

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE 2 E. B. JERMYN :
 :
 v. : Case No. PF-C-08-132-E
 :
 :
 CITY OF SCRANTON :

PROPOSED DECISION AND ORDER

On October 7, 2008, the Fraternal Order of Police E. B. Jermyn Lodge No. 2 (FOP) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the City of Scranton (City) violated section 6(1)(a) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by denying Officers Jill Foley and Melissa Forsette requested union representation at a meeting to investigate a grievance the FOP filed on their behalf, by demeaning the status of the FOP as their exclusive representative, by mocking and interrogating them regarding the grievance and by threatening them for their participation in the grievance.¹ On November 24, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 4, 2009, if conciliation did not resolve the charge by then. The hearing was held as scheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. By May 4, 2009, each party timely filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The FOP is the exclusive representative of a bargaining unit that includes police officers employed by the City. (Case No. PF-U-02-22-E)

2. On August 8, 2008, the FOP filed with the City's chief of police (David Elliott) a grievance "on behalf of Officers Melissa Forsette and Jill Foley as well as all other similarly-situated members of the bargaining unit regarding the City's establishment and maintenance of a hostile work environment for its female employees characterized by blatant sex discrimination and inappropriate conduct." The FOP specifically alleged that "in your capacity as Chief of Police and their supervisor you have referred to Officers Forsette and Foley as being 'whores' for requesting the same overtime work opportunities as their male counterparts." (N.T. 5, 55, 98, 121; Respondent Exhibit 1)

3. On August 12, 2008, the City's public safety director (Raymond T. Hayes) began investigating the grievance by meeting separately with Officers Foley and Forsette. Without naming names, Officers Foley and Forsette told him that other officers had been joking about Chief Elliott's reference to them as "whores." (N.T. 5-8, 36-40, 69-70, 76-77, 95, 99-100)

4. As Mr. Hayes investigated the grievance, he determined that Chief Elliott had referred to Officers Foley and Forsette as "whores." After Mr. Hayes discussed the matter with the City's mayor, the City disciplined Chief Elliott by suspending him for one week and directed him to make a public apology for having referred to Officers Foley and Forsette as "whores." (N.T. 101-102)

5. On August 15 or 16, 2008, Chief Elliott publicly apologized for having referred to Officers Foley and Forsette as "whores." (N.T. 70, 102-103)

¹ The FOP also filed the charge under sections 6(1)(c) and (e), but in its brief the FOP only contends that the City violated section 6(1)(a). A charge not presented to a hearing examiner is waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). Accordingly, the charge as filed under sections 6(1)(c) and (e) will not be addressed.

6. On August 19, 2008, the City's director of human resources (Lisa Moran) summoned Officers Foley and Forsette to a meeting with Mr. Hayes. Officer Foley informed Ms. Moran that the FOPS' president (Detective Sergeant Robert Martin) and the FOP's lawyer (Thomas Jennings) wanted to attend the meeting. Officer Forsette requested union representation because she did not know what was going to happen at the meeting and understood that the City had transferred Chief Elliott's secretary (Maura Pugliese) from his office to City Hall a few days after she related that he had referred to Officers Foley and Forsette as "whores." Officer Forsette also feared retaliation because Chief Elliott "probably was upset" about his public apology. Ms. Moran cancelled the meeting because Mr. Hayes was not able to attend it. (N.T. 8-9, 59-64, 81, 83, 141)

7. On August 26, 2008, Mr. Hayes summoned Officers Foley and Forsette to a meeting. He told them that President Martin and Mr. Jennings would not be allowed to attend. (N.T. 9-11, 41, 59-60, 64, 78, 135)

8. At the outset of the meeting, Mr. Hayes told Officers Foley and Forsette that he wanted to tell them of the outcome of his investigation of the grievance. He also told them that they were not entitled to union representation because they were victims and not the object of any disciplinary action. He then presented them with letters explaining that the City had disciplined Chief Elliott for having referred to them as "whores" and that the City was apologizing to them for Chief Elliott's reference to them as "whores." He next asked them to name the officers who they told him had been joking about Chief Elliott's reference to them as "whores." Officer Foley thereupon asked for union representation because she was nervous and did not know what might happen to her, including whether or not she would be terminated. Like Officer Forsette, she understood that the City had transferred Ms. Pugliese from Chief Elliott's office to City Hall a few days after she related that he referred to Officers Foley and Forsette as "whores." Mr. Hayes said three times that a nearby flag pole had more of a right to be there than the FOP's president or lawyer did. Officers Foley and Forsette told him that they were unable to provide the names of any officers who had joked about Chief Elliott's reference to them as "whores." Mr. Hayes asked them for names "numerous" more times to no avail, prompting Officer Forsette to say, "We're not lying to you." Pointing out that they were trained police officers, he said, "I'm not calling you liars. I just find it hard to believe that you can't give me a name of somebody who has made a comment about it." He also analogized his questioning of them to a time when somebody repeatedly asked him about his attendance at Yankee Stadium. He told them that "other officers in this department are using this situation to state that's a hostile work environment" and that "I have another grievance in front of me about a hostile work environment from another officer." Ms. Moran ended the meeting by telling them that a hostile work environment "can't be permitted," that the entire police department would have to undergo sensitivity training, that other officers might blame them for the training and that they were to report to her if any officer did. (N.T. 10-20, 22-24, 35-36, 41-50, 52-53, 57-67, 75-76, 79, 103-104, 107-117, 127-130, 134, 142; Respondent Exhibits 2-4)

DISCUSSION

The FOP has charged that the City committed unfair labor practices under section 6(1)(a) of the PLRA as read in pari materia with Act 111 (1) by denying Officers Foley and Forsette requested union representation at a meeting to investigate a grievance the FOP filed on their behalf, (2) by demeaning the status of the FOP as their exclusive representative, (3) by mocking and interrogating them regarding the grievance and (4) by threatening them for their participation in the grievance.

The City contends that the charge should be dismissed for lack of proof (1) that Officers Foley and Forsette were entitled to union representation at the meeting and (2) that its conduct was motivated by anti-union animus. According to the City, Officers Foley and Forsette were not entitled to union representation because the meeting was not an investigatory interview that they reasonably believed might result in the imposition of discipline against them.

As set forth in the specification of charges at ¶¶ 12 and 15, the FOP alleges that the City unlawfully denied Officers Foley and Forsette requested union representation because the meeting "was for the purpose of investigating the facts underlying the grievances and interrogating the grievants" and because their "requests for representation were based upon a reasonable belief that the answers to questions posed to them by the City might lead to the imposition of discipline."

No violation of section 6(1)(a) is apparent on the record, however, because the record does not show that Officers Foley and Forsette were entitled to union representation at the meeting.

Employees have the right to union representation upon request at an investigatory interview that they reasonably believe may result in the imposition of discipline against them. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007), citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). An employer commits an unfair labor practice under section 6(1)(a) if it conducts such an interview in the absence of requested union representation. City of Reading v. PLRB, 689 A.2d 990 (Pa. Cmwlth. 1997).

Employees, however, do not have the right to union representation at every meeting with their employer. AFSCME, Council 13 v. Commonwealth of Pennsylvania, PLRB, 514 A.2d 255 (Pa. Cmwlth 1986); Sayre Area School District, 36 PPER 54 (Final Order 2005). As the Board explained in Sayre Area School District, "it must have been an investigatory interview, i.e., the meeting must have been calculated to form the basis for taking disciplinary or other job affecting actions against [the employees] because of past misconduct." 36 PPER at 153.

Employees also do not have the right to union representation unless they reasonably believe that the investigatory interview might result in the imposition of discipline against them. Id.; Port Authority of Allegheny County, 22 PPER ¶ 22010 (Final Order 1990); Falls Township, 30 PPER ¶ 30001 (Proposed Decision and Order 1998). The reasonableness of their belief is to be measured by an objective standard. Id. As the Board explained in Port Authority of Allegheny County, "[f]ear of discipline must have a reasonable basis in fact and not merely be asserted as a device to obtain union representation to make employees more comfortable in unfamiliar or personally threatening settings." 22 PPER at 26.

The record shows that the City's public safety director (Mr. Hayes) and human resources director (Ms. Moran) met with Officers Foley and Forsette in the absence of requested union representation to explain the outcome of Mr. Hayes's investigation of a grievance the FOP filed on their behalf after the City's police chief (Chief Elliott) referred to them as "whores" and to ask them for the names of officers who had joked about Chief Elliott's reference to them as "whores" as they had related to Mr. Hayes without naming names during his investigation of the grievance (findings of fact 2, 6-8). The record also shows that Mr. Hayes explained to Officers Foley and Forsette at the outset of the meeting that they were not entitled to union representation because they were victims and not the object of any disciplinary action and that the City was apologizing to them for Chief Elliott's reference to them as "whores" (finding of fact 8). The record further shows that Officers Foley and Forsette nevertheless believed that the meeting might result in the imposition of discipline against them. Id.

A close review of the record does not show that the meeting was an investigatory interview that Officers Foley and Forsette reasonably believed might result in the imposition of discipline against them. Noticeably absent from the record is any evidence that the meeting was calculated to form the basis for taking any action against them because of past misconduct on their part. Also noticeably absent from the record is evidence that their belief that the meeting might result in the imposition of discipline against them was reasonable. Thus, they were not entitled to union representation at the meeting.

The FOP contends that the meeting was an investigatory interview because Mr. Hayes "believed the officers' grievance to be frivolous and he sought to discipline the officers for initiating bogus claims." Brief at 12. In support of its contention, the FOP points out

that Mr. Hayes asked Officers Foley and Forsette questions "regarding an unresolved portion of the grievance - the hostile work environment allegation." Id. The FOP also submits that Mr. Hayes questioned them in a "demeaning and condescending manner." Id. The FOP further submits that "[t]he questioning and the meeting in general undeniably took on a disciplinary tone" because "the officers even pleaded that they were not lying to him." Brief at 13. Thus, according to the FOP, "Hayes used both blatant militant techniques and passive aggressive behavior in an attempt to power-play these officers, find a means to frame their claims as bogus, and discipline them for initiating such claims." Id.

The record shows, however, that before the meeting even occurred Mr. Hayes determined that Chief Elliott had referred to Officers Foley and Forsette as "whores" as the FOP alleged in the grievance (findings of fact 2 and 4). The record also shows that without naming names Officers Foley and Forsette had previously informed Mr. Hayes that other officers had joked about Chief Elliott's reference to them as "whores" (finding of fact 3) and that his questions of them were to find out the names of those other officers (finding of fact 8). Thus, his questioning of them appears to be nothing more than a natural follow-up on his part. Whatever his manner, then, his questioning of them provides no basis for finding that the meeting was an investigatory interview because he thought the grievance was frivolous and sought to discipline Officers Foley and Forsette for filing a bogus claim. See Sayre Area School District, supra (an employee's fear that the employer "might be laying some kind of trap" does not transform a meeting into an investigatory interview).

The FOP contends that Officers Foley's and Forsette's belief that the meeting might result in the imposition of discipline against them was reasonable because they understood that the City disciplined another employe (Ms. Pugliese) shortly before the meeting, because labor relations between the parties have been strained for years and were particularly strained at the time of the meeting, creating a "general 'mistrust' of management," because Mr. Hayes "tyrannical and obnoxious behavior" at the meeting "exacerbated this fear and mistrust" and because Mr. Hayes did not specifically say that they would not be disciplined. Brief at 13.

As noted above, however, the record shows that Mr. Hayes explained to Officers Foley and Forsette that they were not entitled to union representation because they were victims and not the object of any disciplinary action. The record also shows that Officer Foley testified that Mr. Hayes said that she "would not be the subject of any potential discipline (N.T. 43).

On a substantially similar record in Port Authority of Allegheny County, supra, the Board found that an employe did not have a reasonable basis for believing that a meeting might result in the imposition of discipline against her. In that case, the meeting was to investigate her complaint that her supervisor had sexually harassed her. According to the charging party, the employe reasonably believed that the meeting might result in the imposition of discipline against her because the employer could discipline employes for filing false complaints of sexual harassment. The Board, however, noting that the record did not show that the employer had viewed her complaint as false, explained that her fear of discipline was not reasonable under the circumstances.

The same result obtains on the facts of record here. See also Sayre Area School District, supra, (an employe had no reasonable basis for believing that a meeting might result in the imposition of discipline against her where the employer assured her that the meeting was not disciplinary in nature).

II

As set forth in the specification of charges at ¶ 14, the FOP alleges that the City demeaned the status of the FOP "by ranting at least three times that a flag pole . . . had more of a right to be present during the interrogation than the Lodge and the Lodge's counsel."

An employer commits an unfair labor practice under section 6(1)(a) if it engages in conduct that under the totality of circumstances would have a tendency to coerce reasonable employes in the exercise of a protected right. City of Scranton, 38 PPER 104

(Final Order 2007). Under section 1 of Act 111, employees have the right to be represented by a labor organization of their own free choice. Commonwealth of Pennsylvania, Pennsylvania State Police, 39 PPER 145 (Proposed Decision and Order 2008). Demeaning the status of a labor organization has a tendency to coerce reasonable employees in the exercise of their right to be represented by a labor organization of their own free choice. Commonwealth of Pennsylvania, Department of Military Affairs, 35 PPER 94 (Proposed Decision and Order 2004).

The record shows that when Mr. Hayes met with Officers Foley and Forsette he responded to a request by Officer Foley for union representation by saying three times that a nearby flag pole had more of a right to be there than the FOP's president or lawyer did (finding of fact 8).

Mr. Hayes's repetitive response suggests to reasonable employees that the FOP is no better able to represent them than an inert object is and thus is demeaning to the status of the FOP as their exclusive representative. It is apparent, then, that the City engaged in conduct that under the totality of circumstances would tend to coerce reasonable employees in the exercise of their right to be represented by a labor organization of their own free choice and thereby committed an unfair labor practice under section 6(1)(a).²

The City contends that the charge should be dismissed because Mr. Hayes was not motivated by anti-union animus, but anti-union animus is not a necessary element for finding a violation of section 6(1)(a). City of Scranton, supra.

III

As set forth in the specification of charges at ¶ 16, the FOP alleges that the City "proceeded to mock and interrogate Officer Forsette and Officer Foley for over an hour regarding the grievance they had filed pertaining to Chief Elliott's comments."

As noted above, an employer commits an unfair labor practice under section 6(1)(a) if it engages in conduct that under the totality of circumstances would have a tendency to coerce reasonable employees in the exercise of a protected activity. City of Scranton, supra. The filing of a grievance is a protected activity. Commonwealth of Pennsylvania, Pennsylvania State Police, supra. No violation of section 6(1)(a) is apparent on the record, however, because the record does not show that that the City engaged in conduct that under the totality of circumstances would tend to coerce reasonable employees in the exercise of their right to file a grievance.

The record shows that during Mr. Hayes's investigation of the grievance Officers Foley and Forsette without naming names told him that other officers had joked about Chief Elliott's comment (finding of fact 3). The record also shows that Mr. Hayes asked Officers Foley and Forsette "numerous" times for the names of the officers who they said had joked about Chief Elliott's comment, that his repetitive questioning prompted Officer Forsette to say, "We're not lying to you," that he said, "I'm not calling you liars. I just find it hard to believe that you can't give me a name of somebody who has made a comment about it," that he pointed out that they were trained police officers and that he analogized his questioning of them to a time when somebody repeatedly asked him about his attendance at Yankee Stadium (finding of fact 8).

² In its brief, the FOP contends that the City also demeaned the status of the FOP on three other occasions: (1) before the meeting even began when Mr. Hayes told Officer Foley that "there are no lawyers and no Sergeant Martin [the FOP's president] allowed" (N.T. 11) without explaining why, (2) at a later stage of the meeting when Mr. Hayes told Officers Foley and Forsette that they are employees, he is the employer and he could talk to them whenever he wanted to talk to them (N.T. 26) and (3) at a later stage of the meeting when Officers Foley and Forsette were unable to provide Mr. Hayes with the names of employees who had joked about Chief Elliott's reference to them as "whores" and Mr. Hayes said that the FOP "is the one that put [their] names out there," "use[d] the word pervasiveness" and "held the press conference" (N.T. 19). Brief at 18-19.

A close review of the charge, however, does not show that the FOP alleged that the City thereby committed unfair labor practices. The Board, of course, only has jurisdiction to find the unfair labor practices alleged in a charge. Iroquois School District, 37 PPER 167 (Final Order 2006); Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974)(same). Thus, whether or not the City otherwise demeaned the status of the FOP will not be addressed.

The FOP contends that "the totality of the City's behavior at the August 26, 2008 meeting would have a tendency to dissuade the officers and other bargaining unit members from exercising their right to file grievances" because Mr. Hayes "treated the officers like they were dirt on his shoes." Brief at 20. According to the FOP, he "exhibit[ed] anger and us[ed] a sarcastic tone," "repeatedly demanded answers to his questions even though the officers unequivocally indicated that they did not know the answers," "proceeded to belittle the officers with sarcastic analogies and further interrogation" and "invoked a tyrannical presence both verbally and through body language." Id. In the FOP's view, "[c]ertainly this type of atmosphere would have the tendency to coerce employees and prevent them from filing grievances out of fear of barbaric treatment." Id.

Notably, however, the record shows that Mr. Hayes told Officers Foley and Forsette that he was not calling them liars. Moreover, given that Officers Foley and Forsette previously told him that other officers had joked about Chief Elliott's comment and that Officers Foley and Forsette are trained police officers, it is apparent that no matter how characterized his expression of disbelief at their inability to answer his questions was unexceptional under the circumstances. Thus, there is no basis for finding that the City engaged in conduct that under the totality of circumstances would tend to coerce reasonable employees in the exercise of their right to file a grievance.

IV

As set forth in the specification of charges at ¶¶ 17-19, the FOP alleges that the City threatened Officers Foley and Forsette by "blam[ing them] for another grievance that was filed by [a] female police officer, who also alleged a hostile work environment based on gender," by "stating that because of their conduct, male officers in the Department will be receiving training" and by indicating that "the male police officers will be mad that that they have to receive training, will know that the training is because of them [Forsette and Foley], and will retaliate against them."

As noted above, an employer commits an unfair labor practice under section 6(1)(a) if it engages in conduct that under the totality of circumstances would have a tendency to coerce reasonable employees in the exercise of a protected activity. City of Scranton, supra. As also noted above, the filing of a grievance is a protected activity. Commonwealth of Pennsylvania, Pennsylvania State Police, supra. No violation of section 6(1)(a) is apparent on the record, however, because the record does not show that that the City engaged in conduct that under the totality of circumstances would tend to coerce reasonable employees in the exercise of their right to file a grievance.

The record shows that Mr. Hayes told Officers Foley and Forsette that "other officers in this department are using this situation to state that's a hostile work environment" and that "I have another grievance in front of me about a hostile work environment from another officer" (finding of fact 8). The record also shows that Ms. Moran told them that a hostile work environment "can't be permitted," that the entire police department would have to undergo sensitivity training, that other officers might blame them for the training and that they were to report to her if any officer did. Id.

The FOP contends that "Hayes' and Moran's comments would have a tendency to cause the officers to consider withdrawing their outstanding grievances." Brief at 20. In the FOP's view, "Moran's threat could not have been more blatant in stating that other officers (mostly males) will not like that they have to attend training and will retaliate against them." Id. Notably, however, Ms. Moran told Officers Foley and Forsette that a hostile work environment "can't be permitted." Ms. Moran also told them to report to her if any officer blamed them for the sensitivity training they were to have. It is apparent, then, that Mr. Hayes and Ms. Moran were not threatening Officers Foley and Forsette but rather were apprising them of the steps the City would be taking to eliminate a hostile work environment for them. Thus, there is no basis for finding that the City engaged in conduct that under the totality of circumstances would tend to coerce reasonable employees to consider withdrawing their outstanding grievances.

CONCLUSIONS

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

1. The City is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.

2. The FOP 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 City has committed an unfair labor practice under section 6(1)(a) 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 City shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA as read in pari materia with Act 111.

2. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PLRA as read in pari materia with Act 111:

(a) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

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 fourth day of June 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner