COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION SECURITY POLICE AND FIRE PROFESSIONALS OF AMERICA	:	
v.	:	Case No. PERA-C-03-406-E
	:	(PERA-R-03-247-E)
UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA	:	(PERA-R-03-248-E)

FINAL ORDER

On February 25, 2004, the International Union Security Police and Fire Professionals of America (SPFPA) timely filed, with the Pennsylvania Labor Relations Board (Board), exceptions and a supporting brief to the Proposed Decision and Order (PDO), dated February 10, 2004. In the PDO, the Hearing Examiner concluded that the United Government Security Officers of America (UGSOA) did not engage in unfair practices in violation of Section 1201(b)(1) or (4) of the Public Employe Relations Act (PERA) by appearing on separate election ballots for (1) a unit of supervisory Commonwealth security personnel (PERA-R-03-247-E) and (2) a unit of rank and file Commonwealth security personnel (PERA-R-03-248-E) when UGSOA allegedly was affiliated with a non-guard union.[1] The elections were conducted among security guards who may not be represented by a union or affiliated union, which represents non-security guards pursuant to Section 604(3) of PERA. On March 19, 2004, UGSOA filed a reply to exceptions and a supporting brief.

On June 26, 2003, UGSOA filed with the Board petitions to represent a unit of supervisory guards employed by the Commonwealth and represented by SPFPA and a bargaining unit of rank and file guards employed by the Commonwealth and also represented by SPFPA. On July 28, 2003, SPFPA filed a Memorandum of Agreement (Stipulation) stipulating that UGSOA could appear on the ballots for elections to determine the exclusive representatives of the two units. On August 13, 2003, pursuant to the Stipulation, the Board ordered that elections be held. On September 19, 2003, the Board canvassed the ballots cast in the elections and UGSOA won both elections.

On September 25, 2003, SPFPA filed a charge of unfair practices alleging that, prior to UGSOA's petitions for representation of the Commonwealth security guards and during the election, UGSOA was unlawfully affiliated with organizations representing non-guards in

[1] SPFPA also filed a motion to dismiss UGSOA's representation petition in Case No. PERA-R-03-247-E and Case No. PERA-R-03-248-E incorporating the claims it alleged in its unfair practice charge. Due to the fact that no inappropriate affiliation has been found in this case, the Board need not address whether the proper procedure for an incumbent union to raise before the Board allegations that a rival guard union maintains an unlawful affiliation with a non-guard union(s) or employes is through an unfair practice charge or a motion to dismiss the representation petition of the rival.

violation of Section 604(3) of PERA. On October 23, 2003, SPFPA filed an amended charge additionally alleging that, continually since May 26, 2003, UGSOA was unlawfully affiliated with SEIU and its affiliates, which represent non-guard employes. On November 3, 2003, the Board Secretary issued a Complaint and Notice of Hearing (CNH). On November 4, 2003, UGSOA filed a motion to dismiss the complaint. On November 10, 2003, SPFPA filed a motion for a continuance of the hearing, which was opposed by UGSOA. On the same day, the Examiner declined SPFPA's motion for a continuance. On November 14, 2003, SPFPA's attorney requested four subpoenas duces tecum for SEIU, the Prewitt Organizing Fund, the Organizing Fund, Inc. and Front Line Project, without knowing the addresses for the latter three organizations. At the hearing, UGSOA appeared without the subpoenaed documents. SPFPA moved to enforce the subpoena and continue the hearing to allow time for UGSOA to satisfy the subpoena request, and UGSOA moved to quash the subpoena. UGSOA argued that the subpoena was served only two days prior to the hearing on UGSOA headquarters in Colorado and requested a voluminous amount of material for production at the hearing in Harrisburg, Pennsylvania. The Hearing Examiner granted UGSOA's motion to quash the subpoena and denied SPFPA's motion to enforce the subpoena.[2]

In its exceptions, SPFPA argues that the Examiner erred by characterizing a post-hearing letter, dated February 9, 2004, as a reply brief, which the Examiner refused to consider. In the letter SPFPA argued that UGSOA raised for the first time in its post-hearing brief that SPFPA's subpoena duces tecum should be quashed because the information requested in certain paragraphs of the subpoena were not relevant to the proceedings. However, the Examiner did not base his decision to quash the subpoena on relevancy grounds. In the PDO, the Examiner stated that "without consideration of UGSOA's relevancy objection, UGSOA's motion to quash the subpoena is granted, and SPFPA's motion to enforce the subpoena is denied." (PDO at 7). Accordingly, this exception is moot.

SPFPA further claims that the Examiner erroneously quashed its subpoena duces tecum. SPFPA complains that it did not have enough time to serve the subpoena on UGSOA and that UGSOA should have been able to produce the requested information because it had two days to do so. SPFPA argues the Examiner also erred in relying on SPFPA's delay in serving the subpoenas and denying its request for continuance of the hearing.

We find that the Examiner did not err in quashing SPFPA's subpoena. SPFPA filed its amended charge, wherein it raised specific allegations that UGSOA maintained an unlawful relationship and received

[2] Since 2001, the Service Employees International Union, AFL-CIO (SEIU) and the Prewitt Organization Front Line Project has solicited authorization cards and campaigned for UGSOA during its campaign to unseat SPFPA as the representative of guards employed by Daimler Chrysler. In 2002, UGSOA and SEIU entered into an "anti-raid agreement" (Agreement). The purpose of the Agreement is to avoid jurisdictional disputes between the two unions. The Agreement expressly provides that the rights and obligations under the Agreement do not affect the independent nature, constitution or by-laws of either union and "does not constitute in any manner a direct or indirect affiliation of the parties." (PDO F.F. 2).

financial assistance from SEIU and the Prewitt Organization, four weeks prior to the hearing. SPFPA, therefore, was certainly aware at least four weeks in advance of the hearing upon which entities it needed to serve subpoenas and the specific types of documents to request in those subpoenas to prove the allegations raised in its amended charge. Accordingly, SPFPA bears responsibility for the delay in the effectuation of proper service until two days before the hearing. SPFPA assumed the risk that its continuance request might be denied especially in light of the priority of the timely resolution of a competing claim of representation by a rival union. We further find that the Examiner acted promptly on his denial of the continuance request. The record establishes that the Examiner issued his denial of SPFPA's motion for continuance of the hearing on the same day that the motion was filed with the Board. Accordingly, there were no administrative delays.

In PHRC v. Lansdowne Swim Club, 515 Pa. 1, 526 A.2d 758 (1987), our Supreme Court stated that a party must satisfy the following three-part conjunctive standard to demonstrate the enforceability of an administrative subpoena: (1) the inquiry is within the authority of the agency, (2)the demand is not too indefinite; and (3)the information sought is reasonably relevant. See also, Lunderstadt v. Pennsylvania House of Representatives Select Comm., 513 Pa. 236, 519 A.2d 408 (1986). In York v. Public Utility Comm'n, 281 A.2d 261 (Pa. Cmwlth. 1971), the Commonwealth Court affirmed the Commission's denial of subpoenas duces tecum requesting a mass of papers to be supplied for the purpose of gathering evidence. Quoting from Supreme Court, the York Court stated that "`[a]nything in the nature of a mere fishing expedition is not to be encouraged.'" Id. at 278 (quoting American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 535, 70 A. 867, 869 (1908)).

The National Labor Relations Board (NLRB) observes a similar policy in its administration of the National Labor Relations Act (NLRA). Section 102.66(c) of the NLRB's Rules and Regulations provides that "the regional director or hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." 29 C.F.R. § 102.66(c). Moreover, pursuant to these rules and regulations, the NLRB has employed an "unduly burdensome" standard. Groton Piping Corp., 246 N.L.R.B 99 (1979).

As recognized by the Examiner, the SPFPA subpoena was a document that was over two pages of single-spaced typing consisting of twenty-seven paragraphs requesting a cumbersome amount of documentation. (PDO at 7). The breadth of the requested documentation is aptly demonstrated by just one of the twenty-seven paragraphs which the Examiner quoted in the PDO and provides as follows:

> All records that demonstrate payments of any kind received from any labor organization or federation and /or congress of labor organizations or any of their affiliate locals or subordinate units, including but not limited to documents that identify the

> amount of the payments, the date of the payments, the source of the payments and the reason for the payments from January 1, 2002 until the present time.

(Respondent Exhibit 1, ¶ 10; PDO at 7). As demonstrated by the above-quoted language from the subpoena, SPFPA was engaging in a "fishing expedition". The subpoena requests sought a voluminous amount of material only two days prior to the hearing and required the custodian of records from USGOA in Colorado to attend a hearing in Harrisburg, Pennsylvania. Moreover, as noted by the Examiner, SPFPA also waited to request the subpoena expecting a continuance of the hearing. SPFPA had a duty to expect that the hearing would be held as scheduled and should have timely requested subpoenas when it received the CNH instead of risking that its continuance request could be denied, especially where the continuance request was opposed by UGSOA and was inconsistent with the priority placed on the timely resolution of rival representation claims. Accordingly, the Board concludes that the subpoena was properly quashed as too indefinite, under established Pennsylvania law. The Board further agrees with the Examiner that the subpoena was "unduly burdensome" and that SPFPA failed to exercise due diligence in requesting and timely serving the subpoena on UGSOA by assuming the risk that a continuance would be granted. These are valid "reason[s] sufficient in law" for quashing the subpoena.

SPFPA also contends that the Examiner erred in regarding its reliance on Groton Piping as misplaced. Instead, SPFPA reasserts its reliance on Groton Piping to argue that the Examiner erred in concluding that SPFPA failed to exercise due diligence in timely serving the subpoena and that the subpoena was unduly burdensome. Although the subpoena was served on UGSOA two days before the hearing, SPFPA maintains that it was a sufficient amount of time to comply with all or significant parts of the subpoena. However, as the cases mandate, an assessment of the nature and character of the subpoena at issue is necessary. In other words, to determine whether a subpoena is too indefinite or unduly burdensome, or whether the proponent exercised due diligence in timely serving it, requires an evaluation of the actual contents of the subpoena.

We find that Groton Piping does not support SPFPA's position. The subpoena at issue in Groton Piping was received by the respondent five days before the hearing. The Board, in adopting the administrative law judge's decision and order, stated that, "while it would have been better practice for the subpoena duces tecum, which called for a number of documents, to have been issued earlier, compliance with that subpoena would not have been unduly burdensome." Groton Piping, 246 N.L.R.B at 99. Five days to comply with the subpoena request is markedly different than two days, i.e., more than double the amount of time. Also, the respondent employer seemingly maintained its principal place of business within the vicinity of the hearing, unlike here where UGSOA's principal place of business was in Colorado and the hearing was held in Pennsylvania. Furthermore, although there is no reference to the subpoena itself, the Groton Piping opinion does state that the subpoena only called for a number of documents. The "fishing expedition" in this case is not as limited. Accordingly, the SPFPA's reliance on Groton Piping is, as the Examiner concluded, misplaced.

SPFPA also contends that the Examiner erred in concluding that it failed to show that UGSOA is beyond its formative stages.[3] SPFPA also argues that the Examiner erred in determining that SPFPA undermines its own position that UGSOA is beyond its formative stages by asserting that UGSOA could not have financed the campaign for representation of the unit in this case. Alternatively, SPFPA maintains that even if UGSOA were in its formative stages, the claim that UGSOA maintains an inappropriate relationship with SEIU is a fact intensive analysis precluded by the Examiner's quashing of the subpoena.

The Board agrees with SPFPA that evaluating the nature and extent of any alleged relationship between SEIU and UGSOA is fact intensive. In this regard, the Examiner properly concluded that SPFPA failed to meet its burden of proving an unlawful direct or indirect relationship between UGSOA and SEIU. Notwithstanding whether SPFPA failed to meet its burden due to the quashing of its subpoena, SPFPA bears responsibility for the quashed subpoena, not the Examiner or the Board.

The Examiner thoroughly explained in the PDO the legal analysis under Wackenhut Corporation v. NLRB, 178 F.3d 543, 161 L.R.R.M. 2449 (D.C. Cir. 1999), for evaluating whether a guard union is unlawfully affiliated with a non-guard union. The Examiner properly relied on Wackenhut because the policies behind the guard provisions of the National Labor Relations Act (NLRA) are identical to those of PERA, i.e., to enable an employer to enforce rules for the protection of persons and property on its premises without being compromised by a divided loyalty between the employer and the guards' fellow employes. Township of Falls v. PLRB, 322 A.2d 412 (Pa. Cmwlth. 1974). Our Supreme Court has held that the Board properly relies on federal authority where there is no meaningful difference in policy between the NLRA and PERA. In re Appeal of Cumberland Valley Sch. Dist., 483 Pa. 134, 394 A.2d 946 (1978). Before the Examiner and now before the Board, SPFPA has argued that Wackenhut is "inapposite because the reasoning of that case only applie[d] when labor organizations are in their formative stages." (PDO at 11).

We agree with SPFPA that the Wackenhut rule permitting a non-guard union to give some level of assistance to a guard union requires the guard union to be in its formative or nascent stages of development and indeed the Wackenhut court refers to it as the "`formative stage' doctrine". Id. at 556. However, the question of whether a guard union was in its formative stages when it allegedly received assistance from the non-guard unit is secondary to the preliminary question of whether the proponent established a prima facie case that the assistance received would compromise the independence of the guard union. "`Mutual sympathy, common purpose, and assistance between [guard and non-guard] unions is not, standing alone, sufficient to show an indirect affiliation.'" Id. at 554 (quoting International Harvester Co. 145 N.L.R.B 1747 (1964)). Accordingly, where, as here, there is insufficient record evidence to establish that UGSOA's independence was compromised or that it was not free to decide its own course of action and formulate its own policies without SEIU, there simply is no

[3] A union in its formative stages is a relatively new or inexperienced employe organization that lacks the financial resources or expertise to conduct an organization campaign of a certain group of employes in a given location.

question remaining of whether the guard unit is in its formative stages.

In this regard, the Examiner observed as follows: "SPFPA overlooks that the court in Wackenhut noted that the dispositive inquiry in any case under federal law is whether or not a labor organization is `free to formulate its own policies and decide its own course of action independently.'" (PDO at 11)(quoting Wackenhut, 178 F.3d at 554). The nature and extent of the relationship between UGSOA and SEIU and the independence of UGSOA are the relevant initial inquiries, pursuant to Wackenhut, and indeed constitute necessary conditions precedent to questions regarding the formative or nascent status of the guard union. The Board, therefore, agrees with the Examiner that whether UGSOA was in its "formative stages" at the time of organizing the unit in this case is not determinative, absent the necessary condition precedent of an unlawful relationship.

After a review of the record, the Board concludes that the evidence fails to reflect "a substantial bond that binds the two unions in management and policy, so that the guards' union cannot determine its own course without approval of the nonguard union," as required by Wackenhut. Id. at 554. Indeed, the Agreement between SEIU and UGSOA suggests the opposite. That Agreement, as recited verbatim in Finding of Fact Number 2, provides in relevant part as follows:

> It is expressly understood and agreed that this Agreement or any actions of the SEIU and UGSOA related to this Agreement do not in any way infer, or constitute any type of change, modification or alteration in any manner, form or purpose, of either party's Constitution or By-Laws. The purpose and intent of this Agreement is limited solely and exclusively to matters referenced in the Agreement, and does not constitute in any manner a direct or indirect affiliation of the parties.

(F.F. 2; PDO at 5). The Agreement itself, however, is not dispositive and does not detract from the fundamental inquiry under the statute, i.e., whether the claimant met its burden of proving that a substantial bond binds the two unions in management and policy, so that the guards' union cannot determine its own course without approval of the non-guard union. The weight to be given such an agreement is limited and the Board's conclusions in an unlawful affiliation case will be the result of a fact-laden inquiry into the nature of the parties actual relationship.

SPFPA also claims that the Examiner erred by concluding that SPFPA is estopped from arguing that UGSOA is barred from representing the Commonwealth security guards at issue in Case Nos. PERA-R-03-247 and 248 because SPFPA stipulated to the placement of UGSOA on the ballot. However, the Board has affirmed the Examiner's alternative basis for dismissing SPFPA's charge, i.e., SPFPA failed to meet its burden of proving unlawful affiliation with a union representing non-guards. SPFPA would have to prevail on both claims of error in order to obtain a reversal of the Examiner's conclusion. Accordingly, the Board need not address whether the SPFPA waived or is otherwise estopped from filing a charge of this nature, even though it may have known of alleged unlawful affiliation prior to the Stipulation wherein the parties agreed to UGSOA's placement on the ballot.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

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 eighteenth day of May, 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.