

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :  
 :  
 v. : Case No. PF-C-08-95-E  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 PENNSYLVANIA STATE POLICE :

**DECISION AND ORDER**

On July 24, 2008, 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) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by interfering with Lieutenant Rodney O. Witherite in the exercise of his duties as a station representative for the PSTA and by discriminating against him for being a station representative for the PSTA. On August 11, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing on the charge be held on October 29, 2008. The hearing examiner subsequently continued the hearing upon the request of both parties to afford them additional time for settlement discussions.

On October 15, 2008, the PSTA requested from the Board a subpoena duces tecum commanding the Commonwealth to provide, among other things, "[a]ny and all investigative reports and adjudications related to IAD No. 2008-0267," "[a]ny and all investigative reports and adjudications related to Major Jack Duignan's sexual relationship with a Commonwealth employee," "[a]ny and all electronic communications sent or received by Lieutenant Colonel Rick Brown, Captain James Murtin, Captain M.L. Henry, Captain Tom Oliphant, Lt. Stephen Balar and Sgt. Daniel Gentile on or after April 1, 2008 relating to Lt. Rod Witherite" and "[a]ny and all electronic communications sent or received by Major Jack Duignan on or after January 1, 2007 relating to Lt. Rod Witherite." The Board issued the subpoena duces tecum as requested.

On November 17, 2008, the PSTA filed an amended charge alleging that the Commonwealth committed additional unfair labor practices under sections 6(1)(a) and (c) by further interfering with Lieutenant Witherite in the exercise of his duties as a station representative for the PSTA and by discriminating against him for being a station representative for the PSTA. On December 12, 2009, the Secretary issued an amended complaint and notice of hearing directing that a hearing on the charge as amended be held on March 10, 2009. The hearing examiner subsequently continued the hearing upon the request of the PSTA and without objection by the Commonwealth.

On September 23, 2009, the hearing was held. At the outset of the hearing, the PSTA represented that the Commonwealth had provided it with a redacted copy of a report related to the investigation at IAD No. 2008-0267 but had not provided it with an investigative report involving Major Duignan (EE00-61-2006) or with emails referenced in the subpoena ducus tecum (N.T. 3-4). The PSTA requested enforcement of the subpoena duces tecum as to the redacted portions of the report related to the investigation at IAD No. 2008-0267 (N.T. 4). The Commonwealth moved to quash the subpoena duces tecum as to the redacted portions of the report related to the investigation at IAD No. 2008-0267 on relevancy grounds (N.T. 4-5). The parties agreed that the hearing examiner could review the redacted portions of the internal affairs report at IAD No. 2008-0267 in camera to determine relevancy (N.T. 6). They also agreed to attempt to narrow their differences as to the subpoena duces tecum as to the investigative report involving Major Duignan (EE00-61-2006) and as to the emails (N.T. 6-7). The hearing examiner scheduled a follow-up pre-hearing conference.

On October 9, 2009, the pre-hearing conference was held. The PSTA sought enforcement of the subpoena duces tecum for the investigative report involving Major Duignan (EE00-61-2006) (N.T. 5-6). The Commonwealth moved to quash the subpoena duces tecum as to the report on relevancy grounds (N.T. 7-8). The parties agreed that the hearing examiner could review the report in camera to determine relevancy (N.T. 9). The PSTA also sought enforcement of

the subpoena duces tecum for the emails from April 1, 2008, through November 17, 2009, and from January 1, 2007, through November 17, 2009 (N.T. 10-11). The Commonwealth provided some of the emails but moved to dismiss the subpoena duces tecum as to the rest of them under the deliberative process privilege and the attorney-client privilege (N.T. 11). The parties agreed that the hearing examiner could review the rest of the emails in camera to determine if the deliberative process privilege or the attorney-client privilege applies (N.T. 9). They also agreed to file briefs. On October 23, 2009, the Commonwealth filed a brief.<sup>1</sup> On October 30, 2009, the PSTA filed a brief.

In UGSOA, 35 PPER 53 (Final Order 2004), the Board explained the law regarding the enforceability of subpoenas as follows:

"In PHRC v. Lansdowne Swim Club, 515 Pa. 1, 526 A.2d 758 (1987), our Supreme Court stated that a party must satisfy the following three-part conjunctive standard to demonstrate the enforceability of an administrative subpoena: (1) the inquiry is within the authority of the agency, (2) the demand is not too indefinite; and (3) the information sought is reasonably relevant. See also, Lunderstadt v. Pennsylvania House of Representatives Select Comm., 513 Pa. 236, 519 A.2d 408 (1986). In York v. Public Utility Comm'n, 281 A.2d 261 (Pa. Cmwlth. 1971), the Commonwealth Court affirmed the Commission's denial of subpoenas duces tecum requesting a mass of papers to be supplied for the purpose of gathering evidence. Quoting from Supreme Court, the York Court stated that "[a]nything in the nature of a mere fishing expedition is not to be encouraged." Id. at 278 (quoting American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 535, 70 A. 867, 869 (1908)).

The National Labor Relations Board (NLRB) observes a similar policy in its administration of the National Labor Relations Act (NLRA). Section 102.66(c) of the NLRB's Rules and Regulations provides that "the regional director or hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." 29 C.F.R. § 102.66(c). Moreover, pursuant to these rules and regulations, the NLRB has employed an "unduly burdensome" standard. Groton Piping Corp., 246 N.L.R.B. 99 (1979)."

35 PPER at 166.

The PSTA's request to enforce the subpoena duces tecum as to the redacted portions of the report related to the investigation at IAD No. 2008-0267 must be denied. The investigation involves an allegation of improper conduct by Major Duignan. According to the PSTA, the redacted portions of the report "are relevant because the PSP went to unusual lengths of making Lt. Witherite a subject of an internal investigation when it was alleged another member, Major Duignan, had requested that members of the State Police make inappropriate criminal record inquiries of men that were associating with his estranged/ex-wife" (Brief at 4-5). The PSTA further submits that the redacted portions of the report will allow it "to make a determination as to what information was revealed which led the PSP to make Lieutenant Witherite a subject of the investigation," "to determine what specific allegations were made against Lieutenant Witherite and by whom" and "to determine what, if any, discipline was imposed upon other members of the PSP" (Brief at 5). A close review of the report does not show that Lieutenant Witherite was a subject of the internal investigation. Thus, the redacted portions of the report are irrelevant. The Commonwealth's motion to quash the subpoena duces tecum as to the redacted portions of the report is therefore granted.

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<sup>1</sup> In its brief, the Commonwealth also raises a confidentiality defense for its refusal to provide the redacted portions of the report related to the investigation at IAD No. 2008-0267 and of the investigative report involving Major Duignan (EEOO-61-2006). As explained below, the PSTA's request for enforcement of the subpoena duces tecum for those documents must be denied because those documents are irrelevant. Given that disposition, the Commonwealth's confidentiality defense need not be addressed.

The PSTA's request to enforce the subpoena duces tecum as to the investigative report involving Major Duignan (EEOO-61-2006) also must be denied. The report relates to an investigation of Major Duignan for possible sexual harassment. According to the PSTA, the report is relevant because it will show that Lieutenant Witherite refused a request by Major Duignan to find out what employees involved in the investigation were saying (Brief at 4). Whether or not Lieutenant Witherite refused such a request provides no evidentiary basis for finding that the Commonwealth interfered with him in the exercise of his duties as a station representation for the PSTA or discriminated against him for being a station representative for the PSTA as charged. Thus, the report is irrelevant. The Commonwealth's motion to quash the subpoena duces tecum as to the report is therefore granted.

The PSTA's request to enforce the subpoena duces tecum as to the emails must be granted. According to the Commonwealth, the "emails clearly seek a coordinated effort in dealing with the various legal filings by Witherite, including a then recent grievance, and seek advice from the legal office on how to deal with the pending matters" (Brief at 7) and as such are subject to the attorney-client privilege. The attorney-client privilege applies where a client is seeking advice from its attorney. 42 Pa. C.S. § 5928; Gould v. City of Aliquippa, 750 A.2d 934 (Pa. Cmwlth. 2000). A close review of the emails does not reveal that to be the case here, however. Thus, the emails are not subject to the attorney-client privilege.

According to the Commonwealth, the emails also "involve deliberations among the PSP command staff regarding what to do with the various personnel from Troop N, including Witherite, after IAD 2008-400 was completed and an adjudication issued" (Brief at 9) and thus are subject to the deliberative process privilege. The deliberative process privilege applies to "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice," of legislative or quasi-judicial officers. Fraternal Order of Housing Police, 35 PPER 2 at 3 (Decision and Order 2004), citing Commonwealth of Pennsylvania v. Vartan, 557 Pa. 390, 733 A.2d 1258 (1988); SSHE (Cheyney University), 19 PPER 19200 (Decision and Order 1988). The emails do not relate to deliberations of law or policy-making by legislative or quasi-judicial officers, however. Thus, the emails are not subject to the deliberative process privilege. The Commonwealth's motion to quash the subpoena duces tecum as to the emails is therefore denied.

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 Commonwealth shall comply with subpoena duces tecum as to the emails.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the hearing will be rescheduled upon the request of either party.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this interlocutory order may be filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days after the hearing examiner issues a proposed decision and order pursuant to 34 Pa. Code § 95.91(k)(1).

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

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner