not Sgt. Fizz' pension board advocacy that was the motivation for Chief Heim's decision but rather the Chief's learning of the full extent and nature of Sgt. Fizz' work errors. The FOP's argument that the reasons are a pretext is overwhelmed by the City's evidence in the form of the testimony about his performance from Sgt. Delewski, who was Sgt. Fizz' replacement. The Chief's reasons for transferring Sgt. Fizz were not retaliatory or discriminatory.

Having addressed the "inadequate explanation" argument for inferring that anti union animus was behind the transfer decision, the remaining FOP argument for inferring animus the close timing is a factor to infer that anti-union discrimination motivated the Chief. The Chief decided to transfer Sgt. Fizz on March 10, shortly after Fizz spoke up at the February 12, pension board hearing on the Moser claim. However, the Board will not conclude that anti-union discrimination motivated an employer action based solely on the factor of timing. AFSCME, Council 13 v. Commonwealth, Department of Labor and Indus., Office of Vocational Rehabilitation (OVR), 16 PPER ¶ 16020 (Final Order, 1984),

In summary, the complainant's case based on the argued inferences is not sustained. The city proved that the transfer was due to the chief's discovery of Sgt. Fizz' poor work performance, particularly that Sergeant Fizz had allowed three disciplines to be improperly processed and the chief's honest assessment that the poor work performance could not be rectified.

The alleged refusal of Chief Heim to allow Sgt. Fizz to bid into the "jumper position" on "A" platoon.

The second action to be discussed is the alleged refusal of Chief Heim on to allow Sgt. Fizz to bid into the "jumper position" on the "A" Platoon.

The FOP asserts that Chief Heim's refusal was because he was possessed of the same anti-union animus when he transferred Sgt. Fizz from the administrative assistant position. The FOP asserts that this instance of anti union animus was manifested by 1) the City failing to adequately explain the reason for the personnel decision and 2) the Chief's fabrication of a discipline against Sgt. Fizz in order to to make Fizz unqualified to bid on the position (FOP Brief, pp 9-10)

The City refuted the first basis for inferring animus. The City presented substantial evidence that the parties' labor agreement prevented the Chief from assigning Sgt. Fizz to the position he wanted. The City demonstrated by testimony from the Chief

and Inspector Gery, that the the CBA itself was an obstacle to Sgt. Fizz' bid on the "jumper shift" of the A platoon. The CBA, at Article V, Sections 5 and 7, prohibited mid-year bids into positions without a vacancy. As there was no vacancy on the jumper shift of the A platoon at that time, the Chief did not have to agree to Sgt. Fizz' bid.

As for the second basis to infer that anti-union animus motivated the City, the FOP asserts that the Chief waited from the March 10 conversation with Fizz to March 27 to actually issue a written reprimand to bolster a pretextual reason for the discipline and as retaliation for Sgt. Fizz advocating for Moser's widow.

There is a credibility question that must be addressed. The FOP asserts that Chief Heim was untruthful when he denied telling FOP President Troy Heiser "Well, then I'm going to go do it," meaning that he was going to issue a written reprimand so that Sgt. Fizz would be ineligible to bid on the "jumper shift" of the A platoon. (N.T. 175). Having observed Chief Heim, I must conclude from his demeanor and his appearance that he testified truthfully when he said that Officer Heiser's recollection of that conversation was not correct. Furthermore, the Chief's March 27 written reprimand citing three instances of Sgt. Fizz' neglect of duty was consistent with the March 10 conversation as to reasons why he was transferring Sgt. Fizz.

Having found that the Chief testified credibly, I must conclude that the City offered credible, non-discriminatory reasons for the Chief's issuance of a written reprimand to Sgt. Fizz for his errors in processing three disciplinary actions in the department.

Case No. PF-C-09-59-E

In this charge, consolidated for hearing with PF-C-09-49-E, the FOP alleges that on March 27, 2009, Chief Willlliam Heim issued a written reprimand to Sgt. Michael Fizz alleging neglect of duty relating to the processing of three disciplinary matters. The FOP asserts that this discipline was discriminatory and retaliation for Sgt. Fizz exercise of protected activity, specifically as a pretext to make him ineligible for a bidding on a position.

The facts of this charge are intertwined with PF-C-09-49-E. As was discussed above, the City presented valid, non discriminatory reasons for the Chief's decision to issue a written reprimand for Sgt. Fizz in not properly following up on three disciplinary actions while he was the administrative assistant. The written reprimand was not retaliation for the exercise of protected activity. Accordingly, there will be no finding that the City violated Sections 6(1)(a) and (c) of the PLRA and Act 111 when the Chief issued this written reprimand.

CONCLUSIONS

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

1. That the City of Reading is an employer within the meaning of the PLRA and Act 111.
2. That the Fraternal Order of Police, Lodge No. 9, 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 in Case No PF-C-09-49-E the City has not committed unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA and Act 111
5. That in Case No. PF-C-09-59-E, the City has not committed unfair labor practices in violation of Section 6(1)(a) and (c) 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 charges of unfair labor practices filed to the above case numbers are rescinded and the complaints are dismissed.

IT IS HEREBY FURTHER ORDERED 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 twentieth day of August, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner