

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :
:
v. : Case No. PF-C-07-120-E
:
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

PROPOSED DECISION AND ORDER

On August 30, 2007, the Pennsylvania State Troopers Association (PSTA) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth), violated sections 6(1)(a), 6(1)(c) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by suspending Corporal Daniel Kline for three days without pay and for seven days without pay on July 24, 2007. On October 4, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing on the charge be held on December 4, 2007. On November 7, 2007, the hearing examiner, upon the request of the PSTA and without objection by the Commonwealth, continued the hearing. The hearing examiner rescheduled the hearing to February 12, 2008.

On January 22, 2008, the PSTA amended the charge to allege that the Commonwealth committed additional unfair labor practices under sections 6(1)(a), 6(1)(c) and 6(1)(e) by issuing a supervisor's notation to Corporal Kline on December 20, 2007, and by rating him "substandard" on his employee performance review (EPR) for 2006-2007.¹ On January 25, 2008, the Commonwealth filed a motion in opposition to amendment of charge of unfair practices requesting that the Board decline to issue an amended complaint lest it "significantly alter the scope of the proposed investigation" to the prejudice of the Commonwealth.² In the alternative, the Commonwealth requested that the hearing be continued to afford it sufficient time to prepare a defense to the amended charge. On January 31, 2008, the Secretary issued an amended complaint and notice of hearing directing that a hearing be held on February 12, 2008.³

On February 11, 2008, the hearing examiner, upon the request of the Commonwealth and over the objection of the PSTA, continued the hearing. The hearing examiner rescheduled the hearing to April 1, 2008. On February 21, 2008, the hearing examiner, upon the request of the PSTA and without objection by the Commonwealth, continued the hearing. The hearing examiner rescheduled the hearing to May 29, 2008.

¹ The PSTA also alleged that the Commonwealth committed unfair practices by removing Corporal Kenneth Yuhas from the position of special projects supervisor. Specification of charges ¶ 29. The PSTA did not reiterate that allegation in a second amended charge it filed. Nor did the PSTA litigate that allegation at the hearing. A charge not presented to a hearing examiner is, of course, waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). Accordingly, the allegation involving Corporal Yuhas will not be addressed.

² In support of its motion, the Commonwealth pointed out that the amended charge included the additional allegation as to Corporal Yuhas. The Commonwealth also cited School District of the Township of Millcreek, 9 PPER ¶ 9136 (Nisi Decision and Order 1978), where the Board granted a motion to amend a charge, noting that "[t]he amendment does not alter the parameters of the proposed investigation." Id. at 294.

³ Although the Commonwealth no longer argues the point, it is noted that the Secretary properly issued the amended complaint and notice of hearing even though the amendment altered the scope of the proposed investigation by adding the allegation as to Corporal Yuhas. The Board's rules and regulations provide as follows:

"In the discretion of the Board, upon due notice to the parties, a complaint may be amended, in such manner as the Board may deem proper, at any time before the issuance of a final decision and order if no new cause of action is added after the statute of limitations has run."

34 Pa. Code § 93.14(b). The amended charge did not add a new cause of action after the statute of limitations had run, so under the Board's rules and regulations the Secretary had the authority to issue the amended complaint. Moreover, the Board's rules and regulations further provide that a hearing may be "at a time not less than 5 days after the service of the complaint." 34 Pa. Code § 93.14(a). The Secretary provided timely notice of the hearing to the Commonwealth, so there also was no prejudice to the Commonwealth.

Nothing in School District of the Township of Millcreek, *supra*, compels a contrary result. Although the amendment did not alter the parameters of the proposed investigation in that case, the Board did not find that a charge may only be amended when that is the case. Indeed, the Board's rules and regulations provide otherwise.

On February 29, 2008, the PSTA amended the charge to allege that the Commonwealth committed additional unfair labor practices under sections 6(1)(a), 6(1)(c) and 6(1)(e) as well as an unfair labor practice under section 6(1)(d) of the PLRA as read in pari materia with Act 111 by placing a matchbox car in Corporal Kline's mailbox in late January 2008 and by issuing a supervisor's notation to Corporal Kline on January 31, 2008. On March 6, 2008, the Secretary issued a second amended complaint and notice of hearing directing that a hearing be held on May 29, 2008.

On May 29, 2008, a first day of hearing was held. On July 23, 2008, a second day of hearing was held. On both days of hearing, the hearing examiner afforded the parties a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of the PSTA's case-in-chief, the Commonwealth moved to dismiss the charge as to Corporal Kline's suspensions on the ground that the PSTA had not presented a prima facie case (N.T. 218-219).⁴ The hearing examiner took the motion under advisement pending the receipt of briefs (N.T. 220-221). On September 22, 2008, each party filed a brief by hand-delivery or by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. The PSTA represents a bargaining unit that includes troopers, corporals and sergeants who are employed by the Commonwealth as members of various Troops within the Pennsylvania State Police (PSP). (N.T. 9, 69, 180-181, 249-250)

2. In 2004, the Commonwealth assigned Corporal Kline to Troop D, Beaver. During his tenure at Troop D, Beaver, he was the PSTA's station representative. As the PSTA's station representative, he was responsible for referring to the PSTA complaints from members of the bargaining unit and for representing them at internal affairs interviews. (N.T. 8-10)

3. In January 2005, the Commonwealth assigned Corporal Kline to Troop T, Gibsonia, pursuant to a resolution of a grievance he had filed. (N.T. 8-9)

4. During 2005, Corporal Kline appeared as a witness for Trooper Henry Marotti at an arbitration. (N.T. 10)

5. In January 2007, the Commonwealth assigned Sergeant Bryan Key as the station commander at Troop T, Gibsonia. As the station commander, he was responsible for the overall running of the station. He expected corporals to be front line supervisors responsible for ensuring that their subordinates adhered to existing policies. (N.T. 247-249)

6. In January 2007, Corporal Kline became the PSTA's station representative at Troop T, Gibsonia. (N.T. 9-10)

7. In early 2007, Corporal Kline represented Trooper Harold McClean at an internal affairs interview. (N.T. 13-14)

8. In March 2007, the PSP's bureau of integrity and professional standards, upon a complaint filed by the station commander at Troop T, New Stanton (Sergeant Anthony DeLuca), conducted an internal affairs investigation of Corporal Kline. The investigation involved a mobile video recording (MVR) that Corporal Kline was to have downloaded to a disc but had not. (N.T. 15-17, 77, 202, 222-232; Commonwealth Exhibit 9)

⁴ The Commonwealth also moved to dismiss the charge to the extent that the PSTA alleged that the Commonwealth committed unfair labor practices by threatening to arrest a PSTA attorney for trespass at an investigatory interview of Corporal Rivera on September 13, 2007. According to the Commonwealth, the PSTA did not present a prima facie case in that regard either. Although the PSTA alleged that the Commonwealth made such a threat, amended specification of charges ¶ 22, the PSTA did so in support of the charge as to the supervisor's notation and as to the EPR. The PSTA did not charge that the Commonwealth committed unfair labor practices by making such a threat. Thus, whether or not the Commonwealth committed an unfair labor practice by threatening to arrest a PSTA attorney for trespass at an investigatory interview of Corporal Rivera on September 13, 2007, is not before the Board. See Iroquois School District, 37 PPER 167 (Final Order 2006) (the Board only has jurisdiction to find the unfair practices charged). Accordingly, this portion of the Commonwealth's motion will not be addressed.

9. In March 2007, the PSP's bureau of integrity and professional standards, upon a complaint filed by Sergeant Key, conducted an internal affairs investigation of Corporal Kline. The investigation involved a traffic stop during which Corporal Kline returned to a suspect some of the cash that he had seized as evidence. (N.T. 15, 19-20, 80-82, 247, 252-256; Commonwealth Exhibit 13)

10. In April 2007, Sergeant Key told Corporal Kline that he would personally initiate an internal affairs investigation of him and Trooper Thomas Casselberry if Corporal Kline "FOP'd up" during the investigation of a complaint by a suspect who Corporal Kline and Trooper Casselberry had stopped. (N.T. 11-13, 70, 140, 247, 320)

11. On June 22, 2007, Troop T's commander (Captain R. J. Patterson) issued a disciplinary action report to Corporal Kline "for fail[ing] to verify the MVR recorded on the compact disc after he burned it." (N.T. 190; Commonwealth Exhibit 1)

12. During a roll call on June 26, 2007, Trooper Rubino asked Sergeant Key why he had given overtime to Troop D, Butler, instead of to Troop T, New Stanton. Afterwards, Sergeant Key told Corporal Kline that he would see to it that no one at Troop T, Gibsonia, ever got overtime again if any one tried to show their dissatisfaction with his decision to assign overtime to a different Troop. (N.T. 25-26)

13. On July 1, 2007, Captain Patterson issued a disciplinary action report to Corporal Kline for the incident involving the traffic stop. Captain Patterson wrote that "Corporal Kline did not have the authority to give away any seized asset." (Commonwealth Exhibit 3)

14. By memorandum dated July 24, 2007, the PSP's department discipline officer (Captain Lisa S. Christie) suspended Corporal Kline for three days without pay for the MVR incident. In support of the suspension, she cited regulations requiring the accurate submission of reports, the proper performance of duties and the protection of any evidence. (N.T. 17, 233; PSTA Exhibit 1, Commonwealth Exhibits 10-12)

15. By memorandum dated July 24, 2007, Captain Christie suspended Corporal Kline for seven days without pay for the traffic stop incident. In support of the suspensions, she cited regulations requiring the proper performance of duties, competency and the protection of any evidence. (N.T. 20-21; PSTA Exhibit 2, Commonwealth Exhibits 11-12, 14)

16. During July 2007, Corporal Kline represented Corporal Montgomery Thomas and Trooper Israel Rivera at internal affairs interviews. (N.T. 13-14, 150-151)

17. By the fall of 2007, Corporal Kline had referred to the PSTA complaints from troopers about the assignment of overtime and the use of leave at Troop T, Gibsonia. At Corporal Kline's invitation, troopers had filed the same complaints directly with the PSTA's leadership. (N.T. 24-25, 29-33, 100-101, 137-138, 146-149, 157, 160-163, 184-185)

18. In October or November 2007, the PSTA's president (Sergeant Bruce Edwards) and vice-president (Corporal Joe Sarkis) met with Troop T's area commander (Major McDaniel) and with Captain Patterson about overtime and the use of leave at Troop T, Gibsonia. Sergeant Key's name "came up." (N.T. 166, 180, 189-190)

19. On December 4, 2007, Sergeant Key executed an EPR for Corporal Kline for the period 11/06 to 11/07. Sergeant Key rated Corporal Kline's overall performance as satisfactory. In the area of job knowledge/skills, Sergeant Key rated Corporal Kline's performance as unsatisfactory. By definition, an unsatisfactory rating for job knowledge/skills may mean the employee "[c]onsistently demonstrates a lack of basic job knowledge and/or skills to perform job." Sergeant Key rated Corporal Kline's performance in the area of job knowledge/skills as unsatisfactory because he thought that Corporal Kline had not followed regulations during the MVR incident and the traffic stop incident, had been using his old trooper's identification card instead of a current corporal's identification card in violation of a regulation and had inaccurately recorded the number of warnings he had issued. Sergeant Key wrote as follows:

"1. **JOB KNOWLEDGE/SKILLS:** Corporal Kline displays a working knowledge of the Vehicle Code, Crimes Code and various Departmental Rules and Regulations. On four occasions during this assessment period, Kline did not adhere to Department guidelines and procedures. Two of the incidents resulted in formal complaints that were initiated by me and another station commander. One incident focused on the apparent mishandling of 'seized' monies and property. In the second incident, Corporal Kline intentionally or inadvertently recorded inaccurate information regarding his actions during a criminal investigation. The allegations/complaints were sustained and Kline was disciplined by the department. In connection to his discipline it was discovered that [he] was not familiar with Administrative Regulation 3-4. Corporal Kline surrendered his Trooper Identification Card that was issued in 1987. Kline was promoted to Corporal in May of 1999. When asked about the eight year delay in regards to getting a new identification card, he responded he 'didn't know' he had to. (Notation and STD-501 Attached). Corporal Kline also inaccurately recorded the number of written warning[s] he issued in his self prepared quarterly activities. Corporal Kline recorded 78 and only issued 9. (Notation Attached)."

In the area of work results, Sergeant Key rated Corporal Kline's performance as needs improvement. By definition, a needs improvement rating for work results means that the employee "[o]ften has difficulty meeting expected quality, quantity, customer service, and/or timeliness standards." Sergeant Key wrote as follows:

"2. **WORK RESULTS:** Corporal Kline can complete duty assignments with little difficulty and with minimal supervision when given ample notice. In regards to the quality and quantity of work performed, it is generally adequate. Excluding the two significant incidents mentioned in the p[re]vious Job Factor."

Corporal Kline's "union activities" played no part in Sergeant Key's evaluation of Corporal Kline's performance. (N.T. 41, 94, 269-272, 278, 291-300, 310; PSTA Exhibit 6)

20. By regulation, an EPR is to be based on an employee's performance over the course of the entire rating period. Complaints leading to discipline and discipline are not to be considered. The behavior underlying the complaints may be considered. (N.T. 197-200, 269, 301, 339-340; PSTA Exhibit 13)

21. By regulation, when members of the PSP are promoted, they are to obtain a new identification card with their current rank. Corporal Kline had been using his identification card as a trooper. (N.T. 44, 271, 299)

22. Corporal Kline had no problem with arrests and citations being overturned and had been writing more citations than others. (N.T. 47-48, 94-97, 305; Commonwealth Exhibits 6-8)

23. In mid-December 2007, the PSTA's treasurer (Corporal Yuhas) submitted to Major McDaniel and to Captain Patterson a list of complaints about overtime and the use of leave, among other things, at Troop T, Gibsonia. (N.T. 157-158, 167-170, 184-185; PSTA Exhibit 12)

24. On December 19, 2007, Major McDaniel, Captain Patterson and Troop T's western section commander (Lieutenant James McFadden) directed Sergeant Key to address the complaints that Corporal Yuhas had submitted to Major McDaniel and to Captain Patterson. (N.T. 263, 321-322, 330)

25. On December 20, 2007, at a roll call, Sergeant Key had a list of the complaints that Corporal Yuhas had submitted to Major McDaniel and to Captain Patterson. Sergeant Key knew the complaints had been submitted by the PSTA. He addressed some of the complaints. Smiling at Corporal Kline, he said that overtime would be distributed based on "overall performance" rather than "production." He also said that "overall performance" was "a great statement" because "it's very vague, which means that I can give the overtime to anyone I want to." Corporal Kline complained to a trooper about the amount of his own overtime in comparison to that of other corporals. Afterwards, Sergeant Key told Corporal Kline that the roll call "may not have been the most appropriate setting to talk about personal issues." (N.T. 34-39, 43-44, 84, 101, 125-126, 129-130, 139, 264-265, 267, 321-324; PSTA Exhibit 4)

26. On December 20, 2007, Sergeant Key issued a supervisor's notation to Corporal Kline as follows:

"On this date, you were counseled in regards to discussing personal and personnel policy issues in inappropriate settings (i.e. Roll Call). On two occasions (12/18 & 12/20) you were clearly not pleased with management decisions in regards to leave selection and construction overtime issues. These[] issues had an impact on you and your subordinates. It was clear to me that you wanted to vent and/or wanted a response from me during Roll Call. On this date I request[ed] that we speak in private and you requested a witness. Trooper Paul Marchwinski accompanied you. In brief, you were advised that it is 'Best' to discuss personal/personnel issues in private and later share the [c]ontents of our exchange with subordinates. You appeared to be very receptive."

Sergeant Key issued the supervisor's notation because he thought that Corporal Kline had discussed a "personal issue" and "wasn't serving in the role as a supervisor" at the roll call. The supervisor's notation along with tissues from Sergeant Key's office were placed in Corporal Kline's mailbox. (N.T. 59-63; 266-268, 278; PSTA Exhibits 5 and 10)

27. On December 20, 2007, Lieutenant McFadden signed Corporal Kline's EPR as the reviewing officer. Lieutenant McFadden concurred with Sergeant's Key's rating of Corporal Kline. Lieutenant McFadden considered the quality and general number of arrests that Corporal Kline had made. Lieutenant McFadden did not know the exact number of arrests that Corporal Kline had made or the exact number of warnings he had issued. (N.T. 103, 270, 331-332, 340-341, 346-348; PSTA Exhibit 6)

28. On January 2, 2008, Corporal Kline received his EPR. (N.T. 41, 103; PSTA Exhibit 6)

29. On January 25, 2008, Sergeant Key sent an email assigning Corporal Kline as the vehicle maintenance officer (VMO) and Trooper Wayne Kress as the alternate VMO at Troop T, Gibsonia. A VMO is responsible for making sure that a troop's fleet of vehicles is properly maintained. After he sent the email, Sergeant Key, without "put[ting] a great deal of thought into it," placed a matchbox car in Corporal Kline's mailbox. (N.T. 49-52, 62-64, 273-277, 282, 285, 289-290; PSTA Exhibit 11)

30. On January 28, 2008, Corporal Kline sent an email to Sergeant Key, among others, as follows:

"Gentlemen, during Roll Call today, I was advised by Trooper KRESS that he was not to be assigned zones as he was now holding a SPECIALIZED POSITION of VMO? Removing him from the zones brought us down to three zone coverage. As well, it would have been just a small courtesy to ask me what desk I preferred prior to providing TFC/VMO Kress with a locking desk. I am still a corporal with over 20 years on the job.

As well in Roll Call today, I inquired about why so many Troopers are tuning in VC3111 Obedience to Traffic Control Citation in lieu of VC3362 Maximum Speed Limit citations? Again, I was advised by a Trooper that Corporal PATTERSON related to the men that this station now accepts VC3111 in lieu of VC3362? If this is NEW STATION POLICY and TFC/VMO KRESS has been chosen for a specialized position, it would have been mere courtesy to at least send an email or tell all of the supervisors so that we are kept informed and are on the same page.

Please advise if the above changes are in effect. Cpl. KLINE"

(N.T. 53-55, 272-273; PSTA Exhibit 8)

31. On January 31, 2008, Sergeant Key issued a supervisor's notation to Corporal Kline as follows:

"On Monday January 28, 2008 you sent an email to the Gibsonia Station's Supervisors and a personal associate. The email vented about not being informed about changes in current duty assignments. You[r] email clearly indicated that you failed to comply

with the instructions contained in STD 501 Supervisory Responsibilities and Duty Assignments dated January 31, 2007, Paragraph #3 (n) 'Open and Review ALL E-mails daily'. I sent an email containing the changes in duty assignments to you on Friday January 25, 2008. You apparently did not open/read the email that I sent to you three days prior to your January 28th email. The schedule indicates that you worked the 25th, 26th, 27th and 28th. Read emails daily to avoid inaccurate comments and editorials. Fortunately my email did not contain officer safety issues or time sensitive administrative items (i.e. Subpoenas, VMO, Call-offs, Discretionary Overtime, etc)[.]

Thank you."

Sergeant Key issued the supervisor's notation because he interpreted Corporal Kline's email as indicating that Corporal Kline had not read his email assigning him as the VMO and Trooper Kress as the alternate VMO. (N.T. 56-57, 272-273, 279, 286-288; PSTA Exhibit 9)

32. Corporal Kline's "union activities" did not lead Sergeant Key to treat Corporal Kline any differently from other corporals. (N.T. 278)

DISCUSSION

The PSTA has charged that the Commonwealth committed unfair labor practices by suspending Corporal Kline for three days without pay and for seven days without pay on July 24, 2007. Specification of charges ¶ 15. According to the PSTA, the Commonwealth imposed the suspensions on Corporal Kline because he engaged in protected activity by serving as the PSTA's station representative at Troop D, Beaver, and at Troop T, Gibsonia, by filing a grievance that resulted in his transfer to Troop T, Gibsonia, and by testifying on behalf of Trooper Moretti at an arbitration. Specification of charges ¶ 13. The PSTA alleges that the three day suspension "is disparate treatment meant to punish Kline for his past union advocacy" because the Commonwealth "has not issued suspensions for similar errors where other Troopers were involved." Specification of charges ¶ 9. As to the seven day suspension, the PSTA alleges that "[s]imilar actions by other Troopers have resulted in no disciplinary action." Specification of charges ¶ 10. Reiterating, the PSTA alleges that the Commonwealth "investigated and suspended Kline unfairly because of his prior union activity and current standing as PSTA station representative" and that both suspensions "are disparate and discriminatory penalties meant to punish Kline for his union representation." Specification of charges ¶ 14.

The PSTA has charged that the Commonwealth committed additional unfair labor practices by issuing a supervisor's notation to Corporal Kline on December 20, 2007, and by rating him "substandard" on his EPR for 2006-2007. Amended specification of charges ¶ 30; second amended specification of charges ¶ 25. According to the PSTA, the Commonwealth issued the supervisor's notation and rated him "substandard" on his EPR because he engaged in protected activity by "discussing members' complaints and grievances with PSP leadership." Amended specification of charges ¶ 29; second amended specification of charges ¶ 25. The PSTA alleges that the Commonwealth "retaliated against Kline for the airing of those complaints and challenging decisionmaking/authority." Id.

The PSTA has charged that the Commonwealth committed additional unfair labor practices by placing a matchbox car in Corporal Kline's mailbox in late January 2008 and by issuing a supervisor's notation to Corporal Kline on January 31, 2008. Second amended specification of charges ¶ 33. The PSTA alleges that the Commonwealth's "actions in this regard are part of a continuing pattern of harassment for Kline's having brought the unfair labor practice charges under the PLRA." Second amended specification of charges ¶ 32.

As set forth in its motion to dismiss, the Commonwealth contends that the charge as to the suspensions should be dismissed because the PSTA did not present a prima facie case during its case-in-chief. The Commonwealth contends that the charge as to the suspensions also should be dismissed because, in rebuttal to any prima facie case that the PSTA may have presented, it showed that it suspended Corporal Kline for legitimate business reasons.

The Commonwealth contends that the charge as to the first supervisor's notation and as to the EPR should be dismissed because it showed that it had legitimate business reasons for issuing the supervisor's notation and for rating Corporal Kline as it did.

The Commonwealth contends that the charge as to the placing of the matchbox car in Corporal Kline's mailbox and as to the second supervisor's notation should be dismissed because the placing of the car in his mailbox "can be interpreted as nothing more than an attempt at humor" (Brief at 24) and because it had a legitimate business reason for issuing the supervisor's notation.

An employer commits unfair labor practices under sections 6(1)(a) and 6(1)(c) by discriminating against an employee for having engaged in an activity protected by the PLRA as read in pari materia with Act 111. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004). Acting as a station representative for the PSTA is a protected activity. Commonwealth of Pennsylvania, PSP, 34 PPER 14 (Proposed Decision and Order 2003). So is the filing of a grievance. Id. Appearing as a witness at an arbitration is, too. Commonwealth of Pennsylvania, PSP, 36 PPER 121 (Final Order 2005).

In order to prove unfair labor practices under sections 6(1)(a) and 6(1)(c), the charging party must present during its case-in-chief a prima facie case that the employee engaged in protected activity, that the employer knew that the employee had done so and that the employer discriminated against the employee for having done so. Brentwood Borough, 35 PPER 112 (Final Order 2004), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992). The discriminatory motivation creates the offense. Id. Evidence introduced after the charging party presents its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case. Erie City School District, 39 PPER 8 (Final Order 2008). If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer shows that it would have taken the same action even if the employee had not engaged in the protected activity. Brentwood Borough, supra. A valid non-discriminatory reason for an employment action may rebut any inference that the employer was discriminatorily motivated. Duryea Borough Police Department, supra.

Any finding of an unfair labor practice must be supported by substantial evidence. Commonwealth of Pennsylvania, PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978). A statement reflecting anti-union animus on the part of an employer will support a finding that the employer discriminated against an employee for having engaged in protected activity. Brentwood Borough, supra. Close timing between the employee's protected activity and the employer's action coupled with the employer's disparate treatment of similarly situated employees will, too. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). So will close timing between the employee's protected activity and the employer's action coupled with an inadequate explanation for the employer's action. Lehigh Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005). Nor will the lack of just cause as an arbitrator might define the term. Bucks County Community College, 36 PPER 84 (Final Order 2005). Suspicion is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

An employer commits an unfair labor practice under section 6(1)(d) by discriminating against an employee for having filed a charge with the Board. City of Philadelphia, 38 PPER 184 (Final Order 2007). The analysis to be employed in disposing of a charge under section 6(1)(d) mirrors the analysis to be employed in disposing of a charge under section 6(1)(c). Id. Again, the discriminatory motivation creates the offense. Id.

In support of the charge as to the suspensions, the PSTA presented evidence during its case-in-chief that Corporal Kline was its station representative at Troop D, Beaver, in 2004 (finding of fact 2), was responsible as the PSTA's station representative for representing members of the bargaining unit at internal affairs interviews (finding of fact 2), filed a grievance resulting in his transfer to Troop T, Gibsonia, in January 2005 (finding of fact 3), appeared as a witness for Trooper Marotti at an arbitration in 2005 (finding of fact 4), became its station representative at Troop T, Gibsonia, in January 2007 (finding of fact 6), represented Trooper McClean at an internal affairs interview in early 2007 (finding of fact 7) and was suspended by the Commonwealth for

three days without pay and for seven days without pay on July 24, 2007 (findings of fact 14-15). The PSTA also presented evidence that Corporal Kline represented Corporal Thomas and Trooper Kline at internal affairs interviews in July 2008 (finding of fact 16). With the exception as to Corporal Kline's representation of Corporal Thomas and Trooper Rivera, the PSTA thereby established that he engaged in protected activity before the Commonwealth suspended him.

Notably, however, the PSTA did not establish that the Commonwealth knew that Corporal Kline was the PSTA's station representative at Troop D, Beaver, or at Troop T, Gibsonia.⁵ In Montour County, 35 PPER 147 (Final Order 2004), the Board found no basis for concluding that an employer committed unfair practices by discriminatorily discharging an employee where the employer did not know that the employee had engaged in protected activity. Moreover, Corporal Kline's appearance as a witness at the arbitration occurred in 2005, yet the Commonwealth did not suspend him until July 24, 2007. In Cameron County School District, 37 PPER 45 (Final Order 2006), the Board found no basis for concluding that an employer committed unfair practices by discriminatorily refusing to promote an employee who had engaged in protected activity where the employee had engaged in the protected activity two years before the employer refused to promote her. Furthermore, the PSTA did not establish that the Commonwealth treated Corporal Kline any differently from similarly situated employees. In Scott Township, 27 PPER ¶ 27206 (Final Order 1996), the Board found no basis for concluding that an employer committed unfair labor practices by furloughing a police officer for having engaged in protected activity where there was no showing that the employer treated him any differently from similarly situated employees. Thus, with respect to knowledge and motive, the PSTA did not present a prima facie case as to the suspensions. Accordingly, the Commonwealth's motion to dismiss the charge as to the suspensions must be granted.

Even if the PSTA had presented a prima facie case as to the suspensions, the result would be the same. In rebuttal to any prima facie case that the PSTA may have presented, the Commonwealth established that Corporal Kline engaged in the conduct for which it suspended him (findings of fact 8-9). Thus, it is apparent that the Commonwealth would have suspended him even if he had not been the PSTA's station representative at Troop D, Beaver, and at Troop T, Gibsonia, filed the grievance resulting in his assignment to Troop T, Gibsonia, or appeared as a witness at Trooper Marotti's arbitration. Accordingly, the charge as to the suspensions must be dismissed for that reason as well.

In support of the charge as to the first supervisor's notation and as to the EPR, the PSTA presented evidence during its case-in-chief that by the fall of 2007 Corporal Kline had referred to the PSTA's leadership complaints from troopers about the assignment of overtime and the use of leave at Troop T, Gibsonia (finding of fact 17), that the Commonwealth issued the supervisor's notation to him on December 20, 2007 (finding of fact 26) and that he received the EPR on January 2, 2008 (finding of fact 28). The PSTA thereby established that he engaged in protected activity before the Commonwealth issued the supervisor's notation and before he received the EPR. Notably, however, the PSTA did not establish that the Commonwealth knew that he had referred to the PSTA's leadership the complaints from the troopers. In Cameron County School District, *supra*, the Board found no basis for concluding that an employer knew that an employee engaged in protected activity by participating in the collective bargaining process where the employee's participation in the collective bargaining process occurred beyond the view of the employer. Thus, with respect to knowledge, the PSTA did not present a prima facie case as to the first supervisor's notation or as to the EPR. Accordingly, the charge as to the first supervisor's notation and as to the EPR must be dismissed.

The PSTA seemingly contends that the Commonwealth must have known that Corporal Kline referred to the PSTA's leadership the complaints from the troopers about the assignment of overtime and the use of leave at Troop T, Gibsonia. The PSTA points out

⁵ After the PSTA presented its case-in-chief, the station commander at Troop T, Gibsonia (Sergeant Key), testified that he knew, albeit indirectly, that Corporal Kline was the PSTA's station representative at Troop T, Gibsonia (N.T. 250-251). Because he testified after the PSTA presented its case-in-chief, however, his testimony may not be relied upon to find that the PSTA presented a prima facie case. See Erie City School District, *supra* (evidence introduced after the charging party presents its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case).

that by mid-December 2007 its leadership had presented those complaints to the PSP's leadership (findings of fact 18 and 23) and that on December 19, 2007, the PSP's leadership directed the station manager at Troop T, Gibsonia (Sergeant Key), to address the complaints (finding of fact 24). Suspicion, however, is not substantial evidence. Shive, supra. Thus, in Temple University, 23 PPER ¶ 23033 (Final Order 1992), the Board explained as follows:

"Absent specific knowledge of the individual complainants' union activities the mere general knowledge of union activity alone does not lead us to conclude the [employer's] underlying motive was to discriminate against employees for protected activity. 'Suspicion . . . cannot be substituted for evidence.' PLRB v. Sansom House Enterprise, 378 Pa. 385, 391, 106 A.2d 404, 408 (1954)."

23 PPER at 64. Moreover, under the small plant doctrine, the Board may infer that an employer was aware of an employee's protected activity where its plant is small, the employee is closely supervised and the employee engaged in protected activity in such a manner and at such times that the employer must have noticed, Montour County, supra, but the PSTA did not establish that the small plant doctrine applies on the facts of this case. There is, therefore, no basis for finding that the Commonwealth must have known that that Corporal Kline referred to the PSTA's leadership the complaints from the troopers about the assignment of overtime and the use of leave at Troop T, Gibsonia.

Even if the PSTA had presented a prima facie case as to the first supervisor's notation and as to the EPR, the result would be the same. In rebuttal to any prima facie case that the PSTA may have presented, the Commonwealth established through credible testimony by Sergeant Key that he issued the supervisor's notation because he thought that Corporal Kline had discussed a "personal issue" and "wasn't serving in the role as a supervisor" at a roll call (finding of fact 26).⁶ The Commonwealth also presented credible testimony by Sergeant Key that Corporal Kline's "union activities" played no part in his evaluation of Corporal Kline's performance (finding of fact 19). Thus, it is apparent that the Commonwealth would have issued the supervisor's notation to Corporal Kline and rated him as it did even if he had not engaged in protected activity by referring to the PSTA's leadership the complaints from the troopers. Accordingly, the charge as to the first supervisor's notation and as to the EPR must be dismissed for that reason as well.

The PSTA contends that Sergeant Key's testimony was not credible. According to the PSTA, Sergeant Key unconvincingly denied that in April 2007 he threatened to initiate an internal affairs investigation against Corporal Kline and Trooper Casselberry if Corporal Kline "FOP'd up" during the investigation of a complaint by a suspect who Corporal Kline and Trooper Casselberry had stopped (N.T. 258-259, 319-320). The PSTA also submits that Sergeant Key unconvincingly denied that on June 26, 2007, he threatened to eliminate overtime for Troop T, Gibsonia, if anyone tried to show their dissatisfaction with his assignment of overtime to a different Troop (N.T. 260-262, 320-321). In addition, the PSTA points out that by regulation an EPR is to be based on an employee's performance over the course of the entire rating period (finding of fact 20), that Sergeant Key focused on four discrete matters in evaluating Corporal Kline's job knowledge/skills as unsatisfactory (finding of fact 19) and that Corporal Kline had no problem with arrests and citations being overturned and had been writing more citations than others (finding of fact 22).

In making a credibility judgment, a hearing examiner is guided by a number of considerations. As a hearing examiner explained in Douglass Township, 34 PPER 131 (Proposed Decision and Order 2003):

"Credibility judgments are based upon a witness's appearance, general bearing, conduct on the stand, demeanor, manner of testifying (e.g. candor, frankness, clearness of statements), and certainty of the witness with respect to the facts. Ross Township, 23 PPER ¶ 23175 (Proposed Decision and Order, 1992)(citing In Re

⁶ The PSTA has not charged that the Commonwealth committed unfair labor practices by issuing the supervisor's notation to Corporal Kline because he complained about his overtime. Thus, whether or not he thereby engaged in protected activity is not before the Board. See Iroquois School District, supra (the Board only has jurisdiction to find the unfair practices charged).

Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949)). The demeanor of a witness is the touchstone of credibility. Robinson v. Robinson, 183 Pa. Super. 574, 133 A.2d 259 (1957). Additionally, the Board has stated that an examiner may simply choose to believe one witness over another without further explanation. Upper South Hampton Township, PLRB Case. No. PERA-C-90-60-E (Order Directing Remand to Hearing Examiner for Further Proceedings, 1991)(not reported in PPER)."

34 PPER at 402-403.

Sergeant Key unconvincingly denied that he threatened to initiate an internal affairs investigation of Corporal Kline and Trooper Casselberry if Corporal Kline "FOP'd up" during the investigation the complaint by the suspect who Corporal Kline and Trooper Casselberry had stopped. On cross-examination, Sergeant Key seemingly admitted that at an earlier arbitration he testified that he could "not recall" if he made the threat (N.T. 319). The inconsistency in his testimony casts doubt on his credibility on this point. Accordingly, it has been found as fact that he made the threat, as Corporal Kline testified (finding of fact 10).⁷

In light of Sergeant Key's unconvincing denial that he threatened to initiate an internal affairs investigation of Corporal Kline and Trooper Casselberry if Corporal Kline "FOP'd up" during the investigation the complaint by the suspect who Corporal Kline and Trooper Casselberry had stopped, it also has been found as fact that Sergeant Key threatened to eliminate overtime for Troop T, Gibsonia, if anyone tried to show their dissatisfaction with his assignment of overtime to a different Troop, as Corporal Kline testified (finding of fact 13).⁸

Sergeant Key plausibly testified, however, that he expected corporals to be front line supervisors responsible for ensuring that their subordinates adhered to existing policies (finding of fact 7) and that he issued the supervisor's notation because he thought that Corporal Kline had raised a "personal issue" and "wasn't serving in the role as a supervisor" at the roll call (N.T. 324). Sergeant Key also plausibly testified that he rated Corporal Kline without regard to Corporal Kline's "union activities" (N.T. 272). Notably, Corporal Kline's overall rating was satisfactory (finding of fact 19). Moreover, although the unsatisfactory rating for job knowledge/ skills may have been without just cause as an arbitrator might define the term in that Corporal Kline had no problem with arrests and citations being overturned and had been writing more citations than others (finding of fact 22), there is no dispute that he otherwise engaged in the behavior referenced by Sergeant Key in the EPR. No anti-union animus on the part of Sergeant Key is apparent under the circumstances. His testimony as to the supervisor's notation and as to the EPR has been credited accordingly.

In further support of the charge as to the EPR, the PSTA points out that Lieutenant McFadden testified that he concurred with the rating without knowing the exact number of arrests Corporal Kline had made or the exact number of warnings that he had issued (finding of fact 27). The PSTA also points out that the station commander at Troop T, New Stanton (Corporal DeMarco), testified that he threatened to arrest a PSTA attorney for trespass at an investigatory interview of Trooper Rivera on September 13, 2007 (N.T. 202-203). Lieutenant McFadden was only the reviewing officer, however, and testified without rebuttal that he was generally aware of the number of citations that Corporal Kline had issued (finding of fact 27). Furthermore, there is no apparent nexus between Corporal DeMarco's threat and Corporal Kline's EPR. Thus, neither Lieutenant McFadden's testimony nor Corporal DeMarco's testimony supports the charge.

In support of the charge as to the placing of the matchbox car in Corporal Kline's mailbox and as to the second supervisor's notation, the PSTA presented evidence during its case-in-chief that Sergeant Key placed the matchbox car in Corporal Kline's mailbox

⁷ The PSTA has not charged that Sergeant Key's threat constituted an unfair labor practice in and of itself, so whether or not the Commonwealth thereby committed unfair labor practices is not before the Board and will not be addressed. See Iroquois School District, supra (the Board only has jurisdiction to find the unfair practices charged).

⁸ See footnote 7.

on January 25, 2008 (finding of fact 29), and issued the supervisor's notation to him on January 31, 2008 (finding of fact 31). As a review of the procedural history should indicate, the Commonwealth was aware of the filing of the charge and the amended charge before Sergeant Key placed the matchbox car in Corporal Kline's mailbox and before Sergeant Key issued the supervisor's notation. Apart from the timing of events, however, Sergeant Key's placement of the matchbox car in Corporal Kline's mailbox seems to be unexceptional. Of course, standing alone, the timing of events will not support an inference of anti-union animus. Pennsylvania State Park Officers Association, supra. Thus, with respect to motive, the PSTA did not present a prima facie case as to the placing of the matchbox car in Corporal Kline's mailbox. Accordingly, the charge as to the placing of the matchbox car in Corporal Kline's mailbox must be dismissed.

Even if the PSTA had presented a prima facie case as to the placing of the matchbox car in Corporal Kline's mailbox, the result would be the same. In rebuttal to any prima facie case that the PSTA may have presented, the Commonwealth established through credible testimony by Sergeant Key that, without "put[ting] a great deal of thought into it," he placed the matchbox car in Corporal Kline's mailbox on the very day he assigned Corporal Kline as the VMO (finding of fact 27). Thus, it is apparent that he would have placed the matchbox car in Corporal Kline's mailbox even if the PSTA had not filed the charge or the amended charge. Accordingly, the charge as to the placing of the matchbox car in Corporal Kline's mailbox must be dismissed for that reason as well.

The PSTA contends that the placement of the matchbox car in Corporal Kline's mailbox has had a devastating impact on its ability to represent its members. In support of its contention, the PSTA presented testimony by its president (Sergeant Edwards) that the placement of the matchbox car in Corporal Kline's mailbox along with the placement of tissues from Sergeant Key's office in Corporal Kline's mailbox may have been a joke if perpetrated by a trooper but was belittling and intimidating given Sergeant Key's involvement and Corporal Key's status as the PSTA's station representative at Troop T, Gibsonia (N.T. 194). Given that Sergeant Key was not motivated by anti-union animus, however, the impact of his actions on the PSTA's ability to represent its members is irrelevant.

The PSTA did present a prima facie case as to the second supervisor's notation. The PSTA established that the supervisor's notation excoriated Corporal Kline for not having read an email about VMO assignments (finding of fact 31). The PSTA also established through testimony by Corporal Kline that he had read the email (N.T. 57). The PSTA thereby established an insubstantial explanation for the issuance of the supervisor's notation. Coupled with the timing of events, the insubstantial explanation for the issuance of the supervisor's notation supports a finding of a discriminatory motivation on the part of the Commonwealth.

The charge as to the second supervisor's notation nevertheless must be dismissed. In rebuttal to the PSTA's prima facie case, the Commonwealth presented credible testimony by Sergeant Key that he issued the supervisor's notation because he interpreted a January 28, 2008, email from Corporal Kline as indicating that Corporal Kline had not read the email about the VMO assignments (findings of fact 30-31). A close reading of Corporal Kline's email bears that out (finding of fact 30). In his email, Corporal Kline wrote that if Corporal "KRESS has been chosen for a specialized position, it would have been mere courtesy to at least send an email or tell all of the supervisors so that we are kept informed and are on the same page." Id. No anti-union animus on the part of Sergeant Key is apparent under the circumstances. His testimony has been credited accordingly. Thus, it is apparent that the Commonwealth would have issued the supervisor's notation to Corporal Kline even if the PSTA had not filed the charge and the amended charge on his behalf.

The PSTA contends that there was no basis for Sergeant Key to issue the supervisor's notation because Corporal Kline's email questioned why Trooper Kress had not been assigned to zones and because Sergeant Key never told Corporal Kline that the Trooper Kress was not to be assigned to zones (N.T. 57-58). Be that as it may, the fact remains that Sergeant Key's testimony that he issued the supervisor's notation because he interpreted Corporal Kline's email as indicating that he had not read Sergeant Key's email is borne out by the record. The PSTA's contention is, therefore, without merit.

CONCLUSIONS

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

1. The Commonwealth is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The PSTA is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has not committed unfair labor practices under sections 6(1)(a), 6(1)(c), 6(1)(d) and 6(1)(e) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge as twice amended is dismissed and the complaint as twice amended rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventeenth day of October 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner