

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 5 :
 :
 v. : Case No. PF-C-06-63-E
 :
 :
 CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

A charge of unfair labor practices was filed with the Pennsylvania Labor Relations Board (Board) by the Fraternal Order of Police, Lodge No. 5 (Union) on April 28, 2006, alleging that the City of Philadelphia (City) violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On May 18, 2006, the Secretary of the Board issued a complaint and notice of hearing wherein a hearing was set for June 29, 2006, in Philadelphia, Pennsylvania. This case was consolidated with a companion charge, PF-C-06-98-E, and hearings were held on August 10 and September 18, 2006, when both parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record makes the following findings of fact.

FINDINGS OF FACT

1. The Union is a labor organization.
2. The City is a political subdivision of the Commonwealth of Pennsylvania.

3. On April 20, 2006, Officer Theresa Brooks of the Narcotics Strike Force received a notice to appear for a civil matter at the City Solicitor's office the following day. Brooks also had court notices to appear for two criminal trials on April 21, 2006. Brooks thought that the notice from the Solicitor's office was merely for a preparation session, when in reality it was for both a preparation and deposition. April 21, 2006 was Brooks day off. One of the police department's directives, Directive 13, disallowed officers to attend mere preparation periods on their days off and instructed officers to immediately contact a supervisor if they were unsure of what to do. Brooks was instructed not to attend the Solicitor's preparation. Brooks's supervisor, Sergeant William Judge, telephoned and left a voice-mail message with the Solicitor's office that Brooks was unavailable to appear on April 21. He also entered the court attendance computer system database and left an electronic message about Brooks unavailability for April 21. (N.T. 42-45, 101, 335-350, 374, 377, 378; City Exhibit 1, Union Exhibit 10).

4. The morning of April 21, 2006, Sergeant Edward Hayes of the Narcotics Strike Force received a phone call from Divisional Deputy City Solicitor Kenneth Butensky. Butensky told Hayes that Brooks needed to get to the solicitor's office that day or she would end up "defend[ing] herself with her own money", because the City would "sever her." Hayes understood the import of that threat and passed it on to Brooks. Hayes told Brooks the appearance was not merely a preparation but a "solicitor's hearing." Hayes told Brooks to go to the Solicitor's office after her criminal appearances were finished. Brooks then unsuccessfully attempted to contact the Union for advice over the seemingly conflicting instructions she had received. Brooks then called and spoke to Butensky, who reiterated the necessity of Brooks's attendance at the Solicitor's office that day if she wanted the City to represent her. She told him she would be there that afternoon. (N.T. 43, 46, 48-50, 111, 183, 268, 281, 466-472).

5. Brooks arrived at the Solicitor's offices just after lunch on April 21, 2006. Brooks saw Captain Gerard Levins pass through the waiting area. Brooks and Levins did not get along. Brooks unsuccessfully attempted to contact the Union on her cell phone. City Solicitor Christina Spalding met with Brooks. Spalding assured Brooks that the Solicitor's Office would represent her and also told Brooks that the day's activities included both the preparation for and the actual giving of a deposition in the civil case against the City in which Brooks was also a named defendant. Brooks showed little interest in the preparation, and continued to be upset about the threats made against her and unsure of her pay status. She told Spalding she wanted Union representation and wanted to speak to Spalding's supervisor. (N.T. 52, 54, 56, 112, 184-187, 206, 420, 421).

6. Spalding went to find her supervisor, Butensky. She found him in a conference room with Levins. Butensky agreed to see Brooks in his office and elicited Levin's help in meeting with Brooks. Spalding brought Brooks into Butensky's office and Levins immediately told Brooks that her Captain, James Kelly, was on the speakerphone and wanted to talk to her. Kelly queried Brooks about her concerns, assured her she was correct in going to the Solicitor's Office and that she was, in fact, properly on overtime status. (N.T. 58, 59, 187-191, 388-390, 393, 394).

7. At some point in the meeting, after Kelly assured Brooks that she was properly at the Solicitor's office and would be paid overtime for her attendance, Brooks stated that she was going to call the Union. As she took out her personal cell phone and started to finger the keys, Levins reached over the desk between them and grabbed Brooks's cell phone from her hand. After that happened there was pandemonium in the room. Brooks and Levins were screaming at one another and there was a physical altercation between the two. Spalding and Butensky fled the office, leaving Levins and Brooks. Eventually Levins also vacated the room leaving Brooks alone. (N.T. 61-63, 65, 236, 240, 242, 243, 293, 314, 434, 435, 442).

DISCUSSION

The Union charged the City with violating Section 6(1)(a), (c) and (e) of the PLRA as read with Act 111 when it allegedly denied Brooks her right to Union representation during an investigatory interview on April 21, 2006, and then discriminated against her for attempting to secure that right. Since the April 21 meeting was not investigatory in nature there is no violation by the City of the PLRA.

The gravamen of this charge revolves around a meeting on April 21, 2006, in the City Solicitor's office. The five people present at that meeting¹ all testified about the meeting at the hearing, and the divarication in their testimony was breathtaking. Despite the antipodal testimony about what happened during the April 21 meeting, the record supports the conclusion that the meeting was not an investigatory interview. The determination of whether or not this meeting was an investigatory interview is the basis upon which this charge stands or falls.

The Board will find a violation of Section 6(1)(a) of the PLRA when an employer conducts an investigatory interview with an employe without a union representative being present provided that the employe has requested union representation and provided that the employe has a reasonable belief that discipline may result from the interview. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980); Conneaut School District, 10 PPER ¶ 10092 (Nisi Decision and Order, 1979), 12 PPER ¶ 12155 (Final Order, 1981), citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LLRM 2689 (1975). The right to union representation only obtains when the employer is attempting to uncover evidence of misconduct. AFSCME v. Commonwealth, Pa. Commonwealth Ct., 514 A.2d 255 (1986); AFSCME v. Commonwealth, 17 PPER 17099 (Proposed Decision and Order, 1983), 17 PPER 17102 (Amended Proposed Decision and Order, 1986). A review of the circumstances that led to the April 21 meeting is instructive to understanding why that meeting was not an investigatory interview within the meaning of Weingarten, *supra*. First, however, we must discuss Directive 13.

¹ Captain James Kelly was not corporeally present, but was listening and talking through a speakerphone for the duration of the meeting from another location.

There is, in the police department, a document titled "Directive 13." This directive sets forth, *inter alia*, when and how officers are to deal with conflicting court appearances. More specifically, it instructs officers that subpoenas for criminal court trump notices to appear for civil cases, and that officers are paid overtime when they are subpoenaed for criminal court on days off. Officers are not, however, paid overtime to appear for case preparations, and are not to do so on days off. If there is any uncertainty about the necessity of an officer's appearance, Directive 13 instructs the officer immediately to contact a supervisor for direction.

On April 20, 2006, the day before it was to take place, Brooks received a notice from the City Solicitor's Office about attending either a deposition or a preparatory meeting for a deposition scheduled for April 21, 2006.² Realizing that she had also been subpoenaed to appear in two criminal cases on April 21, and that April 21 was her day off, she asked her immediate supervisors, on April 20, what she should do. Brooks thought the City Solicitor's notice was merely for a preparation. Her sergeant gave the Solicitor's notice a cursory glance, gleaning only the solicitor's phone number assigned to the case. He called that number, as Directive 13 instructs, and left a voice-mail message that Brooks was unable to attend. Moreover, the sergeant also entered the Court attendance computer system database and left an electronic message indicating that Brooks was unable to attend on her day off and listing Brooks's upcoming work schedule.

What Brooks and her supervisors did not recognize was that the notice was for a preparation to be immediately followed by the actual deposition, not merely the preparation alone. Under Directive 13 that difference allowed, indeed, required Brooks to attend on her day off in overtime status.

The following day, April 21 Brooks reported for her criminal court proceedings. Through a phone call from Sergeant Edward Hayes Brooks was made aware that the City Solicitor's Office was adamant about her appearing there that afternoon. Hayes had spoken earlier on April 21 to Divisional Deputy City Solicitor Kenneth Butensky. Hayes relayed Butensky's ultimatum that unless Brooks appeared that afternoon she would no longer be represented by the City and "would have to defend herself with her own money." (N.T. 467). Hayes advised Brooks to go to the Solicitor's Office after her attendance at the criminal cases. Brooks then telephoned Butensky who reiterated his exasperation with her nonappearance for the civil matter. She told him she would be there after her criminal matters were resolved. Brooks then tried unsuccessfully several times to contact her Union representative to get advice over her now contradictory instructions.

Upon her arrival at the City Solicitor's offices Brooks encountered then Captain Gerard Levins. Suffice it to say that these two did not get along amiably. Brooks then met with City Solicitor Christina Spalding who was conducting the preparation for, and representing Brooks at, the deposition. Spalding reassured Brooks that the City was, in fact, representing her in the underlying civil action; however, Brooks was still concerned about her overtime status. Spalding made it clear that Brooks was at the solicitor's office not only to prepare for, but also to actually give a deposition that day.

Evidently not appreciating that Directive 13 granted her overtime status to attend an actual deposition, but not a mere preparation, Brooks was still concerned about her overtime status. Brooks's tone was loud and she spoke angrily about the prior threat that the Solicitor's office would not represent her if she did not cooperate by attending the preparation and deposition that day. Spalding's attempts to reassure and to calm Brooks fell on deaf ears. Brooks was not cooperative about preparing for the upcoming deposition. Brooks told Spalding that she wanted to contact the Union because the Solicitor's office had threatened her. Brooks demanded to speak to Spalding's supervisor, Butensky. Spalding acquiesced and left to find Butensky.

Spalding found Butensky with Levins in a conference room and relayed Brooks's concerns. Butensky sought Levins help in how to handle the matter. They decided to take Brooks to Butensky's office. Returning to Brooks, Spalding led her into Butensky's

² The notice was pursuant to a civil negligence action brought against the City, and Brooks in her capacity as a police officer, concerning an automobile accident involving Brooks's police car and a civilian vehicle.

office. Levins was also in the office and had, unbeknownst to Brooks, telephoned Brooks's commander, Captain James Kelly, and placed him on speakerphone. As soon as Brooks entered the office with Spalding, Levins told Brooks that her commander was on speakerphone. Kelly assured Brooks that she was correct in appearing at the Solicitor's office and that she would be paid on overtime status. It is at this point in the narrative that the witnesses' testimony becomes materially divergent.

Such testimonial divergence requires crediting some witness' testimony and discrediting other witness' testimony. Witness credibility determines the worth of testimony. A witness's appearance, bearing, demeanor, candor, frankness, manner of answering questions, general conduct on the stand, and certainty with respect to facts all help determine credibility. ³ Ross Township, 23 PPER ¶ 23175 (Proposed Decision and Order, 1992) (citing In Re Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949)). The overall demeanor of a witness is the very touchstone of credibility. Robinson v. Robinson, 183 Pa. supra 174, 133 A.2d 259 (1957).

Assessing the credibility of each witness in this case leads to the conclusion that all witnesses shaded their testimony to some extent, some more than others. In comparing the testimony of Brooks, Levins, Spalding, Butensky and Kelly about the meeting on April 21, 2006, it is likely that the truth of what occurred lies in a composite of their various renditions. Clearly, Brooks and Levins have an on-going feud that materially colored and raised questions about the evidentiary veracity of their testimony.

Despite the conflicting and divergent testimony, it is clear that Brooks was told, by those with the respective authority, that the City was, in fact, representing her in the civil matter and that she was to be paid overtime for her preparation and deposition that day. In the face of those two assertions it is hard to fathom how Brooks could reasonably believe that this meeting would result in discipline. And clearly this meeting was not an investigatory interview as envisioned by the rationale set forth in Weingarten, *supra*.

The fact that Brooks and Levins shared such overwhelming animosity that they were reduced to simply screaming at each other over issues that were already resolved does not make this personal confrontation an investigatory interview. Levins's thoughtless, indeed, provocative act of snatching Brooks's cell phone from her hand, albeit while she was trying to call the Union, was not a refusal to allow Brooks Union representation in violation of Weingarten, *supra*, when it was not in the course of an investigatory interview. Consequently, there is no violation of Section 6(1)(a) of the PLRA by the City. How the phone was taken from Brooks by Levins, and who-pushed-whom may have been a matter for further police investigation, but is not germane to the resolution of this unfair labor practice charge.⁴

The remaining violations alleged by the Union are all premised upon the City's discrimination against Brooks for her assertion of Weingarten rights at the April 21 meeting. But since there was no investigatory meeting from which Brooks could reasonably expect discipline to result, there was no protected activity. Absent a nexus between the employer's adverse actions and some protected activity by the employe against whom the adverse actions were taken, there can be no violation of Section 6(1)(c). St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Therefore, this charge is dismissed in its entirety.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

³ This is reflected in the legal maxim, *testes ponderantur, non numerantur*, which translates to "witnesses are weighed, not numbered." In a conflict of evidence, the truth is sought by weighing the credibility of witnesses and not by the mere numerical preponderance on one side or the other. Simply put, it is the quality and not the quantity of evidence that carries the day.

⁴ Some of the Union's proofs involve further actions taken against Brooks by the City as a result of this incident, such as the temporary removal of her service weapon and certain reassignments. (N.T.)

1. The City is an employer within the meaning of section 3(c) of the PLRA as read with Act 111.

2. The Union is a labor organization within the meaning of section 3(f) of the PLRA as read with Act 111.

3. The Board has jurisdiction over the parties.

4. The City has not committed unfair labor practices within the meaning of sections 6(1)(a), (c) and (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code §95.98(a) within twenty (20) days of the date hereof, this Decision and Order shall become absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania this twelfth day of March, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner