## COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

PENNSYLVANIA STATE
TROOPERS ASSOCIATION

:

v. : Case No. PF-C-04-63-E

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COMMONWEALTH OF PENNSYLVANIA : PENNSYLVANIA STATE POLICE :

### **FINAL ORDER**

The Commonwealth of Pennsylvania, Pennsylvania State Police (PSP) filed exceptions with the Pennsylvania Labor Relations Board (Board) on May 31, 2005, to a Proposed Decision and Order issued May 11, 2005, in which the hearing examiner found a violation of Section 6(1)(a) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968 (Act 111). Following an extension of time, the PSP filed a brief in support of its exceptions on June 30, 2005. The Pennsylvania State Troopers Association (PSTA) filed a brief in response to the exceptions on July 19, 2005.

The factual background of this matter can be summarized as follows. On January 9, 2004, an arbitration hearing was held on the grievance filed over the discharge of Corporal Joseph Vazquez. Major Tyree Blocker, an area commander in the state police, has oversight responsibility of three troops of Pennsylvania State Police, including Corporal Vasquez. His duties included review of the results of the investigation of Corporal Vasquez and forwarding those results to the Department Disciplinary Officer within the PSP, who is responsible for recommending the level of discipline. Major Blocker was called to testify under oath by the PSTA attorney, who asked

"Q. And I would ask you this final question, sir. Knowing Corporal Vazquez and his dedication to the Department as you've described it, and also knowing the serious nature of the charges against him, and knowing that the Department has recommended that he be terminated from his employment, do you have an opinion as the Area Commander as to whether you believe that termination of Corporal Vazquez would be an appropriate penalty?"

After pausing for an objection from PSP counsel and hearing none, Major Blocker responded.

"A. Let me preface my answer to that question by saying in strongest terms, that the allegations and actions that generated the investigation that brings us here today were serious - - - are serious, and uncharacteristic of what I know of Corporal Joe Vazquez. However, I recognize that this is a member of our Department that has a 22 to 23 year unblemished record with respect to being a disciplinary problem. From my perspective that means an awful lot to me. And I try to weigh those years of dedicated and committed service in a highly specialized and trained member of the Department with the allegations. And although those allegations are serious and certainly the Corporal needs to be sanctioned here. In my opinion, I do not believe it rises to the level of dismissal."

(Finding of Fact 10).

While troop commanders, in consultation with area commanders, make the initial determination of whether misconduct occurred, they are not directly involved in the imposition of discipline. It is the department disciplinary officer, a deputy commissioner, that recommends a level of discipline to the commissioner who then makes the final determination on discipline. Therefore, the PSP believed that Major Blocker inappropriately testified to matters outside his duties as area commander.

On February 19, 2004, Major Blocker received a notice of official counsel providing

- "1. This official counseling is the result of the grave concern I have relative to your judgment, decision making, and loyalty to the Department as a result of your testimony during the subject arbitration hearing.
- 2. My review of the process in this matter revealed you were contacted by and met with the attorney for the PSTA prior to the proceeding, then testified voluntarily. Opinion testimony based upon your official Department position is by definition expert opinion. By contrast, testimony based on events you have personally witnessed is factual testimony. Your testimony during this hearing was expert opinion.

- 3. PSP members are expected/directed to testify honestly, truthfully, and factually during any/all proceedings. Expert testimony is not appropriate if the witness is not an expert in the area addressed by a question. Testimony outside the scope of your duties or area of responsibility is unauthorized and should not have been offered. Testimony concerning the level of discipline recommended for a member is not factual; rather, it is expert opinion and therefore falls outside your duties and responsibilities.
- 4. You are directed to review References (a) and (b). Upon completion of that review, you shall provide me a written statement attesting to same. It is my opinion the requirements of these regulations extend in principle to testimony offered during arbitration hearings. You should have consulted with the Office of Chief Counsel prior to your testimony.
- 5. You are likewise notified that when testifying in your official Department position during an arbitration hearing, your advocate or legal representative as a management employee is the attorney representing the PSP, not the attorney representing the PSTA or other association/agency.
- 6. This Official Counseling will be made part of my supervisory file documenting your deficiency in this matter and will be reflected on subsequent Employee Performance Evaluations."

(Finding of Fact 11).

On March 29, 2004, the PSTA filed a charge of unfair labor practices alleging that the PSP violated Act 111 and Section 6(1)(a), (c), and (d) of the PLRA by disciplining Major Tyree Blocker, an area commander and member of the bargaining unit, for his testimony during an arbitration. The hearing examiner found that the discipline of Major Blocker for his testimony at the Vasquez arbitration would have a tendency to coerce bargaining unit employes in the presentation of their grievances, and thus violate Section 6(1)(a) of the PLRA.<sup>2</sup>

The PSP argues that the counseling of Major Blocker was for his unprotected activity of giving opinion testimony, outside the scope of his position as area commander, and therefore would not have a tendency to coerce employes and did not violate Section 6(1)(a) of the PLRA.<sup>3</sup> As noted by the hearing examiner, Section 6(1)(a) protects the right of bargaining unit employes to present and arbitrate grievances free from employer interference. The hearing examiner aptly noted that discipline of a witness for giving apparently truthful testimony in response to a direct question at an arbitration tends to interfere with employes' prosecution of grievances. This policy is supported by a review of National Labor Relations Board decisions, which have addressed the discipline of a supervisor for testifying under oath.

As recognized by Elkouri & Elkouri, in How Arbitration Works,

In some situations giving testimony in arbitration proceeding may subject the witness to varied risks of retaliation. For instance, employees and supervisors alike may incur the displeasure of the employer as a result of their testimony. Likewise, employees may jeopardize their relations with fellow workers for testifying at the employer's request. When feeling the need, the arbitrator may seek to protect the interest of persons facing this predicament by reminding the parties of the risks involved.

Although the arbitrator cannot ensure definite protection if the person does testify, there may be firm basis for a valid grievance or unfair labor practice charges in some situations of retaliation for giving testimony.

<sup>1</sup> The composition of the bargaining unit within the PSP is by voluntary recognition, and we are expressly cognizant here that Major Blocker is also a bargaining unit employe pursuant to the consent of the PSP and PSTA.

<sup>&</sup>lt;sup>2</sup> The hearing examiner found no evidence of a violation of Section 6(1)(d) of the PLRA, and because he concluded that the PSP violated Section 6(1)(a), the hearing examiner found it unnecessary to address whether the PSP also violated Section 6(1)(c) of the PLRA by discriminating against Major Blocker for his testimony for a fellow bargaining unit member at an arbitration hearing. No exceptions have been filed by the PSTA.

<sup>&</sup>lt;sup>3</sup> The PSP also argues that Major Blocker's counseling was a private matter and there is no evidence that the PSP intended to disseminate the reasons for the counseling to bargaining unit employes. However, the Section 6(1)(a) claims alleged involve not only a tendency to coerce, but also actual coercion and interference by the employer. Further, Major Blocker is a member of the bargaining unit, and therefore the requirement of dissemination to the bargaining unit has been satisfied. Central Dauphin Education Association v. Central Dauphin School District, 34 PPER ¶ 103 (Final Order, 2003).

Elkouri & Elkouri, How Arbitration Works, pg. 469 (5<sup>th</sup> Ed. 1997).

In fact, it is well recognized in case law under the National Labor Relations Act, that discipline of a supervisor for giving testimony before the NLRB or an arbitrator tends to coerce bargaining unit employes in the presentation of their case, and thus violates the NLRA.4

Rank-and-file employees have a right to have their privileges secured by the Act vindicated through the effective administrative proceedings provided by Congress. Included in this privilege is the right to have witnesses testify without fear of being penalized by their employer. As in the instant case, it may often be necessary to have supervisory personnel testify. It follows, therefore, that any discrimination against supervisory personnel because of testimony before the Board directly infringes the right of rank-and-file employees to a congressionally provided, effective administrative process, in violation of section 8(a)(1), 29 U.S.C.A. § 158(a)(1).

[S]ection 8(a)(1) is broad enough to cover any restraint on employees' rights. We can think of few restraints more direct than actions calculated to prevent rank-and-file employees from having supervisors testify on their behalf.

On this question of testimony, good administration requires uniform application and absolute predictability for those who must run the gauntlet of employer wrath by testifying. The discharge of a supervisor for testifying violates the Act as a matter of law, and the Board needed to find no more than that the Company [took adverse employment action against the supervisor] because of his testimony.

Oil City Brass Works v. National Labor Relations Board, 357 F.2d 466, 471-72 (5th Cir. 1966) (citations omitted). Applying similar reasoning to a case involving a supervisor being disciplined for testifying at an arbitration proceeding, the NLRB found that labor relations are fostered where "employes have a corollary right to a full and fair hearing on their grievances under contract procedures which must likewise be protected from interference or limitation." Ebasco Services, Inc., 181 NLRB 768, 770 (1970).

However, the protections of the NLRA do not give license for a supervisor or employe to testify with absolute immunity.

The Act protects an individual employee's right to have access to the arbitration machinery but it does not control the operation of that machinery. Accordingly, when an employer disciplines an employee based on his participation in or conduct at an arbitration proceeding, the Board properly finds a violation of the Act. Crown Central Petroleum, 177 NLRB 322 (1969), enf'd. 430 F.2d 724 (5th Cir. 1970). On the other hand, when an employer disciplines employees based on past misconduct that comes to light at an arbitration, as in the instant case, no violation will be found.

Section 7 does not extend protection to wrongdoing, freely confessed, simply because the employer discovers the wrongdoing in the course of protected activities engaged in by the employee.

Public Service Electric and Gas Company, 268 NLRB 361 (1983). Where an employe's or supervisor's testimony discloses wrongdoing by the witness, the employer is not prohibited from taking appropriate action. However, where the

(a) It shall be an unfair labor practice for an employer—

to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

29 U.S.C.S. §158(a)(1).

<sup>&</sup>lt;sup>4</sup> Section 8(a)(1) of the NLRA provides in relevant part that

 $<sup>^5</sup>$  In applying a similar statutory framework, the New York Public Employee Relations Board recognizes that "[t]he Act protects the statement and the speaker for making the statement, but does not ... necessarily and always insulate the speaker against all on-the-job consequences of the statement." County of Suffolk, 29 NYPER ¶4652 (Decision of Administrative Law Judge, 1996); see State of New York (Office of Mental Health-Bronx Children's Psychiatric Center), 17 NYPER ¶4576 (Decision of Administrative Law Judge, 1984). Where a supervisor expressed disagreement with certain employer policies and admitted while testifying at a grievance arbitration that she had not been complying with the employer's directives, the employer was found to have a legitimate business reason to discipline her for her admitted past wrongdoings, not because of the fact that she had testified. California State Employees Association, Local 1000 v. State of California (Department of Consumer Affairs), 29 PERC 15 (PERB Decision, 2004). County of Suffolk, 29 NYPER at 4928.

supervisor does not disclose prior actions inconsistent with an employer directive that would have independently subjected the supervisor to discipline, it is not a legitimate reason to discipline the supervisor because he/she provided honest answers to direct questions to which the employer's own counsel did not object. Thus, while an employer may insist on the loyalty of supervisors to the employer's policies and practice, an employer's conduct towards a supervisor will be found to violate section 8(1)(a) of the NLRA where it directly interferes with the employes' protected right to present grievances, such as disciplining the supervisor merely because he or she has testified under oath during the processing of a grievance or at arbitration. Automobile Salesmen's Union, Local 1095 v. National Labor Relations Board, 711 F.2d 383 (D.C. Cir. 1983).

We believe that the policy under the National Labor Relations Act that discipline of a supervisor because of testimony at an arbitration interferes with rank-and-file employes' protected rights in the grievance process is persuasive. See Council 74, AFSCME v. Richardson and Penobscot County Commissioners, No. 84-04 (MLRB, Decision and Order, 1983). As noted above, the Board has experience under Section 6(1)(d) of the PLRA and Section 1201(a)(4) of PERA, dealing with retaliation for testimony before the Board, and it is a mere logical extension to apply the same protections to the protected rights of employes to access the grievance and arbitration process. Ebasco Services, Inc., supra. The result is further buttressed by the fact that this Board has already recognized the potential for interference with bargaining unit employes' rights to grievance and arbitration where the employer retaliates against or intimidates a union witness. Clearfield County Association of Professional Employees v. Clearfield County, 27 PPER ¶27087 (Final Order, 1996) (threats made to partial arbitrator interfered with employes' rights to interest arbitration); Central Dauphin School District, supra (noting, in dicta, that had the statement, conditioning a former employer's cooperation in obtaining Department of Education certification on the assistant principal's arbitration testimony, been directly disseminated to teachers, an unfair practice for a direct interference with employes' protected rights may have been found).

Clearly, subjecting witnesses to potential adverse employment consequences for testifying before an arbitrator amounts to a direct interference with the employes' statutorily protected grievance and arbitration rights. Accordingly, we believe that under the PLRA, there is a direct interference with employes' Section 5 statutorily protected rights, where a supervisor, or other employe, is disciplined for having provided testimony during an arbitration. We acknowledge that the employer may expect that its supervisors and managers be loyal to the employer's public purpose and policies, and may have legitimate business reasons for limiting private discourse or voluntary public dissemination of employer information. However, it is beyond cavil that a public employer may not require one of its employes to engage in subterfuge of judicial or administrative process to avoid answering direct questions, under oath, before the Board or an arbitrator. Accordingly, it is self evident that what the employer may not do under the Section 6(1)(a) of the PLRA is discipline a supervisor or an employe merely for testifying, under oath, where the substance of the employe's testimony would not otherwise independently subject him or her to discipline. See County of Suffolk, supra.

