

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DURYEA BOROUGH POLICE DEPARTMENT :
:
v. : Case No. PF-C-03-21-E
:
DURYEA BOROUGH :

FINAL ORDER

Duryea Borough (Borough) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on December 31, 2003, challenging the Hearing Examiner's order directing reinstatement of Charles J. Guarnieri, Chief of Police, for an alleged violation of Section 6(1)(a) of the Pennsylvania Labor Relations Act (PLRA). Following an extension of time, on January 15, 2004, the Borough filed its brief in support of the exceptions. The Duryea Borough Police Department (Union) timely filed its brief in opposition to the exceptions on January 29, 2004.

On February 20, 2003, the Union filed a Charge of Unfair Labor Practices alleging that the Borough's terminating Chief Guarnieri's employment on February 7, 2003 was in violation of Act 111 of 1968 and Section 6(1)(a), (c) and (e) of the PLRA and further violated Chief Guarnieri's Weingarten rights. In the Proposed Decision and Order (PDO) of December 11, 2003, the Hearing Examiner found that on January 10, 2003, the Borough denied Chief Guarnieri's Weingarten rights, violating Section 6(1)(a) of the PLRA. To remedy the Borough's unfair labor practice, the Hearing Examiner ordered that Chief Guarnieri be reinstated with backpay. With regard to the claims of discrimination, the hearing examiner found that although the Union established a *prima facie* case, the Borough's termination of Chief Guarnieri's employment was based on reasons independent of his protected activity, and thus there was no violation of Section 6(1)(c) of the PLRA.

Section 6(1)(a) of the PLRA protects an employe's right to engage in mutual aid and protection by requesting assistance from a representative at an investigatory interview where the employe reasonably believes discipline may result. Pennsylvania Labor Relations Board v. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). This right is commonly referred to as an employe's Weingarten right. National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975). The employer commits a Weingarten violation under Section 6(1)(a) of the PLRA by denying the employe his representative and continuing with the interview. Fraternal Order of Police Lodge #9 v. City of Reading, 26 PPER ¶ 26172 (Final Order, 1995).

Generally, the remedy for a violation of an employe's Weingarten right is a matter of discretion with the Board and is dependent upon the surrounding facts and circumstances. Although an employer may have violated the employe's Weingarten rights at an investigatory interview,

the Board has adopted a shifting burden analysis for make-whole relief as announced by the National Labor Relations Board in Kraft Foods, 251 NLRB 598 (1980). AFSCME v. Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA), 31 PPER ¶ 31034 (Final Order, 2000), affirmed, 768 A.2d 1201 (Pa. Cmwlth. 2001). Initially, it is the complainant's burden to show that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted, by proving that the employe whose Weingarten rights were violated was subsequently disciplined for the conduct which was the subject of the interview. Kraft Foods, 251 NLRB at 598. To negate the *prima facie* showing of the appropriateness of a make-whole remedy, the employer must then demonstrate that its decision to discipline the employe was not based on information obtained at the unlawful interview. Id.¹ As recently reaffirmed by the Board and the Commonwealth Court,

Under Kraft Foods, once a Weingarten violation has been established, the burden shifts to the employer to establish that it did not impose the discipline based upon information that it obtained at the unlawful interview.

Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA), 768 A.2d at 1206.

While the Borough concedes to the finding of a Weingarten violation, it argues that the Hearing Examiner erred in the application of Kraft Foods. The Borough contends that based on the Hearing Examiner's Findings of Fact, and the evidence presented, it had established a basis to terminating Chief Guarnieri's employment independent of the Weingarten violation, thus sustaining its burden under Kraft Foods and defeating the entitlement to make-whole relief.

The facts found by the Hearing Examiner regarding Guarnieri's treatment by the Borough guided the Hearing Examiner's analysis of both (1) the issue of whether the Borough utilized information obtained in the unlawful interview in deciding to terminate Guarnieri's employment for insubordination; and (2) the issue of whether the employer was motivated by anti-union animus in the termination or whether it was due to a lawful response to insubordination. Both issues involve whether the employer's assessment of Guarnieri's conduct which lead to his

¹ In Kraft Foods, an employe, Fred Dinsmore, was unlawfully interviewed without a Weingarten representative. The NLRB noted that "the only information Respondent obtained from the Dinsmore interview was Dinsmore's identification of a photograph depicting the situs of the forklift collision ... as well as a denial from Dinsmore that he had been engaged in a fight..." The NLRB found that "[s]ince Dinsmore was discharged for fighting, and the fight was witnessed by several other employees who were interviewed by Respondent prior to Respondent's interview of Dinsmore, it is clear that the information obtained from Dinsmore played no part in Respondent's decision to discipline." The NLRB concluded that "Respondent had demonstrated that its decision to discharge Dinsmore ... resulted from [his] ... conduct in the fight and not from Dinsmore's conduct at the interview. Accordingly, our traditional cease-and-desist remedy for respondent's 8(a)(1) violation is appropriate."

dismissal was based on information obtained at the unlawful interview of January 10, 2003. See Kraft Foods, supra.

The Hearing Examiner concluded that the Borough did not discriminatorily fire Guarnieri in violation of Section 6(1)(c) of the PLRA because it believed Guarnieri failed to operate the department within budget (Finding of Fact 33), physically accosted councilman Orkwiss (Finding of Fact 34), was insubordinate in failing to provide a description of his duties (Finding of Fact 36), and submitted inaccurate and misleading information to the Borough Council. (Finding of Fact 38). Other reasons were stated in the Borough solicitor's letter of February 14, 2003, none of which refer or relate to Guarnieri's conduct at the January 10, 2003 interview. Although the Hearing Examiner found ample evidence on the record unrelated to the events of January 10, 2003 to support the Borough's legitimate business reason defense to the discrimination claim, the Hearing Examiner elsewhere in the PDO linked the termination decision to the events of January 10, 2003.

We find this asserted connection between the January 10, 2003 interview and the reasons for Guarnieri's termination to be inconsistent on this record. On these facts, the Hearing Examiner erred by relying on the January 10, 2003 interview as a basis for the Section 6(1)(a) violation and, at the same time, entirely discounting it regarding the 6(1)(c) violation. Although the Hearing Examiner found the Borough's solicitor told Guarnieri that he felt Guarnieri was insubordinate, the solicitor's opinion is of little relevance where the Hearing Examiner did not credit this as a factual basis for his conclusion under Section 6(1)(c) and it was not one of the numerous instances of insubordination cited in the February 14, 2003 dismissal letter. The Hearing Examiner further relied on cross-examination of councilwoman Ann Dommies who testified that at the brief 15-20 minute meeting where Guarnieri provided little information, she believed Guarnieri "may have been insubordinate" because he "wasn't really answering the questions." (N.T. 59). She further testified that the January 10, 2003 events did not, to her knowledge, serve as a basis for Guarnieri's termination. (N.T. 59). All of which comports with the hearing examiner's findings regarding the reasons for the discharge following the formal disciplinary hearing on February 5, 2003, unrelated to the January 10, 2003 interview.

Accordingly, the Borough's reasons for terminating Chief Guarnieri were not based on information obtained at the January 10, 2003 investigatory interview, but for unrelated acts of misconduct and insubordination. As found by the Hearing Examiner, Chief Guarnieri's demand for representation and refusal to directly answer questions, did not play a role in the decision to terminate him for the aforementioned independent reasons adduced at the February 5, 2003 disciplinary hearing. As such, the findings of fact of the Hearing Examiner establish that the Borough had sustained its burden under Kraft Foods, and therefore the Borough's exceptions will be sustained and the remedy will be modified to a cease-and-desist order for the Borough's violation of Section 6(1)(a) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 of 1968 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

That the exceptions filed to the Proposed Decision and Order of December 11, 2003 are sustained. The Order on pages 10-12 of the Proposed Decision and Order is hereby vacated.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Borough 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 Board finds necessary to effectuate the policies of the PLRA and Act 111.

(a) Post a copy of the proposed decision and order and final order within five (5) days of the day hereof in a conspicuous place readily accessible to its employes and have the same remain and so posted for a period of ten (10) consecutive days; and

(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.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member, and Anne E. Covey, Member, this sixteenth day of March, 2004. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

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AFFIDAVIT OF COMPLIANCE

Duryea Borough hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) of the PLRA and Act 111; that it has posted a copy of the proposed decision and order and final order as directed therein; and that it has served a copy of this affidavit on the Duryea Borough Police Department at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
this _____ day of _____, 2004.

Signature of Notary Public