

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :  
ASSOCIATION :  
:  
v. : Case No. PF-C-08-154-E  
:  
COMMONWEALTH OF PENNSYLVANIA :  
PENNSYLVANIA STATE POLICE :

**PROPOSED DECISION AND ORDER**

On December 8, 2008, the Pennsylvania State Troopers Association (PSTA or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania, Pennsylvania State Police (PSP or Respondent) violated Sections 6(1)(a),(b) and (c) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by initiating a Bureau of Integrity and Professional Standards (BIPS) investigation against Corporal Gerald Williams for his exercise of protected activity.

On January 9, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held on March 30, 2009, in Harrisburg, Pennsylvania. The hearing was continued at the request of the Respondent over the objection of the Complainant, to April 29, 2009. At that time, both parties in interest were afforded an opportunity to present testimony and documentary evidence and cross-examine witnesses. Both parties subsequently filed post-hearing briefs; July 9 for the Complainant and July 31 for the Respondent.

The examiner, based upon all matters of record, makes the following findings of fact:

**FINDINGS OF FACT**

1. The Commonwealth of Pennsylvania, Pennsylvania State Police (PSP), is an employer within the meaning of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968.
2. The Pennsylvania State Troopers Association (PSTA), is a labor organization within the meaning of the Pennsylvania Labor Relations Act (PLRA) and Act 111.
3. The PSP and the PSTA were parties to a collective bargaining agreement which expired on June 30, 2008. (N.T. 6, 7, Joint Exhibit 1)
4. Unable to negotiate a successor agreement, the parties proceeded to binding interest arbitration under Act 111. The hearings covered at least nine days in 2008. (N.T. 7, 164-172, Joint Exhibit 2)
5. One interest arbitration proposal of the PSTA concerned creditable leave for union officials and salaries of union officials. This proposal caused numerous e-mails to be circulated among PSTA members criticizing the proposals. (N.T. 167-168)
6. Corporal Gerald Williams is an eighteen year veteran of the PSP working as a criminal investigator assigned to Troop P, Wyoming and is a member of PSTA. (N.T. 164-165)
7. Within the PSTA, Cpl. Williams is a member of the contract Negotiation Committee, the Finance Committee and the Field regulations Committee and is the Vice President of a subordinate Fraternal Order of Police Lodge No. 43. (N.T. 164-165)
8. As a result of the controversial nature of the contract proposals, numerous questions were addressed to Cpl. Williams in his capacity as a PSTA official. (N.T. 168-169)

9. Those questions came via Commonwealth e-mail and via telephone calls. (N.T. 168-169)

10. On September 10, 2008, while off-duty and from his home computer, Corporal Williams accessed his PSP e-mail account and responded to one of the contract proposal inquiries. In an email to Sergeant Jeffrey Balut, Corporal Williams defended the contract proposals and the PSTA leadership. He also criticized the PSP leadership. In relevant part, Corporal Williams wrote,

Quite frankly, I believe [PSTA President] Bruce [Edwards] and [PSA Vice President] Joe [Sarkis] have the best interest in our people more than any major or captain on this job!

The department is screwing the members all the time and grievances are coming in at the rate of 25 to 30 a month! Our money is being spent mostly to defend our members from the unfair discipline that is being handed out by this administration and the unfair treatment of our members by the classless, good-ole boy network of commissioned officers.

Feel free to send my comments to whomever you see fit, including commissioned officers. You know that I am not a person to hide my opinions or beliefs to anyone. You asked and you got it straight. I really do appreciate your comments and concerns. Jer.

(N.T. 11, 170-71, 216, Association Exhibit 1, pp. 2-3)

11. Later that evening, still while off-duty and from his home computer, Corporal Williams wrote a second e-mail to Corporal Thomas Wall, addressing the contract proposals. In the second e-mail, Corporal Williams wrote, in relevant part,

I stand by [PSTA President] Bruce [Edwards] and [PSTA Vice President] Joe [Sarkis] 100 percent. I know their loyalty stands with the members. I can't say that about some other department members. I trust [PSTA President] Bruce [Edwards] and [PSTA Vice President] Joe [Sarkis] more than any other officer. My loyalty is with them. I know first hand what they do for us unlike some of the people that are circulating this misinformation to suit their own agendas. Jer.

(N.T. 171-172, Association Exhibit 1)

12. That Williams' e-mails to Balut and Wall were circulated to other members of the PSP, including numerous commissioned officers. (N.T. 12, 53, 89, 106, 122)

13. Lieutenant Colonel John Brown, the PSP's Deputy Commissioner of Administration and Professional Responsibility, eventually received Williams' e-mails from Internal Affairs. (N.T. 89)

14. That upon reading the emails, Lt. Col. Brown believed that Williams may have violated PSP regulations. (N.T. 91-92, Association Exhibit 1)

15. On October 6, 2008, Brown filed the complaint with the PSP's Bureau of Integrity and Professional Standards (BIPS). The complaint stated, in relevant part, that Williams made "disparaging remarks towards the Department and its command staff-at one point in reference to the command [Williams] refers to them as 'classless, good-ole boy network' of commissioned officers." (N.T. 92, 135, Association Exhibit 1, p. 1)

16. On or about November 6, 2008, Captain Donald Peters, Cpl. Williams' Troop Commander at the time, notified Cpl. Williams that he was the subject of a BIPS internal affairs investigation (IAD #2008-0723) as a result of his two September 10, 2008, e-mails. (N.T. 64, 175-76)

17. An internal affairs investigation is the initial step in the formal PSP disciplinary process which can lead to discipline up to and including termination. (N.T. 185-187)

## DISCUSSION

The PSTA's charge of unfair labor practices alleges that the Pennsylvania State Police violated the PLRA when Captain Donald Peters, Commander of Troop P, notified Corporal Gerald Williams, a member of its contract negotiating team, that he was subject of an internal affairs investigation as a result of two September 10, 2008 e-mails. Captain Peters' involvement in the matter followed Lt. Col John Brown, Deputy Commissioner for Professional Responsibility, sending a complaint to the Bureau of Integrity and Professional Standards (BIPS) that Williams' e-mails included "disparaging remarks towards the Department and its command staff." An internal affairs investigation is the initial step in the formal PSP disciplinary process which can lead to discipline up to and including termination.

The first allegation to address is the charge that PSP violated Section 6(1)(c) of the PLRA. An employer commits an unfair labor practice within the meaning of Section 6(1)(c) if it discriminates against an employe because the employe engaged in activity protected by the PLRA. Camp Hill Borough, 16 PPER ¶ 16054 (Final Order 1986), aff'd, Camp Hill Borough v. PLRB, 507 A.2d 1297 (Pa. Cmwlth. 1986). In order to prove discrimination, the complainant must show that the employe engaged in activity protected by the PLRA, that the employer had knowledge of that protected activity, and that the employer took adverse action against the employe because of the protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977); Camp Hill Borough, supra. The complainant has the burden of proving such a charge by substantial evidence. St. Joseph's Hospital, supra. Substantial evidence requires more than a mere suspicion of the existence of the fact. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

The dispositive issue in this charge is whether the PSTA proved the first element, that Corporal Williams was engaged in protected activity when he sent the two e-mails. The two e-mails triggered the BIPS investigation, which began at PSP's Deputy Commissioner level from Lt. Col. Brown. Therefore, the other two elements, employer knowledge and employer motive are not at issue.

The PSTA asserts that the two e-mails were examples of speech that is protected by the PLRA because they were sent by Corporal Williams in his capacity as a member of the negotiating team in answer to the questions he had been receiving concerning the ongoing dispute over a successor collective bargaining agreement.

The PSP, however, argues that the language in the e-mails is not protected activity because its content was "disparaging," in the words of Lt. Col. Brown's complaint. The PSP asserts that in a para-military organization such as the Pennsylvania State Police, Cpl. Williams' e-mails can not be tolerated and should not be given the same status of protected speech that labor law gives to non-uniformed employes.

Where the employer contends that the contents of a union representative's speech is not protected, the Board has held that criticism of the employer will lose that protection only if it is "offensive, defamatory, or opprobrious," and not if it is merely "intemperate, inflammatory or insulting." Washington County, 23 PPER ¶ 23040 (Proposed Decision and Order, 1992), 23 PPER ¶ 23073 (Final Order, 1992)

After reviewing the language of the two e-mails at issue in the light of Board precedent, the PSP, by Lt. Col. Brown, acted improperly in initiating the BIPS investigation against Williams for those e-mails. It is important to consider the context in which the e-mails were sent, a reply from a negotiating team member to a PSTA member in the middle of the Act 111 submission. In this context, the e-mails did not cross the line set forth above. The content was not "offensive, defamatory or opprobrious." The language was critical of management in general, not of a particular supervisor or manager. The e-mails discussed management's position regarding the Act 111 proposals, not management's performance of police duties, a distinction that the BIPS investigation complaint failed to recognize.

Even recognizing that the PSP is a para-military organization, where there may be different expectations regarding staff relations with commanders which would result in a different definition of protected speech, the particular statements in these e-mails

should not have subjected this PSTA negotiating team member to investigation or discipline. Lt. Col. Brown should have been able to differentiate speech made in the heat of Act 111 interest arbitration proceedings from speech made in the course of performing law enforcement duties during working hours. This off-duty speech, to which the public was not privy, is distinguishable from the speech at issue in PSCOA v. Commonwealth of Pennsylvania, DOC, Fayette SCI, 40 PPER ¶ 70 (Proposed Decision and Order, 2009) where Hearing Examiner Jack Marino found that the Captain at Fayette SCI did not illegally coerce a correctional sergeant when he instructed the sergeant to stop openly mocking him in the presence of inmates. Therefore, it must be concluded that these e-mails were a form of protected speech.

There is no dispute that the other two elements of proving a Section 6(1)(c) discrimination charge are present here: employer knowledge of the protected activity and employer action against the employee because of the protected activity. Because the PSTA has proven all three elements, it has satisfied its burden of proving a Section 6(1)c violation.

The next part of the charge to address is the allegation that the PSP has committed both an independent and derivative violation of Section 6(1)(a) of the PLRA by its conduct in this matter. Section 6(1)(a) of the PLRA makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in this Act." A 6(1)(a) violation may be either independent or derivative. McMahon v. Springfield Township, 28 PPER ¶ 28164 (Final Order, 1997). A derivative violation of Section 6(1)(a) occurs when any of the other Sections of 6(1) is violated. An independent violation of Section 6(1)(a) will be found when an employer has taken an action which, in light of all of the circumstances, tends to be coercive of the free exercise of employee rights, whether or not employees were shown in fact to be coerced. McMahon v. Springfield Township, supra.

The PSTA has demonstrated that the PSP has committed both a derivative and an independent violation of Section 6(1)(a) of the PLRA. The finding of a Section 6(1)(c) violation leads to finding a derivative violation of Section 6(1)(a) of the PLRA. Additionally, the PSP action against Cpl. Williams must be viewed as an independent violation of Section 6(1)(a) because it was coercive of the free exercise of protected rights.

Finally, the PSTA has also charged the Commonwealth with violating Section 6(1)(b) of the PLRA based on an alleged "pattern of conduct designed to compromise the ability of the PSTA to function as a labor organization." (PSTA brief at 9). The PSTA contends that the PSP has attempted to prohibit protected union activities at the work site by subjecting union officials to internal affairs investigations and discipline for engaging in protected activity.

Section 6(1)(b) of the PLRA, like Section 1201(a)(2) of PERA, prohibits an employer from dominating or interfering with a union to the point where the union can be deemed a "company union." PLRB v. Commonwealth (Department of Educ.), 14 PPER ¶ 14069 (Proposed Decision and Order, 1983), 14 PPER ¶ 14135 (Final Order, 1983). The PLRB will find an employer in violation of Section 6(1)(b) of the PLRA if the employer compromises the integrity of a labor organization to the point it is no longer independent of the employer. Port Vue Borough, 30 PPER ¶ 30189 (Proposed Decision and Order, 1999). To prove such a violation, the union must show that the employer is interfering or dominating the union by placing managerial employees in the hierarchy of the union or by providing financial or other aid to the union to the point that it is employer controlled and no longer represents the wishes of the bargaining unit. Pennsylvania Department of Labor and Industry, 15 PPER ¶ 15025 (Final Order, 1984).

The PSTA presented no evidence that the PSP provided financial aid or any assistance to the PSTA. Nor did the PSTA present evidence that the PSP placed, or attempted to place, any member of management in the PSTA's hierarchy. Indeed, as the evidence shows, everyone who testified in this case, with the exception of Deputy Commissioner Brown, is a member of the bargaining unit represented by the PSTA. The PSTA represented bargaining unit includes all members of the PSP up to, and including, those with the rank of major. There is no evidence that Lt. Col. Brown, or any of the other deputy commissioners, is somehow involved in the PSTA. Accordingly, the Commonwealth has not engaged in unfair labor practices in violation of Section 6(1)(b) of the PLRA.

## 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 of Pennsylvania, Pennsylvania State Police, is an employer within the meaning of Section 3(c) the PLRA.
2. The PSTA is a labor organization within the meaning of Section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth of Pennsylvania, Pennsylvania State Police, has committed unfair labor practices within the meaning of Section 6(1)(a) and (c) of the PLRA.
5. The Commonwealth of Pennsylvania, Pennsylvania State Police, has not committed unfair labor practices within the meaning of Section 6(1)(b) of the PLRA.

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the hearing examiner

### HEREBY ORDERS AND DIRECTS

that the Commonwealth of Pennsylvania shall

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA.
2. Cease and desist from discriminating against employees to encourage or discourage membership in any labor organization;
3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:
  - (a) Rescind the notice of the BIPS investigation into Corporal Gerald Williams' two September 10, 2008 e-mails (IAD No. 2008-0723);
  - (b) Expunge any references to this investigation and IAD 2008-0723 from Corporal Gerald Williams' personnel records;
  - (c) Make Corporal Williams whole for any loss of pay and benefits from the BIPS investigation;
  - (d) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days; and
  - (e) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and 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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventeenth day of November, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

---

Thomas P. Leonard, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :  
ASSOCIATION :  
v. : Case No. PF-C-08-154-E  
COMMONWEALTH OF PENNSYLVANIA :  
PENNSYLVANIA STATE POLICE :

**AFFIDAVIT OF COMPLIANCE**

The Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth) hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act; that it has rescinded the notice of the BIPS investigation into Corporal Gerald Williams' two September 10, 2008 e-mails (IAD No. 2008-0723); that it has expungee any reference to the BIPS investigation and IAD 2008-0723 from Corporal Gerald Williams' personnel records; that it has made Corporal Williams whole for any loss of pay and benefits resulting from the investigation; that it has posted a copy of the proposed decision and order in the manner prescribed therein; and that it has served a copy of this affidavit on the PSTA at its principal place of business.

---

Signature/Date

---

Title

SWORN AND SUBSCRIBED TO before me  
the day and year first aforesaid.

---

Signature of Notary Public