There is nothing in the record to suggest that Major Blocker would have been subject to discipline merely for holding a personal or professional opinion about the propriety of the level of discipline issued Corporal Vasquez. In fact, Ralph Periandi, Lieutenant Colonel Deputy Commission of Operations, acknowledged that it is not disloyal for employes to hold differing opinions than that of the commissioner. (N.T. 65). Nevertheless, the official counseling issued Major Blocker acknowledged that while "PSP members are expected/directed to testify honestly, truthfully, and factually during any/all proceedings[,]" "testimony concerning the level of discipline recommended for a member should not have been offered." On the facts here, it is obvious that Major Blocker was disciplined, not because of his opinion about the level of discipline imposed on Corporal Vasquez, but because he had given testimony during the Vasquez arbitration consistent with those views.

Major Blocker was asked during direct examination his opinion of the discipline imposed on Corporal Vasquez. Regardless of the propriety of the question, when unobjected to, Major Blocker had a legal, and ethical, obligation to answer the question. Even if there are internal means for expressing disagreement with the Department Disciplinary Officer, as Lt. Colonel Periandi described, that does not obviate the witness from testifying under oath in response to a direct question. PERA, and commonsense, would not allow a public employer, such as the PSP, to forbid, under threat of discipline, an employe from cooperating in the judicial or administrative process and testifying fully, to the best of their abilities, in response to questions posed to them under oath.

<sup>&</sup>lt;sup>6</sup> This Board has also recognized, *albeit* in a case involving Section 6(1)(d) of the PLRA, that an employer may lawfully discipline an employe who admitted to engaging in wrongdoing while testifying before the Board noting that "[o]ur inquiry ... is directed to the sole question whether the Board can conclude from the evidence produced at the hearings that [the employe] was discharged for some permissible criterion and not because of his having given testimony before this Board." <u>Pennsylvania Labor Relations Board v. Eglin's of Philadelphia, Inc.</u>, Case No. 15 (1953).

<sup>&</sup>lt;sup>7</sup> The PSP's counseling notice claimed that Major Blocker's testimony was impermissible "expert opinion."

We hold that in the absence of any independent basis for discipline disclosed while testifying, <sup>8</sup> disciplining Major Blocker, merely because he had responded to a question posed at an arbitration hearing interferes with employes' statutorily protected rights to prosecute grievances and runs counter to the express policies of the PLRA. Accordingly, after a thorough review of the exceptions and all matters of record, we find that, under the facts of this case, the discipline imposed on Major Blocker for his testimony at the Vazquez arbitration, amounts to a direct interference with employe's protected rights under Section 5 of the PLRA and is a violation of Section 6(1)(a).

### **ORDER**

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

### HEREBY ORDERS AND DIRECTS

that exceptions filed by the Commonwealth are hereby dismissed, and the May 11, 2005 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this twentieth day of September, 2005. 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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<sup>&</sup>lt;sup>8</sup> In its brief on exceptions the PSP argues that the violation of the Field Regulations (FR 1-1.24 and FR 5-5.03) where a "legitimate matter for the counseling notice in and of itself." (PSP Brief at 5). We note however, that the testimony of record does not support this position. Lieutenant Colonel Periandi testified unequivocally that the basis for the counsel notice was not the violation of the Field Regulations (N.T. at 56). Accordingly, this exception is dismissed.

<sup>&</sup>lt;sup>9</sup> Moreover we fully recognize that an independent violation of Section 6(1)(a) also 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 employe, regardless of whether any one particular employe was actually coerced. See Pennsylvania State Corrections Officers Association v. Pennsylvania, Commonwealth of (Department of Corrections, Pittsburgh SCI), 35 PPER 97 (Final Order, 2004). The analysis under Section 6(1)(a) of whether an employer's conduct would tend to coerce employes is objective, and does not involve a question of the employer's motives. Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania

Transportation Authority, 17 PPER ¶17038 (Final Order, 1986). It is inevitable that a bargaining unit employe would be reasonably hesitant to call his supervisor, or another employe, as a witness to testify as to events, where the grievant is aware that the supervisor would be placed in an untenable position, subjecting them to potential discipline for a candid answer in response to a question on direct examination. Likewise, meting out discipline against another bargaining unit employe for their testimony would reasonably instill fear in other bargaining unit employes that they too may suffer the same fate if called to testify honestly for a co-worker. Obviously, there can be no doubt that the potential for retribution against a witness would have a tendency to interfere with the employes' protected right to testify or call witnesses on their behalf.

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COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA STATE POLICE

Signature of Notary Public

### AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania, Pennsylvania State Police hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) of the Pennsylvania Labor Relations Act and Act 111; that it has rescinded the notice of official counseling issued to Major Tyree Blocker; that it has posted the final order and proposed decision and order as directed; and that it has served a copy of this affidavit on the Association at its principal place of business.

	Signature/Date
	Title
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SWORN AND SUBSCRIBED TO before me the day and year first aforesaid.	