

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SPRINGFIELD TOWNSHIP POLICE :
BARGAINING UNIT and :
REBECCA MERSKY :
 :
v. : Case No. PF-C-20-25-E
 :
SPRINGFIELD TOWNSHIP and :
CHIEF MICHAEL E. PITKOW :

FINAL ORDER

Springfield Township Police Bargaining Unit and Rebecca Mersky (Complainants) filed a Charge of Unfair Labor Practices with the Pennsylvania Labor Relations Board (Board) on April 27, 2020, alleging that Springfield Township (Township) and Chief Michael E. Pitkow, (collectively Respondents) violated Section 6(1)(a), (b), (c), (d), (e) and (f) of the Pennsylvania Labor Relations Act (PLRA) as read in *pari materia* with Act 111 of 1968. The Complainants alleged that the Respondents unilaterally changed the promotional process to favor a particular male Sergeant as opposed to Sergeant Rebecca Mersky, who is a female and allegedly more qualified for promotion.¹

By letter dated May 22, 2020, the Secretary of the Board declined to issue a complaint and dismissed the charge. The Secretary noted that clauses (b), (d) and (f) of Section 6(1) of the PLRA bore no relevance to the allegations in the charge. The Secretary further noted that there were no allegations that Sergeant Mersky engaged in protected union activity under Section 5 necessary to support a claim of discrimination under Section 6(1)(c) of the PLRA. Regarding the claims under Section 6(1)(e) of the PLRA, the Secretary determined that Board case law has found that promotional criteria are matters within management's prerogative, and therefore there was no statutory obligation of the Township to collectively bargain within the meaning of Section 6(1)(e) of the PLRA. Finally, noting that there were no claims of threats, interference, or coercion of any Section 5 rights, the Secretary dismissed the claims under Section 6(1)(a) of the PLRA.

On June 10, 2020, the Complainants filed timely exceptions, and a supporting brief, with the Board challenging the Secretary's decision not to issue a complaint.² In the exceptions, the Complainants argue that the Secretary erred in failing to issue a complaint pursuant to Section 6(1)(e)

¹ By letter dated May 8, 2020, the Township filed a response to the Charge of Unfair Labor Practices. The Board's Rules and Regulation do not permit the filing of a response or answer by a respondent prior to the issuance of a complaint by the Board. Accordingly, the Township's response to the charge has not been considered.

² The Township filed a response to the exceptions and brief, with the Board on June 29, 2020. Because a complaint has not yet been issued by the Board in this case, the Township's response to the exceptions and brief, has not been considered by the Board in addressing the exceptions. See Footnote 2, *supra*.

of the PLRA.³ Specifically, the Complainants filed their exceptions "on the basis that while managerial prerogative exists, it cannot be used to favor a male hand selected candidate over a more qualified female candidate for the position of lieutenant." (Union's Exceptions to Decision Not to Issue Complaint at ¶8).

The Complainants in their exceptions do not dispute the Secretary's determination that the changes to the promotional testing are managerial prerogatives, and thus are not subject to collective bargaining under Section 6(1)(e) of the PLRA. FOP Rose of Sharon Lodge No. 3 v. PLRB, 729 A.2d 1278 (Pa. Cmwlth. 1999); Pennsylvania State Troopers Association v. PLRB, 809 A.2d 422 (Pa. Cmwlth. 2002). Instead, the Complainants' Charge is based on the assertion that the Respondents may not unilaterally put in place measures that favor a male candidate for promotion over a more qualified female candidate. However, the Complainants' alleged discrimination against Sergeant Mersky because of her sex or gender, is not a protected activity within the meaning of Section 5 of the PLRA, and thus is not cognizable as an unfair labor practice under Section 6 of the PLRA. See Teamsters Local Union No. 32 v. Washington Township Municipal Authority, 20 PPER ¶20128 (Final Order, 1989) (noting that complainant's allegation that he was discriminated against because of a non-job related handicap is a question for the Pennsylvania Human Relation Commission rather than the Board); United Steel Workers of America Local Union No. 1473 v. Municipal Authority of the Borough of Shenandoah, 28 PPER ¶28068 (Final Order, 1997) (noting that the Board does not have jurisdiction to decide whether there has been compliance with the Pennsylvania Human Relations Act); Ponton v. AFSCME, District Council 33, Local 427, 39 PPER 162 (Final order, 2008) (upholding the Secretary's dismissal of the charge on the ground that allegations of racial discrimination are appropriately remedied through a filing with the Pennsylvania Human Relations Commission); see also Drew v. Pennsylvania Labor Relations Commission, 688 A.2d 274 (Pa. Cmwlth. 1997) (employee's claims of racial discrimination in selection for promotion of a police officer were cognizable under Section 955(a) of the Pennsylvania Human Relations Act⁴).

After a thorough review of the Complainants' exceptions and supporting brief, the Secretary did not err in declining to issue a complaint and dismissing the Complainants' Charge of Unfair Labor Practices. Accordingly,

³ In this regard, the Complaint does not challenge the Secretary's dismissal of the charges under Section 6(1)(a), (b), (c), (d) and (f) of the PLRA. 34 Pa. Code §95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

⁴ Section 955(a) of the Pennsylvania Human Relations Act provides, in relevant part, as follows:

For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability ... of any individual ..., to refuse to hire or employ ..., or to bar or to discharge from employment such individual ..., or to otherwise discriminate against such individual ... with respect to compensation, hire, tenure, terms, conditions or privileges of employment ..., if the individual ... is the best able and most competent to perform the services required.

43 P.S. § 955(a).

the Complainants' exceptions shall be dismissed, and the Secretary's May 22, 2020 decision will be sustained.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111 of 1968, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Rebecca Mersky and the Springfield Township Police Bargaining Unit are hereby dismissed, and the Secretary's May 22, 2020 decision declining to issue a Complaint and Notice of Hearing and dismissing the Charge of Unfair Labor Practices, be and hereby is made absolute and final.

Pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this twenty-first day of July, 2020, 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 on July 24, 2020.