COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 OF THE FRATERNAL ORDER OF POLICE	:	
v.	:	Case No. PF-C-06-91-E
CITY OF SCRANTON	:	

PROPOSED DECISION AND ORDER

On June 7, 2006, the Fraternal Order of Police, E.B. Jermyn Lodge 2 (FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Scranton (City) violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111.

On June 29, 2006, the Secretary, upon review of the Specifications of Charges, declined to issue a complaint and dismissed the charge. On July 17, 2006, the Union filed timely exceptions and a brief in support of exceptions.

On October 17, 2006, the Board issued an Order Directing Remand to Secretary for Further Proceedings directing the Secretary to issue a complaint. On January 18, 2007, the Secretary of the Board issued a Complaint and Notice of hearing in which the matter was assigned to a conciliator for the purpose of resolving the dispute by mutual agreement of the parties and March 15, 2007, in Scranton, was assigned as the time and place of hearing, if necessary.

The hearing was necessary, but was continued to August 30, 2007, at the request of the FOP without objection from the City. The hearing was continued again to November 20, 2007. That hearing was continued at the request of the FOP, without objection from the City with the hearing to be rescheduled at the request of the parties.

On August 14, 2009, the Secretary of the Board issued a letter noting that the matter had been dormant for a period in excess of six (6) months and informing the FOP that the charge would be dismissed unless the Board received a written request demonstrating why further proceedings were warranted.

On August 31, 2009, the FOP requested the matter be rescheduled for a hearing.

The hearing was rescheduled and held on January 7, 2010, before Thomas P. Leonard, Esquire, a hearing examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

On March 8, 2010, the FOP submitted a post-hearing brief. On April 2, 2010, the City submitted its brief.

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 Scranton is an employer within the meaning of Section 3(c) of the Pennsylvania Labor Relations Act.

2. That the Fraternal Order of Police, E.B. Jermyn Lodge 2 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, and is party with the City to a collective bargaining agreement that was in effect at all times relevant to this case. (N.T. 14, 16, Joint Exhibit 7)

4. That the collective bargaining agreement provides at Article XX that unresolved grievances are to proceed to final and binding arbitration. The CBA also provides that if an impartial arbitrator cannot be agreed upon, the said impartial arbitrator is to be selected in accordance with the rules of the American Arbitration Association (AAA). (N.T. 16, Joint Exhibit 7, page 16)

5. That in early 2003, the FOP filed several grievances with the City alleging that the City was violating the collective bargaining agreement. One of the grievances was over the City's alleged failure to maintain minimum manning. (N.T. 12, Joint Exhibits 1 and 2)

6. That on April 4, 2003, the FOP submitted a demand for arbitration of the manning grievance. The demand was docketed to AAA Case No. 14-390-00645-03. (N.T. 12, Joint Exhibits 1 and 2)

7. That On May 12, 2003, the AAA appointed Robert Light as the arbitrator in the manning grievance, AAA Case No. 14-390-0645-03. (N.T. 12, Joint Exhibits 1 and 2)

8. That on the same day, May 12, 2003, AAA appointed Mr. Light to be the arbitrator in AAA Case No. 14-390-00644-03, an FOP grievance over compliance with the SIT Clerks settlement. (N.T. 12 , Joint Exhibits 1 and 2)

9. Pursuant to the AAA's arbitration selection procedures, specifically Rule 12, both the FOP and City have the opportunity to strike arbitrators from a list, ensuring that the arbitrator ultimately selected is acceptable to both parties. (N.T. 13, Joint Exhibit 3)

10. That on June 23, 2003, AAA appointed Arbitrator Light as the arbitrator to hear a grievance filed by Scranton's fire fighters concerning their pension board and the composite pension board, AAA Case No. 14-390-01047-03. (N.T. 12, Joint Exhibits 1 and 2)

11. That on September 30, 2003, the AAA notified the parties that Mr. Light was available for hearing on March 15, 2004. This hearing date was postponed without objection from the FOP. (N.T. 12, Joint Exhibits 1 and 2)

12. On March 24, 2004, the AAA notified the parties that Mr. Light was available for hearing on July 7, 2004. (N.T. 12, Joint Exhibits 1 and 2). This hearing date was also postponed without objection from the FOP. (N.T. 12, Joint Exhibits 1 and 2)

13. September 13, 2004, Mr. Light issued his award in Case No. 14-390-00644-03 (SIT Clerks). The City appealed that award to court. (N.T. 12, Joint Exhibits 1 and 2).

14. That on August 29, 2005, Mr. Light issued his Award in that grievance, AAA Case No. 14-390-01047-03. (N.T. 12, Joint Exhibits 1 and 2)

15. In both AAA Case No. 14-390-00644-03 and AAA Case No. 14-390-01047-03 Mr. Light found against the City and also found that the City acted in bad faith. The awards also provided for the City to pay attorneys fees, which the City believed was punitive in nature. (N.T. 12, Joint Exhibits 1 and 2)

16. That the AAA and the parties eventually selected the date of May 11, 2006, as the date for hearing the manning grievance, AAA Case No. 14-390-00645-03. (N.T. 12, Joint Exhibits 1 and 2)

17. That earlier hearing dates of March 22, 2004 and October 31, 2005 were continued without objection from the FOP. (N.T. 12 Joint Exhibits 1 and 2)

18. That on December 19, 2005, the City's special labor counsel, Richard Goldberg, wrote to City Solicitor Robert Farrell, copying Public Safety Director Raymond T. Hayes concerning AAA Case No 14-390-00645-03:

> The hearing in the above matter is scheduled for May 11, 2006. based on our earlier discussions, we should ask Arbitrator Light to recuse himself from the case. In my judgment, the basis for this request is that he made statements in the two earlier awards, that he issued against the City, indicating a predisposition to the City's acting in bad faith. I believe that he cannot fairly judge this case. I will appreciate your looking at the Light Awards and giving me your perspective as to any indications of predisposition against the City.

I am copying Ray Hayes with this letter and asking that he do the same.

(N.T. 19, 34, Respondent Exhibit 1)

19. That in December, 2005 and early 2006, Mr. Goldberg, Solicitor Farrell and Public Safety Director Hayes engaged in discussions about whether to request Mr. Light's recusal in AAA Case No 14-390-00645-03. (N.T. 20-21, 25, 31-32)

20. That in April 28, 2006, Mr. Goldberg wrote to the AAA requesting the recusal of Mr. Light. (N.T. 12, Joint Exhibit 1 and 2)

21. That Mr. Goldberg cited two cases, AAA Case No. 14-390-00644-03 (SIT Clerks) and AAA Case No. 14-390-01047-03 (Firefighters composite pension board), where the City believed Mr. Light had not been impartial. (N.T. 12, Joint Exhibits 1 and 2)

22. That on May 2, 2006, the FOP's attorney responded to Mr. Goldberg's letter by opposing Mr. Light's recusal. (N.T. 12, Joint Exhibits 1 and 2).

23. That on May 8, 2006, the AAA wrote to Mr. Light and advised him that "after consideration of the parties' contentions the Association determined to deny the objection and reaffirm your appointment, subject to your willingness to remain as Arbitrator in this matter." (N.T. 2, Joint Exhibit 1)

24. Mr. Goldberg testified in this hearing that he and Messrs. Farrell and Hayes had a number of discussions concerning whether or not to ask Arbitrator Light to recuse himself. These discussions intensified in March, 2006 when the City began final preparation for the May 11, 2006 arbitration hearing. (N.T. 29)

25. Mr. Goldberg testified that he and Mr. Farrell were concerned that if the City asked for the recusal of Mr. Light and the request was denied, the City would have to have him, as a hostile arbitrator, hear the case anyway. (N.T. 29)

26. That on May 10, 2006 Arbitrator Light notified AAA that he was withdrawing as the arbitrator. (N.T. 12, Joint Exhibits 1 and 2)

27. That on May 11, the AAA sent the parties a list of arbitrators to replace Arbitrator Light. (N.T. 12, Joint Exhibits 1 and 2)

28. That the parties selected Arbitrator Edward O'Connell as the arbitrator to replace Arbitrator Light. (N.T. 12, Joint Exhibits 1 and 2)

29. That on December 12, 2006, the AAA sent a notice of hearing of the arbitration for May 12, 2007. (N.T. 12, Joint Exhibits 1 and 2)

30. That on May 5, 2008, Arbitrator O'Connell issued an Opinion and Award in AAA Case No. 14-390-00645-03. (N.T. 14, Joint Exhibit 6)

DISCUSSION

The present charge of unfair practices is before me as a result of an order directing remand to the Secretary to issue the complaint. The Board, in its remand order, noted two allegations made by the FOP over the City's request for the recusal of Arbitrator Robert Light in AAA Case No. 14-390-00645-03. The first was the allegation that Arbitrator Robert Light's eventual decision to recuse himself was caused by the City's refusal to pay Arbitrator Light for two other arbitration cases. The second was the allegation that the City's recusal request, and the Arbitrator's voluntary recusal, amounted to a refusal to bargain because the City made the request solely for the purpose of delaying the arbitration proceeding.

The charge contends that the City violated three sections of PLRA. First to be discussed is the charge alleging a violation of Section 6(1)(e), which makes it an unfair labor practice for an employer "To refuse to bargain collectively with the representative of his employes, subject to the provisions of section seven(a) of this act." 43 P.S. 211.6(1)(e).

It is well established labor law that an employer violates Section 6(1)(e) if it refuses to arbitrate a contractual grievance that arises during the term of a collective

bargaining agreement. Upper Makefield Township Police Association v. Upper Makefield Township, 28 PPER ¶ 28182 (Final Order, 1997).

The City argues that it did not refuse to arbitrate the grievance, only that it determined that it would request the recusal of Arbitrator Robert Light for reasons it believed were justifiable. The City pointed out that it utilized the AAA rules governing the parties' grievance and arbitration procedures. On May 8, 2006, in response to the City's request, the AAA reaffirmed the appointment of Arbitrator Light. However, three days later, Arbitrator Light voluntarily withdrew from the case.

The City's witnesses testified credibly that the City's attorney sought recusal of the arbitrator only after engaging in a careful assessment with his client of all the factors involved in such a request. The City's witnesses testified that this assessment did not consider delay as one of the advantages to the City in requesting recusal.

Accordingly, given the particular facts of this case, it must be concluded that the City's recusal request does not constitute a refusal to bargain in violation of Section 6(1)(e) of the PLRA.

The next charge to be addressed is that the City violated Section 6(1)(a) of the PLRA, which makes it an unfair practice "to interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act." 43 P.S. 211.6(1)(a). The Board will find that an independent violation of Section 6(1)(a) has occurred where, in light of the totality of the circumstances, the employer's action has a tendency to coerce a reasonable employe in the exercise of protected rights. E.B. Jermyn Lodge No. 2 of the FOP v. City of Scranton, 38 PPER 104 (Final Order, 2007).

There is no proof that any alleged failure to pay Mr. Light for his prior arbitration cases was the reason for the arbitrator recusing himself. In his May 10, 2006 letter of withdrawal Mr. Light did not mention unpaid fees as the reason for his decision to withdraw from the case.

The record in this case does not contain proof that the City's request for the recusal would have a tendency to coerce a reasonable employe in the bargaining unit from exercising his or her protected rights. The rules of the American Arbitration Association clearly provide for a party to request the recusal of an arbitrator following his or her appointment. The arbitrator himself, not the American Arbitration Association, made the recusal decision.

The FOP argues that evidence of the coercive nature of the City's conduct here was the extensive delay by the City in waiting until April 28, 2006 to request Mr. Light's recusal. Approximately three years earlier, on May 12, 2003, the AAA notified the parties that Mr. Light would hear the grievance. Arbitrator Light was the arbitrator mutually selected by the FOP and the City pursuant to the AAA's arbitration selection procedures. On September 13, 2004, the arbitrator issued his decision in the SIT Clerk grievance. On August 29, 2005, Mr. Light issued the decision in the composition of the pension board grievance. On October 14, 2005 the AAA notified the parties that the hearing date for the arbitration in AAA Case No. 14-390-00645-03 would be May 11, 2006.

The extensive time from Mr. Light's appointment in 2003 to the City's request must be addressed first. An examination of the AAA official file in this case (Joint Exhibit 1) and of the AAA certified docket sheet (Joint Exhibit 2) reveals that earlier hearing dates in 2004 and 2005 were also postponed, apparently without objection from the FOP. These earlier postponements lend support to the City's argument that it was not refusing to arbitrate a grievance.

The FOP argues that when the City lost the other Light awards, it sought made a recusal request knowing that another postponement delay would result. As for that delay, the City's witnesses testified credibly that they did not employ the tactic of a recusal request as part of a delay strategy. They testified that they were engaged in a careful deliberation as they weighed the pros and cons of making such a request. The facts demonstrate that the intervening event of the August 29, 2005 Light Award first caused the City to be concerned about the Arbitrator's impartiality. Then, while reviewing the file prior to the May 11, 2006 hearing, the City concluded that it had to make its recusal request.

Finally, the FOP alleges that the City's conduct violates Section 6(1)(c) of the PLRA, which makes it an unfair practice for an employer "by discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership n any labor organization." 43 P.S. 211.6(1)(c). 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). 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 dispute in this case is over the third element of proof in an anti-union discrimination case: the City's motivation for the recusal request. The FOP argues that the City's action here was retaliation against the employes for exercising their protected activities of processing a grievance to arbitration. The FOP argues that the City's explanation of its decision to request recusal was not believable, leading to the inference that anti-union animus was the true motivation. However, given the discussion above finding that the City's team was engaged in sincere deliberations over the advantages and disadvantages of requesting recusal of the arbitrator, I must conclude that the City was not motivated by anti-union animus in its decision. Accordingly, there will be no finding that the City violated Section 6(1)(c) of the PLRA.

CONCLUSIONS

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

1. That the City of Scranton is an employer within the meaning of Section 3 (c) of the PLRA.

2. That the Fraternal Order of Police, E. B. Jermyn Lodge 2, is a labor organization within the meaning of Section 3(f) of the PLRA.

3. That the Board has jurisdiction over the parties hereto.

4. That the City of Scranton has not committed unfair labor practices in violation of Sections 6(1)(a),(c) and (e) of the Pennsylvania Labor Relations Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixteenth day of September, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner