

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 :

FINAL ORDER

The City of Uniontown (City) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on July 14, 2010, challenging a Proposed Decision and Order (PDO) issued on June 24, 2010. In the PDO, the Board's Hearing Examiner concluded that the City violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111 of 1968, when it demoted Myron Nypaver from his position as Fire Chief and rescinded his pay and duties as the City's Code Enforcement Officer in retaliation for his protected activity. Pursuant to an extension of time granted by the Board Secretary, the International Association of Fire Fighters, Local 955 (Association) filed a timely response to the City's exceptions on August 13, 2010.

The facts of this case are summarized as follows. Mr. Nypaver began employment with the City's Fire Department on February 14, 1989. Beginning in 2002, Mr. Nypaver performed code enforcement duties for the City along with his duties as Assistant Fire Chief. Mr. Nypaver is a certified building code official, and his duties in code enforcement were performed through his position with the Fire Department.

From 2002 until February 2004, Mr. Nypaver received approximately \$5,800 per year for his code enforcement duties. He was promoted from Assistant Fire Chief to Fire Chief on February 4, 2004. However, the City continued to pay Mr. Nypaver the Assistant Fire Chief salary without the extra pay for his code enforcement duties. Mr. Nypaver, accordingly, lost wages when he was promoted to Fire Chief.

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 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 of the budget, 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. If the budget is adopted, the budget ordinance is forwarded to the Pennsylvania Department of Community and Economic Development for approval.

The City's budgets for 2007 and 2008 were passed and approved as ordinances. Daniel Webster, the City's Solicitor from May 1996 to December 2007, personally observed that the budget process for those years occurred properly. The City has passed budget ordinances during the entire time that Mr. Webster was City Solicitor. 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.

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. Thereafter, Mr. Cerjanec readjusted an old resolution by including a raise as well as cost-of-living and longevity increases, which elevated Mr. Nypaver's salary to a figure that satisfied the council members. The majority of City Council voted to give Mr. 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 Mr. Nypaver's raise in the budget. The \$10,000 salary increase was a separate designation on Mr. Nypaver's biweekly paycheck as \$381.61. Paychecks must be signed by the City's Director of Finance, Treasurer, Controller and department head.

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. Mr. Crozier did not participate in the City Council

vote that approved Mr. Nypaver's receipt of an extra \$10,000 per year because he is Mr. Nypaver's father-in-law.

Edward Fike was elected Mayor in late 2007, and he took office in January 2008. Thereafter, Mayor Fike appointed his daughter, Kimberly Marshall, to the position of City Clerk. Ms. Marshall's duties as the City Clerk included recording the minutes of City Council meetings, preparing agendas for those meetings, scheduling meetings for Mayor Fike, overseeing payroll and answering 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.

In reviewing budget proposals for 2009, Mr. Crozier noticed a line item for \$10,000 for code enforcement. Mr. Crozier 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 tell Ms. Marshall that Mr. Nypaver should not be receiving that money for code enforcement.

At the October 7, 2008 City Council meeting, the Council passed a resolution to lay off six of the City's thirteen firefighters. Mr. Nypaver attended that meeting and publicly spoke before Mayor Fike and the City Council against the layoffs, raising safety concerns for the Fire Department and the citizens of the City. A negotiation session was held on October 12, 2008, which resulted in an agreement that only three of the six firefighters would be laid off.

The City Council again indicated its decision to lay off three additional firefighters at a special public meeting on November 22, 2008. Mr. Nypaver attended that meeting and again publicly opposed the additional layoffs. Seven or eight volunteer firefighters also attended the November 22, 2008 special City Council meeting to unite in protest against the layoffs. 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. The off-duty firefighters covered for the on-duty firefighters so that the on-duty firefighters could attend the meeting. Mr. Nypaver did not direct any paid or volunteer firefighters to attend any of the City Council meetings.

On November 28, 2008, Mr. Nypaver received a memo from Ms. Marshall stating that "per Mr. Palumbo, Director of Accounts and Finance, you will not receive the additional \$384.61 that is listed as 'other earnings' on your paycheck unless or until this matter is resolved." Ms. Marshall and Mayor Fike did not try to contact Mr. Webster to learn how Mr. Nypaver received his code enforcement pay. Ms. Marshall also did not contact Mr. Cerjanec to learn how Mr. Nypaver received his code enforcement pay.

On December 2, 2008, Mr. Nypaver filed a formal grievance concerning the City's rescission of the \$384.61 that he received biweekly for his code enforcement duties. Subsequently, Mr. Nypaver was summoned to Mayor Fike's office where Mayor Fike read a prepared oral reprimand to Mr. Nypaver. The Mayor does not supervise or manage the Fire Department; rather, the council member appointed to direct Public Safety supervises the Fire Department. Mayor Fike's oral reprimand disciplined Mr. Nypaver for speaking at the November 22, 2008 special City Council meeting on behalf of the firefighters and for allowing volunteer and on-duty firefighters to attend the public meeting, which was allegedly against City policy.

Mr. 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 would 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. On December 30, 2008, Mr. Nypaver filed another grievance concerning Mayor Fike's reprimand.

On January 13, 2009, the City, without notice, demoted Mr. Nypaver from Fire Chief to Assistant Fire Chief and indicated that his code enforcement duties were taken away. As a result of the City's action, Mr. Nypaver's base salary was reduced. However, Mr. Nypaver continued to perform code enforcement duties.

The Association filed its Charge of Unfair Labor Practices on January 20, 2009, alleging that the City violated Section 6(1)(a), (c), (d) and (e) of the PLRA and Act 111 by demoting Mr. Nypaver, removing substantial duties and reducing his pay in retaliation for supporting the Association and engaging in other protected activities. A hearing was held before the Board's Hearing Examiner on December 30, 2009, at which time both parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner discredited the testimony of Ms. Marshall and Mayor Fike and credited the testimony of Mr. Webster, Mr. Cerjanec, Mr. Nypaver and Mr. Crozier. Based on his credibility determinations, the Hearing Examiner concluded that the City's stated reasons for demoting Mr. Nypaver and reducing his pay were pretextual and discriminatory and, therefore violated Section 6(1)(a) and (c) of the PLRA. The Hearing Examiner additionally determined that the Association failed to establish a violation of Section 6(1)(d) of the PLRA because the Association did not prove that Mr. Nypaver was subject to discrimination for filing a petition or charge with the Board, or giving testimony before the Board. The Hearing Examiner also determined that the Association failed to demonstrate that the City violated its duty to bargain in good faith with the Association under Section 6(1)(e).

In its exceptions, the City challenges the Hearing Examiner's credibility determinations concerning the testimony of Ms. Marshall and Mayor Fike. The City alleges that the Hearing Examiner's questioning of Ms. Marshall and Mayor Fike during the hearing showed bias in favor of the Association and was improper, arbitrary and capricious.

It is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. North Wales Borough Police Department v. North Wales Borough, 38 PPER 181 (Final Order, 2007); E.B. Jermyn Lodge No. 2 of the FOP v. City of Scranton, 38 PPER 104 (Final Order, 2007). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Limerick Township Police Officers v. Limerick Township, 36 PPER 125 (Final Order, 2005). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. City of Scranton, *supra*.

The Hearing Examiner determined that Ms. Marshall's testimony was contradicted by the testimony of other witnesses, whom he deemed credible, as well as by her own testimony. Based upon the inconsistencies, inaccuracies and contradictions that he found in Ms. Marshall's testimony, along with her behavior on the witness stand, the Hearing Examiner determined that her testimony should not be credited. The Hearing Examiner further found that the testimony of Mayor Fike was not credible based upon the Mayor's demeanor on the stand and the Hearing Examiner's determination that he offered inconsistent, evasive and unresponsive testimony.

Not only did the Hearing Examiner fully explain his decision not to credit the testimony of Ms. Marshall and Mayor Fike, but a review of the record in its entirety reveals that the Hearing Examiner's questioning of the witnesses, including Ms. Marshall and Mayor Fike, was intended to obtain facts that were necessary for the disposition of the case. See 34 Pa. Code § 95.91(g) (hearing examiner "shall see that a full inquiry is made into the matters in issue and to obtain a complete record of facts necessary for a fair determination of the issues by the Board."); see also PLRB v. County Commissioners of Susquehanna County, 405 A.2d 577 (Pa. Cmwlth. 1979). Upon review of the record, we find no basis for the City's claim that the Hearing Examiner demonstrated bias or engaged in improper questioning of the City's witnesses. Therefore, the City presents no compelling reasons warranting the reversal of the Hearing Examiner's credibility determinations.

The City further alleges that the Hearing Examiner erred in failing to consider alleged statements made to Ms. Marshall and Mayor Fike concerning Mr. Nypaver's salary increase and job performance as the City's Code Enforcement Officer as uncorroborated hearsay. The City also alleges that the Hearing Examiner erred in stating that Mayor Fike's testimony that he did not retaliate against Mr. Nypaver for engaging in protected activity was a legal conclusion that could not be relied on. The Hearing Examiner offered these contested reasons as additional support for his factual and legal determinations.

The Hearing Examiner's credibility determinations alone support his rejection of the City's defense of its actions.

However, as already discussed, the Hearing Examiner found that the testimony of Ms. Marshall and Mayor Fike in its entirety was not credible and the City has failed to establish compelling reasons for reversing these credibility determinations. Thus, any alleged error by the Hearing Examiner was at best harmless and would not change the result.

Concerning the Hearing Examiner's conclusion that the City violated Section 6(1)(a) and (c) of the PLRA, the charging party must prove that the employee engaged in protected activity, that the employer was aware of the employee's protected activity, and that the employer took adverse action against the employee because of a discriminatory motive or anti-union animus. FOP, Lodge No. 5 v. City of Philadelphia, 38 PPER 184 (Final Order, 2007) (citing St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977)). The charging party must demonstrate that all three elements are present in order to establish a prima facie case under Section 6(1)(a) and (c) of the PLRA. Colonial Food Service Educational Personnel Association v. Colonial School District, 36 PPER ¶ 88 (Final Order, 2005). The employer's motive creates the offense. Id. Further, an employer's pretextual reason for adverse action coupled with close timing of that adverse action to the exercise of protected activity will support a finding that the employer was discriminatorily motivated. Id.

In concluding that the City's explanation for demoting Mr. Nypaver and rescinding his pay and duties as the City's Code Enforcement Officer was pretextual, the Hearing Examiner stated as follows:

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 [Association] 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 [sic] and demoted him.

(PDO, 10). Thus, the Hearing Examiner found that the City's adverse action closely followed Mr. Nypaver's protected activity of supporting the Association at two City Council meetings and that the City offered a pretextual reason for the adverse action against Mr. Nypaver. Because this is an adequate basis to infer a discriminatory motive on the part of the City, the Hearing Examiner properly concluded that the City violated Section 6(1)(a) and (c) of the PLRA.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of Uniontown are dismissed and the June 24, 2010 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member and James M. Darby, Member, this twenty-first day of September, 2010. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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AFFIDAVIT OF COMPLAINT

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 as directed; 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 as directed; that it has posted a copy of the Proposed Decision and Order and Final Order as directed and that it has served a copy of this affidavit on the Association 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