

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF :
FIRE FIGHTERS, LOCAL 104, AFL-CIO :
 :
v. : Case No. PF-C-16-83-E
 :
CITY OF WILKES-BARRE :

PROPOSED DECISION AND ORDER

On September 1, 2016, the International Association of Fire Fighters, Local Union 104, AFL-CIO (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Wilkes-Barre (City or Employer) alleging that the City violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On September 14, 2016, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating December 7, 2016, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was continued multiple times and a hearing was held on April 25, 2018, in Harrisburg, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union submitted a post-hearing brief on July 18, 2018. The City submitted a post-hearing brief on August 17, 2018.

The Hearing Examiner, based on all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 6).
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 6).
3. Thomas Makar has been an employe of the City since 1981. In 1988, he was promoted to Captain, a post he held for 15 years. In the Summer of 2004 he was promoted to the rank of Assistant Chief. He held the position of Assistant Chief until August, 2016, when he was demoted back to Captain. He retired in February, 2018. (N.T. 7-8).
4. Makar had been a member of the Union since 1981. He was Union President from 1998 until January 1, 2012. Makar was an aggressive Union president and was responsible for many grievances being filed on behalf of the Union. (N.T. 9-11, 46).
5. When Makar was promoted to Assistant Chief in 2004, he interviewed for the position. (N.T. 30).

6. Makar was appointed in 2004 by then Mayor Thomas Leighton. When Leighton took office in 2004, he sent a memo declaring the Assistant Chief position to be open. Each time a new mayor has assumed office in the past twenty-five years, the new mayor has declared the Assistant Chief position to be open. The Assistant Chief position is a Mayoral appointment and can be demoted without just cause. (N.T. 41-44, 50-51, 63; City Exhibit 2, page 15).

7. On March 7, 2016, the City, via the Office of the Mayor, notified bargaining unit members that if anyone wanted to submit resumes or letters of interest to become an Assistant Chief the City would accept them. (N.T. 26-27; City Exhibit 6).

8. Makar submitted his resume to the City. Makar drafted his resume and he believed it was low quality. (N.T. 27, 52-53, 58-59; Union Exhibit 8).

9. Makar was interviewed by the City on or about June 20, 2016. Present at the interview was the interview committee ("the Committee") consisting of City Administrator Ted Wampole, HR Director Nicole Ference, and Deputy Fire Chief Al Klapat. The Committee conducted all interviews of the applicants and its purpose was to recommend four candidates to the Mayor for the position of Assistant Chief. (N.T. 28, 63-64, 76).

10. At his interview, Makar was not professionally dressed. Other applicants wore suits or their uniform. (N.T. 65-66).

11. Makar's union activity was not discussed by the Committee when the decision was made to not recommend him to be retained as an Assistant Chief. (N.T. 66, 80).

12. The City interviewed twelve applicants for the four re-opened Assistant Chief positions. All applicants were Union members. At the end of the process of interviewing the twelve applicants, the Committee discussed who would be the top candidates for the Assistant Chief position based the total characteristics of the applicants including attitude and demeanor. The Committee had issues with Makar's attitude and demeanor. (N.T. 63, 71-72).

13. The Committee considered Makar's application to be in the mid-tier of the applications they considered. While Makar was experienced, his demeanor in the interview process reflected negatively on his candidacy. Makar's attitude in the interview turned negative when he was asked about the implementation of the incident command system which Makar did not like. Makar's negativity extended beyond the response to questions about the incident command system and included his belief that he should not even be interviewing for the position. Makar expressed anger to the Committee that he had to interview. (N.T. 79-85, 89).

14. The Committee's final recommendations for Assistant Chief were submitted to the Mayor. By executive order of Mayor Anthony George dated August 1, 2016, Makar was demoted from Assistant Chief to Captain. (N.T. 31, 78; City Exhibit 4, 9).

15. George was not Mayor when Makar was Union President. Makar never dealt with George when Makar was President of the Union. (N.T. 36).

16. Of the four Assistant Chiefs who were in place at the beginning of 2016, only Makar was demoted. Bill Murtha, John Ostrum, and Edward Snarski retained their positions as Assistant Chiefs. Murtha, Ostrum and Snarski are all Union members. Snarski initially was demoted, but retained his rank when the person initially accepted by the City declined the position. (N.T. 34, 55, 65, 67, 96-97).

DISCUSSION

In connection with Makar's demotion from Assistant Chief, the Union alleges violations of Section 6(1)(a), (c) and (e) of the PLRA as read with Act 111. At the hearing, the Union withdrew its claim based on Section 6(1)(e). (N.T. 40). The Union put forth in its brief, for the first time, an independent Section 6(a)(1) claim. (Union Brief at page 19). However, since the Union did not put forth an independent Section 6(a)(1) claim in its specifications of charges, I will not entertain it.

In a discrimination claim under Section 6(1)(c) of the PLRA, the Union has the burden of proving that an 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 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 weigh 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." 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. Id. Close timing combined with another factor 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).

In this matter, the Union has not carried its burden of proving a *prima facie* case because the record does not support a conclusion that the City was motivated by anti-union animus when it demoted Makar from the position of Assistant Chief. It is not contested that Makar engaged in protected activity while he was Union President until 2012. However, the Union argues that Makar's protected union activity extended past 2012 and into 2016 in the form of Facebook posts he made which criticized the City. However, nothing in the record supports a finding that the City had knowledge of these Facebook posts. Therefore, I find that the last protected activity engaged in by Makar that the City had knowledge of was his term as Union President, which ended in 2012.

The record in this matter does not support a conclusion that the City was motivated by anti-union animus. First, and most importantly, there is no direct evidence of anti-union animus. Therefore, in order to prevail, an inference of anti-union animus must be drawn from the record. Second, the demotion to Makar occurred years after Makar engaged in any protected activity which the City had knowledge of. Such a lapse in time weighs heavily against any inference of anti-union animus. See Teamsters Local 776 v. Dauphin County, 32 PPER ¶ 32126 (Final Order, 2001) ("[R]emote timing . . . between the protected activity and adverse employment decision undercuts the inference of unlawful motive or that it was a factor in the adverse employment decision."). Third, the City adequately explained that its decision to demote Makar was based on reasons not related to anti-union animus, which also weighs heavily against any inference of anti-union animus. The record in this matter is clear that the decision to demote Makar was based on the City's negative review of Makar's attitude and demeanor in the interview process as compared to the other applicants. With respect to the City's decision to demote Makar, Alan Klapat, who is the Deputy Chief of the City's fire department, credibly testified as followed:

Q: And as you conducted these interviews and evaluated the candidates were all 12 highly qualified?

A: In my opinion six of the candidates separated themselves from the other six. I had the opportunity to look at each resume.

As far as Thomas Makar's resume it was in the mid tier of the resumes that were submitted. His experience cannot be questioned. He's the most experienced of all candidates between him and Chief Snarksi. So that was the two factors I looked at, including the leadership role they played in their position either being Assistant Chief, Captains, or Privates.

Q. How would you describe your relationship with former Captain Makar?

A. In my opinion we always had a great working relationship. We were personable. I never had an issue with Tom Makar throughout my 27 years.

Q. So why didn't he make your top four?

A. It was a very difficult personal and professional decision that I made. Not including - if I didn't include his demeanor in the interview, it would have been an injustice to the whole process. It would have been unfair to all of the other candidates that came in and presented themselves professionally. Holding a grudge or not, that's not an excuse to come in with a poor attitude, fringing on being belligerent and disrespectful.

As Ted Wampole testified, the first half of the interview, it would have been difficult not to recommend Thomas Makar. The second half of the interview onto the conclusions, was a totally different person. That had a lot of weight on my decision on my input in the final decision process.

(N.T. 78-80). I find that the preceding testimony, and the record as a whole, supports a conclusion that the employer was not motivated by anti-union animus when it decided to demote Makar since the decision was based on non-discriminatory reasons. Since I find that this record does not support an inference of anti-union animus, the City has not violated Section 6(1)(a) and (c) of the PLRA.

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 political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The City has **not** committed an unfair labor practice 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 Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint is 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 eighth day of November, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

Stephen A. Helmerich, Hearing Examiner