

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP PA CONSERVATION POLICE OFFICERS :
LODGE 114 :
 : Case Nos. PF-C-22-51-E
 v. : PF-C-22-53-E
 :
COMMONWEALTH OF PA :

PROPOSED DECISION AND ORDER

On October 5, 2022, the Fraternal Order of Police, Pennsylvania Conservation Police Officers Lodge 114 (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania, Pennsylvania Game Commission (Commonwealth or PGC), alleging that the Commonwealth violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, by reposting a vacancy announcement for a Law Enforcement Coordinator position on September 12, 2022, after FOP President Jonathan Wyant was the only qualified applicant to submit an application during the initial posting between August 25, 2022 and September 8, 2022, in retaliation for Wyant's protected activity. The charge was docketed at PF-C-22-51-E.

On November 2, 2022, the FOP filed a second charge of unfair labor practices with the Board against the Commonwealth, alleging that the Commonwealth violated Section 6(1)(a), (b), and (c) of the PLRA, as read with Act 111, by subjecting Wyant to a pre-disciplinary conference in October 2022 and an ongoing investigation thereafter in retaliation for his protected activity. The charge was docketed at PF-C-22-53-E.

On December 1, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing in PF-C-22-51-E, assigning the charge to conciliation, and directing a hearing on February 13, 2023, if necessary. On January 5, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing in PF-C-22-53-E, assigning the charge to conciliation, and directing a hearing on March 3, 2023, if necessary. The charges were subsequently consolidated for disposition, and the hearings were continued to March 30, 2023.¹ Hearings ensued on March 30, 2023 and April 27, 2023, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties each filed separate post-hearing briefs in support of their respective positions on July 7, 2023.

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. The Commonwealth is the employer of the PGC bargaining unit employes under Act 111, as read *in pari materia* with the PLRA. (N.T. 9)

¹ The charge docketed at PF-C-22-51-E was originally assigned to the undersigned hearing examiner. The charge docketed at PF-C-22-53-E was originally assigned to Hearing Examiner Jack Marino, but the charge was subsequently reassigned to the undersigned hearing examiner so that the matters could be consolidated for disposition.

2. The FOP is a labor organization under Act 111, as read *in pari materia* with the PLRA. (N.T. 9)

3. The FOP is the exclusive bargaining representative for a unit of police employees at the PGC. (Joint Exhibit 1)

4. The FOP and the Commonwealth are parties to a collective bargaining agreement (CBA) effective July 1, 2021 to June 30, 2024. (Joint Exhibit 1)

5. Jonathan Wyant has been employed with the PGC since 1999. He currently serves as a Wildlife Conservation Officer (WCO) in the North Central Region, which includes Lycoming County. Aside from a year he worked as a Federal Aid Supervisor from 2009 to 2010, Wyant has been a WCO since 1999. (N.T. 285-289)

6. Wyant served as President of the FOP from 2016 to 2022, during which he was involved in contract negotiations, Act 111 interest arbitrations, and filing and processing grievances. At the hearing, he identified several notable grievances he handled during his tenure as President, including a June 2016 incident involving the PGC Tracking Team, which is a special operations unit handling searches for fugitives and missing people. He also filed a grievance in 2021 challenging the creation of a central dispatch center at PGC headquarters in Harrisburg. (N.T. 79, 121-122, 289-291, 301-305, 323; FOP Exhibit 17)

7. By email dated June 6, 2016, WCO Victor Rosa, who was a member of the Tracking Team, replied-all to a June 5, 2016 email to the entire Tracking Team, as well as some of their trainers, from then-Chief of Enforcement Jason DeCoskey and stated "[h]as overtime been approved for this training?" (N.T. 82, 323-324; FOP Exhibit 13)

8. By email dated June 6, 2016, DeCoskey replied-all to Rosa's June 6, 2016 email and stated: "WTF..." During the hearing on March 30, 2023, DeCoskey denied that he meant "what the fuck" in his response. Instead, he claimed that he meant "what the freak," which he explained as a joke about radios. He testified that the term was short for frequency, as when you do not understand somebody and need clarification. (N.T. 82-83; FOP Exhibit 13) (Ellipses in original)

9. By email dated June 6, 2016, Rosa replied-all to DeCoskey's previous email and indicated the following, in relevant part:

Gentlemen, the success or failure of this or any other program is NOT based on the amount of time given/donated by its members. If any one of you would like to tell me why we should not be paid for every hour we work for this mission I am listening.

Once again we find ourselves in the position of added risk and responsibility without compensation, those that do this for free need to reassess how your actions affect not only you and your family but every other officer that is not...in the position financially or otherwise to offer his service without pay. The ramifications of working for free go well beyond this team.

If you feel you are more dedicated then [sic] I because you put in time for free, I welcome the opportunity for debate.

From the training in April to the recent L2 and NY training we have taken great strides backwards towards compensation for hours worked. The schedule for next week's training is just another example of taking advantage of personal [sic] that want to better this agency without consideration for the financial cost to them and is a complete disregard for the well-being of its members and all personnel.

I cannot and will not be silent on this any longer, this is wrong. You may accuse me of trying to diminish this team in some way, apply fault should it be disbanded. The facts [sic] is those that may be against it will always be against it and should this or any other program falter at least it did not succeed from the demise of its employee; i.e. slavery.

True leaders would never let this happen so the most you may accuse me of is fighting for my men to be compensated for the hours worked.

(FOP Exhibit 13) (Emphasis in original)

10. By emailed dated June 6, 2016, DeCoskey replied-all to Rosa and indicated the following, in relevant part:

Vic-you will be hearing from me over your email. Do not plan on attending next week's training until you hear from either me or Dan Figured. You [sic] email is over the line; if anyone else feels this way, let me know now before the training.

(FOP Exhibit 13)

11. By letter dated June 23, 2016, DeCoskey indicated the following, in relevant part, to Rosa:

Your most recent behavior in regards to attempting to generate dissent within the ranks of the Woodland Tracking Team regarding the well-established voluntary nature of the team, was self-serving and damaging to team moral [sic], effectiveness, and the [sic] undermining of discipline. As a result of your behavior, that violated SOP 50.37, section 4 (Personal Standards), you are hereby removed from the voluntary position on the Tracking Team.

(N.T. 86-87, 325-326; FOP Exhibit 14)

12. FOP President Wyant testified that, when he investigated this incident, he learned that the PGC Tracking Team members were involved in training sessions that were lasting 12 to 14 hours. He also learned that the Tracking Team members were not being compensated for the trainings. He eventually learned that, when the Tracking Team was created, management had told them there would be no overtime for those duties. (N.T. 324-325)

13. In June or July 2016, the FOP filed a grievance protesting Rosa's removal from the Tracking Team and the PGC's refusal to pay overtime wages for training. (N.T. 88, 324-325; FOP Exhibit 15)

14. In July 2016, the PGC disbanded the Tracking Team, and the FOP subsequently filed a charge of unfair labor practices with the Board alleging a violation of the PLRA. The parties appeared for a hearing before the Board, and ultimately settled the charge. As a result of the settlement, the PGC reconstituted the Tracking Team and reinstated Rosa to his position on the Tracking Team. (N.T. 88-90, 326-329)

15. On August 25, 2022, the Commonwealth posted a vacancy announcement for a Wildlife Conservation Officer Law Enforcement Coordinator (LEC) position in the PGC Bureau of Wildlife Protection/Enforcement Division. The announcement indicated that the position was Civil Service and included a closing date of September 8, 2022. (N.T. 15-16, 19, 330; FOP Exhibit 2)

16. The August 25, 2022 vacancy announcement for the LEC position also included an eligibility section for candidates who have: "One year of experience as a Wildlife Conservation Officer Supervisor; or Four years of experience as a Wildlife Conservation Officer; or Four years of experience as a Game Land Management Group Supervisor," along with Pennsylvania residency and eligibility for selection in accordance with Civil Service rules. (N.T. 16-17, 21, 330-331; FOP Exhibit 2)

17. The PGC's Human Resources Analyst, Ashley Boylan, testified that the eligibility section of the vacancy announcement set forth the minimum experience and training required for the position and that if an applicant did not meet those minimum standards, he or she would not be considered as an eligible candidate for the position. (N.T. 20-21)

18. The positions of Wildlife Conservation Officer, Wildlife Conservation Officer Supervisor, and Game Land Management Group Supervisor are all law enforcement bargaining unit positions, which receive a state-issued vehicle. Employees who are issued a state vehicle are required to maintain a valid Pennsylvania driver's license to perform their duties in those vehicles. (N.T. 22-23, 214, 330-331)

19. The vacancy announcement also contained a heading entitled "Examination Information," which provided that eligibility was based on "Competitive Promotion Without Examination Only." Boylan explained that this was governed by the Civil Service Act and that employees in the next lower class would be eligible for the promotion without having to actually take an exam. (N.T. 23-24; FOP Exhibit 2)

20. Boylan was responsible for posting the vacancy announcement, collecting the applications upon submission, and reviewing the applications to determine whether the applicants were eligible for the position. She was also responsible for sending the eligible applications to the hiring manager, who was Jason DeCoskey, now the Director of Wildlife Protection. DeCoskey had the ultimate authority to determine who got the position. (N.T. 24-26, 90-91)

21. On August 29, 2022, DeCoskey had a meeting with PGC Executive Director, Brian Burhans, regarding vehicles for the LEC position. DeCoskey described how the LEC position was the only Game Warden position at the PGC that did not have a take-home vehicle.² DeCoskey indicated that he went to Burhans with Kyle Jury, the Training Director, and reviewed the numbers

² The record shows that State Game Warden is a working title for the WCO position. (N.T. 22)

regarding how often the LECs would need a vehicle and how often they were going to the vehicle pool to obtain one. After the meeting, Burhans agreed and decided that the LECs would be issued a vehicle. (N.T. 95-97, 100; Commonwealth Exhibit 1)³

22. By email dated August 30, 2022, DeCoskey indicated to the PGC Regional Directors the following, in relevant part:

Greetings-Just an FYI about Travis Pugh's position that just opened last week. I'm not sure if any of your supervisors are interested or not but the position (and all Warden BWP positions) now include a vehicle and 120 OT. The Executive Office was kind enough to look at the position and justification for vehicles to make that decision. Please share with your staff. The position closes in September. Hopefully this decision will have more wardens interested in the position.

(N.T. 151-153; Commonwealth Exhibit 1)

23. DeCoskey testified that he sent the August 30, 2022 email to the Regional Directors hoping to solicit more applicants for the LEC position. (N.T. 153)

24. FOP President Wyant easily met the requirements for eligibility for the LEC position and submitted an application on September 1, 2022 during the August 25 to September 8, 2022 window. He was the only person to submit an application for the LEC position during that window. However, he did not receive any notice of an interview pursuant to that announcement. (N.T. 27, 33-34, 46, 184, 212, 330-332, 334)

25. By email dated September 7, 2022, DeCoskey indicated to Boylan: "I think we will need to repost the [LEC position] due to a change in the position description." DeCoskey testified that he requested a change to the job posting because of a driver's license requirement, despite the fact that all the bargaining unit employees are required to have a valid Class C license already. He acknowledged that bargaining unit employees who have lost their driver's license were disciplined by the PGC. David Mitchell, the PGC Deputy Executive Director of Field Operations, confirmed that bargaining unit employees, who lose their driver's license, are subject to discipline. (N.T. 34-35, 100-101, 126, 172, 214-215; FOP Exhibit 9)

26. Immediately after the September 7, 2022 email, Boylan called DeCoskey to find out what the change was for the position description. DeCoskey told Boylan to add the requirements of possessing a valid driver's license and operating a motor vehicle. (N.T. 37-38, 126-127; FOP Exhibit 9)

27. By email dated September 7, 2022, Boylan indicated to Wendy Palmer, the Administrative Assistant to the Bureau of Wildlife Protection, with a copy to DeCoskey, that Palmer was to add the additional requirements of possessing a valid driver's license and operating a motor vehicle with a Class C driver's license to the Essential Functions of the position description. (N.T. 38-39, 129; FOP Exhibit 9)

³ DeCoskey testified that the PGC has five LEC positions, which are all located at PGC headquarters in Harrisburg. (N.T. 98-99, 103)

28. After DeCoskey replied on September 7, 2022 that the change was done, Boylan responded on September 9, 2022 and indicated that "Wyant is the only applicant so I will repost this first thing Monday morning." (N.T. 44-45, 129-130; FOP Exhibit 9)

29. Boylan testified that she did not forward Wyant's application to DeCoskey during the August 25 to September 8, 2022 window because the position was going to be reposted. She could not recall any time when she reposted a position after having a qualified applicant for this bargaining unit. DeCoskey also testified that he did not receive any application packages for the first announcement and that he did not find out that Wyant applied for the LEC position during the first announcement until after he had the meeting with Executive Director Burhans regarding vehicles. (N.T. 34, 45-47, 93, 95-96, 107)

30. DeCoskey testified that he recalled two instances since 2006 where the PGC has reposted a position after having received an application from a qualified applicant during the first posting. He indicated that it happened once in 2007, but he did not provide a date or timeline for the other alleged incident. (N.T. 106-107)

31. On September 12, 2022, the Commonwealth posted a second vacancy announcement for the LEC position, which was open through September 26, 2022. The announcement was identical to the first one, except that two additional requirements were added to the "Essential Functions" listed in the announcement, "[p]ossess a valid driver's license and [o]perates a motor vehicle with a valid Class C driver's license." (N.T. 30-33, 110, 342-343; FOP Exhibit 5)

32. Wyant discovered that the LEC job was reposted while he was on vacation and called Law Enforcement Supervisor Chris Krebs on September 16, 2022, who was on a conference call with Dave Carlini, the Regional Manager, and Harold Malehorn, who was Wyant's immediate supervisor. Carlini indicated to Wyant during the call that the LEC job was reposted to get a deeper applicant pool. When Wyant questioned Carlini about who made that decision, Carlini did not know the answer. (N.T. 247-248, 332-336)

33. Wyant testified that in his 24 years at the PGC, he has never seen a position get reposted when there was a qualified applicant who applied. (N.T. 336-337)⁴

34. Wyant continued to press Carlini about who made the decision to repost the LEC announcement. Carlini eventually told him to contact Ashley Boylan of human resources. (N.T. 337)

35. Wyant submitted an application for the LEC position under the second announcement on September 18, 2022 out of an abundance of caution. (N.T. 49, 337-338, 350; FOP Exhibit 6)

⁴ Wyant recalled one time where the PGC reposted a vacancy announcement for a position in the North Central Region where two employees submitted applications, but one of the applications was deficient for some reason. Wyant explained that the PGC reposted the job to allow the one employee to correct a minor issue. But not where the PGC only had one qualified applicant. (N.T. 344)

36. On September 20, 2022, Wyant called Ashley Boylan, who told him the job was reposted because the hiring manager wanted a deeper applicant pool. When Wyant asked Boylan if she could recall anyone in the bargaining unit not being granted an interview for a position for which he or she was qualified, Boylan did not have an answer. Boylan gave Wyant the deeper applicant pool justification during the call at least two or three times and did not mention anything about a driver's license requirement. Wyant continued to question Boylan, who finally replied that the decision was made by Jason DeCoskey, and she was not sure. (N.T. 56-59, 338-339; FOP Exhibit 9)⁵

37. Boylan admitted during the hearing that DeCoskey told her that the PGC wanted a deeper applicant pool for the LEC position during their telephone conversation on September 7, 2022. Boylan also conceded at the hearing that the PGC previously received only one applicant for a Game Land Management Supervisor position in Lycoming County and that applicant, who was a Mr. Bernardi, was awarded the position. (N.T. 58-62)

38. At the hearing, DeCoskey denied that he ever told Boylan the LEC position needed to be reposted to broaden the candidate pool. (N.T. 130-131)

39. On September 23, 2022, WCO Scott Frederick submitted an application for the LEC position pursuant to the second announcement. Frederick did not apply during the first window. Frederick met the minimum eligibility requirements for the LEC position. Wyant and Frederick were the only applicants under the second announcement. Boylan sent both applications to the hiring manager, DeCoskey. (N.T. 50-52, 110-111, 184; FOP Exhibit 7)

40. DeCoskey testified that, as part of the application packages, he received two Employee Performance Review (EPR) forms for Wyant and one for Frederick. DeCoskey acknowledged that Wyant had excellent EPRs, which were substantially better than Frederick's. He also admitted that Wyant had more seniority than Frederick by two years. DeCoskey decided to interview both applicants. (N.T. 111-117, 190-191; FOP Exhibit 3, 8)

41. On September 28, 2022, Wyant had a follow up call with Regional Manager, Dave Carlini, who again stated that the LEC job was reposted for a deeper applicant pool. Carlini also indicated that DeCoskey made the decision. (N.T. 257-258, 341-342)

42. On October 12, 2022, FOP President Wyant had a telephone conversation with WCO Scott Frederick and explained how he had applied for the LEC position during the first posting. Wyant advised Frederick that the FOP had filed a charge of unfair labor practices because the PGC did not give

⁵ At the hearing, Boylan initially testified that she told Wyant the LEC position was reposted because of the additional requirements of the driver's license. However, she was later forced to acknowledge that her September 20, 2022 emails to Labor Relations Coordinator, Delynn Steffan, and Human Resources Director, Christine Worley, indicated that she told Wyant it was "to broaden the candidate pool." The driver's license requirement appears nowhere in her September 20, 2022 emails. Boylan further conceded that her November 18, 2022 witness statement is devoid of any mention that she told Wyant the PGC wanted a deeper or broader applicant pool. Based on these inconsistencies in Boylan's account, it must be concluded that Wyant's version of events was more accurate and credible. (N.T. 53-58, 64; FOP Exhibit 9)

him an interview after the first posting. Wyant considered Frederick to be a friend and did not want the charge to have a negative effect on their relationship. Frederick was unaware of the charge or that Wyant had applied for the LEC position and asked what could potentially happen. Wyant was unsure of the potential remedies but advised Frederick of what he was seeking with the charge, along with the fact that there could be any number of results. Wyant testified that he wanted to be upfront with Frederick about the situation. (N.T. 193-198, 351-353)

43. Frederick contacted DeCoskey after his conversation with Wyant and asked DeCoskey a number of questions. Frederick wanted to know whether he could be forced to return to the field if he accepted the promotion, but then the FOP subsequently prevailed on its unfair labor practices charge. Frederick was concerned that the PGC would fill the vacancy left from his prior position and that he could potentially be displaced from his job. Frederick was primarily concerned with the ramifications of the FOP's litigation and did not make any complaints to DeCoskey about how Wyant conducted himself on the call. DeCoskey directed Frederick to contact human resources. (N.T. 136-141, 198-201)

44. The PGC's Labor Relations Coordinator, Delynn Steffan testified that DeCoskey advised her that WCO Frederick made a complaint about WCO Wyant contacting Frederick regarding the FOP's charge of unfair labor practices related to the posting of the LEC position. (N.T. 419)

45. On October 14, 2022, WCO Frederick provided a witness statement to the PGC's Labor Relations Coordinator, Delynn Steffan, which provided, in relevant part, as follows:

Game Warden Jonathon Wyant contacted me on Tuesday, October 11, 2022, via phone however I missed his call on this date. I called him back on Wednesday, October 12, 2022. Warden Wyant advised that the PGC posted a WCO Law Enforcement Coordinator position that Warden Wyant bid on and he was the only bidder for the first posting. Warden Wyant expressed that he was not initially afforded an interview and the position was reposted to expand the candidate pool since he was the only bidder. Warden Wyant advised he would be filing an Unfair Labor Practice (ULP). Mr. Wyant expressed that he was not doing it against me, but he believes the agency did something wrong by not affording him an interview during the first posting. Mr. Wyant explained that depending on how the interview goes, if he would win the ULP it could possibly displace me if I would be the selected candidate for the WCO Law Enforcement Coordinator position. I didn't see Warden Wyant's comments as a threat or discouraging. My only concern is that I've been with the agency for a while, and I don't want to be in a similar situation such as the Girosky/Troutman case. I don't want to be put in the same position of being placed in the WCO Law Enforcement Coordinator position and a few months down the road Warden Wyant wins the ULP and I'm out of my district without a destination. I don't believe Warden Wyant contacted me to intimidate me, rather he wanted me to hear it firsthand that he would be filing a ULP with the possibility if he would win the case, it may impact me if I am the selected candidate for the position. The PGC is a small agency and the way this agency works word spreads. I heard that Warden Wyant was my only competition so I'm sure he heard the

same about me applying for the WCO Law Enforcement Coordinator position.

Warden Wyant does not intimidate me, and I do not believe he was intentionally trying to discourage me, but there are some outfall concerns. I would like to know what grounds I would have to stand on since there are a lot of what ifs. If I'm offered the WCO Law Enforcement position and I accept, leave my district and assume the WCO Law Enforcement Coordinator position and Warden Wyant wins the ULP what would occur at that time? Could we receive approval from RD Beahm to hold my district until the ULP is satisfied? Do I have return rights to my district? My interview is scheduled for October 24, 2022, and I will discuss my options with the interview panel at that time.

(N.T. 201-202, 356; FOP Exhibit 19)

46. Wyant testified that he agreed with Frederick's characterization of their October 12, 2022 phone call. (N.T. 356)

47. On October 24, 2022, the PGC held a pre-disciplinary conference (PDC) with Wyant. Steffan was concerned that Wyant appeared to be intimidating or interfering with another PGC employe, which would have violated the PGC's rules and standards of conduct. Steffan interrogated Wyant during the PDC, during which Wyant told her that he did not reach out to Frederick to intimidate Frederick. Wyant indicated that he and Frederick were friends, and the call was simply meant as a heads-up regarding the charge of unfair labor practices. (N.T. 419-423; Commonwealth Exhibit 10)

48. Also on October 24, 2022, Wyant and Frederick each separately underwent an interview for the LEC position. The interview panel included DeCoskey, the Bureau Director, along with Mike Reeder, the Director of the Communications Division, Mark Rutkowski, the Assistant Bureau Director, and Kyle Jury, the Training School Supervisor. DeCoskey supervises Reeder, Rutkowski, and Jury. DeCoskey testified that the primary qualification for the LEC position that he was looking for was purchasing experience. (N.T. 94, 117-119, 135, 190-191, 194, 216, 344-345; FOP Exhibit 9, 10)

49. Wyant testified that he was very aware of what the LEC position entailed because he had spoken to the previous incumbent, Travis Pugh. Wyant was hoping that the panel would ask about purchasing experience so he could highlight his own purchasing and procurement experience for the year he spent in the Federal Aid Supervisor position. However, the panel did not ask him any questions about purchasing. (N.T. 347-349)

50. DeCoskey testified that Wyant and Frederick both interviewed well. DeCoskey believed that Frederick was the best candidate for the position because he had more of a procurement background as it related to his previous civilian job. He stated that the panel agreed that Frederick was the better candidate. (N.T. 157-161)

51. DeCoskey explained that he felt Frederick was the better candidate because Frederick's previous job was as a golf course superintendent where he was responsible for purchasing large bulk orders of items, such as fertilizer and seed. He testified that Frederick went into great detail during his interview about his prior purchasing experience. DeCoskey also stressed that Frederick was a firearms and defensive tactics

instructor, having initiated a new statewide program the agency uses for close quarters defense, along with serving on a ceremonial unit. He claimed that Wyant did not have any similar procurement related experience. (N.T. 162-164)

52. DeCoskey testified that nobody from the panel recommended Wyant for the LEC position. He indicated that Frederick ultimately got the LEC position. DeCoskey had the final authority over that determination. (N.T. 164-165)

53. DeCoskey testified that 60 to 70 percent of the LEC job involves purchasing or procurement duties. He admitted on cross-examination, however, that the panel did not ask any specific questions about purchasing or procurement during the interviews. He also acknowledged that Frederick's purchasing experience did not occur during his employment with the PGC. (N.T. 175-179)

54. DeCoskey testified again during the second day of hearing on April 27, 2023, at which time he offered additional reasons for why he selected Frederick over Wyant for the LEC position. He stated that he had some questions about Wyant's ability to perform in a leadership role for the Bureau of Wildlife Protection. Specifically, he cited one incident from 2009 or 2010 while DeCoskey and Wyant were both serving in the PGC's ceremonial unit. DeCoskey described receiving complaints from another member of the unit that Wyant did not accept constructive criticism. (N.T. 365-368)

55. DeCoskey also described another incident in which Wyant allegedly undermined DeCoskey's teaching ability at the PGC's training academy during the 31st class of cadets. DeCoskey testified that he taught the cadets by reading Title 34, Chapter 21 of the Pennsylvania Crimes Code verbatim, which is apparently how the PGC typically trains its cadets. He indicated that some of the other resident instructors at the training academy advised him the next day that Wyant retaught that same chapter to the cadets later in the evening. DeCoskey eventually confronted Wyant over the incident and warned Wyant not to do it again. (N.T. 368-370)

56. DeCoskey further testified that there have been times where he said hello to Wyant in a hallway only to have Wyant ignore him. He also claimed that Wyant refused to even look at him during an interview for another position, during which DeCoskey sat on a panel of three members. He indicated that Wyant declined to call him to discuss the LEC position. DeCoskey explained that he wondered why somebody would want to work for him if that person cannot even talk to him. He testified that he did not believe he could build trust with such an individual. DeCoskey stated that other members of the interview panel expressed similar concerns and that he took all of this into consideration when deciding who to select for the LEC position. (N.T. 370-372)

57. On cross-examination, DeCoskey admitted that the employe who complained about Wyant did not provide DeCoskey with any examples of how he could not accept constructive criticism. DeCoskey was forced to admit that he did not know what constructive criticism Wyant was allegedly not accepting or responding to. DeCoskey nevertheless acknowledged that this complaint, in part, formed a basis for his decision not to select Wyant for the LEC position. (N.T. 373-374)

58. On rebuttal, Wyant testified that he did reteach Chapter 21 of Title 34 later that evening after DeCoskey had taught it earlier in the day. Wyant explained that he did so only after more than a few cadets asked him to explain a lot of the material covered earlier by DeCoskey. Wyant indicated that he did not intend to undermine or contradict DeCoskey, but rather that he was trying to help the cadets better understand the material. (N.T. 440-442)

59. Labor Relations Coordinator Steffan testified that after the October 24, 2022 PDC, Wyant did not receive any formal discipline. Instead, she stated that he received a verbal counseling through his supervisor. She claimed that counseling is simply meant as coaching for the employee on how to improve moving forward. She testified that Wyant should not have reached out to the other candidate himself and gone through the chain of command instead. She noted that Wyant was given the opportunity to contact DeCoskey with any concerns that Wyant had. (N.T. 424-425)

60. By email dated October 28, 2022, Steffan indicated the following, in relevant part, to Supervisor Malehorn and Regional Director Carlini:

As a follow up to the PDC held for Warden Wyant, he should be issued a verbal counseling upon his return for the inappropriate conduct when he contacted Warden Frederick about his intentions to file a ULP. Please provide Warden Wyant expectations moving forward that he should not be making contact to other Warden's [sic]/employees that may appear to be intimidating, threatening or interfering. Explain that his actions did in fact result in some doubt from Warden Frederick. Please let me know what date you plan to hold this meeting so I can update my records accordingly...

(N.T. 250-251, 354, 432; FOP Exhibit 12)

61. Shortly thereafter, Wyant received the verbal counseling from Malehorn, who simply read Wyant the October 28, 2022 email. Wyant questioned Malehorn about what Wyant did wrong, to which Malehorn replied that Malehorn did not know and that Malehorn was just supposed to read the email to Wyant. (N.T. 250-251, 354-355)

62. WCO Frederick testified that his promotion to the LEC position was effective sometime around November 28, 2022. (N.T. 181-182)

DISCUSSION

The FOP argues that the Commonwealth violated Section 6(1)(a) and (c) of the PLRA⁶ and Act 111 in PF-C-22-51-E by reposting the LEC vacancy announcement on September 12, 2022 and refusing to hire WCO Wyant for the position, when he was the only qualified applicant to apply, in retaliation for Wyant's protected activity. Likewise, the FOP contends in PF-C-22-53-E that the Commonwealth violated the same provisions of the PLRA by initiating

⁶ Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in this act... (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization..." 43 P.S. § 211.6.

an investigation, PDC, and verbal counseling of Wyant in retaliation for his protected activity. The FOP further submits that the Commonwealth has committed an independent violation of Section 6(1)(a) in both cases because the Commonwealth's actions would have a tendency to coerce the economically dependent employees in the exercise of their rights under the PLRA. The Commonwealth, for its part, maintains that both charges should be dismissed because the Commonwealth's actions in both cases were motivated by legitimate nondiscriminatory reasons, and not by anti-union animus. Specifically, the Commonwealth asserts that DeCoskey decided to repost the LEC vacancy announcement on September 12, 2022 in PF-C-22-51-E because of the additional driver's license requirements once the PGC Executive Director approved the use of a take-home vehicle for the position. Similarly, the Commonwealth posits that the investigation, PDC, and counseling of Wyant in PF-C-22-53-E were based on Steffan's legitimate suspicion that Wyant's conduct during the October 12, 2022 phone call with Frederick violated the PGC's work rules and standards of conduct. The Commonwealth further submits that Wyant did not suffer any adverse employment action in either case.⁷

To establish a violation of Section 6(1)(c) under the PLRA, the charging party must show that the employee was engaged in protected activity, the employer knew of that protected activity, and there was an adverse employment action motivated by anti-union animus. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, PA State Police, 33 PPER ¶ 33011 (Final Order, 2001). It is the motive for the adverse employment action that creates the offense under Section 6(1)(c). PLRB v. Ficon, 254 A.2d 3 (Pa. 1969). An employer may rebut a claim of discrimination under Section 6(1)(c) of the PLRA by proving that the adverse employment action was based on valid nondiscriminatory reasons. Duryea Borough Police Dept. v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004).

The Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. City of Philadelphia, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities—for example, whether leading organizers have been eliminated; the extent to which the adversely affected employees engaged in union activities; and whether the action complained of was "inherently destructive" of employee rights. City of Philadelphia, supra, citing PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004), the Board has long

⁷ The FOP has also alleged a violation of Section 6(1)(b) in PF-C-22-53-E. An employer commits an unfair labor practice under Section 6(1)(b) of the PLRA if it creates a so-called "company union." FOP Conservation Police Officers Lodge 114 v. Commonwealth of Pennsylvania, Pennsylvania Game Commission, 39 PPER 87 (Proposed Decision and Order, 2008). A "company union" is created when the employer provides assistance to or is involved with a labor organization to the point that the labor organization is indistinguishable from the employer. *Id.* In this case, the FOP has not offered any evidence, nor argued that the Commonwealth's actions have created a company union. As a result, the charge under Section 6(1)(b) of the PLRA in PF-C-22-53-E will be dismissed.

held that the timing of an adverse action against an employee engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

Here, the FOP has sustained its burden of proving the first two elements of the Section 6(1)(c) discrimination test. The record shows that Wyant has engaged in numerous protected activities dating back several years during his time as President of the FOP from 2016 to 2022. During that time, he was involved in contract negotiations, Act 111 interest arbitrations, and filing and processing grievances. He identified one specific grievance from June 2016 involving the PGC Tracking Team, which specifically challenged the authority of DeCoskey, who was the hiring manager for the LEC position at issue in this matter. There is likewise little doubt that the Commonwealth knew about Wyant's protected activity. DeCoskey acknowledged that he was aware of the FOP's 2021 grievance challenging the creation of a central dispatch center at PGC headquarters in Harrisburg, which Wyant personally filed and processed, along with a charge of unfair labor practices addressing the same issue. (N.T. 121-122, 301-305). In fact, the record shows that Jason DeCoskey, Delynn Steffan and Mike Reeder met with Wyant and the FOP in May 2021 to try to resolve the matter. (N.T. 308-313; FOP Exhibit 17, 18).⁸ In addition, the record shows that Wyant played a pivotal role in filing and processing the FOP's 2016 grievance regarding the Tracking Team incident. DeCoskey acknowledged that he was aware of that grievance as well. (N.T. 88). DeCoskey further acknowledged being aware of the FOP's 2016 charge of unfair labor practices relative to the Tracking Team incident. (N.T. 88). The Board's records reflect that Wyant testified in support of the FOP's position during the hearing in that unfair labor practices charge, which was docketed at PF-C-16-65-E, and for which DeCoskey was also present. (N.T. 88).⁹ Indeed, DeCoskey testified that, as Union President, Wyant "fights tooth and nail for his members." (N.T. 157). As such, the issue in this case depends on the third and final element of the Section 6(1)(c) discrimination test, i.e. whether the Commonwealth was unlawfully motivated when it decided to repost the vacancy announcement for the LEC position in September 2022.

The FOP has also sustained its burden of proving the third element of the test, as the record is replete with overwhelming evidence of anti-union animus on behalf of the Commonwealth. First of all, the record shows that, in response to a question from WCO Rosa in June 2016 about whether overtime was approved for training, DeCoskey, who was then-Chief of Enforcement, replied "WTF..."¹⁰ Then, in response to Rosa's follow-up email, which was clearly advocating for overtime pay for the Tracking Team members and constituted protected activity, DeCoskey advised Rosa not to attend the

⁸ Reeder's claim during the April 27, 2023 hearing that he did not know about the grievance or charge of unfair labor practices until recently has not been accepted as credible, given the evidence that he was present for the May 2021 meeting. In any event, Reeder admitted that he knew Wyant was President of the FOP when they were filed. (N.T. 391, 401-402).

⁹ While DeCoskey is not listed as a witness in the transcript for the charge docketed at PF-C-16-65-E, he nevertheless received a subpoena to appear for the October 14, 2016 hearing. He also conceded during the March 30, 2023 hearing in this matter that he was present for the 2016 hearing on the FOP's prior charge. (N.T. 88).

¹⁰ DeCoskey's denial that he meant "what the fuck" has not been accepted as credible.

training and eventually removed Rosa from the Tracking Team shortly thereafter.¹¹ This is plain and overt evidence of unlawful motivation on behalf of DeCoskey. If that were not enough, the record also shows that the PGC subsequently disbanded the Tracking Team altogether as a result of this protected activity and that the Team was only reconstituted following a charge of unfair labor practices by the FOP, which proceeded to a hearing before the Board and which the parties settled. As the FOP persuasively argues, this shows a troubling history of retaliatory conduct by the PGC in response to activities protected under the PLRA.

The next factor which supports an inference of anti-union animus is the Commonwealth's failure to adequately explain the reasons for its actions. The Commonwealth argues that it had legitimate nondiscriminatory reasons for reposting the LEC position in September 2022, namely that DeCoskey made the decision to repost based solely on the alleged fact that the essential functions of the position had changed. Of course, this contention relies on DeCoskey's testimony that he convinced the PGC Executive Director to allow the LEC position to have a take-home vehicle on August 30, 2022. According to the Commonwealth, this required a change to the essential functions of the LEC position because the employee holding that job title would now have to possess a valid driver's license, as well as the ability to operate a motor vehicle. Because the August 25, 2022 posting did not list these requirements as essential functions of the LEC position, the Commonwealth submits that the posting did not accurately reflect the revised requirements for the job. This argument, however, ignores the obvious fact that eligible candidates for the LEC position were required to have experience as a Wildlife Conservation Officer, Wildlife Conservation Officer Supervisor, or Game Land Management Group Supervisor, which are all bargaining unit positions that are issued a state vehicle, and that all employees who are issued a state vehicle are required to maintain a valid Pennsylvania driver's license. In fact, the record shows that all bargaining unit employees must maintain a valid Pennsylvania driver's license and that employees who lose their driver's license are subject to discipline. DeCoskey himself admitted that, since LECs were not previously issued a take-home vehicle, they sometimes had to use Commonwealth pool cars if they were required to go into the field from their duty station at headquarters in Harrisburg, and that the LECs had to have a valid driver's license to use the pool cars. (N.T. 103-104). As a result, it is readily apparent that the justification proffered by DeCoskey for the reposting was pretextual in nature.

To that end, the Commonwealth has also offered shifting reasons as its justification for the reposting in September 2022. The PGC's Human Resources Analyst, Ashley Boylan, told WCO Wyant multiple times during their call on September 20, 2022, that the hiring manager, who was DeCoskey, reposted the position because he wanted a deeper applicant pool. What is more, Boylan did not mention anything about the alleged driver's license requirement during the September 20, 2022 call. This was consistent with her September 20, 2022 emails to Labor Relations Coordinator, Delynn Steffan, and Human Resources Director, Christine Worley. Boylan admitted during the hearing that DeCoskey told her the PGC wanted a deeper applicant pool for the LEC position during her phone call with DeCoskey on September 7, 2022.¹² Even Dave Carlini, the PGC Regional Manager for the North Central Region, told Wyant on multiple

¹¹ The Commonwealth does not argue that Rosa's June 2016 emails somehow lost the protection of the PLRA.

¹² Although DeCoskey denied making such a statement to Boylan, his denial was self-serving and, once again, not credible.

occasions during their phone calls on September 16 and September 28, 2022, that the LEC position was reposted to get a deeper applicant pool. These admissions cast considerably more doubt over the Commonwealth's alleged explanation that the LEC position was reposted in September 2022 because of the need to add the driver's license requirement to the essential functions list.

Adding further support for the notion that the Commonwealth's explanation here was pretextual is the compelling fact that the PGC has not reposted a vacancy for a bargaining unit position in recent memory when it has received a qualified applicant for the position. Wyant credibly testified that in his 24 years at the PGC, he had never seen a position get reposted when there was a qualified applicant who applied. Boylan could not recall ever reposting a vacancy for the bargaining unit when the PGC received a qualified applicant during the first posting. (N.T. 47, 61). When confronted by the FOP with evidence of 16 job postings between 2018 and 2022, in which the PGC received only one applicant, Boylan could not recall even one specific instance where the PGC reposted the position. (N.T. 66; FOP Exhibit 11). Boylan further admitted that the PGC previously received only one applicant for a Game Land Management Supervisor position in Lycoming County and that applicant was awarded the position. Even DeCoskey, whose testimony has not been deemed credible in any significant regard, could only recall two alleged instances since 2006 where the PGC has reposted a position after having received an application from a qualified applicant during the first posting, with one purported incident occurring in 2007 and no timeline provided for the other. Thus, even if this testimony were to be accepted, there is still no evidence that the PGC has reposted in such a situation since 2007. This compels a finding that the Commonwealth has proffered pretextual reasons for its actions and treated Wyant's application for the LEC position disparately from other similarly situated employes.¹³

The FOP also points to the interview process as further support for the Commonwealth's unlawful motivation. On this point, the Commonwealth offered testimony from DeCoskey and Mike Reeder, who was the Director of the Communications Division. At the first hearing on March 30, 2023, DeCoskey testified that the primary qualification for the LEC position that he was looking for was purchasing experience. He claimed that WCO Frederick was the better candidate because of his purchasing and procurement experience, which Frederick obtained as a golf course superintendent prior to serving with the PGC. DeCoskey claimed that Wyant did not have any similar procurement related experience. However, the record shows that the interview panel did not ask even a single question about purchasing or procurement, despite DeCoskey's claim that 60 to 70 percent of the job involves these duties. Notably, WCO Wyant was hoping for questions about purchasing and procurement so he could emphasize his experience in this subject matter during the year he spent working as a Federal Aid Supervisor for the PGC in 2009 to 2010. While DeCoskey also cited Frederick's experience as a firearms and defensive tactics instructor during the March 30, 2023 hearing, his testimony primarily focused on Frederick's alleged superior purchasing qualifications. At the next hearing on April 27, 2023, however, DeCoskey all of the sudden had several additional reasons for why he did not select Wyant, above and beyond the reasons he gave on March 30, 2023.¹⁴ These additional reasons included an

¹³ The Commonwealth does not argue that WCO Wyant was not qualified for the LEC position or that he did not otherwise meet the eligibility requirements.

¹⁴ DeCoskey's demeanor was also remarkably changed and unsettled during the April 27, 2023 hearing, as compared to the March 30, 2023 hearing.

alleged inability to accept constructive criticism, along with an incident during the 31st class of cadets, in which Wyant purportedly undermined DeCoskey's teaching ability. DeCoskey further claimed that Wyant sometimes does not say hello or make eye contact with him. DeCoskey's testimony on his additional reasons for not selecting Wyant for the LEC position is rejected as not credible or persuasive. Why DeCoskey did not simply provide these additional reasons during the first day of hearing on March 30, 2023, when he testified at length, is unclear. As the FOP convincingly points out, DeCoskey's testimony on April 27, 2023 shows that he somehow understood that his testimony at the previous hearing might not be sufficient for the Commonwealth's position to be credited or accepted.

Reeder's testimony was similarly problematic. Reeder essentially parroted DeCoskey in every aspect of his testimony. He cited WCO Frederick's experience in purchasing and procurement during Frederick's time as a golf course superintendent, along with his defensive tactics and Tracking Team experience. (N.T. 386-388). Reeder also regurgitated the teaching incident with the cadets, wherein Wyant allegedly undermined DeCoskey, (N.T. 389-390), even though Reeder later admitted that he was not an instructor at the PGC's academy at the time and that he was not even present for that block of instruction. (N.T. 398). Reeder even conceded that he was told about that alleged incident by DeCoskey himself. (N.T. 399).¹⁵ While it may not be particularly noteworthy for an interview panel to reach consensus on who each individual believes to be the best candidate for a position, it strains credulity to submit that all four individuals had exactly the same reasons and concerns for doing so, especially when three of the four people were not even present for one of the alleged major "concerns." To be sure, this evidence belies the testimony of DeCoskey at the March 30, 2023 hearing, wherein he stated that he does not want his interviews to be focused on his opinion alone. (N.T. 93-94). Instead, DeCoskey implied that, despite him having the final say, he welcomed a difference of opinion from the other individual group members. (N.T. 93-94). Yet not one panel member cited a single reason, which deviated even slightly from those of DeCoskey, to arrive at the same conclusion.

The Commonwealth's puzzling reasons for why it selected Frederick over Wyant are further amplified by a simple comparison of the candidates. By any objective measure, Wyant was certainly the superior applicant. Wyant interviewed extremely well, had more seniority than Frederick, far better EPRs than Frederick, and actually possessed a year of experience performing the much-desired purchasing and procurement duties for the PGC, which he could have recited had he simply been questioned about it during the interview.¹⁶ Moreover, there is no evidence that Wyant had any disciplinary

¹⁵ The parties stipulated that, if called, Kyle Jury and Mark Rutkowski would have substantially similar testimony to Reeder with respect to the interview process for the LEC position and the reasons that they recommended Frederick for the position, along with the concerns they had with Wyant being selected for the position. (N.T. 404-405). The parties also stipulated that neither Jury, nor Rutkowski were present for the alleged incident involving Wyant reteaching Title 34, Chapter 21 of the Crimes Code. (N.T. 405).

¹⁶ Both DeCoskey and Reeder conceded that Wyant interviewed well, with DeCoskey going so far as to state that Wyant interviews "extremely well" and is "well-studied," along with being "well-versed" in relation to the position for which he applies. On top of that, the disparity in the EPRs of the candidates is astounding, in and of itself. (N.T. 158, 382; FOP Exhibit 3, 4, 8).

issues, which would have significantly affected his candidacy. If the PGC really had legitimate concerns regarding Wyant's performance and conduct as an employee, it is curious why his EPRs and disciplinary record are devoid of any such instances. On these facts, then, it must be concluded that the reasons proffered by the PGC for reposting the LEC position in September 2022 were manufactured to mask the true motivation behind the action, i.e. that the PGC harbored unlawful, anti-union animus in violation of the PLRA.

In support of its position that the charge under Section 6(1)(c) in PF-C-22-51-E should be dismissed, the Commonwealth argues that DeCoskey could not have been motivated by anti-union animus because he was unaware that Wyant had applied for the LEC position or that Wyant was the sole applicant at the time he decided to repost the position. However, DeCoskey's testimony in this regard has not been accepted as credible or persuasive. Nor has Human Resources Analyst, Ashley Boylan's testimony been credited that she did not forward Wyant's application to DeCoskey until after the first vacancy closed. The record shows that the first vacancy opened on August 25, 2022 and that DeCoskey approached the PGC Executive Director about take-home vehicles for the LEC position on August 29, 2022. DeCoskey obtained the Executive Director's approval for the take-home vehicle on August 30, 2022 and forwarded an email on the same date to the PGC Regional Directors notifying them of the change. At that time, there would have been no applicants for the position yet. The only logical inference to be drawn from DeCoskey's actions on August 29 and 30, 2022 is that he was keenly aware that there was no interest in the position from any of the bargaining unit members. Otherwise, he would not have taken the steps he did to entice bargaining unit employees to apply. Indeed, after Wyant applied on September 1, 2022, DeCoskey did nothing to repost the LEC position until September 7, 2022, just one day before the vacancy was scheduled to close, despite being fully aware that the LEC position, like any other position, always required a valid driver's license and that the position description allegedly required a reposting of the vacancy announcement. Once again, the only logical inference to be drawn from these record facts is that DeCoskey and Boylan were in frequent contact throughout the posting period and that DeCoskey was fully aware that Wyant was the sole applicant at that point. This is much more consistent with the apparent need to "deepen the applicant pool" justification, which permeated the PGC during this period. Boylan's testimony that DeCoskey was the individual who told her of the need to deepen the applicant pool has been specifically credited on this point. Of course, if DeCoskey was unaware of who or how many bargaining unit employees had applied for the posting, then he would have had no reason to request a deeper applicant pool at the time.

The Commonwealth also maintains that the FOP's charge in PF-C-22-51-E does not contain any allegations regarding Wyant's non-selection for the LEC position, and therefore, any such allegations regarding the same are not properly before the Board. However, the FOP's charge expressly details how Wyant was the only applicant to apply during the August 25 to September 8, 2022 posting, that the PGC does not repost positions in the bargaining unit when a qualified applicant submits an application, that the PGC nevertheless reposted the LEC position during a window of September 12 through September 26, 2022, that the PGC representatives told Wyant the LEC position was reposted for a deeper applicant pool, and that this was done in retaliation for Wyant's protected activity. The crux of the charge is clearly delineated as the PGC's decision to repost the position when it had a qualified applicant for unlawful reasons, which necessarily and implicitly includes Wyant's non-selection for the position after the first posting. As a result,

the Commonwealth was clearly on notice of the specific averments in the charge and appeared more than ready to defend itself at both the March 30, 2023 and April 27, 2023 hearings. In fact, the Commonwealth never raised any argument during either hearing that it did not have adequate notice of the grounds for the charge and was able to present a plethora of witnesses in support of its position, including those who specifically addressed the reasons why it allegedly selected Frederick for the LEC position instead of Wyant. As such, the Commonwealth's argument in this regard must be rejected.

The Commonwealth further posits that the charge docketed at PF-C-22-51-E should be dismissed because Wyant did not suffer any adverse employment action. But it cannot be seriously contended that being denied a promotion, or any position for that matter, because of one's statutorily protected, concerted activity, is not an adverse employment action. The Commonwealth submits that there is no record evidence suggesting that Wyant would have been hired for the LEC position if the position was not reposted. Unfortunately for the Commonwealth, this argument is unavailing. As previously set forth above, there is ample evidence in the record demonstrating that the PGC has not reposted a vacancy for a bargaining unit position in recent memory when it has received a qualified applicant for the position. Boylan instead confirmed a previous occurrence wherein the PGC received only one applicant for a Game Land Management Supervisor position in Lycoming County and that applicant was awarded the position. And when she was confronted with 16 job postings between 2018 and 2022, in which the PGC received only one applicant, Boylan could not recall even one specific instance where the PGC reposted the position. The obvious inference being that the sole applicant was awarded the position in each of those 16 instances.

The Commonwealth's own witness, the Office of Administration's Chief of Intake, Lydia White, explained how the Civil Service Promotion Without Examination criteria works. She described how an applicant who meets the posting requirements, has one year of service in the next lower job class, does not have any discipline above the level of written reprimand in the prior year, and whose most recent EPR is satisfactory or higher is eligible for promotion. (N.T. 411-413). The record shows that Wyant easily met the minimum eligibility requirements for the LEC position and submitted his application during the initial posting. He had outstanding EPRs and proved that he could successfully pass the interview stage of the process, as confirmed by DeCoskey and Reeder. Accordingly, there is sufficient evidence to conclude that he would have been awarded the LEC position, but for his protected activity. The Board has specifically approved a remedy ordering the employer to award a promotion where the record shows that "but for" the protected activity, the employe would have been awarded the promotion. Police Ass'n of Falls Township v. Falls Township, 44 PPER 65 (Proposed Decision and Order, 2012), 44 PPER 93 (Final Order, 2013); Fraternal Order of Police, Lodge 7 v. City of Erie, 39 PPER 60 (Proposed Decision and Order, 2008), 41 PPER 149 (Final Order, 2008); Fraternal Order of Police, Lodge 9 v. City of Reading, 33 PPER ¶ 33112 (Proposed Decision and Order, 2002). Therefore, the Commonwealth will be directed to promote Wyant to the LEC position and make him whole for any losses he sustained as a result of the Commonwealth's unlawful conduct effective immediately.

The FOP has also sustained its burden of proving that the Commonwealth was unlawfully motivated in the charge docketed at PF-C-22-53-E. In PF-C-22-53-E, the record shows that Wyant engaged in protected concerted activity by discussing the FOP's pending October 5, 2022 charge of unfair labor practices

and its potential ramifications with a fellow bargaining unit member, WCO Frederick, on October 12, 2022. The record also shows that the Commonwealth was obviously aware of Wyant's protected activity, as DeCoskey and Labor Relations Coordinator, Delynn Steffan, readily conceded. Indeed, the record shows that Frederick called DeCoskey on October 12, 2022 and told DeCoskey about his conversation with Wyant. Frederick understandably had a number of questions about the situation and was primarily concerned with the ramifications of the FOP's litigation. DeCoskey admitted during his testimony that Frederick did not make any complaints to DeCoskey about how Wyant conducted himself on the call. Nevertheless, Delynn Steffan testified credibly that DeCoskey advised her that Frederick made a complaint about Wyant contacting Frederick regarding the FOP's charge of unfair labor practices related to the posting of the LEC position. As a result of this alleged complaint, Steffan began an investigation, which included obtaining a witness statement from Frederick on October 14, 2022, in which Frederick denied that Wyant tried to threaten, discourage or intimidate Frederick. Despite this evidence, Steffan persisted in her investigation and held a PDC with Wyant on October 24, 2022, which of course only confirmed Frederick's version of events and produced no evidence of any wrongdoing on Wyant's behalf. On October 28, 2022, Steffan then directed Wyant's direct supervisor, Harold Malehorn, to issue Wyant a verbal counseling "for the inappropriate conduct when [Wyant] contacted Warden Frederick about his intentions to file a ULP." Malehorn read Wyant the directive from Steffan on October 28, 2022.

This clearly satisfies the third prong of the discrimination test under Section 6(1)(c) of the PLRA. The Commonwealth began an investigation of Wyant based on an alleged complaint from Frederick, as reported by DeCoskey to Steffan, but which Frederick never actually made. DeCoskey's animus has been well established. Moreover, the Commonwealth persisted in its investigation despite uncovering no evidence of wrongdoing at any stage of the process. Rather, the record shows that Wyant should have been exonerated of any alleged allegations immediately after Frederick's witness statement on October 14, 2022, and then again, after the October 24, 2022 PDC. Undeterred, Steffan nonetheless directed Wyant to receive a verbal counseling expressly for discussing the FOP's pending litigation with a fellow bargaining unit member, which she deemed "inappropriate conduct." However, Wyant's conduct was not inappropriate in any way, shape or form, and instead constituted protected, concerted activity under the PLRA, as set forth above. Thus, the Commonwealth has admittedly subjected Wyant to an internal investigation, PDC, and verbal counseling for protected activity in direct violation of the PLRA.

The Commonwealth argues that Wyant did not suffer any adverse employment action because the mere convening of a PDC does not constitute discipline. The Commonwealth also maintains that Wyant only received a verbal counseling, which is not considered disciplinary in nature either. However, the Commonwealth Court has held that simply subjecting an employee to an internal investigation for protected conduct constitutes adverse employment action under Section 6(1)(c). Pennsylvania State Police v. PLRB, 41 PPER 183 (Pa. Cmwlth. 2011), *affirming* Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order, 2010). In addition, at least one Board hearing examiner has concluded that any written documentation designed to correct an employee's conduct constitutes discipline. East Allegheny Education Ass'n, PSEA/NEA v. East Allegheny School District, 47 PPER 55 (Proposed Decision and Order, 2015). The record shows that the verbal counseling was memorialized in an October

28, 2022 email from Steffan to Malehorn and that Steffan would "update [her] records accordingly." In light of these facts, the Commonwealth will be directed to purge any mention of the investigation, PDC, and verbal counseling from Wyant's file, along with the usual cease and desist remedies in PF-C-22-53-E.

Finally, the FOP argues that the Commonwealth has committed independent violations of Section 6(1)(a) in both PF-C-22-51-E and PF-C-22-53-E. The Board will find an independent violation of Section 6(1)(a) of the PLRA if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employes have been shown in fact to have been coerced. Bellefonte Police Officers Ass'n v. Bellefonte Borough, 27 PPER ¶ 27183 (Proposed Decision and Order, 1996) *citing* Northwestern Education Ass'n v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 6(1)(a). Northwestern School District, *supra*. However, an employer does not violate the PLRA where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Dospoy v. Harmony Area School District, 41 PPER 150 (Proposed Decision and Order, 2010) (citing Ringgold Education Ass'n v. Ringgold School District, 26 PPER ¶ 26155 (Final Order, 1995)).

Here, the record clearly supports a determination that the Commonwealth has independently violated Section 6(1)(a) of the PLRA in both cases. In PF-C-22-51-E, the Commonwealth refused to promote the FOP President after he was the only employe to apply for the LEC position during the first vacancy announcement and instead decided to repost the position, despite never having done so before when there was a qualified applicant who had applied. Moreover, the Commonwealth has not proffered any credible legitimate reasons for doing so and has instead put forth readily transparent, pretextual reasons for its actions. Likewise, in PF-C-22-53-E, the Commonwealth initiated an internal investigation, subjecting the FOP President to a PDC and verbal counseling, when it had no evidence of any wrongdoing on the FOP President's behalf. The Commonwealth persisted in its internal investigation, despite ample evidence that the FOP President should have been exonerated at every stage of the investigation. Once again, the Commonwealth could not provide any credible legitimate reasons for its conduct, claiming that it needed to persist in the investigation because Steffan suspected that Wyant "may have been attempting to threaten, intimidate, coerce, or interfere with Frederick in the hiring process for the LEC position." See Commonwealth brief at p. 24. However, Steffan began the investigation based on an alleged complaint by Frederick, as reported by DeCoskey, which never occurred. And, she continued her investigation notwithstanding the exculpatory evidence she uncovered at every turn, even going so far as to order discipline for Wyant. Thus, the record shows that the Commonwealth's actions, in both cases, would certainly have a tendency to interfere with and coerce employes in the exercise of their rights under the PLRA.

The Commonwealth argues in its post-hearing brief that the FOP failed to allege an independent violation of Section 6(1)(a) in its specification of charges. But the FOP, after detailing the numerous factual allegations at length, included the following averment in both of its charges: "The forgoing amounts to unlawful interference with and discrimination against bargaining unit members for engaging in protected activity." This averment tracks the language of both Section 6(1)(a) and (c) of the PLRA and its set forth conjunctively, which effectively raises two separate causes of action. As

such, it must be concluded that the FOP has sufficiently raised an independent Section 6(1)(a) claim, in addition to its Section 6(1)(c) claim. Therefore, the Commonwealth has also independently violated Section 6(1)(a) 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 Commonwealth is the employer of the PGC bargaining unit members under Act 111 as read *in pari materia* with the PLRA.
2. The FOP 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 Commonwealth has committed unfair labor practices in violation of Section 6(1)(a) and (c) of the PLRA in PF-C-22-51-E and PF-C-22-53-E.
5. The Commonwealth has not committed unfair labor practices in violation of Section 6(1)(b) of the PLRA in PF-C-22-53-E.

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 Commonwealth shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111;
2. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;
3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:
 - (a) Immediately make an unconditional offer to promote Jonathan Wyant to the position of Law Enforcement Coordinator and make him whole for all wages and benefits, plus six percent per annum interest, that he would have earned in the LEC position, beginning with the date the PGC promoted Fredericks to the LEC position through the date the PGC promotes Wyant to the position;
 - (b) Immediately purge Wyant's personnel file, to include all paper and electronic copies and records, of any and all mention of or references to the internal investigation, including but not limited to the October 24, 2022 PDC and the October 28, 2022 verbal counseling;

(c) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days;

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

(e) Serve a copy of the attached Affidavit of Compliance upon the Union.

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 21st day of September, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP PA CONSERVATION POLICE OFFICERS :
LODGE 114 :
 : Case Nos. PF-C-22-51-E
 v. : PF-C-22-53-E
 :
COMMONWEALTH OF PA :

AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania, Pennsylvania Game Commission hereby certifies that it has ceased and desisted from its violations of Section 6(1) (a) and (c) of the Pennsylvania Labor Relations Act; that it has complied with the Proposed Decision and Order as directed therein by immediately making an unconditional offer to promote Jonathan Wyant to the position of Law Enforcement Coordinator and make him whole for all wages and benefits, plus six percent per annum interest, that he would have earned in the LEC position, beginning with the date the PGC promoted Fredericks to the LEC position through the date the PGC promotes Wyant to the position; that it has immediately purged Wyant’s personnel file, to include all paper and electronic copies and records, of any and all mention of or references to the internal investigation, including but not limited to the October 24, 2022 PDC and the October 28, 2022 verbal counseling; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union 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