

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LEHIGH TOWNSHIP POLICE ASSOCIATION :
 :
 v. : Case No. PF-C-22-57-E
 :
 LEHIGH TOWNSHIP (NORTHAMPTON) :

PROPOSED DECISION AND ORDER

On November 14, 2022, the Lehigh Township Police Association (Association or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Lehigh Township (Township or Employer), alleging that the Township violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, by unilaterally changing Officer Jonathon Roth's platoon assignment on October 3, 2022 in retaliation for his protected activity and without bargaining with the Association regarding a different procedure for such changes than the one set forth in the collective bargaining agreement.

On January 12, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on March 16, 2023, if necessary. The hearing was subsequently continued to April 12, 2023 at the Township's request and without objection by the Association. The hearing ensued on April 12, 2023, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.¹ The parties each filed separate post-hearing briefs in support of their respective positions on June 22, 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 Township is a public employer and political subdivision under Act 111, as read *in pari materia* with the PLRA. (N.T. 7)
2. The Association is a labor organization under Act 111, as read *in pari materia* with the PLRA. (N.T. 7)
3. The Association is the exclusive bargaining representative for a unit of police employes at the Township. (Association Exhibit 1)
4. The Association and the Township are parties to a collective bargaining agreement (CBA) effective January 1, 2020 to December 31, 2023. (Association Exhibit 1)
5. Article 6 of the CBA, which is entitled "Scheduling," provides in relevant part, as follows:

The Chief of Police or Board of Supervisors is responsible for scheduling of all assignments. The Chief will have sole discretion in determining members [sic] shift assignments. The

¹ The hearing was held virtually by agreement of the parties.

Board of Supervisors reserves the right to review any or all scheduling.

(Association Exhibit 1)

6. Article 7 of the CBA, which is entitled "Twelve Hour Shift Schedule," provides in relevant part, as follows:

The parties agree that the department will **continue** operating on a **twelve**-hour shift schedule subject to the following:

- A. Officers shall work a fourteen-day schedule as follows: Off Sunday, Work Monday and Tuesday, Off Wednesday and Thursday; Work Friday, Saturday and Sunday; Off Monday and Tuesday; On Wednesday and Thursday; Off Friday, Saturday and Sunday.
- B. One (1) eight-hour shift shall be included in the rotation for each officer.
- C. With the exception of holiday time and the officer's birthday, all leave time shall remain calculated as one "day" equaling eight (8) hours.
- D. The Department will be divided into two platoons with one (1) Sergeant assigned to each platoon.
- E. Scheduled shifts will be: 7am to 7pm, 11am to 11pm, 3pm to 3am, 7pm to 7am, 6am to 6pm and 6pm to 6am. **The parties may mutually agree at any time to make a change in the shift-length duration.**
- F. The Township still retains their right for scheduling under Article 6 of the contract.
- G. The Township will provide a one year schedule by October 1 of the previous year, showing days off and scheduled work days for the purposes of planning for both the Officer and the Township...
- H. **Absent exigent circumstances, individual officer's scheduled days off will not be changed; however, at no time may more than one officer be scheduled for leave time (vacation, personal, or holiday) on any given day.**
- I. Absent exigent circumstances, scheduled shift assignments will not be changed by the Township with less than 60 days' notice to the officer.
- J. Nothing within this Article will prevent the voluntary switching of shifts or days off between officers when mutually agreed upon by the officers and the Chief of Police provided overtime is not generated.
- K. In the event of a long term absence of an officer (medical, retirement, resignation, termination, exceeding 30 days), **the** Township reserves the right to move an officer into the absent officer's patterned rotation. That officer will remain in that new rotation until the absent officer returns. Upon return of the absent officer, the other officer will be returned to his original rotation. Approved vacations will not be altered as a result of this. **This change will be offered first on a voluntary basis; then done in reverse seniority order. In the event of a permanent absence, the officer who is moved will remain in that rotation until such time as the vacancy is filled. Once the vacancy is filled, the officer will have the option of remaining in the new rotation or returning to his original rotation.**

- L. **Notwithstanding any other provision of this Agreement, the Township's Board of Supervisors may terminate the 12-hour shifts and change to a different shift schedule at any time if the Township deems it appropriate to change the schedule provided that the Township provides the Association with sixty (60) days' notice of such change and if the reason for such change is based on increase [sic] overtime or other costs, manpower or staffing issues, or potential liability issues or other operational reasons...**

(Association Exhibit 1) (Emphasis in original)

7. Jonathon Roth has been employed as a police officer for the Township for 18 years. He is the Township's only canine officer. He is also the only officer handling grants, which involve reviewing statistics for enforcement purposes, such as checkpoints, roving patrols, and aggressive driving operations, and which result in overtime opportunities. He became President of the Association in May 2022 and has served as an officer of the Association since 2011. He has been involved in contract negotiations since 2013. He described taking a leadership role for the Association with regard to the discipline and grievance process for major cases in March 2020 and November 2021. (N.T. 18-19, 61, 64-65)

8. Roth testified that the department is split into two platoons of five officers per platoon, plus one sergeant, that work opposite days from each other. Each platoon works six 12-hour shifts, plus one eight-hour shift every two weeks. The schedule results in patterned days off, such that the first platoon will work certain days of the week, while the second platoon has those days off, and then they switch the next week through the rotation. (N.T. 22-23)

9. Roth had served on the same platoon since 2017 when the department first implemented the 12-hour schedule. (N.T. 25)

10. Roth testified that the Township has a deadline of October 1 to release the schedule for the following year. He explained that this allows for predictability of scheduling appointments and vacations, which have to be requested by December 1, unless the vacation request is for the first three months of the year, which have to be placed by September 1. (N.T. 23, 29-30)

11. Roth testified that prior to 2020, he had a very good relationship with the Township's Chief of Police, Scott Fogel. Roth described Fogel as "probably one of the best bosses I've worked for." But in March 2020, when Roth was serving as Vice President of the Association, he intervened on behalf of another officer, who was off sick for two weeks. Roth and then-Association President Ball went to Chief Fogel and Township Manager Alice Rehrig separately to informally resolve a potential grievance, after which the Township agreed to pay the officer for days he was off waiting for the results of a Covid-19 test. Roth described how Fogel changed a little after that incident. (N.T. 19-20, 67-69, 81)

12. On February 7, 2022, Roth made a complaint to Sergeant Henry which alleged that Chief Fogel was engaging in harassing behavior towards another female officer, who he identified as Officer Edwards. After that, Fogel changed his behavior towards Roth and stopped being friendly to him. Fogel stopped responding to certain emails and even avoided being in the same room as Roth. (N.T. 40-41, 83-84)

13. In February 2022, Roth attended a meeting with the Township Manager, Alice Rehrig, and other officers regarding the Chief's conduct towards Edwards. Edwards eventually filed a complaint with the United States Equal Employment Opportunity Commission (EEOC), as well as the Pennsylvania Human Relations Commission (PHRC), which identified Roth. (N.T. 41-42)

14. In May 2022, Roth attended another meeting with Township Manager Rehrig and the Township's attorney, which involved Edwards' allegations against Fogel. The Township's representatives assured Roth that he would not be subject to retaliation for attending the meeting. (N.T. 42-43)

15. On September 13, 2022, the Township's Board of Supervisors voted to suspend Officer Edwards for three days for an incident on November 4, 2021, in which she was allegedly late for her shift. (Association Exhibit 11)

16. On September 27, 2022, Officer Roth encountered Chief Fogel in the squad room of the Township's police station, during which Fogel accused Roth of "playing games" with regard to Officer Edwards having to turn in her badge and gun as a result of the suspension. At first, Roth did not even know what the Chief was talking about, as Roth had no involvement with Edwards turning in her equipment. At the hearing, Roth described Fogel's demeanor as nasty and his appearance as having a red face. Roth testified that Fogel was scolding and berating him in front of another officer. (N.T. 45-46)

17. On September 30, 2022, Roth filed a grievance on behalf of Officer Edwards, alleging a violation of the CBA and challenging her three-day suspension issued on September 13, 2022 as lacking just cause. (N.T. 43-44; Association Exhibit 11)

18. By email dated October 3, 2022, the Township released the schedule for 2023, which contained just one change from the platoon assignments that existed in 2022, i.e. Roth was switched with Officer D'Alessandro. Officer D'Alessandro is the Township's only motor carrier officer. Roth did not have any notice of the change prior to receiving the schedule. (N.T. 31, 48, 61-62; Association Exhibit 3, 10)

19. On October 4, 2022, Chief Fogel issued a denial of the Association's September 30, 2022 grievance. (N.T. 44-45; Association Exhibit 12)

20. Roth testified that the change in platoon assignments has had a significant impact on his life. He explained how he has been on the same schedule for a long time, so he was able to schedule things, such as vacations and medical appointments, far in advance. He also described how the change has taken him away from his friends and support network. He indicated that, with policing, it is good to decompress from the job and be with your friends when they are also off. But now he is not able to see his friends without using more vacation time. (N.T. 32-33)

21. Officer D'Alessandro was not currently working in a patrol capacity at the time of the hearing, as he was off for a medical injury. He was originally out from April 2021 until about December 2021, and then went out again in April 2022. Roth was unaware of any timeline regarding D'Alessandro's potential return to work. (N.T. 34, 62)

22. Roth testified that the Township did not comply with Article 7(F) of the CBA when it changed his platoon assignment. He stated that the change was not offered on a voluntary basis originally or done in reverse seniority order. He explained how he was second in seniority under the sergeant on his old platoon and second in seniority under Officer Manogue on his new platoon. He was not the most junior officer on either platoon. Nor did the Township identify any potential exigent circumstances for the change pursuant to Article 7(H) or 7(I). (N.T. 36-37)

23. Roth testified that, when used in the CBA, scheduled days off refers to the actual days of the week in which the officers are off work, while scheduled shift assignments refers to the time of the officer's shift, such as 6:00am. (N.T. 37-38)

24. The Township did not bargain with the Association prior to switching Roth and D'Alessandro's platoon assignments. Nor did the Township provide the Association with notice of the change before it happened. (N.T. 39-40)

25. On October 31, 2022, the Association filed a grievance, alleging that the platoon switch contained in the October 3, 2022 schedule for the 2023 calendar year violated the CBA. The Township denied the grievance on November 9, 2022, and the matter has proceeded to arbitration. (Joint Exhibit 1)

26. In support of its position, the Township introduced the testimony of Chief Fogel, who has served as the Township's Police Chief for approximately 11 years. Fogel testified that the Township only has two operational specialty officers for daily activities, which are the canine and motor carrier officers. He identified Officers Roth and D'Alessandro as the individuals currently holding those respective positions. Up to and including 2022, Roth served on Sergeant Henry's platoon, while D'Alessandro was on Sergeant Mirabile's platoon. (N.T. 107-110)

27. Fogel testified that he discussed switching the operational platoon assignments for Roth and D'Alessandro in 2021 with the sergeants. He indicated that he tabled the idea because it was simply too late to make the change. He explained that the schedule was already finished and that it would have been too difficult to dismantle it, and then redo it before the beginning of October. (N.T. 110)

28. Fogel testified that the purpose of switching the platoon assignments primarily involved providing an opportunity for everybody in the department to have access to those specialty officers. He acknowledged that if the department has overtime details, the motor carrier officer may be called in on the other platoon, but claimed that those instances are rare because the department generally encounters budgetary issues every year with overtime. He also explained that the department does not do many specialty details where the canine officer would need to be called out with the other platoon unless he was working overtime and out for something specific. Fogel claimed that the whole purpose of the change "was simply to do a bit of rebalancing" with regard to the specialties and to make things fair and equitable between the platoons. (N.T. 111-112)

29. Fogel testified that another reason for the change was that Roth is one of the better officers with regard to excelling and performance in

connection with traffic enforcement and arrests. He stated that the change would also rebalance the quality and quantity of what occurs on both platoons. (N.T. 112)

30. Fogel offered a third reason for the change related to the grants that Officer Roth handles. He indicated that Roth generally does those grant details, such as DUI checkpoints, on his days off. He described how switching Roth to the other platoon maintains Roth's opportunity for those details, while also giving the other platoon the benefit of working them as well. (N.T. 112-113)

31. Fogel testified that the officers would benefit from having access to the canine officer on the other platoon because they would have more exposure to dealing with the canine and knowing how the dog works. He stated that officers need to know how the handler works with the dog and how they can avoid getting in the way. Specifically, he indicated that officers need to know where to be, how to be around the dog, and how to avoid contaminating scenes. He explained that officers cannot simply walk in front of the dog or next to the handler, as that can cause problems. (N.T. 113-114)

32. Fogel testified that officers would similarly benefit from exposure to the motor carrier officer because there are times when the Township will send another officer out to assist with the situation, depending on the severity of the vehicle being inspected. He claimed that officers would benefit from exposure to both specialties because it would provide them with the opportunity to understand how those specialty positions actually function. (N.T. 114)

33. Fogel testified that he started discussing the platoon change in July or August 2022 with the sergeants. He also stated that he discussed the platoon change with the Township Manager at some point prior to September 2022. He further discussed the platoon change with the Township's Board of Supervisors in early September 2022. (N.T. 114-115)

34. The Township introduced a Google spreadsheet as Township Exhibit 3, which demonstrated that Roth and D'Alessandro had their platoon assignments switched on September 2, 2022. (N.T. 116-118; Township Exhibit 3)

35. Fogel testified that Sergeant Mirabile actually does the schedule. He explained that Mirabile is very well versed with the particular schedule that the Township uses and knows it inside and out. He described how Mirabile could probably do in a couple hours what the Chief would take a few days to do. (N.T. 117-118)

36. Fogel testified that he reviewed the CBA when he made the decision to switch the platoon assignments. He believes that the CBA gives him the authority to make that change. (N.T. 119-120)

37. Fogel testified that D'Alessandro was currently working light duty at the time of the hearing and just had an appointment with his physician. He was also scheduled for a fit-for-duty evaluation within the week. The Chief therefore anticipated D'Alessandro returning to work shortly. He stated that D'Alessandro would be permanently working on the platoon opposite from the one he worked in 2022. (N.T. 120-121)

38. Fogel described his September 27, 2022 encounter with Roth as taking place on the day Officer Edwards was supposed to turn in her badge, gun, and ID card, and start serving her suspension. He conveyed this to the sergeants, but Mirabile left for the day without Edwards having turned in her equipment. He indicated that Edwards then also left without turning her equipment in. So Fogel went to Roth. (N.T. 123-124)

39. Fogel testified that he stated to Roth "look, I don't know what's going on here, but you need to turn these things in. They've got to be returned. Put them in a locker. I don't want them in the gun locker. I want them in one of the property lockers. It's a temporary locker that I can get in and get the stuff out of. I know it's secure there." (N.T. 124)

40. Fogel denied that he raised his voice or yelled at Roth. He claimed that he just told Roth what he needed to be done, and it was that simple. He acknowledged that his voice may have been elevated but just because he wanted to make sure Roth understood. He characterized it as normal supervisory behavior. (N.T. 124-125)

41. Fogel testified that, by the time of this September 27, 2022 encounter with Roth and the September 30, 2022 grievance, he had already made the decision to change the platoon assignments for Roth and D'Alessandro. He reiterated that the decision was effective on September 2, 2022. He denied that he changed their platoon assignments to retaliate against Roth for any reason. (N.T. 125-126)

42. On cross-examination, Fogel acknowledged that the Township had another officer going to motor carrier school in June 2023 and that D'Alessandro had not undergone his fit-for-duty exam yet. He conceded that he did not know whether D'Alessandro would be cleared to return to work after his exam. (N.T. 128-129)

DISCUSSION

The Association argues that the Township violated Section 6(1)(a), (c) and (e) of the PLRA² and Act 111 by unilaterally changing Officer Jonathon Roth's platoon assignment on October 3, 2022 in retaliation for his protected activity and without bargaining with the Association. Specifically, the Association submits that Roth has engaged in numerous protected activities going back years, for which Chief Fogel harbored animus, and which was the true motivation for the Chief's decision to change his platoon assignment. Likewise, the Association asserts that the change in platoon assignments was also a repudiation of the parties' CBA. The Association further alleges that the change in platoon assignments has the tendency to interfere with or coerce employes from engaging in protected activity. The Township, on the other hand, contends that it did not violate the PLRA or Act 111, and the charge should be dismissed, because the Township had legitimate nondiscriminatory reasons for its actions. In particular, the Township

² 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 employes 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...(e) To refuse to bargain collectively with the representatives of his employes, subject to the provisions of section seven (a) of this act." 43 P.S. § 211.6.

relies on the Chief's testimony that he implemented the platoon change for operational reasons. The Township also maintains that it had a contractual privilege to change the platoon assignments for Officers Roth and D'Alessandro. The Township further posits that the change in platoon assignments would not have a tendency to coerce employees from engaging in protected activity due to the Chief's operational reasons for the change.

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 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).

In this case, the Association has sustained its burden of proving the first two elements for a Section 6(1)(c) discrimination claim. The record shows that Roth has indeed engaged in a multitude of protected activities dating back years, as alleged by the Association. Roth became President of the Association in May 2022 and served as an officer of the Association since 2011. He has been involved in contract negotiations since 2013 and specifically intervened on behalf of another employee in March 2020 for a sick leave issue with the Chief and the Township Manager, which especially rankled the Chief. In February 2022, Roth made a complaint to Sergeant Henry that the Chief was harassing Officer Edwards and participated in the Township's investigation of the alleged incident, which continued into May 2022. Roth also filed a grievance on September 30, 2022, challenging the Township's imposition of discipline to Officer Edwards.

The record also shows that the Township had knowledge of Roth's protected activity. In March 2020, Roth went directly to the Chief and the Township Manager on separate occasions to advocate for an employee who was waiting for the results of a Covid-19 test. In February 2022, Roth attended

meetings and interviews with Township representatives, including the Township Manager and attorney, in connection with his complaint on behalf of Officer Edwards. Chief Fogel admitted on cross-examination that he knew officers were being interviewed about that complaint in May 2022, which would have included Roth. (N.T. 126-127). Fogel also conceded that he knew about Roth's September 30, 2022 grievance on behalf of Edwards. (N.T. 127). In fact, Roth credibly testified that he emailed the grievance directly to Fogel. (N.T. 71). The Township does not actually dispute either of the first two elements of the discrimination test in its post-hearing brief. As usual then, the dispute hinges on the third and final element of the test, i.e. whether the Township was unlawfully motivated when it made the platoon change in October 2022.

The Association has also sustained its burden of proving that the Township was unlawfully motivated when it issued the schedule change in October 2022. The record shows that Association President Roth had a very good relationship with Chief Fogel until March 2020 when Roth informally presented a potential grievance separately to both the Chief and the Township Manager, which was the impetus for the Chief's demeanor change towards Roth. Then, in February 2022, when Roth again engaged in protected concerted activity by making a complaint to Sergeant Henry that the Chief was harassing Officer Edwards, the Chief completely changed his behavior towards Roth and stopped being friendly to him altogether. At that point, Chief Fogel stopped responding to certain emails and even avoided being in the same room as Roth. On September 27, 2022, Roth encountered Fogel in the squad room at the Township's police station, which led to Fogel accusing Roth of "playing games" with regard to Edwards turning in her badge and gun. Even though Roth did not know what Fogel was talking about, Fogel appeared nasty and red-faced, and then proceeded to scold and berate Roth in front of another officer.³ As the Association persuasively argues, these incidents all lead directly to an inference that Fogel harbored clear animosity towards the Association President. Indeed, each of these incidents occurred close in time and coincided with Roth's separate instances of protected activity. In fact, the March 2020 and February 2022 changes to Fogel's demeanor followed immediately after Roth engaged in mutual aid and protection with his fellow bargaining unit police officers. Likewise, the September 27, 2022 incident was only seven months after Roth's February 2022 protected complaint about Fogel harassing Edwards and only four months after Roth assisted the Township in May 2022 with its corresponding investigation. This is cumulatively plain evidence of animus and unlawful motivation on behalf of Fogel.

Nor does it matter that Fogel allegedly considered making the same platoon change in 2021, as the Township claims. First of all, as previously set forth above, Fogel's alleged discussions of such a change in 2021 does not predate Roth's protected activity. The record shows that Roth engaged in protected activity as an officer of the Association dating back to 2013 at the latest. Similarly, the March 2020 incident involving the Covid-19 test appears to be the initial source of hostility, as Fogel was clearly irked and began to change his demeanor towards Roth afterwards. What is more, the Township has not offered any credible reasons or justification for why it announced the change in platoon assignments in October 2022.

³ Of course, Fogel denied that he raised his voice or yelled at Roth and characterized the incident as simply normal supervisory behavior. However, this testimony has not been accepted as credible or persuasive. Based on my observation of the witnesses, the testimony of Roth has been specifically and wholly credited on this point.

Fogel claimed that, although he discussed making the platoon change in 2021, he tabled the idea because it was simply too late to make the change. He testified that the schedule was already finished and that it would have been too difficult to dismantle it, and then redo it before the beginning of October. While still on direct examination, however, Fogel then contradicted himself by stating that Sergeant Mirabile, who actually does the schedule, is very well versed with the particular schedule that the Township uses and knows it inside and out. Fogel even described how Mirabile could probably do in a couple hours what the Chief would take a few days to do. The record shows that Mirabile has been the Sergeant since 2018 and has been involved with the schedule for 10 years. (N.T. 134-135). As such, Mirabile would have been available to revise the schedule in 2021 in just a few hours when the Township allegedly did not have enough time before the October 1 contractual deadline.⁴ Notably, Mirabile testified during the hearing, but he did not confirm Fogel's claim that Fogel contemplated the change in 2021. Furthermore, I am unable to credit Fogel's testimony that the Township somehow held the October 1 contractual deadline for the schedule in 2021 to be so inviolate. To the contrary, the record shows that the Township did not issue the schedule for 2023 until October 3, 2022. Fogel claimed that he did not put the 2023 schedule out until October 3, 2022 because that was the first Monday in October and that neither sergeant was available over the weekend. (N.T. 122). Fogel was forced to admit on cross-examination, however, that the police department is a 24/7 operation. (N.T. 129). These contradictions cast considerable doubt over much of Fogel's testimony and render him simply not credible or worthy of belief. In fact, his testimony breaks down even further when reviewing his alleged reasons for the change in platoon assignments.

On this point, Fogel offered three reasons for the change. Fogel testified that the primary purpose of switching the platoon assignments involved providing an opportunity for everybody in the department to have access to those specialty officers. Fogel testified that the officers would benefit from having access to the canine officer on the other platoon because they would have more exposure to dealing with the canine and knowing how the dog works. He stated that officers need to know how the handler works with the dog and how they can avoid getting in the way. Specifically, he indicated that officers need to know where to be, how to be around the dog, and how to avoid contaminating scenes. He explained that officers cannot simply walk in front of the dog or next to the handler, as that can cause problems. Fogel testified that officers would similarly benefit from exposure to the motor carrier officer because there are times when the Township will send another officer out to assist with the situation, depending on the severity of the vehicle being inspected. He claimed that officers would benefit from exposure to both specialties because it would provide them with the opportunity to understand how those specialty positions actually function.

However, Fogel did not explain why the platoon change had to be permanent in nature or why he could not achieve the same results by simply sending officers to training to expose them to those specialties. Knowing how to behave and avoid contaminating scenes, as well as where to position oneself in relation to the dog, certainly appear to be lessons, which can be

⁴ Why the schedule would need to be completely redone when Fogel just wanted the platoon assignments for Roth and D'Alessandro to be switched is also a mystery. Presumably such a change would only require swapping out the names for each officer in the already-finished schedule with the other one.

taught in a matter of hours or days at most by Roth or during formal training. Learning how to assist the motor carrier enforcement officer on vehicle inspections also does not appear to be a prolonged endeavor. Officers are presumably required to be certified in each of these fields to be practitioners of the specialty. Uncertified officers then would surely be limited in what they can do to assist in the inspection, which means they would primarily be performing routine police backup duties for most of the time. How short-term exposure or training in these specialties would not accomplish the same goals the Chief identified during his testimony is uncertain. In any event, the record shows that the motor carrier officer, Officer D'Alessandro, is out on extended medical leave with no firm return date. On top of that, Article 7(E) of the CBA shows that the officers work a number of different scheduled shifts, including 7am to 7pm, 11am to 11pm, 3pm to 3am, 7pm to 7am, 6am to 6pm, and 6pm to 6am. Unfortunately for the Township, Fogel did not explain how often the officers on each platoon work together at the same time or whether each officer on Roth's new platoon had even been exposed to the dog by the time of the hearing in April 2023, some five months into the new year. Thus, it is not at all clear how much more exposure the officers would have to the specialty officers even on the same platoon than they would have if the specialty officers are called out for overtime on the other platoon.

Fogel testified that another reason for the change was that Roth is one of the better officers with regard to excelling and performance in connection with traffic enforcement and arrests. Fogel claimed that the change would also rebalance the quality and quantity of what occurs on both platoons. This testimony, however, was not believable on its face. As the Association points out, it is hard to imagine Fogel treating Roth with such contempt and disdain as the record shows if Fogel truly held Roth in such high regard. Fogel could not even bring himself to remain in the same room as Roth, beginning in February 2022, and stopped responding to many of his emails. Significantly, Fogel did not even bother to inform Roth of the impending platoon change even though Fogel allegedly contemplated the change in 2021, and again in July or August 2022. Instead, Fogel allowed the first notice to Roth of the change to come on October 3, 2022 when the schedule was issued. To insist that one of the reasons for the change was Roth's high performance as an officer during the hearing in this case when Fogel did not even extend Roth the simple courtesy of discussing or notifying him of the change prior to October 2022 is disingenuous at best and plain evidence of pretext and animus.

Fogel also offered a third reason for the change related to the grants that Officer Roth handles. He indicated that Roth generally does those grant details, such as DUI checkpoints, on his days off. He described how switching Roth to the other platoon maintains Roth's opportunity for those details, while also giving the other platoon the benefit of working them as well. However, as the Association contends, this benefit to the department is minimal at best. The record shows that the officers work a rotating schedule, so that they have every other weekend off, which would make Roth's grant projects available to both platoons. In any case, Roth was only required to work three checkpoints a year, which greatly diminishes the impact of that detail should it not fall on his weekend to work. (N.T. 65-67).

In light of this evidence, the Association has sustained its burden, not only of proving a prima facie case of discrimination, but also of demonstrating that the Township's proffered reasons for the adverse

employment action were pretextual in nature. Indeed, the Association has shown that Roth continually engaged in protected activity, which was repeatedly followed shortly thereafter with changes in Fogel's conduct and demeanor, yielding an inference of unlawful motive on Fogel's behalf. In addition, the Association has demonstrated that the Township proffered pretextual reasons for the change in platoon assignments, which results in the inescapable conclusion that the Township lacked an adequate explanation for the adverse action. Unfortunately for the Association, however, the charge under Section 6(1)(c) and (e) of the PLRA must nevertheless be dismissed as prematurely filed.

Section 9(e) of the PLRA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than six weeks prior to the filing of the petition or charge." 43 P.S. § 211.9(e). As a general matter, the nature of the unfair practice claim alleged frames the limitations period for that cause of action. Upper Gwynedd Township Police Dept. v. Upper Gwynedd Township, 32 PPER § 32101 (Final Order, 2001). For a refusal to bargain a change in terms and conditions of employment, notice to the union of the implementation of the challenged policy or directive triggers the statute of limitations. Harmar Township Police Wage and Policy Committee v. Harmar Township, 33 PPER § 33025 (Final Order, 2001). Implementation is the date when the directive becomes operational and serves to guide the conduct of employees, even though no employees may have been disciplined or corrected for failure to abide by the directive. *Id.* Mere statement of future intent to engage in activity, which arguably would constitute an unfair labor practice, does not constitute an unfair labor practice for engaging in that activity. Upper Gwynedd Township, at 264. The Board will dismiss a charge as prematurely filed where the complainant files the charge prior to actual implementation. City of Allentown, 19 PPER § 19120 (Final Order, 1988).

In this case, the record shows that the Association filed the instant charge on November 14, 2022, which was within the six-week limitations period following the Township's October 3, 2022 schedule change announcement. However, the Township did not actually implement the platoon change until January 1, 2023. (Association Exhibit 10). As a result, Roth had not suffered any adverse employment action until January 1, 2023 when the new schedule became effective and began to govern the conduct of the bargaining unit employees. The Association did not timely amend its charge at any time following the actual implementation of the new schedule, much less within six weeks of the change. Although the Township announced the platoon change when it published the 2023 schedule on October 3, 2022, this was nothing more than a statement of future intent to engage in activity, which would arguably constitute an unfair labor practice. But the October 3, 2022 announcement of the platoon change did not constitute an unfair labor practice for actually making the platoon change. Indeed, the Township could have changed its mind at any time between October 3, 2022 and January 1, 2023. Even the CBA between the parties contemplates the Township making a change to the shift schedule in Article 7(I) and 7(L) with 60 days' notice. That the Township did not change its mind regarding the platoon change does not transform the Association's premature charge of unfair labor practices into a timely one. Simply put, the Association's failure to file an amended charge following actual implementation of the new schedule in January 2023 is fatal to its case under Section 6(1)(c) and (e). As such, the charge under Section 6(1)(c) and (e) of the PLRA was clearly premature and must be dismissed as a matter of law. See Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 35 PPER 114 (Final Order,

2004) (holding that the Board and its hearing examiners do not have jurisdiction to entertain premature claims that are not ripe for adjudication).

The same result, however, does not obtain with regard to the Association's allegation of an independent violation of Section 6(1)(a) of the PLRA. 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 employees 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 employee 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)).

There is little doubt that the Township has committed an independent violation of Section 6(1)(a) of the PLRA by announcing the platoon change on October 3, 2022. Indeed, as previously set forth at length above, the record clearly shows that Chief Fogel was unlawfully motivated when he made the decision to change Roth's platoon. Such retaliation for protected concerted activity would undoubtedly tend to interfere with and coerce employees in the exercise of their rights. Nor is the Association's charge of an independent violation of Section 6(1)(a) premature. On these facts, the October 3, 2022 announcement itself, when viewed in combination with the other factors yielding an inference of unlawful motive, would certainly have a tendency to coerce employees in the exercise of their rights under the PLRA. Therefore, it is of no consequence that Roth had not suffered any adverse employment action until the Township implemented the platoon change on January 1, 2023 for purposes of the Section 6(1)(a) claim. But the remedy must nevertheless be limited to a cease and desist order, along with the Board's usual posting requirements, as the Board is still without jurisdiction to remedy any conduct post-dating the charge.

CONCLUSIONS

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

1. The Township is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Association 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 Township has committed unfair labor practices in violation of Section 6(1)(a) of the PLRA.
5. The charge under Section 6(1)(c) and (e) of the PLRA is not ripe for adjudication, and therefore, dismissed as premature.

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 Township 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. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:

(a) 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 employes and have the same remain so posted for a period of ten (10) consecutive days;

(b) 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

(c) 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 11th day of August, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

