

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :  
:  
v. : Case Nos. PF-C-09-95-E  
:  
COMMONWEALTH OF PENNSYLVANIA : PF-C-09-129-E  
:  
PENNSYLVANIA STATE POLICE :

**PROPOSED DECISION AND ORDER**

On August 4, 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), (c), (d) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by (1) retaliating against Troopers Metz, Shirey and Kukich for having engaged in protected activity and by (2) endorsing the retaliation against them.<sup>1</sup> The Board docketed the charge to Case No. PF-C-09-95-E. On August 26, 2009, the Secretary of the Board declined to issue a complaint. The Secretary reasoned that the first part of the charge was untimely filed because it referenced events occurring more than six weeks before the charge was filed and that the second part of the charge did not state a cause of action under any of the sections cited. On September 15, 2009, the PSTA filed exceptions alleging that the Secretary's declination to issue a complaint on the second part of the charge was an abuse of discretion.<sup>2</sup>

On November 12, 2009, the PSTA filed a charge alleging that the Commonwealth committed additional unfair labor practices under sections 6(1)(a), (c), (d) and (e) of the PLRA as read in pari materia with Act 111 by further retaliating against Troopers Metz and Shirey for having engaged in protected activity. The Board docketed the charge to Case No. PF-C-09-129-E.

On December 10, 2009, the Secretary issued a complaint and notice of hearing directing that a hearing be held on March 23, 2010.

On December 15, 2009, the Board issued an Order Directing Remand to Secretary for Further Proceedings sustaining the PSTA's exceptions in Case No. PF-C-09-95-E. The Board reasoned as follows:

"In its Charge, the Complainant alleged that the Commonwealth violated Section 6(1)(a), (c), (d) and (e) of the Pennsylvania Labor Relations Act (PLRA) when it advised the Complainant to meet with a Lieutenant and a Captain who were previously unhelpful in resolving complaints about alleged discrimination against bargaining unit members for union activity. The Secretary dismissed the Charge on the basis that referring the Complainant to certain people for assistance is not discrimination for union activity.

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<sup>1</sup> The alleged retaliation included the following: (1) "order[ing] Cpl. Brown to change Trooper Metz's schedule to 'mess with him'" in late August or early September 2008, (2) "direct[ing] Trooper Kirkland] not to provide [MCSAP overtime] to Trooper Metz and Trooper Kukich" in September/October 2008, (3) subjecting Trooper Metz and Trooper Shirey to "ride-a-longs" in mid to late October 2008, (4) "arrang[ing] for Trooper Metz and Trooper Shirey to be assigned well known high call zones" and "bann[ing] them] from working slower call zones" in mid to late October 2008, (5) "refus[ing] to provide [MCSAP] overtime to Metz or Shirey" in November 2008, (6) "revers[ing] station policy by precluding Trooper Shirey from filling in as MCSAP Inspector while Trooper Kirkland was on vacation" in February 2009, (7) "questioning [Trooper Metz] leaving patrol zones to use the station rest room facilities," (8) "unfairly downgrading Employee Performance Reviews," (9) "advis[ing] Cpl. Brown [on April 26, 2009] not to schedule Troopers Metz, Shirey or Kukich for school bus inspections" and (10) "hand[ing] Trooper Shirey] two negative supervisor's notations" on May 9, 2009.

<sup>2</sup> The PSTA did not except to the Secretary's declination to issue a complaint on the first part of the charge. Thus, whether or not the Commonwealth committed unfair labor practices by retaliating against Troopers Metz, Shirey and Kukich for having engaged in protected activity is no longer before the Board.

In its exceptions, the Complainant argues that it sought to remedy the alleged adverse treatment that bargaining unit members endured and that the Commonwealth's referral of the Complainant to the Lieutenant and the Captain indicated that the Commonwealth intended to take no formal action to correct the adverse treatment and amounted to an endorsement of the alleged discrimination for union activity.

Based upon the allegations set forth in the Charge and the further clarification in the exceptions, we are hereby remanding this matter to the Secretary with direction to issue a complaint."

The Board cautioned, however, that "[t]his order directing remand shall not be construed by the parties as a determination that the August 26, 2009 decision of the Secretary was in error." On December 24, 2009, the Secretary issued a complaint and notice of hearing directing that a hearing be held on May 6, 2010.

On February 22, 2010, the hearing examiner upon the request of the parties consolidated the charges for hearing. On April 20, August 17 and November 5, 2010, the hearing examiner held the hearing and afforded the parties a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of the PSTA's case-in-chief, the Commonwealth moved to dismiss the charge in Case No. PF-C-09-95-E as untimely filed to the extent that the PSTA alleged that the Commonwealth had retaliated against Troopers Metz, Shirey and Kukich for having engaged in protected activity and for lack of proof to the extent that the PSTA alleged that the Commonwealth had endorsed retaliation against them (N.T. 349). The hearing examiner took the motion under advisement pending the filing of briefs (N.T. 350). On January 14, 2011, the Commonwealth filed a brief by hand-delivery, and the PSTA filed a brief by deposit in the U.S. Mail.

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, 334)

2. In late April or early May 2009, Trooper Gregory W. Metz provided the PSTA's president (Sgt. Bruce Edwards) with a letter complaining about "retaliatory measures taken by [Sergeant Christopher] KARNES" against members of the bargaining unit at Troop A Greensburg, including Troopers Metz, Donald J. Shirey and John C. Kukich, Jr., during the previous two years. (N.T. 223-224, 274-275; Association Exhibit 11)

3. In May 2009, President Edwards brought the letter to the attention of the colonel who was the commissioner of the PSP. (N.T. 337)

4. On June 20, 2009, Trooper Metz emailed the PSP commissioner as follows:

"Sirs,

I recently forwarded a 9 page letter concerning matters at PSP Greensburg including retaliation for union activity as well as a hostile work environment. I typed my letter and forwarded it to Bruce EDWARDS. He in turn forwarded to your office. I was wondering if my complaint is being addressed. I hope that you do not take this e-mail as being disrespectful but your latest e-mail stated that we could contact you regarding matters of mutual interest."

(N.T. 275-277; Association Exhibit 14)

5. On June 20, 2009, the executive officer to the commissioner (Major Lynn E. Hess) emailed Trooper Metz as follows:

"I will be happy to look into this. As I understand without checking, this may be in the grievance process and if so I won't be in a position to release much information, but can at least provide you with a status."

(N.T. 277-278, 350-353; Association Exhibit 14)

6. On May 26, 2009, Major Hess emailed Trooper Metz as follows:

"Greg,

It appears some, but not all, of your concerns are incorporated in a grievance filed by Trooper Donald Shirey, with an outcome still to be determined. To properly address the outstanding issues I would urge you to request a meeting with Lieutenant Clifford Jobe and Captain George Kuzilla, who are in the best position to assess the situation. Many, if not all, of your concerns can possibly be addressed in this manner. Should that not be the case, the grievance process remains as a viable option."

(N.T. 278-279; Association Exhibit 14)

7. On September 30, 2009, as Sergeant Karnes was leaving in his truck 30 minutes after the end of his workday, Trooper Metz asked him for approval to change shifts with another trooper to work a MCSAP detail on October 2, 2009. Sergeant Karnes denied the request because he would have had to return to work to make the change and because Trooper Metz had not availed himself of a number of opportunities earlier that day to timely make his request. (N.T. 287-278, 480-486; Association Exhibit 15)

8. On October 30, 2009, Trooper Metz asked Sergeant Karnes to approve a schedule change for November 4, 2009, to work a MCSAP detail. Sergeant Karnes denied the request because Trooper Metz was transferring from Troop A Greensburg two days after Thanksgiving and he wanted Trooper Metz to complete any outstanding cases before transferring. (N.T. 287-295, 486-490; Association Exhibits 16-17)

#### DISCUSSION

Case No. PF-C-09-95-E

The PSTA has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a), (c), (d) and (e) of the PLRA as read in pari materia with Act 111 by endorsing retaliation against Troopers Metz, Shirey and Kukich for having engaged in protected activity. As the Board has construed the charge, the alleged unfair labor practices occurred when the Commonwealth in a May 26, 2009, email "advised the [PSTA] to meet with a Lieutenant and a Captain who were previously unhelpful in resolving complaints about alleged discrimination against bargaining unit members for union activity." Order Directing Remand to Secretary for Further Proceedings.

As noted above, the Commonwealth has moved to dismiss the charge as untimely filed and for lack of proof. According to the Commonwealth, with the exception of its sending the email on May 26, 2009, none of the other events referenced in the charge occurred within six weeks of the filing of the charge, making the charge as to those events untimely filed. Noting that the email invited the PSTA to file a grievance over its complaints of retaliation, the Commonwealth submits that no unfair labor practices under sections 6(1)(a) and (c) occurred when it sent the email. In its brief, the Commonwealth also contends that the charge as filed under sections 6(1)(d) and (e) should be dismissed for failure to state a cause of action.

The Commonwealth's motion to dismiss the charge for lack of proof is granted.<sup>3</sup>

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<sup>3</sup> The Commonwealth's motion to dismiss the charge as untimely filed need not be addressed. As noted above, the PSTA did not file exceptions to the Secretary's declination to issue a complaint on the charge to the extent that the PSTA alleged that the Commonwealth had committed unfair labor practices by retaliating against Troopers Metz, Shirey and Kukich for having engaged in protected activity more than six weeks before the charge was filed, so that part of the charge is no longer before the Board.

In Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 121 (Final Order 2005), the Board explained that an independent violation of section 6(1)(a)

"occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable bargaining unit employee, regardless of whether any one particular employee was actually coerced."

Id. at n. 9. In Philadelphia Housing Development Corporation, 34 PPER 145 (Final Order 2003), the Board found a violation of the Public Employee Relations Act's counterpart to section 6(1)(a) where an employer endorsed its representatives discriminatory conduct by not taking sufficient steps to disavow it.

A close review of the email shows that the Commonwealth not only urged the PSTA to contact the captain and lieutenant who the PSTA contends were previously unhelpful in resolving complaints about alleged discrimination against bargaining unit members for union activity but also reminded the PSTA that "the grievance process remains as a viable option" if meeting with the captain and the lieutenant would not address the PSTA's concerns (finding of fact 6).

No violation of section 6(1)(a) is apparent on that record. Grievances, of course, are a time-honored means of addressing work place disputes, PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982), so the Commonwealth's invitation to access the grievance procedure is hardly exceptional. Moreover, there was no showing that the Commonwealth refused to process grievances. Under the totality of circumstances, then, there is no basis for finding that the email would coerce a reasonable employee in the exercise of a protected activity. Thus, the charge under section 6(1)(a) must be dismissed.

An employer commits an unfair labor practice under section 6(1)(c) if it discriminates against employees for having engaged in protected activity. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996). The record does not show, however, that the Commonwealth discriminated against employees for having engaged in protected activity when it sent the email. Notably, the email was sent by Major Hess, the executive assistant to the commissioner of the PSP, in response to a complaint by the PSTA that Sergeant Karnes was retaliating against Troopers Metz, Shirey and Kukich at Troop A Greensburg (findings of fact 2-4). Although the PSTA presented evidence of anti-union animus by Sergeant Karnes (N.T. 19-20, 22-24, 31, 120-121, 127-131, 176, 231-234), the record may be searched in vain for any evidence to support a finding that Major Hess, who sent the email, was motivated by anti-union animus. Motivation creates the offense under section 6(1)(c), id., so there is no basis for finding a violation of section 6(1)(c). Thus, the charge under section 6(1)(c) must be dismissed.

An employer commits an unfair labor practice under section 6(1)(d) if it discriminates against employees for having filed a charge with the Board. City of Philadelphia, 38 PPER 184 (Final Order 2007). A close review of the charge reveals that the PSTA alleged as much, specifically referencing two previous charges it filed when the Commonwealth committed unfair labor practices by unilaterally modifying an agreement of the parties regarding the assignment of discretionary overtime (Case Nos. PF-C-08-100-E and PF-C-09-54-E). Contrary to the contention of the Commonwealth, then, the charge states a cause of action under section 6(1)(d). The record does not show, however, that the Commonwealth sent the email because the PSTA filed those charges. Motivation creates the offense under section 6(1)(d), id., so there is no basis for finding a violation of section 6(1)(d). Thus, the charge under section 6(1)(d) must be dismissed.

An employer commits an unfair labor practice under section 6(1)(e) if it refuses to bargain with the exclusive representative of its employees. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). The PSTA has not alleged any facts to support a finding that the Commonwealth was under an obligation to bargain over sending the email. Thus, as the Secretary pointed out in declining to issue a complaint of the charge, the charge does not state a cause of action under section 6(1)(e).<sup>4</sup> Accordingly, the charge under section 6(1)(e) must be dismissed.

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<sup>4</sup> As noted above, in remanding for a hearing on the merits, the Board cautioned that "[t]his order directing remand shall not be construed by the parties as a determination that the August 26, 2009 decision of the Secretary was in error."

The PSTA has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a), (c), (d) and (e) of the PLRA as read in pari materia with Act 111 by discriminating against Troopers Metz and Shirey for having engaged in protected activity. According to the PSTA, the discrimination occurred when Sgt. Karnes (1) denied a request by Trooper Metz for a schedule change to work a MCSAP detail on October 2, 2009, (2) denied Trooper Metz the opportunity to work a MCSAP detail on November 4, 2009, and (3) mandated that Troopers Metz and Shirey seek his personal approval for overtime.

The Commonwealth contends that the charge should be dismissed for lack of proof that it violated sections 6(1)(a), (c) and (d) and for failure to state a cause of action under section 6(1)(e).

An employer commits unfair labor practices under sections 6(1)(a) and (c) if it discriminates against employes for having engaged in protected activity, Borough of Geistown, supra, and under sections 6(1)(a) and (d) if it discriminates against employes for having filed a charge with the Board. City of Philadelphia, supra.

During its case-in-chief, the PSTA presented a prima facie case of discrimination under sections 6(1)(a) and (c) as to the first two parts of the charge by showing the following: (1) that in September 2008 Trooper Shirey complained to a representative of the PSTA (Corporal Ronald L. Zona, the president of FOP Lodge 62) that Sergeant Karnes was not equitably distributing overtime to members of the bargaining unit at Troop A Greensburg, President Zona immediately raised the matter with Sergeant Karnes without mentioning who was complaining and Sergeant Karnes surmised that Trooper Metz made the complaint and told President Zona to tell Trooper Metz to mind his own business (N.T. 19-20, 22-24, 31, 176), (2) that Sergeant Karnes told Corporal James Brown that he was upset that Trooper Metz "went to the union" and that he was going to show "who's boss" (N.T. 231-234), (3) that in October 2008 Sergeant Karnes in conversing with Corporal Kirk Reese about the overtime complaint said that if someone screws with him he was going to screw with them back (N.T. 120-121), (4) that in January 2009 Sergeant Karnes said "It's payback" when Trooper Jeffrey Lewis, referencing a directive to Trooper Metz to account for his whereabouts during a recent shift, asked Sergeant Karnes why he was messing with Trooper Metz (N.T. 127-131), (5) that Sergeant Karnes inexplicably denied Trooper Metz's request for a shift change to work a MCSAP detail on October 2, 2009 (N.T. 281-288; Association Exhibit 15) and (6) that Sergeant Karnes inexplicably denied Trooper Metz the opportunity to work a MCSAP detail on November 4, 2009 (N.T. 289-295; Association Exhibits 16-17).

In rebuttal to the PSTA's prima facie case of discrimination, however, the Commonwealth presented testimony by Sergeant Karnes that he denied Trooper Metz's request for a shift change to work the MCSAP detail on October 2, 2009, because he would have had to return to work to make the change and because Trooper Metz had not availed himself of a number of opportunities earlier that day to timely make his request (finding of fact 7) and that he denied Trooper Metz the opportunity to work the MCSAP detail on November 4, 2009, because Trooper Metz was transferring from Troop A Greensburg two days after Thanksgiving and he wanted Trooper Metz to complete any outstanding cases before transferring (finding of fact 8). Both explanations are plausible in that a supervisor may reasonably refuse to accommodate an employe's dilatory request for a shift change and may reasonably expect a transferring employe to complete their assigned work before transferring. The hearing examiner has credited Sergeant Karnes's testimony accordingly. There is, therefore, no basis for finding that the Commonwealth violated sections 6(1)(a), (c) and (d). See Duryea Borough Police Department, 862 A.2d 122 (Pa. Cmwlth. 2004) (a valid non-discriminatory reason for an employer's action may rebut any inference that the employer was discriminatorily motivated). Thus, the charge under those sections must be dismissed for lack of proof.

The PSTA contends that the charge should be sustained because Sergeant Karnes's testimony was not credible. According to the PSTA,

"[t]he eighty (80) pages of his cross-examination testimony revealed a tidal wave of unresponsive cocksure replies to direct questions. It also revealed an attitude

perfectly suited to striking out, retaliating against union members who used their labor organization to challenge his decisions."

Brief at 28. The PSTA further submits that Sergeant Karnes's explanations for why he took other actions against Trooper Metz<sup>5</sup> were suspect and that his explanation for why he denied Trooper Metz the opportunity to work the MCSAP detail on November 4, 2009, was especially suspect. According to the PSTA, "[w]hen asked [on cross-examination] what important task Metz performed [on November 4, 2009], Karnes replied: 'I haven't the foggiest idea,'" thereby proving that his testimony on direct examination was fabricated. Brief at 31. The PSTA would have the hearing examiner find Sergeant Karnes's testimony to be incredible under the circumstances.

Whatever may be the case with respect to the other actions taken by Sergeant Karnes against Trooper Metz, the explanations Sergeant Karnes gave for why he denied the request by Trooper Metz for a shift change to work the MCSAP detail on October 2, 2009, and for why he denied Trooper Metz the opportunity to work the MCSAP detail on November 4, 2009, were plausible, as noted above. Moreover, the PSTA overlooks Sergeant Karnes's further testimony on cross-examination relative to the task Trooper Metz performed on November 4, 2009. Sergeant Karnes went on to say the following:

"Maybe you can enlighten me what was assigned to him on November 4<sup>th</sup> because I'm assuming he was working the patrol and taking care of his overdue reports, his unsubmitted reports, his traffic arrests that needed updated, his non-traffic citations that needed updated, the disposition of his evidence, because he was transferring in three weeks."

(N.T. 587). His further testimony on cross-examination was consistent with his testimony on direct examination that he denied Trooper Metz the opportunity to work the MCSAP detail on November 4, 2009, because Trooper Metz was transferring from Troop A Greensburg two days after Thanksgiving and he wanted Trooper Metz to complete any outstanding cases before transferring. Furthermore, the PSTA presented no evidence that Trooper Metz had completed all of his work when Sergeant Karnes denied him the opportunity to work the MCSAP detail on November 4, 2009. There is, therefore, no basis for finding that Sergeant Karnes fabricated his testimony. The hearing examiner has credited his testimony accordingly.

The PSTA never established that Sergeant Karnes mandated that Troopers Metz and Shirey seek his personal approval for overtime, so the third part of the charge also must be dismissed for lack of proof.

The charge does not state a cause of action under section 6(1)(e), so that part of the charge must be dismissed as well.

#### 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), (c), (d) and (e) of the PLRA as read in pari materia with Act 111.

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<sup>5</sup> The other actions are as set forth in footnote 1, supra.

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 charges are dismissed and the complaints 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 twenty-seventh day of January 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner