# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :

.

v. : Case No. PF-C-09-83-E

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE

## PROPOSED DECISION AND ORDER

On June 19, 2009, the Pennsylvania State Troopers Association (PSTA) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth), violated sections 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) when it issued disciplinary action reports to two officers of the PSTA (Joseph Plant and Gerald Williams). On June 30, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 3, 2009. The hearing examiner subsequently granted a series of requests by one or both parties for a continuance of the hearing. On April 12 and September 24, 2010, the hearing examiner held the hearing and afforded the parties a full opportunity to present evidence and to cross-examine witnesses. On November 4, 2010, the PSTA filed a brief by hand-delivery. On November 5, 2010, the Commonwealth filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

## FINDINGS OF FACT

- 1. The PSTA represents employes of the Commonwealth who are members of the Pennsylvania State Police (PSP).  $(N.T.\ 136-137)$
- 2. Beginning in the spring of 2008, troopers at Troop P, Wyoming, complained to the vice president and president of FOP Lodge 43 (Cpl. Gerald E. Williams and Tpr. Joseph M. Plant, respectively) that the director of the PSP's internal affairs division (Capt. Willard W. Oliphant) was bringing trash to the barracks for disposal by the maintenance men. Some of the troopers thought that they would not be able to get away with similar conduct and asked President Plant and Vice President Williams what they were going to do about it. The trash sometimes impeded access to patrol cars. (N.T. 12-14, 43-44, 56-59, 96-97, 99-100, 105, 107, 276-278)
- 3. During work time, President Plant surreptitiously observed Capt. Oliphant leaving trash at the barracks and with a PSP camera took pictures of the trash. (N.T. 60-62, 89-90; PSTA Exhibit 7)
- 4. By late October 2008, the PSP had begun an internal affairs investigation of Vice President Williams for sending emails disparaging its command staff. (N.T. 22-24, 38-39, 315-316; PSTA Exhibits 1-2)
- 5. On December 2, 2008, after a maintenance man (Bob Smith) at Troop P, Wyoming, told Vice President Williams that trash left at the barracks was Capt. Oliphant's and that he was tired of disposing of it, Vice President Williams snapped a picture of the trash and told the commander of the staff services section (Lt. Michael J. Kreidler) that Capt. Oliphant was bringing trash to the barracks for the maintenance men to dispose of, that "guys" were tired of seeing it and that a maintenance man was tired of disposing of it. Lt.

The PSTA also charged that the Commonwealth violated section 6(1)(e) of the PLRA as read in pari materia with Act 111 by modifying policies and guidelines governing grievances, grievance committees and grievance resolution procedures. The PSTA did not prosecute that portion of the charge at the hearing, however, so the charge under section 6(1)(e) is no longer before the Board and will not be addressed. See SSHE, 32 PPER ¶ 32118 (Order Denying Application for Supersedeas 2001)(an argument not presented to a hearing examiner is waived).

Kreidler referred the matter to Troop P's commanding officer (Capt. Donald C. Peters), who met with Vice President Williams later that day. After Vice President Williams reiterated what he told Lt. Kreidler, Capt. Peters advised Vice President Williams to file a complaint against Capt. Oliphant. Capt. Peters also said something about casting a net and people getting caught up in it. Lt. Kreidler explained that in going after big fish small fish might be caught. Troopers were washing their personal vehicles at the barracks at the time. Vice President Williams said that he only wanted Capt. Oliphant's conduct to stop. Thinking that he was being subjected to disparate treatment, Vice President Williams also said that he would be bringing up Capt. Oliphant's conduct at his own internal affairs investigation. Capt. Peters said he would make sure that Capt. Oliphant's conduct stopped. (N.T. 14-22, 34-35, 37-48, 163-170, 173-177, 184, 188-189, 194-195)

- 6. On December 8, 2008, the PSTA's president (Sgt. Bruce Edwards) complained to the PSP's commissioner (Col. Frank Pawlowski) and to the PSP's deputy commissioner of administration and professional responsibility (Lt. Col. John Brown) that Vice President Williams's emails were not as damaging to the command staff's ability to command as Capt. Oliphant's bringing of trash to the barracks for disposal by the maintenance men was. Lt. Col. Brown referred the matter involving Capt. Oliphant to the director of the PSP's bureau of integrity and professional standards (Maj. Charles Skurkis), who decided that there was no need for an internal affairs investigation of Capt. Oliphant. (N.T. 136-141, 157, 160-161, 198-204, 230-232, 240-242).
- 7. On December 17, 2008, the investigator (Sgt. Jay Livziey) in the internal affairs investigation of Vice President Williams moved an interview of Vice President Williams from January 6, 2009, to December 19, 2008. Sgt. Livziey originally scheduled the interview for January 6, 2009, when Vice President Williams was unavailable in mid-December 2008 because of a trial. Sgt. Livziey moved the interview to December 19, 2008, after the trial did not go forward and after he was informed by Capt. Oliphant that Capt. Peters wanted the investigation concluded as soon as possible so Capt. Peters would be able to adjudicate the matter in a timely fashion. (N.T. 24-29, 50-51, 316-319; PSTA Exhibit 3)
- 8. On December 19, 2008, President Plant complained to Lt. Col. Brown at a grievance meeting that Capt. Oliphant was bringing his trash to the barracks for disposal by the maintenance men, that he was concerned that Capt. Oliphant may have prompted the change in the date of Vice President Williams's interview with Sgt. Livziey and that the maintenance men were tired of dealing with Capt. Oliphant's trash. (N.T. 68-72, 83-86, 243-244)
- 9. On December 23, 2008, Lt. Col. Brown told Maj. Skurkis about President Plant's complaint regarding Capt. Oliphant. Maj. Skurkis directed Capt. Peters to initiate an internal affairs investigation of Capt. Oliphant. Capt. Peters filled out a use of force or complaint reception and processing work sheet alleging as follows:

"On December 2, 2008, Cpl. Gerald Williams, Troop P Polygraph Unit, verbally informed Lt. Michael Kreidler (C.O. Staff Section, Troop P) and I that Captain Oliphant had been bringing his personal trash to the Wyoming HQ station to have the janitors put the trash in the station dumpster. Cpl. Williams stated the maintenance guys said they are tired of dealing with it, and that he (Cpl. Williams) felt the action is inappropriate. I advised Cpl. Williams to complete a SP1-101 if he wished to make this a formal complaint. Cpl. Williams came to me that afternoon and said he did not want the matter to go to an IAD; he just wanted the conduct to stop. It was subsequently brought to the attention of the Deputy Commissioner of Administration and Professional Responsibility by the PSTA."

(N.T. 180-183, 193, 195, 204-207, 244; Commonwealth Exhibit 2)

- 10. Maj. Skurkis assigned Capt. Oliphant's subordinate in internal affairs (Lt. Nicholas Saites) to conduct the investigation of Capt. Oliphant. (N.T. 148, 207-208, 223, 234, 290-292, 323-325)
- 11. On January 8, 2009, Lt. Saites interviewed Capt. Peters, Lt. Kreidler, Cpl. Thomas Wall, a maintenance man and Capt. Oliphant as part of his investigation of Capt. Oliphant. Sgt. Livziey, who was assisting Lt. Saites, also interviewed a maintenance man. No one told

Lt. Saites that a maintenance man had complained about disposing of Capt. Oliphant's trash. (N.T. 168, 183, 264, 268, 278, 293-299, 327, 330-331, 334-335; PSTA Exhibit 5)

- 12. On January 14, 2009, Lt. Saites interviewed Vice President Williams next to last as part of his investigation of Capt. Oliphant. The subject of an internal investigation is usually interviewed last. Vice President Williams told Lt. Saites that no maintenance man had complained about disposing of Capt. Oliphant's trash. (N.T. 29-30, 36, 46-47, 77, 147, 177, 208, 299-301, 330, 335; PSTA Exhibit 5)
- 13. On January 20, 2009, Lt. Saites interviewed President Plant last as part of his investigation of Capt. Oliphant. President Plant gave Lt. Saites the pictures he had taken of Capt. Oliphant's trash and told Lt. Saites that he had surreptitiously taken the pictures with a PSP camera while on duty after he observed Capt. Oliphant leaving the trash. (N.T. 73-75, 300-304, 336; PSTA Exhibit 5)
- 14. In a general investigative report (IAD# 08-0864) dated February 1, 2009, Lt. Saites wrote that no maintenance man had complained about disposing of Capt. Oliphant's trash, that Vice President Williams had investigated who left the trash and that President Plant had surreptitiously observed Capt. Oliphant leaving trash at the barracks and with a PSP camera had taken pictures of the trash. (N.T. 32, 292; PSTA Exhibit 5)
- 15. Upon reviewing the report, Maj. Skurkis found the complaint against Capt. Oliphant to be unfounded and forwarded the report to the commanding officer of Troop P.  $(N.T.\ 210-213,\ 227-228,\ 307,\ 338)$
- 16. On May 18, 2009, Capt. John T. Dougherty, who had been the commanding officer of Troop P for two days, reviewed the report and found that President Plant and Vice President Williams had misrepresented that maintenance men complained about disposing of Capt. Oliphant's trash and had conducted an unauthorized investigation of Capt. Oliphant. Despite suspecting that "there might be some missing pieces" because "it just didn't make sense to me," Capt. Dougherty without instruction from anyone higher up in the chain of command "sustained the allegations against" President Plant and Vice President Williams and issued a notice of pre-disciplinary conference and summary report to each of them.

  (N.T. 30-32, 54, 75, 88-89, 113-116, 127-129, 134, 210-214, 227-228, 307; PSTA Exhibit 4)
- 17. On June 5, 2009, Capt. Dougherty issued disciplinary action reports to President Plant and Vice President Williams. In the report for President Plant, Capt. Dougherty wrote as follows:

"Based upon the facts contained in IAD Investigation 2008-0864, it is evident that from the onset of the investigation that you, for reasons unknown, misrepresented the facts and misled Command Staff at Wyoming and other Department Personnel, by implying that you had received complaints on the matter. You also repeated similar statements regarding complaints during a meeting on December 19<sup>th</sup>, 2009. On January 26, 2009, Corporal Gerald Williams stated that no one in fact ever complained about this matter. The investigation revealed no one at Troop P Wyoming who complained and the maintenance staff when interviewed said that they never complained. These actions reflect that you were untruthful, misrepresented facts, and this raise several integrity issues that need to be addressed.

Additionally, you conducted, what is without question, an investigation into another member while you were on Commonwealth paid time, using Commonwealth resources. You were also aware, due to a past similar case, the allegations you made were neither violations of Department regulations nor law."

In the report for Vice President Williams, Capt. Dougherty wrote in pertinent part as follows:

"Based upon the facts contained in IAD Investigation 2008-0864, it is evident that from the onset of the investigation that you, for reasons unknown, misrepresented the facts and misled Command Staff at Wyoming and other Department Personnel, by implying that you had received complaints on the matter. On January 26, 2009, you stated that

no one in fact ever complained to you. The investigation revealed no one at Troop P Wyoming who complained and the maintenance staff when interviewed said that they never complained. These actions reflect that you were untruthful, misrepresented facts, and this raise several integrity issues that need to be addressed.

Additionally, you conducted, what is without question, an investigation into another member while you were on Commonwealth paid time, using Commonwealth resources. You were also aware, due to a past similar case, the allegations you made were neither violations of Department regulations nor law."

(N.T. 52-53, 75-76, 216, 314-315; PSTA Exhibits 6 and 8, Commonwealth Exhibits 3-4)

18. In late February or early March 2010, the PSP rescinded the disciplinary action reports for President Plant and Vice President Williams after Capt. Dougherty, having become more acclimated to his command, initiated a further investigation in August 2009. (N.T. 54, 115-123, 130, 132-133, 216-222, 250, 265, 268-272, 308-313, 315; Commonwealth Exhibits 1, 3-4, 6)

## DISCUSSION

The PSTA has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111 when it issued disciplinary action reports to two officers of the PSTA (Joseph Plant, who is the president of FOP Lodge 43, and Gerald Williams, who is the vice president of FOP Lodge 43). The PSTA alleges that the "disciplinary action was pretext for retaliation against Plant and Williams for their protected activities, including. It was motivated by antiunion animus." Specification of charges ¶ 12. According to the PSTA, Vice President Plant engaged in protected activity by

"advising a superior officer that Captain Williard Oliphant, Director of the Pennsylvania State Police Internal Affairs Division, was improperly bringing his personal trash from his home to Troop P Headquarters, located in Wyoming, Pennsylvania and directing civilian personnel of the State Police to dispose of it."

Specification of charges  $\P$  6. According to the PSTA, President Williams engaged in protected activity by "reiterat[ing] that Captain Oliphant was improperly utilizing State workers to perform personal duties with respect to his home trash." Specification of charges  $\P$  7.

The Commonwealth contends that the charge should be dismissed because complaining about Capt. Oliphant bringing his personal trash to the barracks for disposal by civilians is not a protected activity, because it issued the disciplinary action reports for cause unrelated to any such activity on the part of President Plant and Vice President Williams and because it subsequently rescinded the disciplinary action reports and thereby repudiated any coercive effect their issuance may have had on members of the bargaining unit.

An employer commits unfair labor practices under sections 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111 if it discriminates against an employe for having engaged in an activity protected. <u>Duryea Borough Police Department v. PLRB</u>, 862 A.2d 122 (Pa. Cmwlth. 2004). In order to prove unfair labor practices under those sections, the charging party must present during its case-in-chief a prima facie case that the employe engaged in protected activity, that the employer knew that the employe had done so and that the employer discriminated against the employe for having done so. Brentwood Borough, 35 PPER 112 (Final Order 2004), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992). The discriminatory motivation creates the offense. Id. Evidence introduced after the charging party presents its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case during its casein-chief. Erie City School District, 39 PPER 8 (Final Order 2008). If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer shows that it would have taken the same action even if the employe had not engaged in the protected activity. Brentwood Borough, supra. A valid nondiscriminatory reason for the employer's action may rebut any inference that the employer was discriminatorily motivated. Duryea Borough Police Department, supra.

Any finding of an unfair labor practice must be supported by substantial evidence. Commonwealth of Pennsylvania, PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978). Close timing between the employe's protected activity and the employer's action coupled with an inadequate explanation for the employer's action will support a finding that the employer discriminated against an employe for having engaged in protected activity. Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005). Nor will the lack of just cause as an arbitrator might define the term. Bucks County Community College, 36 PPER 84 (Final Order 2005). Suspicion is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

As more fully set forth in the findings of fact, the record shows that the PSTA established the following during its case-in-chief: (1) that members of the bargaining unit, thinking that they could not get away with similar conduct, complained to President Plant and to Vice President Williams that the PSP's director of internal affairs (Capt. Oliphant) was bringing trash to the barracks for disposal by the maintenance men (N.T. 13-14, 57-59, 96-97, 99, 105, 276-278); (2) that on December 2, 2008, Vice President Williams complained to the staff services section commander (Lt. Kreidler) and to the commanding officer (Capt. Peters) at Troop P that Capt. Oliphant was bringing trash to the barracks for the maintenance men to dispose of, that "guys" were tired of seeing it and that a maintenance man was tired of disposing of it (N.T. 14-18, 34-35); (3) that Vice President Williams was under investigation by internal affairs at the time for having sent emails disparaging the PSP's command staff (N.T. 22-24; PSTA Exhibits 1-2); (4) that Capt. Peters said something about casting a net and people getting caught up in it, while Lt. Kreidler said that in going after big fish small fish might be caught (N.T. 18); (5) that on December 8, 2008, the PSTA's president (Sqt. Edwards) complained to the PSP that Vice President Williams's emails were not as damaging to the command staff's ability to command as Capt. Oliphant's bringing of trash to the barracks for disposal by the maintenance men was (N.T. 136-141); (6) that on December 17, 2008, the investigator (Sgt. Jay Livziey) in Vice President Williams's internal affairs investigation moved an interview of Vice President Williams from January 6, 2009, to December 19, 2008 (N.T. 24-29); (7) that on December 19, 2008, President Plant complained to the PSP that Capt. Oliphant was bringing his trash to the barracks for disposal by the maintenance men, that he was concerned that Capt. Oliphant may have prompted the change in the date of Vice President Williams's interview by Sgt. Livziey and that the maintenance men were tired of dealing with Capt. Oliphant's trash (N.T. 68-72); (8) that the PSP assigned Capt. Oliphant's subordinate (Lt. Saites) to conduct an internal affairs investigation of Capt. Oliphant (N.T. 30, 147-148); (9) that Lt. Saites conducted the investigation on an inaccurate premise that Capt. Oliphant was leaving his trash for the maintenance men to dispose of in a dumpster (N.T. 34-35; PSTA Exhibit 4); (10) that Lt. Saites interviewed Vice President Williams next to last and President Williams last as part of his investigation of Capt. Oliphant (N.T. 76-77); (11) that the subject of an internal affairs investigation is usually or always interviewed last (N.T. 76-77, 147); (12) that Lt. Saites did not interview any other patrol trooper even though patrol troopers always know what is going on (N.T. 119) and issued a report that was incomplete (N.T. 52-54, 73-74; PSTA Exhibit 5); (13) that despite suspecting that "there might be some missing pieces" because "it just didn't make sense to me" a relatively new commanding officer (Capt. Dougherty) "sustained the allegations against" President Plant and Vice President Williams and issued disciplinary action reports to them that he would not have issued if he had known the facts to be different (N.T. 113-116, 126-127); (12) that President Edwards "would not have taken the word of two maintenance men over two respected troopers" (N.T. 153); (13) that the PSP did not discipline Capt. Oliphant (N.T. 146); and (14) that after he became acclimated to his new command Capt. Dougherty initiated a further investigation of President Plant and Vice President Williams that resulted in the PSP rescinding the disciplinary action reports (N.T. 54, 116-123).

By the end of the PSTA's case-in-chief, the record also showed that troopers washed their personal vehicles at the barracks (N.T. 40-41), that Capt. Oliphant's trash was impeding access to patrol cars (N.T. 43) and that Sgt. Livziey moved up his interview with Vice President Plant after a trial that originally prevented Vice President Williams from being interviewed any earlier did not go forward (N.T. 50). The record further

showed that based on Lt. Saites's report and without instruction from anyone higher up in the chain of command Capt. Dougherty issued the disciplinary action reports for two reasons: (1) because President Plant and Vice President Williams had misrepresented that maintenance men complained about disposing of Capt. Oliphant's trash and (2) because President Plant and Vice President Williams had conducted an unauthorized investigation of Capt. Oliphant during work time (N.T. 127-129, 134; PSTA Exhibits 6 and 8).

A close review of the record at the end of the PSTA's case-in-chief shows that the PSTA did not present a prima facie case of discrimination during its case-in-chief. Although the PSTA established that President Plant and Vice President Williams engaged in protected activity by voicing the complaints of members of the bargaining unit about Capt. Oliphant bringing trash to the barracks for disposal by the maintenance men in that the complaints related to work place conduct the members thought they could not get away with and in that the trash impeded access to patrol cars, see Fabrication Specialists, supra (employes who met for the purposes of discussing working conditions and planning a system for dealing with their employer were engaged in protected activity); Millvale Borough, 36 PPER 147 (Final Order 2004) (a police officer's complaint about a mayor's use of a police bicycle was a protected activity), 2 and that the Commonwealth was aware of their protected activity, it did not establish that the Commonwealth's issuance of the disciplinary action reports to them was motivated by anti-union animus.3 To the contrary, by the end of the PSTA's case-in-chief, the record showed that Capt. Dougherty issued the disciplinary action reports to them for reasons unrelated to their protected activity: (1) having misrepresented that the maintenance men had complained about disposing of Capt. Oliphant's trash and (2) having conducted an unauthorized investigation of Capt. Oliphant during work time. Misrepresenting the facts is not a protected activity. As the Commonwealth points out, neither is conducting an unauthorized investigation, Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 84 (Final Order 2010), nor is conducting union business during working hours. Ellwood City Police Wage and Policy Unit v. PLRB, 736 A.2d 707 (Pa. Cmwlth. 1999). Thus, at the end of the PSTA's case-in-chief, there was no basis for finding that the Commonwealth retaliated against President Plant and Vice President Williams for having engaged in protected activity. See Millvale Borough, supra (no anti-union animus may be found where the employer's motivation was unrelated to any protected activity by employes).

In arguing for a contrary result, the PSTA would have the Board find that it established that Capt. Dougherty was an "unsuspecting dupe" (N.T. 153) who the PSP set up to issue the disciplinary action reports to President Plant and Vice President Williams for having voiced the complaints about Capt. Oliphant bringing his trash to the barracks for disposal by the maintenance men. In order to so find, however, the Board also would have to find that the PSP initiated the internal affairs investigation of Capt. Oliphant to get to President Plant and to Vice President Williams and that Capt. Peters, to whom President Plant and Vice President originally voiced their complaints about Capt. Oliphant, and Lt. Saites, whose investigation of Capt. Oliphant formed the basis for the disciplinary action reports issued by Capt. Dougherty, were part of the set up. In addition, the Board would have to discredit Capt. Dougherty's testimony that he issued the disciplinary action reports without instruction from anyone higher up in the chain of command.

The record at the end of the PSTA's case-in-chief does not support a contrary result, however. Given that President Plant, Vice President Williams and President Edwards had all complained about Capt. Oliphant bringing his trash to the barracks for disposal by the

<sup>&</sup>lt;sup>2</sup> The Commonwealth contends that President Plant's and Vice President Williams's activity was not protected because the PLRA as read in pari materia with Act 111 does not cover "retaliation claims for reports made under the Pennsylvania Whistleblower Act, 43 P.S. § 1421." Pittsburgh Board of Public Education, 34 PPER 38, 39 (Final Order 2003) (construing the analogous provisions of PERA). Their activity is protected, however, for the reasons set forth above.

 $<sup>^{3}</sup>$  In its brief at 9, the PSTA contends that the Commonwealth was motivated not only by anti-union animus but also by "cronyism." The Board has no jurisdiction to redress conduct motivated by "cronyism."

 $<sup>^4</sup>$  The Commonwealth also contends that Vice President Williams did not engage in protected activity by stating that he would bring up Capt. Oliphant's conduct during an internal affairs investigation of his own (N.T. 39-40). The PSTA has not cited that statement as a basis for the charge, so whether or not Vice President Williams was protected when he said as much need not be addressed.

maintenance men, it is unexceptional that the PSP initiated the internal affairs investigation of Capt. Oliphant. Given that troopers washed their personal vehicles at the barracks, Capt. Peter's comment about casting a net and people getting caught up in it and Lt. Kreidler's comment that in going after big fish small fish might be caught are in context unexceptional as well in that any complaint about using the barracks for personal reasons might affect members of the bargaining unit, too. Any adverse inference to be drawn from the fact that Sgt. Livziey moved up the interview of Vice President Williams is undermined by the fact that Vice President Williams became available for an earlier interview after a previously existing conflict in his schedule (the trial) was removed. Although the PSP's assignment of Lt. Saites to conduct the investigation is suspicious in light of his status as Capt. Oliphant's subordinate and although the manner in which Lt. Saites conducted the investigation is suspicious, suspicion is not substantial evidence. Shive, supra. Moreover, no adverse inference may be drawn from the fact that the PSP did not discipline Capt. Oliphant. Disparate treatment of similarly situated employes may support an inference of discriminatory motivation, City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989), but the record does not show that Capt. Oliphant, President Plant and Vice President Williams were similarly situated. See <a href="Erie">Erie</a> <a href="City">City</a> <a href="School District">School District</a>, 40 PPER 12 (Final Order 2009) (retaliation charge alleging disparate treatment dismissed where there was no showing that the employer treated the alleged discriminatee any differently from any similarly situated employe). Most notably, although Capt. Dougherty's testimony that upon reviewing Lt. Saites's report he "sustained the allegations against" President Plant and Vice President is suspect in that the only allegation Lt. Saites investigated involved Capt. Oliphant's conduct, Capt. Dougherty's further testimony that he issued the disciplinary action reports to President Plant and Vice President Williams based on what he knew at the time and without instruction from anyone higher up in the chain of command was credible, especially since he inquired further into the matter once he became more acclimated to his command and since his further inquiry resulted in the rescission of the disciplinary action reports. Finally, Capt. Dougherty did not find the maintenance men to be any more credible than President Plant or Vice President Williams in that by all accounts the maintenance men did not complain about Capt. Oliphant's trash on their own. Thus, there is an insubstantial basis for finding that Capt. Dougherty was an "unsuspecting dupe" who the Commonwealth set up to issue the disciplinary action reports because President Plant and Vice President Williams had voiced the complaints about Capt. Oliphant bringing his trash to the barracks for disposal by the maintenance men. See Municipal Authority of the Borough of West View, 28 PPER ¶ 28057 (Final Order 1997), aff'd, 29 PPER ¶ 29107 (Court of Common Pleas of Allegheny County 1998) (hearing examiner erred in finding anti-union animus based on mere speculation).

In further support of its contention that Capt. Dougherty was an "unsuspecting dupe" who the PSP set up to issue the disciplinary action reports to President Plant and Vice President Williams for having voiced the complaints about Capt. Oliphant bringing his trash to the barracks for disposal by the maintenance men, the PSTA submits that testimony by the director of the PSP's bureau of integrity and professional affairs (Maj. Skurkis) and by Lt. Saites show that they went to extraordinary lengths to ensure that Capt. Dougherty issued the disciplinary action reports as he did. In the case of Maj. Skurkis, the PSTA pointedly emphasizes that in excusing Capt. Oliphant's conduct he took great pains to refer to Capt. Oliphant's trash as "combustibles" rather than trash. Be that as it may, Maj. Skurkis and Lt. Saites did not testify during the PSTA's case-in-chief; rather, they testified during the Commonwealth's defense of any prima facie case the PSTA may have presented during its casein-chief. Thus, their testimony may not be relied upon in deciding whether or not the PSTA presented a prima facie case. See Erie City School District, supra, 39 PPER 8 (Final Order 2008) (evidence introduced after the charging party presents its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case during its case-in-chief). Under the circumstances, their testimony also need not be reviewed to determine the merits of the Commonwealth's defense.

In its brief at n. 7, the PSTA "respectfully submit[s] that the evidence was such that an independent violation of [section 6(1) (a) may be found] because members were discouraged from engaging in protected activities. The PSTA has not charged an independent violation of section 6(1) (a), however; rather, it charged a derivative violation of section 6(1) (a). Inasmuch as the Board only has jurisdiction to find the unfair labor practices charged, Iroquois School District, 37 PPER 167 (Final Order 2006),

no independent violation of section 6(1) (a) may be found. The Commonwealth's repudiation contention, therefore, need not be addressed.

# 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 an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
- 2. The PSTA is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
  - 3. The Board has jurisdiction over the parties.
- 4. The Commonwealth has not committed unfair labor practices under sections 6(1) (a) and (c) of the PLRA as read in pari materia with Act 111.

## ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

## HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

## IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this third day of December 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner