COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

KAOLIN WORKERS UNION, UNION DE TRABAJADORES DE KAOLIN	:	
v.	:	Case No. PLRA-C-05-2-E
KAOLIN MUSHROOM FARMS, INC.	:	

FINAL ORDER

Kaolin Workers Union, Union de Trabajadores de Kaolin (Union) filed exceptions with the Pennsylvania Labor Relations Board (Board) on June 24, 2005. The Union's exceptions challenge a June 9, 2005 decision of the Secretary of the Board declining to issue a complaint and dismissing its Charge of Unfair Practices filed against Kaolin Mushroom Farms, Inc. (Employer), alleging that the Employer violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA).

In determining whether to issue a complaint, the Board assumes that all facts alleged are true. Generally, a complaint will be issued unless the facts alleged in the charge could not support a cause of action for an unfair practice. Homer Center Education Association v. Homer Center School District, 30 PPER ¶ 30024 (Final Order, 1998).

In its Specification of Charges, the Union alleges that during a meeting with members of the bargaining unit, on or about March 25, 2005, the Employer's supervisor Armando Valente told workers that "all the union has negotiated for you is to deduct $5 from your check."

In its exceptions to the Secretary's refusal to issue a complaint, the Union additionally alleged that the statement was made in the presence of Union President Efren Diego.[1] The Union argues that this additional fact perfects its charge, warranting the issuance of a complaint, since derogatory comments made about a union representative in the presence of an employe tends to coerce employes in the exercise of their rights under the PLRA.

In support of its argument, the Union cites to AFSCME District Council 89 v. Commonwealth, Department of Military & Veteran Affairs, 35 PPER 94 (Proposed Decision and Order, 2004). In that case, the hearing examiner found that the employer's profane and disparaging comments ("[w]hat is with the m___ f___, c___ s___ union scum") tended to coerce employes in the exercise of their PERA protected rights. AFSCME District Council 89 v. Commonwealth, Department of Military & Veteran Affairs, *supra*. That case, however, is distinguishable from the facts of the present case. As the Board has held in adopting a National Board standard, "protected conduct will lose that protection if it is offensive, defamatory, or opprobrious, and not if it is merely intemperate, inflammatory or insulting." See AFSCME, District Council 85 Local 3530 v. Millcreek Township, 31 PPER ¶ 31056 (Final Order, 2000). Thus in AFSCME v. Reading School District, 25 PPER ¶ 25181 (Proposed Decision and Order, 1994), a Union agent's reference to managements' representatives in profane terms in the presence of bargaining unit employes was determined not to constitute protected activity under Article IV of PERA. This, however, is not a case such as AFSCME DC 89 or Reading School District. Here, the alleged remark was merely the Employer's supervisor telling workers that all the Union has negotiated is a $5 deduction from their paychecks.

The law is well established that under the First Amendment, an employer has a right to indicate its general views regarding bargaining and/or the union, as long as the expression includes no actual or veiled threat of reprisal or promise of benefit to the employes for their participation in protected activities or does not constitute an attempt to circumvent the bargaining representative and bargain directly with the bargaining unit. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981); PLRB v. Northeast Education

[1] The Board's rules and regulations require that additional facts in exceptions be supported by an appropriate affidavit. 34 Pa. Code § 95.31. The Union has not attached an affidavit to the additional factual allegations in the exceptions. However, the Board need not address this issue as the Union's exceptions lack merit for other reasons.

Intermediate Unit No. 19, 15 PPER ¶ 15127 (Pa. Ct. of Common Pleas, 1984). Since the Employer's alleged expression contained no actual or veiled threats or promises of benefits and did not appear to be an attempt to negotiate directly with individual bargaining unit members, and the language used by the Employer does not rise to the level of offensive, defamatory or opprobrious, the First Amendment protects the expression.

In further support of its claim, the Union cites to the National Labor Relations Board case Rankin & Rankin, Inc., 330 NLRB 1026 (2000). In that case, in the early stages of the union's organizing campaign, the respondent's chief executive officer threatened employes that if the union demanded higher wages and the company disagreed, the union could call a strike and the employes could be replaced by new employes that would be hired for less money. The remarks were made only two (2) days after the respondent's top management official had approached employes in the lunchroom and coercively threatened them. The NLRB found that the remarks, given their context, were unlawful. Here, the supervisor never allegedly threatened job loss or made similar coercively threatening remarks about the Union within a short period of time. Additionally, the alleged statement was not made in the early stages of the Union's organizing campaign. Therefore, the context in which an unfair practice was found in Rankin & Rankin, Inc. is significantly distinguishable from the context of the Employer's alleged comment. Consequently, Rankin & Rankin, Inc., does not present a compelling argument to issue a complaint in this case.

The Union correctly notes that the Board must be careful to ensure that an employer's First Amendment right does not outweigh the equal rights of the employes to associate freely. As the Board has stated,

> any balancing of those rights must take into account the economic dependence of the employes on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

PLRB v. Stairways, Inc, 425 at 1175, citing, NLRB v. Gissel Packing Company, 395 US 575, 617, 89 S.Ct. 1918 (1969). The alleged statement was simply an indication of the supervisor's general views regarding the Union. While it was derogatory in nature, it contained no actual or veiled threats or promises of benefits and did not appear to be an attempt to negotiate directly with individual bargaining unit members. As such, the statement does not outweigh the employes' rights to organize and is protected by the First Amendment.

After a thorough review of the exceptions and all matters of record, there are no facts alleged to support the Union's charge under Section 6(1)(a) and (e) of PLRA. Accordingly, the Board will dismiss the exceptions and sustain the Secretary's decision declining to issue a complaint.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions are dismissed and the Secretary's decision not to issue a complaint be and the same is hereby made absolute and final.

SIGNED, SEALED, DATED and MAILED this nineteenth day of July, 2005.

PENNSYLVANIA LABOR RELATIONS BOARD

L. DENNIS MARTIRE, CHAIRMAN

ANNE E. COVEY, MEMBER